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July 4, 2006

VIA FACSIMILE and e-mail only to:

Ms. Eileen Wunsch
Chief, Health Care Services Review Division
Bureau of Workers' Compensation
Department of Labor and Industry
Chapter 127 Regulations -- Comments
PO Box 15121
Harrisburg, PA 17105-5121

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Dear Ms. Wunsch:

As requested in the Proposed Rulemaking for the Department of Labor and Industry, Medical Cost Containment, I am enclosing the comments of Hajduk & Associates URO/PRO Services.

As an authorized Utilization Review Organization and an attorney authorized to practice law in this Commonwealth who represents injured workers in my practice, I recommend that these regulations not be approved as written for final rulemaking.

Specifically, I offer the following observations about the proposed rulemaking:

127.805a - UR of medical treatment prior to acceptance of the claim. The injured worker is required to treat with the insurer/employer's panel physician for the first 90 days after the injury. This section will have the insurance company reviewing its own panel physician's treatment and has the potential to decrease the number of physician's willing to act as a panel physician; and has the further incentive for the physicians that are on the panel to be very conservative in the treatment and not aggressively treat the injured worker to prevent potential review (and denial of reasonableness and necessity of care and consequently payment to the panel physician). It will add another layer of litigation for the injured worker to contend with; the worker will not only be litigating the injury but also the treatment for the injury.

127.811 – UR of entire course of treatment. Section (c) will create the potential for bias and influence between the reviewers who will be placed in the position of coming to a consensus on the reasonableness and necessity of the treatment. This will require many reviewers to come to one determination for each facet of care and will result in increased costs for these reviews dependant on the time the reviewers and the URO will need to spend in consultation to reach consensus. It also appears to allow the URO to make the determination in the reasonableness and necessity of care, an issue that is to be reserved only to the reviewers. This may reduce the burden of the WCJ who is the ultimate fact-finder and the one who should appropriately resolve the inconsistencies in reports. However, since the WCJ will only have the report and the records, he or she will never have the opportunity to know how or why the inconsistencies were resolved in a certain manner and without that knowledge, he or she does not have all the facts before him or her to make a reasoned decision. Further, this regulation is at odds with 127.852 – scope of review of URO's.

127.821 Precertification. This aspect of UR has the potential to be abused by the insurance industry. There have been no guidelines put forth on the insurance industry and the use of this proposed precertification regulation. Adjusters could require that the injured worker ask for precertification of all treatment requested and the injured worker will have to wait ten days to see if the insurance company will pay for the treatment before the injured worker can seek any type of treatment. Then, if the insurance company will not pay, the injured worker must wait a maximum of another 30 days for potential approval of the treatment. This could result in the worker having to wait a maximum of 40 days before he or she can ever see a doctor and treat for an injury. Serious harm to the injured worker is likely to occur from lack of treatment for such a long period of time. And if the treatment is not approved, the worker will be forced to litigate medical treatment before he or she ever begins treatment.

127.823 Precertification – provider filed requests and 127.824 – employee filed requests. This regulation will place an additional burden on providers who treat injured workers. Life happens to people; recently a provider under review had a death in his family and the records weren't sent. If this happens under the new regulations, even before a claimant will be able to treat for his or her work injury, he or she (through no fault of his own) will be required to litigate the need for treatment and thus, increase costs, ultimately because of increased litigation and recovery times because of the lack of treatment resulting in longer periods of disability.

128.842(d) Determining a change in medical condition is not the bailiwick of a reviewer. The legislature never intended reviewers to comment on any more that the reasonableness and necessity of care. Under this regulation, reviewers are given the authority to make a determination that was previously the authority of the WCJ as the ultimate fact-finder in a

case. This determination of a change in condition is completed without a hands-on evaluation of the injured worker and potentially violates the injured worker's due process rights.

127.852 is at odds with 127.833 and 127.842 which specifically allow the reviewer to determine whether or not a change in the injured worker's condition has occurred.

127.855 Employee personal statement (4) does not permit any type of enclosures, attachments or documentation to the statement. This creates a potential denial of the injured worker's due process rights when the insurer is given more rights than the claimant by allowing the insurance company to submit peer reviewed, independently funded studies and articles and reliable medical literature to the reviewer as in 127.856. Yet the employee is only permitted to discuss the treatment he has received from the provider under review.

127.864 (d) is at odds with 127.833 (a) as it limits the reviewers ability to determine how far into the future (180 days) treatment is reasonable and necessary, in contradiction to some protocols that will allow treatment for a longer period of time. While this may be reasonable for a simple strain/sprain injury, in the case of a serious and/or complicated injury, the injured worker will be placed into the position of being required to file a request for recertification every six months, thereby increasing the burden on the injured worker to justify his need for treatment for his work injury, not at all in keeping with the spirit of the workers' compensation law. This could also have a detrimental effect on providers' willingness to take on and treat seriously injured workers.

127.865(1) will allow the same reviewer to determine the continued reasonableness and necessity of treatment of an injured worker (or not) and could result in bias in both directions, for or against the insurance company and the injured worker. Efforts must be made to avoid bias in the utilization and peer review system in workers' compensation.

127.871(b) creates questions on whether the insurance company must pay for bills even though they file a petition for review of the UR determination. If they are ultimately successful in the challenge, how does the insurance company get reimbursed, does the provider under review have to give the money back???

The Bureau has cited that these proposed regulations will reduce costs to the Department and the workers' compensation community and create a more competitive environment for UR. What the Bureau has failed to note is that if reduced costs occur, it will come at the expense of the injured worker's treatment and impose a drastic impact on the injured worker's burden to get medical treatment approved.

These proposed regulations do not clarify what current law is, they completely change the

utilization/peer review environment. Further, the proposed regulations seek to make a change in current law regarding the authorization of URO's.

127.1051 This regulation changes the requirement of the Bureau to authorize URO's when the Act clearly requires the Bureau to perform this duty.

In reviewing the Procurement Handbook, Chapter 7 Competitive Sealed Proposals (RFP Process), I note that the "award is made to the responsible offeror whose proposal is determined, in writing, to be the most advantageous to the purchasing agency. (emphasis added) The question arises as to who the purchasing agency is, the Bureau or the workers' compensation insurance carriers. The insurance companies currently pay the fees for UR costs; will the Bureau now pay for the cost of reviews when the insurance carriers are required to pay?

It also appears from the Procurement Code that requirements other than the ability to effectively and efficiently render unbiased utilization review determinations will need to be satisfied, especially the requirement that it is cost driven. URO's will be required to submit to an RFP process and after it is approved through the RFP process, the Bureau will have no obligation to use the services of the URO. This increases costs to the Commonwealth to have one department working to award a contract (approve an RFP) for a URO that may never be used by the Bureau to complete the work for which it bid and was approved. This in my opinion is a serious waste of money and time.

Also with the regulation that does not require to Bureau to use the URO once a contract has been awarded, this action will result in the lack of random assignments that currently exists in the worker's compensation scheme. This random assignment was specifically instituted to prevent the incentive that peer review organizations have to produce a specific outcome for the insurance company as exists in Act 6 Auto law. It has the potential to have the Bureau be politically and economically driven by the insurance industry, the very result that the workers' compensation act sought to avoid when requiring the utilization review process to be overseen by the Bureau. In other words, the Bureau would be selecting and controlling for the insurance company the URO's who would likely produce a certain outcome at a certain cost; thus sacrificing the injured worker and his treatment in the process.

Please include this letter as my written comments regarding the proposed rulemaking. Also, please accept this letter as a request to speak at the meeting scheduled in Pittsburgh on July 13, 2006.

Very truly yours,

Mary L. Hajduk

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Gelnett, Wanda B.

From: LI, BWC-Administrative Division [RA-LI-BWC-Administra@state.pa.us]
Sent: Friday, July 07, 2006 8:02 AM
To: Wunsch, Eileen; Kupchinsky, John; Kuzma, Thomas J. (GC-LI); Howell, Thomas P. (GC-LI)
Subject: Comments on Regs. from Karla

-----Original Message-----
From: Martha A. Seper or Mary L. Hajduk [mailto:hajduk.uro@verizon.net]
Sent: Thursday, July 06, 2006 6:37 PM
To: ra-li-bwc-administra@state.pa.us
Subject: Comments

I sent the document more than once yesterday; however, will send it again. It is a simple PDF file that can be opened with Adobe. I also faxed it today as well, just in case you cannot open this attempt either.