LAW OFFICES OF

SAUL, EWING, REMICK & SAUL LLP

PHILADELPHIA, PENNSYLVANIA
BALTIMORE, MARYLAND
BERWYN, PENNSYLVANIA

PENN NATIONAL INSURANCE TOWER
2 NORTH SECOND STREET, 7th FLOOR
HARRISBURG, PA 17101

(717) 257-7500

NEW YORK, NEW YORK
PRINCETON, NEW JERSEY
WILMINGTON, DELAWARE

PATRICK T. BEATY
Direct Dial: (717) 238-7672
Direct Fax: (717) 257-7580

Fax: (717) 238-4622
World Wide Web: http://www.saul.com

INTERNET EMAIL
Firm: harrisburg@saul.com
Direct: pbeaty@saul.com

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REVIEW COMMISSION

John R. McGinley, Jr., Chairman
Independent Regulatory Review Commission
14th Floor, Harristown 2
333 Market Street
Harrisburg, PA 17101

RE: IRRC Regulation # 1978
Department of Labor & Industry
Bureau of Workers' Compensation
Special Funds Assessments

Dear Chairman McGinley:

We represent several Workers' Compensation insurers in Pennsylvania on whose behalf we have filed objections to the 1998 assessments for the support of the Workers' Compensation Administration Fund. Each of these insurers received assessments in the fall of 1998 which were significantly higher than they had anticipated. The reason for the unexpected increases in assessments was that the Bureau of Workers' Compensation ("Bureau") had changed the methodology for calculating each company's assessment from a calculation based upon the amount of their compensation payments to one based upon earned premium. The formula used by the Bureau in 1998 was the same formula contained in the "Final Form Regulations" now before the Independent Regulatory Review Commission ("IRRC") for approval. Unfortunately, the Bureau did not feel it was necessary to obtain the approval of IRRC or the standing committees of the General Assembly before implementing its new formula. As discussed below, however, the lack of proper regulatory approvals is not the only legal flaw in the Bureau's new assessment system.

In its Regulatory Analysis Form accompanying the final form regulation, the Bureau indicates that it has proposed this regulation in order to "clarify" Act 57 of 1997. Section 2218 of Act 57 provides as follows:

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> Effective July 1, 1998, the assessments for the maintenance of the Subsequent Injury Fund, the Workmen's Compensation Supersedeas Fund and Workmen's Compensation Administration Fund under sections 306.2, 443 and 446 of the act of June 2, 1915 (P.L. 736, No. 338), known as the "Workers' Compensation Act", shall no longer be imposed on insurers but shall be imposed, collected and remitted through insurers in accordance with regulations promulgated by the Department of Labor and Industry.

Section 446 of the Workers' Compensation Act, referred to in the above provision of Act 57, directs the Department of Labor and Industry ("L&I") to "make assessments and collect moneys based on the ratio that such insurer's or self-insurer's payments of compensation bear to the total compensation paid in the preceding calendar year in which the assessment is made". Nothing in Act 57 indicates an intention on the part of the General Assembly to change the basis for calculation of the assessments required by Section 446. Act 57 merely provided that the assessments would no longer be imposed *on* insurers and it authorized L&I to develop by regulation a process for imposing, collecting and remitting assessments *through* insurers.

While Act 57 did not specify on whom the assessments would be imposed if not on insurers, the fact is that workers' compensation insurers have only one source for those payments, i.e, the employers who pay workers' compensation premiums. Of course, these are the same people who eventually paid the assessments prior to Act 57. The cost of assessments needed to pay for running the workers' compensation system have always been passed through to employers in the form of higher premiums. Act 57 attempted to clarify the pass-through characteristic of the assessments for the benefit of the insurance industry so they would not be subject to retaliatory taxes in other states. No change in law or regulation was needed in order to *accomplish* the pass-through, because it was already happening in fact.

Act 57 did not repeal Section 446 of the Workers' Compensation Act. In fact, Act 57 refers specifically to the assessment for the "Workers' Compensation Administration Fund under section[s] ... 446" of the Workers' Compensation Act. Section 446 requires that the assessment be calculated on the basis of compensation paid in the prior year. Once that figure has been calculated by the Bureau, Act 57 requires that the Bureau *impose* the assessment on employers, that insurers *collect* the assessment from employers and that employers *remit* the assessment through insurers to the Bureau.

It is important to keep in mind that, regardless of whether the assessment is calculated on the "compensation paid" basis or on the "earned premium" basis called for in the proposed regulation, the amount imposed on an individual employer bears no relationship to his own loss experience. Even under the Bureau's proposed regulation, the assessment would be based upon each insurer's proportionate share of total earned premium in the prior year. An individual employer may not have been insured by the same carrier in the year before the assessment is imposed, so his assessment will depend upon how much earned premium was paid to his new carrier by other employers, not on the amount he paid to his former insurer. Therefore, it cannot be said in support of the Bureau's proposed change that the new assessment base is necessary in order to begin imposing assessments on employers. The fact is that, even under the new system, the assessment base is still an insurer base, not an employer base.

If the Bureau really wanted to impose the assessment directly on employers, it would base the assessment on the number of employees covered by workers' compensation and each employer would pay a flat rate per employee. Unfortunately, the Workers' Compensation Act does not permit that kind of change in the assessment base, any more than it permits the change proposed by the Bureau from a compensation-paid system to an earned premium system.

It is clear, therefore, that the proposed final form regulation should be rejected by IRRC because it is beyond the statutory authority of the Department of Labor & Industry and does not conform to the intention of the General Assembly in the enactment of the statute upon which the regulation was based. 71 P.S. §745.5a(h). An administrative agency has no authority to amend a statutory mandate by regulatory action. Section 446 requires that assessments be based upon compensation paid in the prior year. Section 446 does not authorize the calculation of assessments on the basis of earned premiums. It is that simple.

The proposed regulation also does not conform with the intention of the General Assembly because it does not do the one thing that Act 57 asked the Department to do, to spell out how the assessment would be imposed, collected and remitted. About the only thing the regulation has to say on that subject is that L&I is delegating that responsibility to the insurance industry. The proposed regulation would amend various sections of Title 34 of the Pennsylvania Code to require employers to comply with "procedures defined by the approved rating organization", which are the two rating bureaus which all workers' compensation insurers are required to participate in as members. 34 Pa. Code §§121.22(d); 121.23(c); 121.31(e) (proposed). However, Act 57 did not give the rating bureaus any authority to decide how employers shall remit their assessments. The General Assembly delegated that responsibility to L&I.

Even if your commission should determine that the proposed regulation does conform with the statutory mandate, we must object to the attempt by L&I to make the regulation retroactive so that it would apply to all assessments made on or after July 1, 1998. If Act 57 did nothing else, it clearly required L&I to adopt regulations before implementing any change in the manner in which assessments would be imposed, collected and remitted. Unfortunately, L&I did not do that. Instead, they issued assessments in the fall of 1998 using exactly the same system of calculation for which they are now seeking regulatory approval. Several insurers who received those assessments have filed formal objections because the new system substantially increased their assessments above what they would have been using the compensation-paid formula and because those companies did not believe they had the right to recoup the increased assessments from their insureds. Those appeals have been consolidated for an administrative hearing which is expected to occur in the summer of this year.

The Bureau is now attempting to render those appeals moot by obtaining retroactive authority to do something that was not authorized when they did it. For the reasons discussed above, we believe that the entire regulation should be rejected on the grounds that it is beyond the statutory authority of the agency and does not conform with the legislative intent. At the very least, IRRC should disapprove the retroactivity provision in the regulation, thereby preserving the appeal rights of our insurance company clients.

Thank you for your consideration of these comments. If you have any questions about our position, please let me know.

Sincerely,

Patrick T. Beaty