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INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

September 7, 2005

Honorable Stephen M. Schmerin, Secretary
Department of Labor and Industry
1700 Labor and Industry Building
Harrisburg, PA 17120

Re: Regulation #12-67 (IRRC #2484)
Department of Labor and Industry
General Provisions

Dear Secretary Schmerin:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman
Executive Director

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Enclosure

cc: Honorable Joseph B. Scarnati, III, Chairman, Senate Labor and Industry Committee
Honorable Christine M. Tartaglione, Minority Chairman, Senate Labor and Industry Committee
Honorable Bob Allen, Majority Chairman, House Labor Relations Committee
Honorable Robert E. Belfanti, Jr., Democratic Chairman, House Labor Relations Committee

Comments of the Independent Regulatory Review Commission

on

Department of Labor and Industry Regulation #12-67 (IRRC #2484)

General Provisions

September 7, 2005

We submit for your consideration the following comments on the proposed rulemaking published in the July 9, 2005 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Department of Labor and Industry (Department) to respond to all comments received from us or any other source.

1. Section 121.1. - Definitions. - Clarity.

Employer

This term incorporates by reference two definitions of “employer” found in Sections 103 and 401 of the Workers’ Compensation Act (Act). Section 103 of the Act is under Article I, relating to interpretation and definition. Section 401 of the Act is under Article IV, relating to procedure. The definitions from the Act differ and are not interchangeable. Therefore, both statutory definitions should not be combined in one regulatory definition. The Department should select one statutory definition that is most appropriate for Chapter 121, relating to general provisions. If one statutory definition is more appropriate in a certain section than the other statutory definition, then that definition should be referenced in or added to that section.

Insured employer

The definition of this term includes employers who chose to insure their workers’ compensation liabilities through a workers’ compensation insurance carrier. The Department has indicated that this term also encompasses employers who cover their liabilities through the State Workmen’s Insurance Fund. The final-form regulation should be amended to reflect this fact.

2. Section 121.3. - Filing of forms. - Clarity.

Subsection (a) and (c)

These subsections use the terms “electronic format” and “electronic means.” The Department has stated that forms can be filed electronically on their website or through an approved electronic data interchange protocol. Because these terms are vague and could include methods other than those noted by the Department such as e-mail or telephone, we recommend that the terms be defined.

Subsection (b)

This subsection allows the Bureau of Workers' Compensation (Bureau) to return forms that are not properly completed or filed. The final-form regulation should require the Bureau to inform the applicant why the form was not completed or filed correctly.

Subsection (d)

This subsection addresses how the filing date will be determined when delivery is made using the United States Postal Service. However, it does not address how the filing date will be determined if other means of delivery are used.

The Department recently amended Section 101.82 of its regulations on unemployment compensation relating to time for filing an appeal from determinations of the Department. This section establishes how the filing dates for appeals filed by a variety of means including U.S. mail, common carrier, fax, electronic transmission and personal delivery will be determined. Language similar to Section 101.82 should be included in this subsection.

3. Section 121.3b. - Posting workers' compensation information. - Clarity.

Subsection (a)

This subsection requires an employer to post information at its primary place of business and its "sites of employment." We note that language used in this subsection is similar to language in the Act. However, the phrase "sites of employment" lacks clarity and could make it difficult for an employer to fulfill all of its responsibilities. For example, what would the "site of employment" be for a visiting nurse or pharmaceutical salesperson that works exclusively from their home or automobile? The final-form regulation should specify how an employer can meet its obligations if some or all of its employees do not report to a particular "site of employment."

Subsection (b)

Paragraph (6) states the following: "If your claim is denied, you have the right to request a hearing before a workers' compensation judge." For clarity, this subsection should be amended to state, "If your claim is denied **by your employer**, you have the right to request a hearing before a workers' compensation judge." (emphasis added)

4. Section 121.7. - Notice of compensation payable and notice of temporary compensation payable. - Clarity.

Subsections (c) and (d)

These subsections allow an employer to file certain forms as "amended" or "estimated" by clearly identifying those forms as such. We asked the Department how an employer would be able to clearly identify forms filed electronically as "amended" or "estimated." The Department responded that they intend to revise the forms to include a box that could be checked to indicate that the forms are "amended" or "estimated." We believe this revision is appropriate and recommend that the forms be amended before this regulation is finalized. The same comment applies to the similar language in Section 121.8(c) and (d), Section 121.9(d) and (e), and Section 121.12(a).

Subsection (e)

This subsection contains two subjects. The first relates to amending a Notice of Compensation Payable, Form LIBC-495, and Notice of Temporary Compensation Payable Form, LIBC-501. The second relates to filing a Supplemental Agreement for Compensation for Disability or Permanent Injury, Form LIBC-337. These two provisions should be separated into two distinct subsections. The same comment applies to the similar language in Section 121.8(d) and Section 121.9(e).

Subsection (f)

This subsection states that an employer “may” file a Notice of Compensation Payable, Form LIBC-495, when an employee’s injury has not resulted in lost time from work in medical only cases. The Department has indicated that filing Form LIBC-495 is not the only form that can be used. However, employers are expected to file either Form LIBC-495 or other forms for medical only cases. The final-form regulation should be amended to reflect the fact that employers are expected to notify the Department of medical only cases. It should also list what forms could be filed to meet this requirement.

5. Section 121.11. - Supplemental agreements for compensation for death. - Clarity.

Subsection (b) states that, “Form LIBC-338 **may** be changed” (emphasis added) when one of the listed changes occur. It is our understanding that a Supplemental Agreement for Compensation of Death, Form LIBC-339 **must** be used to amend Form LIBC-338 when one of the listed changes occurs. To reflect the requirement to amend the agreement, the word “may” should be replaced with “shall” in the final-form regulation. The same comment applies to similar language in Section 121.12(a) as it applies to correcting errors in computing wages and Form LIBC-495 and Form LIBC-501.

6. Section 121.16. - Updating claims status. - Need; Reasonableness; Paperwork; Preparation costs.

This section requires insurers to file an Annual Claims Status report, Form LIBC-774.

We have three concerns with this requirement. First, the Department has indicated that this form has yet to be developed. Without having this form, it is impossible for this Commission to assess whether it places unnecessary burdens on the regulated community. We suggest that this form be developed and shared with the regulated community before this regulation is returned in final-form.

Second, commentators have questioned the need for requiring the submission of the new Form LIBC-774 as a replacement for Form LIBC-392, which insurers did not routinely submit, although required to do so. The Department should explain the purpose and need for Form LIBC-774.

Finally, the Department should explain what additional paperwork will be required and provide an estimate of the preparation costs associated with filing the form for both the Department and the insurers.

7. Section 121.17. - Change in compensation. - Clarity.

Subsections (a), (b) and (c)

These subsections state that certain forms “may” be filed if there is a change in compensation. The Department has indicated that Subsections (a) and (b) pertain to situations in which both the employer and employee are in agreement pertaining to changes in compensation and Subsection (c) pertains to suspension or modification of compensation by the employer. It is our understanding that in these subsections the proper forms **must** be filed. As currently drafted, these subsections do not reflect this fact. To improve clarity, we recommend that Subsections (a) and (b) be amended to reflect that if the employer and employee are in agreement, then the appropriate forms shall be filed with the Bureau and Subsection (c) be amended to require the filing of a Notification of Suspension or Modification, Form LIBC-751.

Additionally, Subsection (c) references Sections 413(c) and (d) of the Act, but does not include a corresponding Purdon’s citation. To be consistent with the rest of the proposed rulemaking, we recommend that the Purdon’s citation be included.

8. Section 121.18. - Subrogation. - Clarity.

Subsection (a) states, “[I]f a third party obtains recovery” It is our understanding from our discussions with the Department that “third party” should be deleted and replaced with “employee.”

9. Section 121.21. - Reimbursement for silicosis, anthraco-silicosis or coal workers’ pneumoconiosis. - Clarity.

Subsection (b)

Paragraph (1) requires certain information to be reported “. . . in a format as required by the Bureau.” What is the required format? Will the Bureau provide a form for the requested information? The final-form regulation should include an explanation of the format that will be required in this subsection or delete the phrase, “. . . in a format required by the Bureau.”

Subsection (c)

This subsection states that insurers shall keep records for three years and that these records shall be available for inspection at reasonable times. We have two concerns. First, the final-form regulation should include an explanation as to when the three-year retention period begins. Second, the phrase, “reasonable times” is vague and should be changed to “normal business hours” in the final-form regulation. This comment also applies to similar language in Section 121.30(d).

10. Section 121.25. - Issuance of compensation checks. - Clarity.

Paragraph (2) states that “[N]otice of the first payment to a claimant shall be sent to counsel of record.” The final-form regulation should specify who is responsible for notifying the counsel of record and the manner in which counsel of record will be notified.

11. Section 121.27. - Orders to show cause. - Clarity.

Subsection (a)

This subsection references “the act or regulations.” The term “act” is defined at Section 121.1, relating to definitions. However, the term “regulations” is not defined. For clarity, the

Department should include specific references to the regulations that must be followed. This comment also applies to the similar language in Subsection (g) of this section and in Section 121.27a(a) and Section 121.30(e).

Subsection (d)

This subsection states that a hearing will be conducted under this section and, when applicable, 1 Pa. Code Part II. The phrase “when applicable” is vague. The final-form regulation should either delete this phrase or provide more detail as to when 1 Pa. Code Part II will be followed.

Subsection (e)

This subsection requires that hearings be recorded and that the Department keep transcripts of the hearings. Since the Department is not required to keep records for a specific time period, the phrase, “and kept by the Department” should be deleted.

Additionally, this section refers to “the Department” while the rest of the regulation refers to “the Bureau.” The regulation should be consistent in references to the agency throughout the regulation.

12. Section 121.27a. - Bureau intervention and penalties. - Clarity.

Subsection (a)

This subsection contains two “may” provisions. The first relates to the possible imposition of penalties by a workers’ compensation judge for an alleged violation of the act or regulations. The second pertains to the notification of the imposition of penalties by the workers’ compensation judge to the Bureau. The first “may” provision is appropriate because the workers’ compensation judge has discretion when imposing penalties. However, once it is determined that penalties will be imposed, we believe the notification of the Bureau should be mandatory. Therefore, the second “may” provision should be “shall” to require notification of the Bureau.

Subsection (b)

This subsection states that the workers’ compensation judge will provide a copy of the description of the nature of the alleged violation to the Bureau and provide copies of the notification to all parties. It is our understanding that it is the Department’s intent that the Bureau and the other parties will be notified at the same time. To improve clarity, Subsection (b) should include language to that effect.

Facsimile Cover Sheet

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Pages: 7

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Comments: We are submitting the Independent Regulatory Review Commission's comments on the Department of Labor & Industry's regulation #12-67 (IRRC #2484). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: *Lori Shuff* Date: 9/7