

Original: 2485

Wunsch, Eileen

From: Seelig, Todd
Sent: Friday, August 05, 2005 5:12 PM
To: Kupchinsky, John; Wunsch, Eileen
Cc: Cicola, David
Subject: Comments of Proposed Rulemaking, Chapter 123 and 121

Dear John and Eileen:

As you may know, the Pennsylvania Workers' Compensation Judges have an Association known as the Pennsylvania Workers' Compensation Judges' Association (PWCJPA). A majority of the approximate 90 WCJs are members. We have polled our members to see if there were any comments on these regulations. Pursuant to the Pennsylvania Bulletin, I am submitting written comments to the proposed regulations.

34 Pa. Code 123:

Proposed Regulation 123.203. This proposed regulation received the most comments from our members. Several judges were concerned whether there was statutory authority to support the Regulation, specifically 123.203(c).

Proposed Regulation 123.204(a). There was a comment expressed that the regulation did not specify "when" the disclosure must be made to allow the WCJ to determine if the regulation has been complied with. Perhaps Proposed regulation 123.204(a) should begin with the word, "Before", as does 123.205(b).

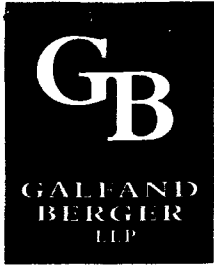
Proposed Regulation 123.204(b). There was a comment that this section should also contain a provision as to when a copy of the report must be sent to the employee. At this point, the Rules of Administrative Practice and Procedure before WCJs would seem to be the only source for this information which apply after litigation has already started. The WCJ Rules require disclosure at the first hearing in a litigated modification or suspension petition. The Commonwealth Court has seemed concerned with when the Claimant receives this information to allow Claimant to actually "follow up" on the job. Perhaps a regulation would be useful to the WCJs and Appellate Courts on this issue.

34 Pa. Code 121

Proposed Regulation 121.3b(b)(3). There was a comment made that the proposed regulation should include in the "posted information" when the employer must provide this notice (i.e., both at the time of hire and at the time of injury). This would hopefully aid in giving both employers and employees more information of what is required. This is often an issue in litigation.

Thank you for your attention to these comments.

Judge Todd B. Seelig
President, PWCJPA



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July 25, 2005

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Eileen K. Wunsch, Chief, Health Care
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RE: Proposed Regulations for Vocational Experts

Dear Ms. Wunsch:

I have the following suggestion to add to Section 123.204.

(c) The vocational expert who interviews the claimant and conducts a labor market survey must provide claimant and claimant's counsel with a copy of those reports at the time they are generated.

This proposal is suggested as part of the continuing obligation on the part of vocational experts to fulfill their obligations under the Code of Professional Ethics; and also be consistent with the PA Supreme Court's decision Kachinski. Under Kachinski the court indicated the whole process of vocational issues are based on "good faith." While Kachinski was based on the process of providing actual job openings to a claimant; the concept of "good faith" has not change merely because the obligation/burden on an employer is now to provide earning power assessment surveys/labor market surveys.

For example, the employer alleges it needs a vocational expert to assess the ability of claimant to the type of work that can be performed. Why shouldn't the claimant have a copy of this assessment in order to better understand what he/she may be able to do. Without it the employer is basically directing claimant to go out and look for work (Notice of Ability to Return to Work) without the advantage of knowing what type of transferable skills he/she may have.

There is no downside to providing these records/reports to claimant if it leads to a better understanding of vocational skills and perhaps the type of work or specific jobs that claimant should be looking for. The whole purpose of the survey is to have claimant return to work or establish a true earning capacity.

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Eileen K. Wunsch, Chief, Health Care Services Division
July 25, 2005
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We respectfully request an addition to the above section in order to avoid unnecessary argument over when, where and how such information should be turned over to a claimant.

Respectfully submitted



MARC S. JACOBS

MSJ/db

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Samuel R. Marshall
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August 4, 2005

Eileen K. Wunsch, Chief
Health Care Services Division
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Re: Chapter 123 - proposed regulation

Dear Eileen:

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 123, the chapter implementing Act 53 of 2003 concerning qualifications for vocational experts.

Section 123.201b - Definitions

"Financial interest:" The definition is so broad and ambiguous as to arguably cover any relation between the insurer and the vocational expert receiving a referral, which was not the intent of Act 53.

Subsection (ii) includes a "present or former employment relationship" between the insurer and the vocational expert as meaning the insurer has a financial interest in the expert. A past "employment relationship" does not mean a current financial interest.

Further, the phrase "employment relationship" is an oddity. Presumably, this subsection intends to require disclosure

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where a vocational expert is (or was) an employee of the insurer. That should be succinctly stated - referring to "employment relationships" suggests something beyond being an employee.

Subsection (iii) speaks of "a managerial, fiduciary or controlling interest" in either the vocational expert or the entity employing him. We are not sure what the Bureau means by these terms.

For instance, what is a "fiduciary interest" in an expert or an entity, beyond the ownership or employment interests already covered in the preceding subsections? What is meant by a "managerial interest"? Any insurer has to manage a referral, and arguably the expert to whom the referral is made, at least to ensure timeliness and completeness; that does not mean the insurer has a financial interest in the expert. And since the insurer has the choice of what expert to send a referral, doesn't every insurer arguably have a controlling interest?

This subsection seems a needless confusion to the preceding ones. If an insurer owns (partly or wholly) or employs an expert of the entity where the expert works, it has a financial interest in the expert or entity that must be disclosed. If not, there is nothing to disclose.

Subsection (iv) includes arrangements where consideration from the insurer to the expert "is based upon the vocational expert's opinion or outcome." Presumably, the intent here is to require disclosure of contingency arrangements where pay to an expert varies depending on whether the expert's interview helps or hurts the insurer.

That is an understandable goal, but it is misplaced within a definition of an insurer having a financial interest in a vocational expert that must be disclosed. In fact, it is the exact opposite, as it goes to the financial interest of an expert, not of an insurer.

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Further, this issue, and the presumed intent in subsection (iii), is already dealt with by Act 53's requirement that vocational experts comply with the Code of Professional Ethics for Rehabilitation Counselors pertaining to the conduct of expert witnesses. Specifically, Rule 2.4 of that Code requires experts to "clarify the nature of their relationships to all involved parties" and to "provide unbiased, objective opinions."

Section 123.204 - Conduct of expert witnesses

As a general point, this would be better titled, "conduct of vocational experts," not conduct of expert witnesses.

Subsection (a) makes the point we are trying to make about the needlessly broad and vague definition of "financial interest" in Section 123.201b. This subsection requires a vocational expert to disclose to the employee "the role and limits" of his relationship with the insurer." As drafting note, this would be better stated to simply require disclosure of the expert's relationship with the insurer - the reference to roles and limits adds only the chance for confusion.

As a substantive point, this subsection highlights that the areas the Bureau has tried to lump within its definition of "financial interest" in subsections (ii), (iii) and (iv) of that definition are correctly (and better) dealt with here.

We also recommend this section make specific reference to the Code of Professional Ethics for Rehabilitation Counselors pertaining to the conduct of expert witnesses, as set forth in Act 53. While Section 123.201 of the proposed regulation, while setting forth the regulation's purpose, mentions the Code - albeit without Act 53's limit of "pertaining to the conduct of expert witnesses" - this section does not, except in its unexplained title.

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Section 123.205 - Financial interest disclosure

Subsection (c) again illustrates the problem with the Bureau's proposed definition of "financial interest." It states, correctly, that paying the cost of an expert does not trigger a "financial interest" disclosure. But the breadth and vagueness of subsections (iii) and (iv) arguably conflict with that. Further, this section goes to the point that past "employment relationships" have nothing to do with current financial interests.

As an editing point, the subsection should refer to the vocational expert's - not interview's - cost.

We realize these are, in some ways, subtle distinctions. Nonetheless, they are important ones: Act 53 itself came about only because of some unanticipated "subtle distinctions," and that lesson shows the value of addressing ambiguities in advance.

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 123.

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.