Original: 2485

The Insurance Federation of Pennsylvania, Inc.

1600 Market Street
Suite 1520
Philadelphia, PA 19103
Tel: (215) 665-0500 Fax: (215) 665-0540
E-mail: mailbox@ifpenn.org

Samuel R. Marshall
President & CEO

April 13, 2006

John R. McGinley, Jr., Chairman
Independent Regulatory Review Commission
14th Floor
333 Market Street
Harrisburg, PA 17101

Re: Regulation 12-68 - Department of Labor and Industry's final-form regulation on qualifications for vocational experts

Dear Chairman McGinley:

On behalf of our member companies and our trade association counterparts at the national level, we recommend the IRRC disapprove this regulation.

We believe key provisions of the regulation, as detailed below, are not in the public interest. These provisions are not warranted or envisioned by the underlying legislation giving rise to this regulation, Act 53 of 2003, and will only frustrate the intent of that act, which was to facilitate the use of qualified vocational experts. Further, they are unclear, unfeasible and unreasonable.

At the outset, we concede this is the first time we have raised these concerns during the IRRC process. That is because the provisions at issue are new in this version. They do not incorporate or address comments or suggestions from IRRC staff or other commentators at the proposed stage; they are new directions that merit fresh review and revision.

As to the specific provisions:

Section 123.202a - Qualifications of experts under Act 53 of 2003

In its final form regulation, the Department of Labor and Industry seems to require that, going forward, a vocational expert be both licensed as a professional counselor by the state under the Social Workers, Marriage and Family Therapists and Professional Counselors Act, 63 P.S. Section 1901, and certified by one of the nationally recognized professional organizations listed in the regulation. In its proposed regulation, the Department made this as an "either/or" requirement.

We note this **seems** to be the requirement because of some odd wording in the regulation: The Department states that a vocational expert must "possess one of the following" but then requires both state licensure as a counselor and certification by a national body.

Requiring licensure under the Professional Counselors Act serves no purpose and will impede the availability of vocational experts going forward. Being licensed under that act means nothing in terms of being qualified to be a vocational expert - one reason the majority of vocational experts now used in Pennsylvania (without complaint by the Department or workers compensation judges) are not licensed under the act.

Being licensed under Pennsylvania's Professional Counselors Act is also unreasonable when dealing with vocational experts performing earning power assessments on injured workers who have moved to other states. By way of example, an injured worker may move to Florida - but under this regulation, only a person licensed as a professional counselor in Pennsylvania could perform an assessment on him. That would be a needless and cumbersome cost on all parties.

Notably, the Department does not impose this licensure requirement for those already acting as vocational experts.

They can continue to do so going forward without state licensure as professional counselors - because, as the Department has always recognized, certification by the nationally recognized organizations is the key to being qualified. Further, the Department did not impose this requirement in its regulation setting forth standards for vocational experts under Act 57, the predecessor to Act 53.

Further, this new requirement of state licensure as a professional counselor was not done at the recommendation of any commentators. IRRC staff pointed out, correctly, that this licensure by itself does not make one qualified as a vocational expert.

The Department, however, has turned that upside down by now requiring state licensure as a professional counselor. Neither IRRC staff nor any other commentator - nor the Department itself - suggested that certification by one of the listed national organizations is insufficient, although that is the result of this regulation.

In essence, this requirement of state licensure as a professional counselor is truly a new one. It was not suggested by either Act 57 of 1995 (the act first allowing vocational experts to perform earning power assessments) or Act 53 of 2003, which addressed a procedural problem with the original act. It was not in the Department's original regulation setting forth qualifications for vocational experts, and it was not in its proposed version of this regulation - or in any of the comments to that.

Imposing this requirement adds nothing to ensuring qualified vocational experts; instead, it makes finding them needlessly difficult and will limit an already limited availability of such experts. That wasn't the purpose of Act 53, which was to facilitate, not curtail, the use of these experts.

This could be easily remedied regulation by either deleting the state licensure requirement or providing, as seems to have been the recommendation of IRRC staff, that state licensure alone is insufficient and that certification in those situations is also needed.

Section 123.204 - Conduct of vocational experts

Subsection (b) requires that a vocational expert "serve a copy of the report on the employee, and counsel if known, within 30 days of the date of the earning power assessment interview."

A vocational expert, however, is often unable to complete his report within 30 days of conducting his earning power assessment interview.

These reports are not just of the interview, but of the other items listed in Section 306(b)(2) of the Workers Compensation Act, 77 P.S. Section 712, and often involve follow-up medical visits and other routine aspects. All that can - and does, under current practice - mean the vocational expert's report will not be completed within 30 days of the earning power assessment interview.

Granted, several commentators, including IRRC staff and the Workers Compensation Judges Association, recommended that the Department proscribe a set time in which the vocational expert share his report with the employee. To that end, it would make sense to require that an expert share his report within 30 days of completing the report - not 30 days of performing one part of what goes into a report, the earning power assessment.

In essence, subsection (b) is a requirement that a vocational expert complete his earning power assessment report of an employee within 30 days of interviewing the employee.

That is, as noted above, unrealistic given the other items entailed in these reports. It is also nowhere suggested in Act 53. It is not a requirement in the Department's original regulation of vocational experts under Act 57, and was not in the Department's proposed regulation or in any comments to that. Finally, it does not protect the employee: While his interests may be prejudiced if he does not get a copy of the report once completed, he is in no way prejudiced if the report takes (as it often does) more than 30 days after his interview to complete.

In summary:

Act 53 was relatively simple. It changed Section 306(b)(2) of the Workers Compensation Act to require only that the Department set qualifications for vocational experts by regulation, rather than affirmatively approve such experts. It was enacted in the context of an already-existing regulation setting forth qualifications for these experts, qualifications which the IRRC had approved. Whatever else it was, Act 53 was not an attempt to revise those qualifications, and certainly not an attempt to impede the use of vocational experts.

The Department's final-from regulation, however, goes beyond that purpose to establish new and needless restrictions on the use of vocational experts by requiring that they be licensed as professional counselors by the state, and that they complete their reports within 30 days of performing interviews with employees.

Those requirements, first introduced in final-form and not truly responsive to any comments on the proposed regulation, are certainly not called for under Act 53. To the contrary, they will frustrate the intent of the act and needlessly undermine the proper use of vocational experts.

Notably, the Department has never sought these requirements in the decade since passage of Act 57 and the use of vocational experts. Further, the corrections to these problems are, as suggested above, easy to do and will not harm employees or otherwise conflict with either Act 53 of the Workers Compensation Act generally.

For these reasons, we recommend this regulation be disapproved.

Sincerely,

Samuel R. Marshall

C: Eileen K. Wunsch, Chief
Health Care Services Division
Bureau of Workers Compensation

The Insurance Federation of Pennsylvania, Inc.

1600 Market Street
Suite 1520
Philadelphia, PA 19103
Tel: (215) 665-0500 Fax: (215) 665-0540
E-mail: mailbox@ifpenn.org

Samuel R. Marshall
President & CEO

May 31, 2006

ORIGINAL: #2484 & #2485

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

ORIGINAL: 2485

PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY
417 Walnut Street
Harrisburg, PA 17101-1902
717 255-3252 / 800 225-7224
FAX 717 255-3298
www.pachamber.org

April 17, 2006

Mr. John R. McGinley, Jr., Chairman
Independent Regulatory Review Commission
14th Floor
33 Market Street
Harrisburg, PA 17101

Dear Chairman McGinley:

On behalf of the members of the Pennsylvania Chamber of Business and Industry, we are writing to recommend that the Independent Regulatory Review Commission (IRRC) disapprove Regulation 12-68, the Department of Labor and Industry's (Department) final-form regulation on qualifications for vocational experts.

As you know, Act 53 of 2003 changed Section 306 (b) (2) of the Workers' Compensation Act to require only that the Department set qualifications for vocational experts by regulation, rather than affirmatively approve such experts. It was enacted in the context of an already-existing regulation setting forth qualifications for these experts, qualifications which the IRRC had approved. Act 53 was not an attempt to revise those qualifications, and certainly not an attempt to impede the use of vocational experts.

However, we believe the Department's final-form regulation goes beyond that purpose to establish new and needless restrictions on the use of vocational experts by requiring that they be licensed as professional counselors by the state, and that they complete their reports within 30 days of performing interviews with employees.

Those requirements, first introduced in final-form and not truly responsive to any comments on the proposed regulation, are certainly not called for under Act 53. Rather, they will frustrate the intent of the act and needlessly undermine the proper use of vocational experts.

In short, we believe key provisions of the regulation are not in the public interest. Additionally, these provisions, which are not warranted or envisioned by the underlying legislation giving rise to this regulation, are unclear, unfeasible and unreasonable.

For these reasons, we recommend that Regulation 12-68 be disapproved.

Sincerely,

James D. Welty
Vice President, Legislative & Corporate Affairs

Cc: Honorable Elizabeth A. Crum
Deputy Secretary for Compensation & Insurance
Pennsylvania Department of Labor & Industry

Original: 2485

Gelnett, Wanda B.

From: IRRC
Sent: Friday, April 14, 2006 11:50 AM
To: Gelnett, Wanda B.
Subject: FW: Comment: Act 53 Changes

-----Original Message-----
From: Denise Cordes [mailto:dcordes@danmarassociates.com]
Sent: Friday, April 14, 2006 11:46 AM
To: IRRC
Subject: Comment: Act 53 Changes

To whom it may concern:

In regard to the changes in Act 53, I had the following communications with Eileen Wunsch at the Bureau. My comments are bolded. I do hope you have some impact on this as I believe it will negatively impact the quality of LMSs that are produced. The only way that Act 57/53 can provide a cost-effective solution for insureds while simultaneously providing a fair and objective assessment of a claimant's residual earning capacity is if the Vocational Counselor is not forced to put out an inferior product to meet some arbitrary deadline. Every Vocational Counselor is motivated to work as quickly as possible as our livelihood depends on it but we cannot ethically compromise our product - which potentially affects the benefits received by an injured worker.

Denise D. Cordes, MS, CRC, D-ABDA, D-ABVE

- I understand your concerns. Please remember that I did what you do for 19 years, so I am well aware of ethics and quality standards and I do not feel these will be compromised in any way.
- Again, it is unfortunate that you did not provide input during the appropriate times.
- Eileen K. Wunsch, MS, CPIW, ARM
- Chief, Health Care Services Review
- Bureau of Workers Compensation
- ewunsch@state.pa.us

-----Original Message-----

- **From: Denise Cordes [mailto:dcordes@danmarassociates.com]**

- Sent: Monday, April 10, 2006 9:46 AM
- To: Wunsch, Eileen
- Subject: RE: CHANGES TO THE ACT

I too work with accounts that request a thirty day turn around and for some cases - that is no problem. But I've told my accounts many times after meeting a particular client that there will not be a thirty day turnaround unless they are willing to submit a survey with one or two jobs that are appropriate. If they are - fine. But I will not sink to putting telemarketing jobs in every LMS just to have a wage to report when such jobs are not vocationally appropriate. The difference between vocational evaluations and physician evaluations is substantial. A vocational counselor must consider multiple factors (age, education, residual transferable skills, and physical impairment), must conduct a transferable skills analysis to identify a base of potentially suitable jobs, then must approach the labor market where employers may or may not expeditiously return your calls to discuss an advertised job, a case may be referred in the worst of the job-hunting season (Nov-Jan or June-Aug), a client may reside in a labor market that is extremely rural, etc. There are too many factors not in my control to guarantee that every survey can be done in 30 days. Many can, some to many can't. The problem is I cannot (and will not) compromise my product to please my referral base or now, to comply with the law. I will only do an LMS under these circumstances - if my referral source agrees that I will get paid for my file review and/or initial interview and can return the case if I do not believe that the particular client can have a sufficient number of jobs in the thirty-day period. This probably means I will not be doing many LMSs but perhaps my rebuttal business will grow as

- **each vocational counselor has an ethical and legal requirement to ensure**
- **that the jobs they put forth in their surveys are not just physically**
- **appropriate but also vocationally suitable. Therefore, I predict that the**
- **number of surveys that can be rebutted as providing evidence of a bona fide**
- **residual wage earning capacity (by showing both physically and vocationally**
- **suitable jobs) will abound. I hope I am right as my livelihood will depend**
- **on it. Vocational counselors in private sector have significant accountability to customers, lawyers, clients, and their professional code of ethics. This is like telling a physician the maximum number of days for**
- **all gall bladder patients to be hospitalized is 5 days - but we all know**
- **that in some individual cases there are mitigating circumstances that**
- **necessitate a longer stay. Whose decision should it be when these patients**
- **with particularly difficult circumstances cannot get well in 5 days...the**
- **legislature, the insurance industry, or the doctor?**

-----Original Message-----

- From: Wunsch, Eileen [mailto:ewunsch@state.pa.us]
- Sent: Monday, April 10, 2006 7:37 AM
- To: Denise Cordes
- Cc: drappucci@danmarassociates.com
- Subject: RE: CHANGES TO THE ACT

- Our information from insurers, attorneys and rehab people indicates that
- most Labor Market Surveys are done well under 30 days because of the
- insurers and attorneys' needs. Health Care Providers have 10 days to submit
- their initial reports and IRE physicians have to complete their evaluation
- within 30 days. Why should you be the only people without any time limits
- or accountability?

- The information I have from talking to tons of voc people is that 30 days is
- no problem and most of their accounts require the report to be submitted in
- much less time than that.
- Again, we have vehicles for input and I am sorry you did not use them.
- Should you have any further questions, please contact me directly.
- Eileen K. Wunsch, MS, CPIW, ARM
- Chief, Health Care Services Review
- Bureau of Workers Compensation
- Department of Labor & Industry
- 1171 South Cameron Street
- Harrisburg, PA 17104
- Phone: 717 772-1912
- FAX: 717 772-1919
- ewunsch@state.pa.us

- **-----Original Message-----**
- **From: Denise Cordes [mailto:dcordes@danmarassociates.com]**
- **Sent: Thursday, April 06, 2006 4:12 PM**
- **To: Wunsch, Eileen**

1. **Subject: RE: CHANGES TO THE ACT**

    - **You are right Eileen - I was too busy and now I must suffer what I am sure**
    - **will have a worsening effect on the quality of labor market surveys... but I**
    - **never suspected that there would be legislation placing time limits on how**
    - **long a professional could take to do a labor market survey when "time" is**
    - **just not something that is exclusively in control of the counselor...again -**

- **to send your LMS to a claimant when it is done is fine...to say it must be**
- **done in 30 days...how many people, disabled or non-disabled, take only 30**
- **days to do a job search....a real estate agent may sell a home in 30 days in**
- **May or June but not in the dead of winter. I just can't imagine a timeframe**
- **would've been enacted nor can I understand the reasoning behind it. Oh**
- **well...thank God I do a lot of liability work.**

-----Original Message-----

From: Wunsch, Eileen [mailto:ewunsch@state.pa.us]

Sent: Thursday, April 06, 2006 6:31 AM

To: dcordes@danmarassociates.com

Cc: LI, BWC-Helpline; drapucci@danmarassociates.com

Subject: CHANGES TO THE ACT

- Your recent comments that were sent erroneously to the Bureau HELPLINE were
- forwarded to me.
- While we appreciate your input, there were several public meetings and
- public comment periods during the past two years when these regulations were
- under consideration and that would have been the appropriate time and place
- for your comments. Or you could have worked through your professional
- organization to gain input.
- We suggest you monitor the Pennsylvania Bulletin for the final form
- regulations or contact your professional association for specific
- information and guidance.

Should you have any further comments, please contact me directly.

Original email sent by Denise Cordes:

- **I just received notice from PARPS that we MUST send our Labor Market Surveys to injured workers within 30 days of having interviewed the worker. If this is actually a true**

interpretation of the regulations, my comments follow:

- **The 30-day rule is ridiculous and will result in even poorer quality labor market surveys. When does this 30-day rule go into effect? I have no problem sending my survey to the claimant but there are labor market factors and individual factors that just make the 30-day rule downright impractical if not impossible. The ads dry up between Thanksgiving and the New Year and again over summer vacation schedules. As well, some people are just more difficult to find appropriate jobs for (which is why my written disclosure always provides information on PaCareer Link and OVR services). Almost 20 years ago I was a placement counselor (non-disabled population) and the rule of thumb for placement was 30 days of job searching for every $10,000 of desired income. Yeah - you can find telemarketing and McDonald's jobs in 30 days...forget whether such jobs are vocationally suitable (even if they are physically suitable)! Can you imagine telling a doctor they have 30 days to treat an illness regardless of the nature of the illness, the age of the patient, etc.? Can you imagine telling a teacher they have 30 days to ensure that all 20 of their students must demonstrate proficiency on all four operations pertaining to fractions or decimals (I use to teach 5th and 6th grade) regardless of the individual student's IQ? Wish researchers only had 30 days to find cures, social workers only had 30 days to remedy the impact of childhood poverty, etc. When do we become the experts? Why are the legislators the experts on labor market conditions such that they know ALL labor market surveys can be completed, dictated, typed and proofed to ensure the claimant receives the survey exactly 30 days after they are interviewed. This is outrageous.**

- **Denise D. Cordes, M.S., CRC, D-ABVE, D-AVDA**