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TO: John Kupchinsky, Director
Bureau of Workers' Compensation

FAX NO: 1-717-772-0342

DATE: July 25, 2005

FROM: Thomas C. Lowry, Esq.

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MESSAGE: **Chapter 121 Regulations - Comments**

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NOTICE

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July 25, 2005

John Kupchinsky
Bureau Director, Bureau of Workers' Compensation
Department of Labor and Industry
Chapter 121 Regulations – Comments
P. O. Box 15121
Harrisburg, PA 17105

Re: Chapter 121 Regulations – Comments

Dear Bureau Director Kupchinsky:

I am writing to you to provide my enclosed analysis and comments, as well as suggestions, regarding the proposed rule making/regulations. Please accept my letter as an attempt to provide constructive criticism from someone who is an experienced workers' compensation litigator.

Section 121.3b Posting Workers' Compensation Information

It is commendable that the proposed regulations will require that an employer, at its primary place of business and at its sites of employment, post the proposed workers' compensation information. However, I would suggest additional language to Section 121.3b (3) as follows:

> "If your employer has posted a list of six or more healthcare providers in your work place, you are required to visit one of them for your initial treatment, except for an emergency. Your employer is required to give you a notice of your rights and responsibilities for using the list of providers."

It is suggested that the underlined language be revised by the following:

> "You will be asked to sign a written acknowledgment form by your employer that you have been informed of your rights and responsibilities for using the list of providers."

This suggested change would bring the regulation in better conformity with Section 306 (f.1)(1)(i), which requires that an employer shall ensure that the employee has been informed and that he understands these rights and duties as evidenced by the employee's written acknowledgment.

Section 125.5 Reporting Injuries to the Bureau and Section 121.7 Notice of Compensation Payable and Notice of Temporary Compensation Payable

It is commendable that the Bureau seeks to require an employer to timely report the occurrence of an injury by the submission of the requisite Employer's Report of Occupational Injury or Disease, Form LIBC-344. However, by deleting references to the seven day waiting period, so to redefine disability as an injury resulting in disability continuing the entire day, shift or turn, or longer in which the injury was received, I am concerned that an employer will be forced to file a Notice of Compensation Payable or a Notice of Temporary Compensation Payable where there is no legal requirement to do so. In the past, under the existing regulations, it was not necessary to file an Employer's Report of Occupational Injury or Disease until the expiration of the seven day waiting period occurred (thus rendering it a compensable injury). Therefore, the proposed change at Section 121.5 (d)(2), which deletes the words "not before" and replaces it with "within seven days" will have far reaching consequences with unintended results. While it will encourage employers to timely report a disabling injury under Regulation 121.7, an employer is then required to file either a Notice of Compensation Payable, Notice of Temporary Compensation Payable, or a Notice of Denial no later than 21 days from the date the employer has notice or knowledge of disability. Without the reference to the waiting period previously contained in Section 121.5 (d)(2), an employer would be forced to file the NCP, NTCP or ND if an injured worker is disabled for less than seven days. Therefore, I would oppose the elimination of the seven day waiting period as contrary to law. A suggested correction would be to redraft the proposed rule of Section 121.7 (a) to include a reference that only upon the expiration of the statutory waiting period does an employer's obligation arise to file an NCP, NTCP or Notice of Denial.

In response to developing case law spearheaded by the PA Commonwealth Court in Lamansky v. WCAB (Hagan Ice Cream Company), 738 A.2d 498 (Pa. Cmwlth. 1999) and Waldameer Park v. WCAB (Morrison), 819 A.2d 164 (Pa. Cmwlth. 2003), the Bureau created a Medical Only Notice of Compensation Payable on March 29, 2004. Prior thereto, the

practice by many insurers and self-insurers has been to attempt to put a square peg in a round hole by utilizing a Notice of Denial (LIBC-496) disputing disability, but agreeing to pay medical benefits. See Darrall v. WCAB (H.J. Heinz Company), 729 A.2d 706 (Pa. Cmwlth. 2002).

Therefore, in recognition of the importance that an injured worker who is not disabled be assured of ongoing medical treatment for an acknowledged work injury, I would recommend that additional proposed language be set forth in Section 121.7 (f) that indicates that this form should be utilized when there is a need for ongoing medical treatment after any initial treatment is received for a non-disabling injury. Once again, the language contained in the proposed regulation is imprecise and lacks internal consistency, since it indicates in medical only cases when an employee's injury has not resulted in lost time from work, an employer may file a Notice of Compensation Payable (Form LIBC-495). There is no explanation of the seven day waiting period that renders the injury compensable on the eighth day of disability. The current language would suggest that it be limited in its use only for injuries that did not result in lost time from work which improperly restricts the use of this valuable document.

Section 121.16 Statement of Compensation Paid Updating Claims Status

The apparent intent of this proposed regulation is to replace the Statement of Compensation Paid, which pertained to a specific final payment report that permitted the Bureau to review to ensure that proper payment was received before a claim was closed, with a much broader obligation to report all insurers' and self-insurers' open claims. I am concerned with the need to safeguard such important information including the non-discoverable posting of reserves for each and every open claim. There is a further need to safeguard such information that may lead to the improper solicitation of unrepresented claimants who are receiving compensation benefits. Clearly, the filing of a Notice of Compensation Payable, Notice of Temporary Compensation Payable and the filing of a Claim Petition already permits the Bureau of Workers' Compensation to track the number of open cases. Therefore, because of the aforementioned legitimate concerns, I would recommend that this proposed regulation be deleted and not adopted. It would further appear to place undue burden upon insurers and self-insurers to provide on an annual basis updated claim status information on each open claim.

Section 121.18 Subrogation Procedure

The proposed new regs merely contain clarifying language. However, I believe the Bureau is missing the opportunity to clearly set forth the procedure and calculation method to complete a Third Party Settlement Agreement. The Bureau's form itself, as written (and as interpreted by insurance companies), is contrary to controlling case law. The Bureau misses the opportunity to remedy this problem, although the redrafting of the Third Party Settlement Agreement, Form LIBC-380, would be a satisfactory remedy.

I welcome further discussions and dialogue on my written comments.

Respectfully submitted,

Thomas C. Lowry
Attorney at Law

TCL/smg