Kupchinsky, John

From: Larry Chaban [lchaban@rjslegal.com]
Sent: Monday, August 08, 2005 2:54 PM
To: jkupchinsk@state.pa.us
Subject: Chapter 121 Regulations - Comments

Dear Director Kupchinsky:

On behalf of the Pennsylvania Trial Lawyers Association I am submitting Comments on the proposed rulemaking for 34 Pa. Code Chapter 121 that were published in the July 9, 2005 Pennsylvania Bulletin. These are attached to the email. I will also be sending a copy of the comments by first class mail today.

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COMMENTS REGARDING PROPOSED REGULATIONS FOR TITLE 34 PA CODE CHAPTER 121 ON BEHALF OF THE WORKERS' COMPENSATION SECTION OF THE PENNSLYVANIA TRIAL LAWYERS ASSOCIATION

34 Pa. Code §123.3(d): The regulation addresses the filing date when mail is used. However, it does not specify the filing date when electronic means are used. While common sense should tell one that filing is complete upon electronic transmission, it should be made clear in the regulation that this is so. Otherwise, it can potentially lead to arguments over when a form is actually filed electronically.

The current electronic forms have an option to print confirmation upon submission. Other than that, the public does not know how the electronic submissions are logged at the Bureau. To prevent unwanted litigation, this should be made clear in the regulations with regard to electronic filing.

34 Pa. Code §123.3b(b)(3): It remains a significant problem that employers or their representatives are selecting health care providers for injured employees, whether there is a panel or not. This was recognized as a problem in the Fall 2004 Bureau of Workers' Compensation newsletter. Injured workers are not adequately informed of their rights with regard to the selection of the health care provider. Injured workers, therefore, do not realize the employer is violating the WC Act when the employer selects the provider. As the Department is mandating adequate notice to injured workers of rights with regard to panel providers this protection should be included.

This section should include the following statement, "The injured worker, and not the employer, is the only one permitted to select the health care provider with which to treat."

34 Pa. Code §121.5(c): This proposed regulation should be eliminated. There is no statutory or regulatory authority to allow a Notice of Compensation to be amended, except as provided by 34 Pa. Code §121.7(d) and (e), or by Supplemental Agreement (Form LIBC-377). The Employer should have no greater right to amend a Notice of Temporary Compensation Payable (NTCP) than it does a Notice of Compensation Payable.

An NTCP is a document that is unilaterally issued by the employer, insurance carrier or TPA. The injured worker has no input regarding the information included in it. Allowing the amending of a NTCP will permit significant, unilateral changes in the terms of the form. This is particularly true where the amendment would relate to the "Description of Injury." As the WC Act and regulations now stand, only a Supplemental Agreement or petition to a workers' compensation judge is the allowable method to amend an NCP or NTCP.

There was no statement in the "Purpose" section of the proposed regulations with regard to the reason for the substantial expansion of the rights of an employer,

carrier or TPA to unilaterally amend the NTCP. It is not possible, therefore, to comment directly on the reasons for this beyond what was stated above.

34 Pa. Code §121.7(f): The regulation on medical only cases should be mandatory and not merely optional. The word "may" should be changed to "shall."

Commonwealth Court has made clear that in medical only cases an NCP is required. *Orenich v. Workers' Compensation Appeal Board (Geisinger Wyoming Valley Medical Center)*, 863 A.2d 165, 168 (Pa. Cmwlth. 2004). The court showed that there are an extremely important reasons for this requirement.

> Under the usual practice of workers' compensation when an employee is injured, the employer issues an NCP to identify the nature of the injury and specify the amount of money being paid to the employee. It also places the burden of proof on the proper party who wishes to make a challenge to either the medical bills or the compensation being paid. Regarding the medical bills, based on that NCP, the employer is able to question medical bills for treatment that it believes is not reasonable nor necessary. It may do so by requesting a utilization review of the medical bills, which it would not be able to do without the NCP, as there would be no record of any injury to question. As to compensation being paid, the NCP is also important where the employer decides that it wants to terminate paying the employee's medical bills or benefits. In such a case, the burden is properly on the employer to prove that the medical bills or benefits are no longer warranted rather than on the injured employee who would otherwise have to prove they were to be continued if the NCP did not exist. In the converse situation, the burden would be on the employee, by filing a claim petition, who believes that he or she is entitled to compensation because the injury has resolved into a disability causing loss of earning power or to add additional injuries to the NCP, which the employer disputes. Having an NCP acknowledging the injury fixes the nature of the injury for both the employer and the claimant, allows for utilization review of treatment, and keeps the burden of proof on the proper party to prove what otherwise would not be possible without an NCP.

Orenich, 863 A.2d at 169-170. By making the medical only NCP optional, the Department is taking a position contrary to the settled case law in this area. PaTLA believes that only the General Assembly can make such a significant change in the interpretation of the statute. The Department does not, even under Section 435 of the WC Act, have the ability to make such a significant change in what the WC Act requires.

Further, PaTLA believes that making the medical only NCP optional will continue to encourage employers, carriers and TPAs to use what are called "medical only Notice of Compensation Denial." Use of such forms, where medical is paid, is contrary to the

precedent of Commonwealth Court. As noted above in *Orenich*, use of an NCD misplaces the burden of proof in compensation cases where compensation, by way of medical benefits, has been paid. PaTLA believes that the regulations should not encourage employers, carriers and TPAs to act contrary to the law as stated by Commonwealth Court.

34 Pa. Code §121.17: In our initial proposal, we recommended that a termination not be permitted by using a Supplemental Agreement, Form LIBC-337. The reason for this is that Form LIBC-377 does not have the express warnings that an Agreement to Stop Weekly Workers' Compensation Payments (Final Receipt), Form LIBC-340, does.

The Final Receipt lets the injured worker know that the agreement means the worker is fully recovered. The Final Receipt also tells the worker that it should not be signed if he or she has returned to work earning less or the employer is holding the final check for signature.

Form LIBC-337 contains no such warnings. The employer, compensation carrier or TPA is the sophisticated party in such situations having training and/or advice on the procedures under the WC Act. The unrepresented, injured worker does not have the legal sophistication to be aware of the significance of signing a Supplemental Agreement with termination language. The warnings on Form LIBC-340 have no effect if Form LICB-337 is allowed to be used for a termination (final receipt).

Form LIBC-340 also contains a warning about having three (3) years to reopen the claim from the date of last payment. Form LIBC-337 contains no such warning. Significantly, where Form LIBC-337 is used for suspension or modification, the injured worker will have up to 500 weeks to reopen a claim, the period of partial disability. The unrepresented, injured worker will not be aware of the significant difference between a suspension verses final receipt where Form LIBC-337 is allowed to be used for a termination.

The workers' compensation statute is remedial and to be applied in the manner most favorable to the injured employee. *Sporio v. Workmen's Compensation Appeal Bd. (Songer Const.)*, 717 A.2d 525 (Pa. 1998). Allowing the use of Form LIBC-337 in place of Form LIBC-340 is contrary to that principle. Subsection (b) should make it clear that Form LIBC-337 cannot be used in place of Form LIBC-340 where the employer or carrier is seeking a final receipt/termination.