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July 10, 2006

Eileen Wunsch, Chief
Health Care Services Review Division
Bureau of Workers' Compensation
Department of Labor and Industry
1171 South Cameron Street
Harrisburg, PA 17104

RECEIVED
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INDEPENDENT REGULATORY
REVIEW COMMISSION

Re: Proposed Amendments to Title 34, Chapter 127 – Workers' Compensation Medical Cost Containment

Dear Ms. Wunsch:

The American Insurance Association ("AIA") appreciates the opportunity to offer comments on the Bureau's proposed revisions to Chapter 127 of Title 34 of the Pennsylvania Code, entitled "Workers' Compensation Medical Cost Containment."

AIA is a trade association of major property and casualty insurance companies, representing approximately 400 insurers that provide all lines of property and casualty insurance throughout the United States and write more than \$120 billion in annual premiums. Our members collectively write over \$500 million of workers' compensation insurance premium in the State of Pennsylvania, constituting more than 20% of Pennsylvania's workers' compensation market. As a result, AIA members have a considerable stake in the health and market viability of the Pennsylvania system.

I. Introduction

AIA agrees that many aspects of Chapter 127 warrant review and improvement. However, we believe the current proposal is so fraught with ill-conceived, confusing and impractical provisions that the Bureau should withdraw it as a precursor to engaging insurers and other stakeholders in a meaningful dialogue to identify the many problems and potential improvements. Indeed, this is an approach the members of the Medical Cost Containment Committee were led to believe would occur before the proposal was formally introduced. While we appreciate that participants on that committee were asked to contribute to a "wish list" of suggested regulatory improvements in 2003, the Bureau's proposal far exceeds the contours of that list and should not be touted as the intended outcome of the committee's recommendations.

That the Bureau has now acknowledged the need to conduct a series of hearings to address the multitude of concerns being raised from all corners of the regulated community, while a welcome development, speaks to the fact that, for a proposal of this scope and complexity, meaningful consultation should have preceded formal introduction. We look forward to working with the Bureau to ensure that any amendments to Chapter 127 uphold not only the spirit of the regulation (i.e., medical cost containment), which implicates the best interests of all stakeholders and the realities of the health care marketplace.

II. Standard of Review

By any measure, the vast majority of proposed revisions to Chapter 127 will require extensive alteration before formal adoption would be advisable. For purposes of these comments, we have analyzed two significant aspect of the proposal – the “Medical Treatment Review” and “Medical Fees and Fee Review Calculations” provisions – with reference to the criteria used by the Independent Regulatory Review Commission (IRRC) to ensure that agency regulations are in the public interest. Following are the results of this comparison. [Please note that AIA is a subscriber member of the Insurance Federation of Pennsylvania (IFP) and concurs with the findings of the IFP’s sectional analysis of the Department’s proposal.]

A. Consistency with Legislative Intent

Section 127.801 et seq. of the proposal would rewrite existing regulations governing medical treatment review, revising some provisions and adding many new ones. We are particularly concerned with the introduction of the concept of “precertification” (Sections 127.821 – 127.825), which lacks statutory authority. Section 306(f) of the Workers’ Compensation Act provides that “The reasonableness or necessity of all treatment provided by a health care provider under this act may be subject to prospective, concurrent or retrospective utilization review at the request of an employe, employer or insurer.” All of these forms of utilization review (UR) are currently in use in Pennsylvania’s workers’ compensation system; and, while AIA acknowledges there have been serious problems in implementing these concepts, we do not believe the solution entails introducing another procedural layer that was not contemplated by the Legislature. Accordingly, we believe the provisions relating to precertification must be eliminated.

B. Economic Impact

Any meaningful analysis of the economic impact of the proposed revisions to Chapter 127 must take into account the stated purpose of that chapter, which (as expressed by its title) is “Workers’ Compensation Medical Cost Containment.” For a variety of reasons, many of the proposed changes to the medical treatment review provisions fail to meet this standard.

For instance, the precertification provisions discussed above would introduce another layer of complexity to the UR process – one that appears to be redundant of existing layers and would have separate and conflicting rules and standards. Rather than seeking to consolidate the current UR framework, the proposal would force stakeholders to navigate a Byzantine array of alternatives – precertification; prospective review; complete review of all treatment; recertification; redetermination; and regular retrospective, concurrent and prospective review. The existing UR process is already cumbersome and expensive, mainly because of Pennsylvania’s dubious distinction of being the only state to authorize extensive state involvement in UR; and AIA is not aware of any other state that authorizes or countenances the additional layers of process contemplated by the proposal.

The Department’s proposal also fails to address the issue of fees for medical treatment review. While the providers of medical *services* are subject to fee limitations, both utilization review organizations (UROs) and peer review organizations (PROs) are permitted to charge unlimited fees, which are borne by insurers and, ultimately, employers. In addition, while insurers have a general statutory obligation to pay the costs of UR, the requirement (in Section 127.809(c)) that insurers pay the costs of a withdrawn UR, regardless of which party requested the UR, will place an inordinate economic burden on insurers and provide an incentive for reckless filing and withdrawal of UR requests.

Sections 127.128 and 127.133 provide additional examples of lost opportunities to rein in medical costs. Section 127.128 perpetuates the exemption from fee limitations on treatment provided at trauma and burn centers. In order to place some meaningful parameters around this exemption, “usual and customary” charges should be defined as the amount these facilities typically accept as reimbursement for a particular type of service, not simply the charged amount; and “usual and customary” charges should only apply to actual trauma or burn treatments, and not other services provided by those facilities. Section 127.133, which requires insurers to reimburse employees for actual costs of prescription drugs will encourage pharmacies to evade both the fee schedule for pharmaceuticals and contracted rates by requiring claimants to pay over the counter. In order to avoid an adverse economic impact to the system, the proposal should clarify that pharmaceutical reimbursement must be at fee schedule or contractual rates.

C. Public Health and Safety

As mentioned earlier, AIA believes problems with Pennsylvania’s UR process pose serious impediments to better claims outcomes. There are major disincentives for carriers to initiate utilization review, which encourages inappropriate medical care and overutilization of medical services. Adding new layers to the process for resolving medical disputes will exacerbate this situation, as medical providers and claimant attorneys will take advantage of an ever-more

complex and unbounded administrative process to seek excessive or improper medical treatment that jeopardizes the health of Pennsylvania's workers by increasing the likelihood of poor medical outcomes, higher indemnity awards and medical bills.

While certain aspects of the UR process will require statutory amendments, we believe the Department has the authority to adopt standards for medical treatment that will protect the health of injured workers. The proposed amendments to Section 127.856 merely permit parties to UR to submit medical literature and studies to UROs, without providing UROs with any guidance on how to assess all claims in a uniform manner or weigh the relative value of competing and conflicting studies and standards. The only way to remedy this serious problem is to require that all medical care be delivered in accordance with evidence-based treatment guidelines, such as those promulgated by the American College of Occupational and Environmental Medicine (ACOEM). Treatment guidelines play a critical role in promoting evidence-based medicine by translating scientific clinical research into information that medical providers can use when making important diagnostic and treatment decisions. Where treatment guidelines are available and being used by medical providers, one can expect substantial uniformity in clinical practice. Evidence-based treatment guidelines will lead to more effective and higher quality medical care for injured workers. The primary means by which quality will improve is through the reduction or elimination of unnecessary medical treatment, although utilization of some services might also increase. However, because overutilization and inappropriate utilization are more frequent and widespread problems than underutilization, the net effect should be lower and more predictable medical costs and a reduction of unnecessary medical treatment. In 2004, California enacted legislation requiring that all treatment be performed in accordance with guidelines promulgated by the Division of Workers' Compensation based on the ACOEM guidelines. Preliminary results indicate that the guidelines have dramatically reduced the number of x-rays, CT scans, MRIs, physical medicine and chiropractic visits, and surgeries prescribed to claimants in California.

D. Reasonableness

There are numerous instances in which the proposed amendments to Chapter 127 (though perhaps unintentionally) unreasonably fail to safeguard the legitimate interests of various parties – in many cases insurers, but others as well. As elsewhere addressed in this memorandum, many of the substantial changes to the medical treatment review process would make it unreasonably difficult for insurers to fend off requests for excessive or inappropriate medical treatment, to the detriment of both employees and employers. More specifically, Section 127.858 unreasonably prohibits UROs from reviewing records from independent medical examiners (IMEs), which negatively impacts all parties to a UR. In addition, Section 127.805 inexplicably prohibits an insurer from later disclaiming liability for treatment under review when it has requested UR but has

not filed documents with the Department admitting liability for a work-related injury, or is not subject to a determination imposing this liability. Section 127.822, which requires insurers to pay for requested treatment if not denied within ten days of a precertification request, provides an inadequate time frame for such serious consequences and fails to require that the request be sent to the adjuster by certified mail. In addition, Sections 127.207, 127.208, 127.251-261, and 127.822 all impose insufficient time frames on insurers and providers, in view of the significance of the issues and the realities of today's health care system (e.g., additional vendor reviews and use of outsourcing and third-party administrators), and should be amended to extending the time frames or refer to "business days" instead of the implied reliance on calendar days.

Moving beyond UR, there are other provisions that fail the "reasonableness" test. For instance, Section 127.752 prohibits employers from requiring employees seeking medical treatment from a list of designated providers to report to a single point of contact before receiving treatment from a provider on the list. In addition to lacking statutory justification, this prohibition would eliminate a practice that has proven beneficial to injured workers. Indeed, the annual review of access to medical care commissioned by the Department continues to show high levels of claimant satisfaction, and it would be unwise to jeopardize this positive development in an otherwise troubled medical treatment delivery system.

E. Clarity

AIA believes the proposal's overall lack of clarity is one of its greatest deficiencies. Many provisions are reminiscent of statutory language, i.e., containing general concepts only, with details to be filled in at a later time. A regulatory proposal, especially on such an important and complex subject, should anticipate and incorporate the answers to most follow-up inquiries, not raise additional ones. The fact that many Pennsylvania workers' compensation claims handling experts – including members of the Medical Cost Containment Working Group – have experienced difficulty in determining either the motivation or likely impact of many proposed changes highlights the need for input from the regulated communities before the Department proceeds to final-form regulations.

As discussed in Section B of this memorandum, the new medical treatment review provisions are confusing and apparently redundant. It is unclear whether different avenues of review authorized for different parties (e.g., "precertification" for employees and providers, and "prospective review" for insurers) are intended to apply in the same instances and offer the same procedural rights. With respect to medical fees, while we appreciate the fact that the statutory "freeze" of 1994 Medicare rates for provider reimbursement complicates the Department's task in updating these provisions, the selective and inconsistent references to current Medicare values and policies will cause a great deal of confusion as current and discarded standards overlap. Accordingly,

we urge the Department to join us in recommending that the Pennsylvania Legislature amend the Workers' Compensation Act to require medical fee reimbursements to float with all current Medicare values and policies.

III. Conclusion

AIA believes the proposed amendments to Chapter 127 fail to satisfy the standards of review to which all agency regulatory proposals are subject in Pennsylvania. In recognition of the importance of the issues implicated by Chapter 127, we would welcome the opportunity to work with the Department and other parties in drafting a new proposal that will contain workers' compensation medical costs while safeguarding the legitimate interests of all stakeholders in the workers' compensation system in a clear, reasonable and statutorily authorized fashion. If you have any questions about these comments, please do not hesitate to contact me at (202) 828-7167.

Sincerely,

/s/

Kenneth A. Stoller
Senior Counsel

cc: Independent Regulatory Review Commission
Loudon L. Campbell
R. Taylor Cosby
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Kathy Cooper

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Subject: AIA Comments on Department of Labor and Industry's Proposed Amendments to 34 Pa. Code Ch. 127

Dear Ms. Wunsch,

Attached you will find the comments of the American Insurance Association (AIA) to the Department of Labor and Industry's proposed amendments to 34 Pa. Code Ch. 127 -- Workers' Compensation Medical Cost Containmentment.

Please let me know if you have any questions about these comments.

Regards,

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