

STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE
300 Capitol Mall, 17th Floor
Sacramento, CA 95814

PROPOSED DECISION

**SEPTEMBER 1, 2022 WORKERS' COMPENSATION INSURANCE
CLASSIFICATION AND RATING RULES**

FILE NUMBER REG-2022-00006

In the Matter of: Proposed adoption or amendment of the Insurance Commissioner's regulations pertaining to the California Workers' Compensation Uniform Statistical Reporting Plan–1995, Miscellaneous Regulations for the Recording and Reporting of Data–1995, and the California Workers' Compensation Experience Rating Plan–1995. These regulations will be effective on September 1, 2022.

SUMMARY OF PROCEEDINGS

The California Department of Insurance ("Department") held a virtual public hearing in the above-captioned matter on April 26, 2022, at the time set forth in the Notice of Proposed Action and Notice of Public Hearing, File Number REG-2022-00006, dated March 18, 2022. A copy of the Notice is included in the record. The record closed on April 29, 2022.

The Department distributed copies of the Notices to persons and entities referenced in the record. The Notices included a summary of the proposed changes and instructions for interested persons who wanted to view a copy of the information submitted to the Insurance Commissioner in connection with the proposed changes. The Workers' Compensation Insurance Rating Bureau ("WCIRB") submitted a filing letter and related documents on February 28, 2022, which was available for inspection by the public at the Oakland office of the Department and were available online at the WCIRB's website, www.wcirb.com.

The WCIRB's filing proposes amendments to the California Workers' Compensation Uniform Statistical Reporting Plan–1995, Miscellaneous Regulations for the Recording and Reporting of Data–1995, and California Workers' Compensation Experience Rating Plan–1995.

The Department accepted testimony and written comments at a virtual hearing on April 26, 2022. The Hearing Officer announced that the record would remain open until 5:00 p.m. on April 29, 2022, to enable interested persons to submit additional written comments. The matter having been duly heard and considered, the Department now presents its review, analysis, and Proposed Decision and Order.

**REVIEW OF PROPOSED CHANGES TO THE WORKERS' COMPENSATION
UNIFORM STATISTICAL REPORTING PLAN–1995, THE MISCELLANEOUS
REGULATIONS FOR THE RECORDING AND REPORTING OF DATA–1995
AND THE CALIFORNIA WORKERS' COMPENSATION EXPERIENCE
RATING PLAN–1995**

Amendments to the California Workers' Compensation Uniform Statistical Reporting Plan–1995 (USRP)

The WCIRB proposed amendments to the USRP to be effective on September 1, 2022 and applied to policies with an effective date on or after September 1, 2022. The proposed amendments are contained in the WCIRB's filing and are summarized in the Notice of Proposed Action.

The Department reviewed the WCIRB's proposed amendments to the USRP and received no objections to those proposed amendments. The proposed amendments are reasonable and consistent with the purpose of the USRP. This proposed decision recommends, therefore, that the amendments be approved.

Amendments to the Miscellaneous Regulations for the Recording and Reporting of Data–1995

The WCIRB proposed amendments to the Miscellaneous Regulations for the Recording and Reporting of Data–1995 to be effective on September 1, 2022, and applied to policies with an effective date on or after September 1, 2022. The proposed amendments are contained in the WCIRB's filing and are summarized in the Notice of Proposed Action.

The Department reviewed the WCIRB's proposed amendments and received no objections to the proposed amendments. The proposed amendments are reasonable and consistent with the purpose of these Miscellaneous Regulations for the Recording and Reporting of Data–1995. This proposed decision recommends, therefore, that the amendments be approved.

Amendments to the California Workers' Compensation Experience Rating Plan–1995 (ERP)

The WCIRB proposed amendments to the ERP to be effective on September 1, 2022 and applied as of the rating effective date of a risk on or after September 1,

2022. The proposed amendments are contained in the WCIRB's filing and are summarized in the Notice of Proposed Action.

1. Proposed Amendments to Section VI, Rating Procedure, Rule 2, Actual Losses and Actual Primary (Ap) Losses, to exclude COVID-19 claims with accident dates from December 1, 2019 through August 31, 2022 from the computation of experience modifications.

At the Department's hearing on April 26, 2022, the WCIRB presented its proposed change to limit the exclusion of COVID-19 claims from the computation of experience modifications to those claims with accident dates from December 1, 2019 through August 31, 2022. Accordingly, any COVID-19 claims occurring on or after September 1, 2022 would be factored into the calculation of an employer's experience modification. The WCIRB explained that the purpose of experience rating is to provide a financial incentive to promote workplace safety, and historically, experience rating includes consideration of all workplace injuries that arise at the workplace in determining an employer's experience modification. The WCIRB advised that there have been limited exceptions to that principle, the last one occurring decades ago related to the injuries and deaths arising out of the September 11, 2001 terrorist attacks. The WCIRB emphasized that the proposed change is consistent with the spirit and intent of experience rating.

In explaining the rationale for the proposed amendment, the WCIRB highlighted that current circumstances are significantly different from the time when the rule excluding COVID-19 claims from experience rating was initially adopted in 2020. At this point in time there is an understanding that COVID-19 is not a temporary, short-term phenomena, but rather, infectious disease experts believe that the disease is endemic and the risk of infection will be present in the general population for the foreseeable future. However, now there is a better understanding about virus transmission, and vaccines and personal protective equipment are readily available. There are workplace safety standards and protocols in place, as well as statutory presumptions that set forth the standards for determining whether an employee's COVID-19 infection is entitled to a presumption of compensability.

The WCIRB explained that those employers who are diligent in protecting their employees by following established workplace safety protocols and incurring fewer COVID-19 claims than the benchmark for their industry, all else being equal, will have a lower experience modification and pay less in premium. While a less safety-conscientious employer in the same industry, who is not as careful in following workplace protocols to protect their employees and has more claims than the industry average, will, all else being equal, have a higher experience modification and pay higher premiums.

The Department made a number of inquiries to the WCIRB during the hearing regarding whether certain factors were taken into consideration when making the proposal to sunset the exclusion of COVID claims from experience rating, and what the potential impact on employers would be.

The WCIRB advised that in making its proposal, the impact of the COVID-19 rebuttable presumptions was taken into account. The rebuttable presumptions, first ordered by Governor Newsom through Executive Order N-62-20, and then codified in Senate Bill 1159 (2020), shift the burden of proof from an employee to establish that a COVID-19 infection is work-related to the employer to show that it is not. The WCIRB reviewed the rate of workers' compensation claims being filed and found that they were approximately the same, with or without the presumptions. The presumptions are a factor but not the exclusive factor of determining whether a worker's infection is work-related. In some cases, it is very clear that the worker contracted the virus on the job and those claims will be filed regardless of the existence of a presumption.

The WCIRB asserted that it is reasonable to prospectively include COVID-19 claims in experience rating since the virus is becoming endemic and will be an issue that employers will be dealing with for the foreseeable future. Like many other workers' compensation hazards, COVID-19 is now part of the ecosystem, and employers can do things to mitigate the risk and protect their workers. The spirit and intent of experience rating is to provide a direct financial incentive to promote workplace safety, and the proposed amendment would advance that goal.

The WCIRB also took into consideration the potential impact that the proposed amendment would have on employers who are already facing numerous challenges, including with staffing, implementing workplace safety measures, adapting operations to an ever-changing business environment, and making decisions about returning employees to the workplace. The effect of the proposed amendment is to reward and offer relief to safety-conscious employers. Those employers who are diligent about workplace safety and have fewer than the average expected number of claims for their industry should, all else being equal, have a lower experience modification and pay less in premium. Conversely, those employers who are not as careful in protecting their employees' safety will have more than the average number COVID-19 claims for their industry and will likely have a higher experience modification and pay more in premium.

Essentially, experience rating is a zero-sum game within an occupation classification in terms of premium in that some employers will pay a little bit more by including COVID-19 claims if they have more than the typical number of claims, and some employers will pay less. It results in a redistribution of costs within a discrete industry based on an employer's claim history compared to the average expected for that industry. On average, the impact of the proposed

amendment should balance out to be overall cost-neutral within each industry. Additionally, the applicable experience period is three years, which begins four years and nine months prior, and terminates one year and nine months prior to the date an experience modification is to be established, which limits the effect of a singularly poor year.

At the public hearing, there were no public comments regarding the proposed amendment. The Department received a total of three written comments, from two different entities, regarding the proposed amendment.

The first comment received was submitted by the California Association for Health Services at Home (CAHSAH), a trade association representing licensed and Medicare Certified home health agencies, hospices, and home care aide organizations. CAHSAH expressed its concerns about the proposed amendment and the impact it would have on home health care providers. CAHSAH advised that home care employers prioritize their employees' safety through strict compliance with Cal/OSHA standards aimed at preventing hazards in the workplace, including regulations providing strong measures for prevention of aerosol transmitted diseases.

CAHSAH expressed particular concern that home health care entities were being included in the same category as institutional and other health care entities, since data indicates these other health care settings have experienced much higher incidences of COVID-19 outbreaks. Additionally, the conditions of employment are much different, including a unique one-to-one patient treatment basis, and the eagerness of employees to attribute COVID-claims to non-industrial cause. CAHSAH also challenged the need for the current statutory COVID-19 presumptions, asserting there is a lack of scientific basis to support them, and questioning the necessity to offer presumptions for health care workers in light of the historically low denial rates of workers' compensation claims for that industry.

CAHSAH expressed its opposition to the proposed amendment and suggested that there be further analysis of data on the impact of vaccines and boosters on COVID-19 cases in each industry classification.

The WCIRB responded to CAHSAH in a letter dated April 22, 2022, providing clarifying information about the statutory COVID-19 presumptions, the workers' compensation classifications, and experiencing rating. The WCIRB explained that the statutory COVID-19 rebuttable presumptions of injury, which are a creation of the Legislature, are not related to how employers in the healthcare industry, or any industry, are grouped for workers' compensation classification or experience rating purposes. The WCIRB clarified that home care employers are not grouped into the same category as institutional and other health care employers for the purpose of experience rating. Instead, since home care agency operations are unique and distinctly different than institutional health care and

congregate health care facilities, they are classified under separate and distinct classifications than facility-based healthcare employers for workers' compensation purposes.

The WCIRB explained that experience rating is a statutorily mandated system in California that is intended to incentivize workplace safety. All the components of the experience rating process are set by the Insurance Commissioner and established in the Commissioner's regulations. The experience modification for a specific employer is computed based on a comparison of their own claim history to the average expected claims experience for all employers in their workers' compensation classification. Those employers with a better than average claim history compared to the average of other employers in their classification will have an experience modification below 100% and, all else being equal, pay less premium. Conversely, employers with a worse than average claim history will have an experience modification over 100% and pay a higher premium.

The WCIRB emphasized that the home health care employers' experience modifications are based on each employer's own claim history compared to the average expected claims experience for all similarly situated home health care employers included in their specific classification, and are not linked to the claims experience of other classifications. The WCIRB further highlighted the distinction between the COVID presumptions and experience rating classifications. It explained that while facilities providing healthcare service such as hospitals and skilled nursing facilities may be grouped with home healthcare providers for purposes of the rebuttable presumption of compensability of COVID-19 infections, their workers' compensation claims experience has no bearing on the experience modification of home healthcare providers.

At the hearing, the WCIRB advised that they met with the president of CAHSAH and a number of its board members the prior day, to discuss CAHSAH's concerns. During their discussion, the WCIRB explained the distinction between how businesses are grouped for purposes of determining the applicability of the COVID-19 rebuttable presumptions versus how they classified for experience rating purposes. The WCIRB reiterated that home health care providers are in an occupational classification restricted to home health services, and are not combined with hospitals or nursing homes for experience rating. Instead, their experience modification is based upon a comparison of the employer's claim history with the average expected losses for all businesses that similarly provide home health services. The WCIRB stated that once the representatives from CAHSAH understood the distinction, their concerns about the proposed amendment were allayed.

On the day of the hearing, CAHSAH submitted a second written comment. CAHSAH sent an email to the WCIRB and the Department indicating that their questions and concerns had been addressed.

The second commenter expressed opposition to the proposed amendment. The commenter indicated that the WCIRB's Classification and Rating Committee had approved this proposed amendment in 2021, when there was a belief that the pandemic was winding down. However, the commenter stated that such a belief was premature as evidenced by various factors, including spikes in infection rates from COVID variants. The commenter asserted that the proposal is inconsistent with the most fundamental principle of experience rating, namely that historical losses can be used only to the extent that they have predictive value, and questioned how a viral infection in 2022 makes an insured a greater risk in 2027. The commenter urged the Insurance Commissioner to reject this proposal.

While there is some truth to the notion that past experiences are not necessarily predictive, the WCIRB noted that COVID-19 is transitioning into an endemic phase, not much different from other communicable diseases that are covered in the workers' compensation system. Those communicable diseases are allowed to affect an experience modification factor, and reflect a particular employer's safety measures with respect to communicable diseases. The experience period would also alleviate the effect of a particularly bad year, in this case, most likely to be September 1, 2022 through August 31, 2023, by blending it over a three-year period with an insured's other policy years. Data has indicated that as COVID-19 claims continue to reverberate through the industry, even with variants, those claims are becoming less serious in severity and frequency, and less costly. This suggests that the cost of COVID-19 claims for accident years 2022 and beyond will continue to decline.

After careful consideration of the information provided by the WCIRB and all comments received, the undersigned for this proposed decision recommends that the proposed amendment be adopted. The proposed amendment is reasonable and the inclusion of COVID-19 claims for purposes of calculating an employer's experience modification is consistent with the intent and goal of experience rating.

2. Other Proposed Amendments

The Department has reviewed the WCIRB's other proposed amendments to the USRP and received no objection as to those items. As to those items, the proposed amendments are reasonable and consistent with the purpose of the USRP. This proposed decision recommends, therefore, that the amendments be approved.

PROPOSED ORDER

IT IS ORDERED, by virtue of the authority vested in the Insurance Commissioner of the State of California by California Insurance Code sections 11734, 11750(a), 11750.3, 11751.5, and 11751.8 that the proposed revisions to the California Workers' Compensation Uniform Statistical Reporting Plan–1995, the Miscellaneous Regulations for the Recording and Reporting of Data–1995, and the California Workers' Compensation Experience Rating Plan–1995 filed by the WCIRB and Sections 2318.6, 2353.1 and 2354 of Title 10 of the California Code of Regulations are hereby amended and modified in the respects specified above; and

IT IS FURTHER ORDERED that these regulations shall be effective September 1, 2022.

I HEREBY CERTIFY that the foregoing constitutes my Proposed Decision and Proposed Order in the above entitled matter as a result of my review of the record and the comments received and I hereby recommend its adoption as the Decision and Order of the Insurance Commissioner of the State of California.

June 1, 2022

Yvonne Hauscarriague

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DEPARTMENT OF INSURANCE**

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FILE NUMBER REG-2022-00006

DECISION AND ORDER

I hereby adopt the Proposed Decision and Proposed Order of Yvonne Hauscarriague, dated June 1, 2022, in the above-entitled matter as my Decision, except for the proposed amendment to begin including COVID-19 claims, with accident dates on or after September 1, 2022, in experience modification computations. After weighing and considering the evidence and arguments, I conclude it is unreasonable to make such a change at this time; I, therefore, decline to adopt the rule that would limit the exclusion of COVID-19 claims from experience rating to those claims with dates of injury between December 1, 2019 through August 31, 2022.

WHEREFORE, IT IS ORDERED that, except for the proposed amendment to limit the exclusion of COVID-19 claims from experience rating that I decline to adopt in this Decision and Order, the WCIRB amend the California Workers' Compensation Uniform Statistical Reporting Plan–1995, Miscellaneous Regulations for the Recording and Reporting of Data–1995, and the California Workers' Compensation Experience Rating Plan–1995 as set forth in the Proposed Decision.

IT IS SO ORDERED THIS 28TH DAY OF JUNE, 2022.



RICARDO LARA
Insurance Commissioner