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Samuel R. Marshall
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John Kupchinsky, Director
Bureau of Workers Compensation
Department of Labor and Industry
P.O. Box 15121
Harrisburg, PA 17105

Re: Chapter 121 - proposed regulation

Dear John:

On behalf of our member companies and several national trade associations with overlapping membership, we offer the following comments on the Bureau's proposed revisions to Title 34, Chapter 121, the General Provisions chapter for the Bureau.

As a general comment, we appreciate the Bureau's attempt to update an old regulation to reflect changes in the law and implement improvements.

We are concerned, however, that the proposed regulation creates rather than resolves confusion in various filing requirements, and that it imposes significant - but needless - paperwork in the proposed Annual Claims Status Report. Our comments are intended to point out the areas of confusion, what we believe (and, we think, the Bureau's experience proves) to be needless filings, the areas where we question the statutory authority behind a proposed change, and to recommend revisions that will address those concerns.

Section 121.3 - Filing of forms

Subsection (b): We recommend the 10 day period for filing a corrected version of a form be extended to **21 days**, consistent with the 21 day deadlines in other sections. Ten days - especially assuming these are calendar, not business, days - is too short in instances where new information may need to be gathered. Further, we recommend the timing on this - "10 days of (from?) the written notice of the return of the form" - be clarified to match the timing in subsection (d): It should be ten days from the postmark on the return.

Subsection (c): We favor greater acceptance of electronic filings by the Bureau, but this goes in a different direction: The better focus is on requiring the Bureau to accept electronic filings, not allowing it to require these filings. We recommend the subsection be redrafted to state, **"The Bureau shall accept the filing of forms or data through electronic means."**

Section 121.3b - Posting workers' compensation information

Subsection (a): Requiring the posting of this information at all sites, not just the employer's primary place of business, is an impractical expansion of the current requirement. The problem is with what constitutes a "site of employment" in a temporary or moving workplace with roving contractors, where the employer may not have a trailer or building (e.g., a home renovation site).

We recommend this refer to **"fixed sites of employment"**; otherwise, the ambiguity in what is a "site of employment" invites needless arguments of improper postings at temporary worksites, and jeopardizes such things as the required use of a physician panel because of questions of adequately displayed notice.

Section 121.5 - Reporting injuries to the Bureau

Subsection (c): This should clarify that the "definition" of disability applies only to reports under this section, not reports generally.

Section 121.7 - Notice of compensation payable and notice of temporary compensation payable

Subsection (a): With Section 121.1 now defining an "employer" as including an insurer, this creates some confusion. An insurer cannot require an employer to notify it of a disability, or punish it for failing to do so, so an insurer cannot necessarily file within 21 days of when the insured employer knew of the disability - since the insured employer may not have told the insurer. This can be corrected by stating that the employer shall do all the obligations set forth in this subsection within 21 days from the date **"that"** (not "the") employer knew of the disability.

Subsection (b): As drafted, this creates confusion with subsections (d) and (f), since it arguably calls for conflicting reporting requirements. We recommend this be clarified by adding to this subsection the phrase, **"except as provided in the following subsections."**

Section 121.16 - Updating claims status

Subsection (a): This implements a new form and new reporting requirement. We have not seen the form, and we do not understand the requirement - but it seems an expensive, expansive and needless amount of paperwork on all sides, and we recommend this be deleted.

We are not sure what the Bureau is seeking in the Report - is it aggregate information on all claims, or information on each claim, or somewhere in between? What information

is required? Depending on what is sought in this new Report, this could go well beyond other required forms and reports - and for what reason, and based on what statutory authority?

This creates the potential for a significant - and needless - increase in cost to insurers, employers and the Bureau. In the preamble, the Bureau claims the regulation should have no significant fiscal impact, and that the regulation imposes no significant additional reporting - in large part suggesting that this new Report is neutralized by the Bureau's deletion of the annual filing of a Statement of Account of Compensation, Form LIBC-392.

That is misleading. First, the Bureau has not sought, and insurers have not filed, Statements of Accounts of Compensation for some time, so this is really a new requirement, not a neutral replacement of an existing one. Second, it appears this new form may require significantly more information than in the Statement of Account of Compensation, or at least information that is significantly harder and more expensive to produce.

Further, the Bureau should explain the purpose of the proposed Report as well as the statutory authority behind it. The preamble suggests this report is to verify information the Bureau already has on claims; does that information really need separate verification, or is this merely an expensive way of making insurers and employers say the same thing twice? The history of the Statements of Account of Compensation shows that some filings, whatever their theoretical merit, are irrelevant in practice; this regulation provides a chance to correct that, not extend it through a new and just as needless filing requirement.

Finally, the enforcement provisions in subsections (a)(3) and (4) need to be reconciled with the provisions in the proposed Section 121.27. These subsections suggest referral by the Bureau to the Insurance Department is the exclusive remedy for failing to file this new report; but Section 121.27 envisions the alternative enforcement tool of an Order to Show Cause within the Department (as distinct from the Bureau?). Which is it?

Subsection (b): The Bureau has not required, and many insurers have not always filed, this Final Statement of Account of Compensation Paid. Rather than proposing the continuation of this filing, why not delete it - or at least explain why the Bureau wants to require this in the proposed regulation even though it has not required it in practice in the past?

Further, we recommend this subsection's reference to "compensation" be clarified to refer only to indemnity payments, not medical bills. Courts at times lump both into the term "compensation", but we assume the Bureau does not intend this to apply to "medical only" claims.

Section 121.18 - Subrogation

Subsection (a): We recommend this be corrected to state that it applies **"if an employer obtains a recovery from a third party."**

Subsection (b): We recommend this subsection be deleted. Supplemental agreements are rare and, in any event, the information envisioned here is already in the Third Party Settlement Agreements in subsection (a). This seems another instance of a form that amounts to needless paperwork.

Section 121.25 - Issuance of compensation payable

Subsection (a)(2): So as to avoid confusion and arguments on what constitutes proper notice, we recommend this be clarified to state, **"Such notice shall be satisfied by sending a copy of the Notice of Compensation Payable or Notice of Temporary Compensation Payable."**

Section 121.27 - Orders to show cause

We believe the old language in this section was, although rarely used, lacking in clarity or statutory authority in many instances; but we think the new language suffers the same defect.

We recommend this section be revised to simply incorporate the rules of administrative practice and procedure controlling Orders to Show Cause as set forth in Part II of Title 1 of the Pennsylvania Code. An example is in the Insurance Department's regulations, set forth in Section 56.1 of Title 31 of the Pennsylvania Code.

Absent this, the regulation implements seemingly minor, but potentially crucial, differences without explanation. For instance:

- **Subsection (b)** and its provisions for an Answer vary from Section 35.37 of Part II, Title 1, but with no explanation of the reasons for the variances;

- **Subsection (c)** refers to the appointment of a "hearing officer", presumably as distinct from the presiding officers (and the rules related to them) in Part II of Title 1, again with no explanation of the differences;

- **Subsection (d)** provides that hearings will be conducted under this section and, when applicable, Part II of Title 1, but without explanation of when Part II would not be applicable.

- This section generally refers to the Department, whereas the rest of the regulation refers to the Bureau, and the regulation itself is for a chapter within Part VIII of Title 34, referring only to the Bureau. That could create unintended consequences - as with subsection (a) and its reference to this section applying to the Department and any violations of the "regulations," possibly a broader scope than Part VIII.

Curiously, subsection (c) has the appointment of a hearing officer being made by the Bureau Director, whereas the rest of the section refers to the Department - raising the questions of why the appointment would not come from the Secretary, and whether appeals would go to the agency head or directly to Commonwealth Court;

The Administrative Agency Law and Part II of Title 1 of the Pennsylvania Code set forth a detailed and well-established framework for Orders to Show Cause that has long applied to all Commonwealth agencies. This regulation should follow them, or at least better explain its proposed differences.

Section 121.27a - Bureau intervention and penalties

This section raises the same questions as with Section 121.27. Part II of Title 1, at Section 35.27 **et seq.**, has provisions controlling intervention generally; to what extent, and why, does this regulation vary?

Further, this section continues the possible confusion of the Bureau and the Department. Under Section 121.27, it is the Department that files an Order to Show Cause for violations of the act or regulations (albeit with the question of the scope of the regulations - Part VIII or beyond?); and the hearings on alleged violations would be before an officer serving on behalf of the Bureau Director (albeit with the question of whether it should be the Secretary). Here, the Bureau, not the Department, intervenes to pursue the same alleged violations; and the hearing is before a workers compensation judge, not a hearing officer appointed by either the Bureau Director or the Secretary.

Agencies should be consistent in determinations of what constitute violations of the act or the regulations; that means consistent in the hearings to determine violations, too, and that should mean one forum, not multiple ones, for resolving disputes.

Thank you for the opportunity to comment on this proposed regulation. We are happy to discuss any questions or concerns, and we look forward to a true dialogue with the Bureau, the standing committees, the IRRC and other interested parties in the effort to revise Chapter 121.

Sincerely,

Samuel R. Marshall

C: Kim Kaufman, Executive Director
Independent Regulatory Review Commission

Honorable Joseph B. Scarnatti, III
Honorable Christine M. Tartaglione
Honorable Robert Allen
Honorable Robert E. Belfonti, Jr.