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ORIGINAL: #2484 & #2485

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INDEPENDENT REGULATORY REVIEW COMMISSION

To: Elizabeth Crum
John Kupchinsky
Tom Kuzma

From: Sam Marshall

Re: Chapters 121 and 123

First, our thanks to the Bureau for the May 19 meeting. It helped us better understand the Bureau's thinking, and I hope gave you a better understanding of ours. In that vein, the following sets forth our comments on the specific sections we discussed, based on insights from the meeting and some follow-up within the industry (as last week was a vacation week for many, comments are still coming in, and I'll share them as they arrive).

Chapter 121 - General provisions

Section 121.3 - Filing of forms

Subsection (b): We appreciate your willingness to consider extending the 10 day period in which to send corrective forms to 14 days, and to consider adopting subsection (d)'s timing of 14 days from the postmark on the return.

Subsection (c): We remain troubled by the regulation's allowing the Bureau to "require the filing of forms or data through electronic means." As we said in earlier comments on this subsection, we hope electronic filings will be used more often.

Nonetheless, the technical concerns in converting systems - yours and ours - make us concerned with the possibility of unilateral requirements. Our reasoning really is the same as when you objected to our recommendation that you be required to accept electronic filings: You noted that "the Department must first have the capability in place in order to receive and accept an electronic filing, and simply is not able to accept certain types of electronic filings."

That holds true on our end, too. Accordingly, we recommend the Bureau revise this subsection to allow it to require electronic filings by regulation. That can be a painful process from both sides, but it generally leads to a practical solution for both sides.

Section 121.3b - Posting

This section highlights the concern of including, in the definition section, insurers as part of employers: The general posting is not something an insurer could do or monitor. That is a concern throughout this Chapter; you might consider carving out within the definition of "employer" those sections where the inclusion of an insurer makes no sense.

We also recommend you delete the requirement that the general workers compensation information be given to each new employee at the time of hire and annually thereafter. This is not required in Section 305(e) or elsewhere in the Act, would be unworkable (especially on the "annually thereafter" end), and would be incapable of monitoring and enforcement.

We also recommend the notice be revised to keep separate the physician panel notice in Section 306(f.1)(1)(i) of the Act. Under the act, that is a separate notice, with an employee acknowledgement requirement; it should remain separate in the regulation, too.

Sections 121.7 and 121.7A - Notices of compensation and temporary compensation payable

We note the practical problem of an insurer having to file the forms in these sections within 21 days of the insured employer having notice of a disability - namely, those situations where the employer doesn't tell the insurer in time for us to comply with the 21-day rule.

We appreciate this problem is created by the Act. Nonetheless, a regulation should solve, not perpetuate, impossible compliance requirements, and triggering the 21 day obligation from when the insurer knows makes sense. This can be done by changing, in subsection (a) of both sections, the phrase "no later than 21 days from the date the employer had notice or knowledge" to "that" employer.

Section 121.16 - Annual Claims Status Report

We appreciate your willingness to have this apply to claims opened between three and four years before a given calendar year - as opposed to between two and three years. We reiterate that the instructions be written into the regulation, perhaps by incorporating Form LIBC-774 into the regulation.

Chapter 123 - Vocational experts

Section 123.202a: For all the reasons we raised in April, we recommend the Bureau drop its requirement that a vocational expert be both a Licensed Professional Counselor under Pennsylvania's Social Workers, Marriage and Family Therapists and Professional Counselors Act, and certified by one of the nationally recognized organizations.

We appreciate your concern that the state be given the chance to take action against a bad expert. Our understanding is that the national organizations already have a process in place to do that (and I'll bet it is more focused that the state licensing agency; my experience is that proceedings in those agencies are rare and slow).

Section 123.204(b): We appreciate your clarification that you really did mean this to apply to the vocational expert's report of the interview, as opposed to his report of the earning power assessment itself.

We recommend you revise this to require that a vocational expert send the earning power assessment report to the injured worker at the same time he sends it to the employer; you may want to expressly require that the earning power report include a report and or the case notes from the interview as required under the Code of Ethics for vocational experts. That should satisfy both our concerns, since the injured worker would get the case notes or report of the interview, but would get this as part of getting a copy of the earning power assessment itself.

The earning power assessment report, not the interview, is the key element and, I think, was at the heart of the IRRC's comment that "an employee who undergoes **this assessment** (my emphasis, but the IRRC didn't refer to the undergoing the interview) has a vested outcome in the outcome regardless of whether the outcome was in the employee's favor of the insurer's favor." Ironically, the regulation as currently drafted would require timely sharing of an interim report but not the final assessment report.

Again, thank you for the meeting. Give me a call with any comments or questions, and I'll keep you abreast of ours.

C: John McTiernan