

THOMAS C. LOWRY, ESQ., P.C. & ASSOCIATES

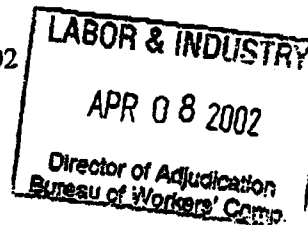
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April 3, 2002



Elizabeth A. Crum
Director of Adjudication
Commonwealth of Pennsylvania
Department of Labor & Industry
Bureau of Workers' Compensation
P. O. Box 15121
Harrisburg, PA 17106

Re: WCAB/WCJ Regulations Comments - Open Letter

Dear Judge Crum:

I have recently reviewed the Proposed Rulemaking published in the PA Bulletin (32 Pa.B. 1518) for Saturday, March 23, 2002, and I am writing to express my personal concerns as an attorney whose workers' compensation practice is throughout the Commonwealth of Pennsylvania primarily on behalf of self-insurers and carriers. The Proposed Rule 131.52 promotes "when practicable and appropriate, the entire record shall be completed at the first hearing", although this is discretionary with the Judge. While this is a commendable purpose, it may lead to widespread differences in hearing practices among the Workers' Compensation Judges. Perhaps a practical solution would be to also arrange to update the Judge Book - Procedural Guide for Workers' Compensation Practitioners published by the Pennsylvania Bar Institute in 1997 so that the Judges can outline their procedures and provide attorneys with guidance accordingly. Also, this Proposed Rule 131.52 would appear to be at variance with Proposed Rule 131.61 pertaining to the exchange of information. The Proposed Rule 131.61 will require the moving party to provide information before the first hearing; however, the respondent has an obligation to exchange information within 45 days after the first hearing. Obviously, if all information is not exchanged before the first hearing, it cannot be regarded as a final hearing. Presumably, the solution would be to hold a pretrial conference for the purpose of exchanging information before the first and final hearing. However, I have general concerns regarding the one day one trial format since a busy law practice may lead to legal conflicts that would have to be resolved through cooperation between the Bench and Bar.

April 3, 2002

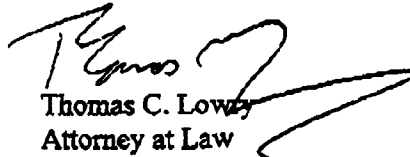
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I commend the drafters of the proposed rules for the procedure for the calculation and approval of quantum meruit legal fees as set forth in the amendment to Rule 131.55, as well as the long needed mechanism for the dismissal of frivolous pleadings envisioned by the amendment to Rule 131.40.

As to Proposed Rule 131.33 involving the need to file an answer to all petitions other than claim petitions within 20 days, it is important to clarify that this is not mandatory, but merely suggested. Otherwise, it would be an unfair expansion of the existing case law under Yellow Freight Systems, Inc. v. WCAB (Matara), 423 A.2d 1125 (Pa. Cmwlth. 1981) that could conceivably work to the disadvantage of both employers and injured claimants alike. Under the proposed amendment to Rule 131.33 (e), an answer must be responsive in its denial or admission. This is in the nature of a "notice pleading" which may place an unfair burden upon employers because of the time constraints to file a prompt answer. Oftentimes, the file materials are transmitted the day the answer is due and may not be complete in their investigation. As information becomes available and exchanged between counsel, stipulations of undisputed facts can be agreed to by the parties at the first hearing before the WCJ. Therefore, I am critical of this proposed amendment, since it may open the door to a whole "motion for judgment on the pleadings practice" to be heard by the WCJ even before a single witness testifies.

Thank you for the opportunity of permitting this writer to make these comments. Hopefully, you will find this input helpful.

Very truly yours,


Thomas C. Lowry
Attorney at Law

TCL/smg

cc: Louis P. Lombardi, II, Esq.
Members, Montgomery Bar Association Workers' Compensation Committee
Workers' Compensation Judges (Malvern, PA)

Original: 2259

Pennsylvania Workers' Compensation Professional Judges Association

823 Reamer Avenue
Greensburg, PA 15601
April 19, 2002

Elizabeth a. Crum
Director of Adjudication
Bureau of Workers Compensation
Department of Labor and Industry
WCAB/WCJ Regulations Comments
P. O. Box 15121
Harrisburg, PA 17106

RE. PWCJPA's comments on the Proposed Rules
for Administrative Practice and Procedure before
the Workers' Compensation Judges

Dear Director Crum:

Enclosed are the comments, which have been approved by both the Adjudication and Workload Committee and the Executive Board of the Pennsylvania Workers' Compensation Judges' Professional Organization. These suggestions were developed by the Association to enhance the effectiveness of the rules while maintaining the Workers' Compensation Judge's independence to manage his or her cases in a manner that gives all parties a fair opportunity to present their cases.

Sincerely,

Ada Guyton,
President

Cc: Stanley Siegel, Esq.

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WORKERS' COMPENSATION
BUREAU

Pennsylvania Workers' Compensation Judges Professional Association's Comments
Re: Proposed Special Rules of Administrative Practice and Procedure Before the
Workers' Compensation Judges

Published in *Pennsylvania Bulletin*, Volume 32, # 12 on March 23, 2002

131.3 Part (a) of this section states "The referee may, for good cause, waive or modify..." Delete "*for good cause*" and insert "within the Judge's discretion. (i.e. "The Judge may, within the Judge's discretion, waive or modify...)" The rules reference "the discretion of Workers' Compensation Judge" throughout Sections 131.12 (a), 131.13 (c), 131.40, 131.52 (c), 131.54 (a), (c), 131.61 (c). This proposed change is consistent with the clear preference shown in the rules for the "discretion of the Workers' Compensation Judge." It would prevent litigation of whether the judge had "good cause" to exercise his or her discretion.

131.11 Part (b) of this section has been changed from "as evidenced by the postmark" to "as evidenced by a United States Postal Service postmark." The Pennsylvania Workers' Compensation Judge's Professional Association recommends the existing section not be changed as it believes this change is in response to the Commonwealth Court's decision in *SEPTA v. UCBR*, 661 A2d 505 (Pa. Cmwith. 1995.) The committee believes this case is distinguishable as it dealt with an(unemployment compensation appeal and, not a petition.

131.21 Part (a) references "the social security number of the employee, unless another identifying number has been assigned by the Bureau." This section should be changed to reflect the fact the Bureau assigns bureau claim numbers to all cases. The reference to social security numbers should be deleted. The section as drafted is inconsistent efforts to protect an individual's privacy by eliminating the social security number as a common identifier.

131.22 Part (a) references "If the transfer of the case is agreed to by the Bureau,..." The "Bureau" should be deleted. If the parties and Judge agree to the transfer, that fact should be sufficient for a transfer.

131.24 Recusal of Judge should be amended as follows:

(a) The Judge has the right to recuse himself or herself on his own motion without comment.

(b) would be the proposed paragraph (a) published in the *Pennsylvania Bulletin*.

(c) would be the proposed paragraph (b) published in the *Pennsylvania Bulletin*.

This addition would preserve the Workers' Compensation Judge's right to recuse himself or herself and the Judge's privacy whenever the Judge feels that he or she may not be able to maintain their impartiality. The ability to recuse without comment would prevent any risk of creating any basis or prejudice when the petition is reassigned to another Judge.

131.33 This section has been rewritten to reflect changes in the case law rather than statute. Law made by Judges is subject to change. Furthermore, the case law as to when

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and what the defendant(s) may or may not continue to contest is not clearly defined and will vary depending on the facts of each case. Therefore, the Pennsylvania Workers' Compensation Professional Association recommends no change to the existing rule except to reflect the change from 15 to 20 days on Answers to Claim Petitions which would be consistent with statute.

131.36(f) The second "may" should be changed to shall since it specifies that time period in which an answer must be filed. (i.e. An answer to a petition for joinder may include a motion to strike the joinder and shall be filed within 20 days following service of the petition for joinder by the Bureau.)

131.52 (f) The section should be changed to The Bureau and the parties shall provide the judge with all document required by law to be filed with the Bureau and which are relevant to issues in dispute with the same injury date and pertaining to the same claim. In addition, the statement *The judge and the employee may not introduce the Employer's Report of Occupation Injury or Disease into evidence* should be deleted as there are times that this document (which never should be used to establish that an injury occurred) is relevant to other issues such as notice, credibility, timeliness of the issuance of the initial Bureau document, etc.

131.53 a (b) (1) The term "trial deposition" should be changed to "deposition." The term "trial deposition" is not defined and has no meaning in our system.

131.53 a (b) (2) This section should be redrafted to more specifically address the concerns about the parties having to wait months to testify. "Upon request, a party shall have the opportunity to testify before the judge at the pretrial or other hearing prior to the scheduled one day trial or other consolidated hearing procedure."

131.54 (a) The portion reading "if the parties do not object" be stricken. The section references "At the discretion of the Judge..." but then indicates "if the parties do not object." possibly suggesting that the Judge has no discretion if a party objects. This construction is not acceptable and the portion identified is best stricken.

131.55 (d) The Pennsylvania Workers' Compensation Judges Professional Associations recommends that "will" be changed to "may" as the proposed rule is in conflict with the *Ramich v. Workers' Compensation Appeal board (Schatz Electric, Inc.)*, 564 Pa. 656, 770 A.2d 318 (April 30, 2001).

131.57 (d) The portion reading "after the hearing" should be changed to "after the closure of the record" to reflect the fact that the record occasionally stays open after the hearing for exhibits (Social Security language, fee agreement, costs, etc.).

131.61 (b) The portion reading "no later than" should be stricken as it is redundant with the addition of the language "prior to".

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131.81 (b) (3) This addition be stricken in its entirety as it will only complicate the litigation of Workers' Compensation cases. It places an individual (a claimant or uninsured employer) who is receiving no income at a disadvantage.

131.101 (c) The third "evidentiary" be deleted from the last sentence as it is not needed and is confusing. It should be worded . . . *When the judge determines that the evidentiary record is closed, the judge will notify the parties that the evidentiary record is closed on the record or in writing.*

131.101 (f) The "shall" in the first sentence should be changed to "may". Certification of the evidentiary record is not required in each and every case.

131.101 (h) The proposed "shall" should be changed back to "may." The Workers' Compensation Judge should have the discretion to have the parties' written arguments submitted in a format that is most useful to the Judge.

131.121 Part (g) should be stricken. The rules, which are procedural, should not set forth substantive standards (i.e. the party with the burden). This change is following the case law [*Sanders v. Workers' Compensation Appeal Board (Marriott Corp.)*, 756 A.2d 129 (Pa. Cmwlth. 2000)], not the statute.

A new section 131.59 should be drafted to reflect the use of Mediation and Settlement Conferences that reflect the numerous and strong efforts to promote the usage of Alternative Dispute Resolution within our Workers' Compensation system. Alternative Dispute Resolution is not the same as the statutory Informal Conference referenced in 131.58. The Pennsylvania Workers' Compensation Judges' Association suggests that the following working be used:

The parties and the Judges are free to utilize even less formal Alternative Dispute Resolution mechanisms such as Mediation and Settlement Conferences to expedite the prompt resolution of their disputes.

FACSIMILE COVER PAGE

Office of Chief Counsel
Workers' Compensation Division
1171 South Cameron Street, Room 103
Harrisburg, PA 17104-2501

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INDEPENDENT REGULATORY
REVIEW COMMISSION**DATE:** April 23, 2002 **FAX NUMBER:** 783-2664**TO:** Independent Regulatory Review Commission**FROM:** Thomas Kuzma, Deputy Chief Counsel *TJK***Number of Pages** 5 **Including This Cover Page**

Accompanying this cover sheet, please find a public comment to the proposed rulemaking number 12-61, Special Rules of Administrative Practice and Procedure before workers' compensation judges and Special Rules of Administrative Practice and Procedure before the Workers' Compensation Appeal Board.

Please feel free to call with any questions at 783-4467.

Cc: James Holzman, Deputy Chief Counsel, L&I (by mail)
Brian Abela, Acting Director of Legislative Affairs, L&I (by mail)

TO RESPOND BY FACSIMILE, OUR FAX NUMBER IS: (717) 783-4469
Any questions regarding the faxed document(s)?
Please call (717) 783-4467