



Kentucky Workers Compensation Funding Commission to Clarify Regulatory Guidance

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Authors:

[Greg E. Mitchell](#)

[Jason P. Renzelmann](#)

The Kentucky Workers Compensation Funding Commission (“Funding Commission”) recently announced that it will undertake regulatory and legislative action to enhance transparency and provide clearer guidance to insurers in calculating workers compensation premium taxes. The announcement came after a recent Kentucky state court appellate decision found an audit decision and tax assessment by the Commission was ***arbitrary and inconsistent with the governing statutes***.

The state court action, as an appeal in an administrative proceeding, involved significant assessments imposed by the Funding Commission following an audit related to a group of affiliated insurers’ calculation of premium taxes on workers compensation policies with deductible provisions, as well as premium taxes related to certain policyholders’ federal black lung benefit liability. Those assessments were vacated in an administrative proceeding by the Kentucky Claims Commission, and the Claims Commission decision was upheld by the Franklin County, Kentucky Circuit Court in [*Kentucky Workers Compensation Funding Commission v. BrickStreet Mutual Insurance Company, et al*](#), No. 20-CI-00306 (Franklin County, Ky Cir. Ct. Jan. 13, 2022). In its meeting on January 26, the Funding Commission determined not to appeal the court’s decision. It also announced efforts to pursue regulatory and legislative changes that are seemingly directed at addressing the administrative process issues identified and challenged by the insurers and confirmed by the court’s decision.

The court’s decision highlighted a lack of regulatory guidance and statutory authority supporting the Funding Commission’s audit methodology and tax assessment calculations, as well as interplay of regulation of rates and rating rules by another agency. With respect to deductible policies, for example, the governing statutes require premium taxes be assessed on “the premium that would have applied without a deductible.” KRS 342.122(3). The Funding

Commission interpreted this provision to mean that the premium base should be based on the actual premium adjusted to simply add back any premium credits given for deductible policies, but without taking into account other discounts or credits that would apply to policies without deductibles under the insurer's filed rate schedule and rules filed with the Kentucky Department of Insurance (KDOI). However, no regulation or other official guidance document had set forth the calculation methodology utilized by the Funding Commission. The court held that, absent a lawfully adopted regulation setting forth this methodology, the Commission's position was incompatible with the statutory language, and therefore arbitrary.

The court also rejected the Funding Commission's imposition of additional taxes and penalties related to federal black lung benefits for certain companies who had purchased state workers compensation insurance policies, but who were self-insured under the federal black lung program. The Commission had argued that the insurers failed to initially provide adequate proof of the policy holders' self-insured status, and that Kentucky law required workers compensation insurers to provide coverage for all potential liability of its policyholders. But the court held the governing statutes only required payment of premium taxes for premiums actually received by the insurer, and it was not disputed that the insurers had not received any premiums related to federal black lung benefits.

The court's decision involved both substantive administrative law and regulatory primacy between the Funding Commission and the Kentucky DOI. The recent actions by the Funding Commission suggest it is endeavoring to address the issues challenged by the insurers and highlighted in the court's opinion.

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