

**ORIGINAL: 2542**

**Gelnett, Wanda B.**

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**From:** LI, BWC-Administrative Division [RA-LI-BWC-Administra@state.pa.us]  
**Sent:** Tuesday, July 11, 2006 7:39 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:** Larry Chaban [mailto:lchaban@rjslegal.com]  
**Sent:** Monday, July 10, 2006 3:44 PM  
**To:** ra-li-bwc-administra@state.pa.us  
**Subject:** Comments on Proposed Medical Cost Containment Regulations

Dear Ms. Wunsch:

On behalf of the Workers' Compensation Section, I am providing comments on the Proposed Medical Cost Containment Regulations. They are attached in Word format. If you need them in another format, please let me know.

I hope to see you at the meeting in Pittsburgh on July 13, but I will not be arriving until approximately 11:30AM due to a hearing before the WCAB.

Thank you for your attention and consideration in this matter.

Very truly yours,

**Lawrence R. Chaban, Esquire**

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**COMMENTS TO PROPOSED MEDICAL COST CONTAINMENT  
REGULATIONS BY THE WORKERS' COMPENSATION SECTION,  
PENNSYLVANIA TRIAL LAWYERS ASSOCIATION**

On June 10, 2006, the Department of Labor and Industry published Proposed Rulemaking with regard to the Medical Cost Containment Regulations, 34 Pa. Code Ch. 127 (36 Pa.B. 2913). The Workers' Compensation Section of the Pennsylvania Trial Lawyers Association has thoroughly reviewed the proposed regulations. It has compared these proposals to the existing regulations and the development of the law since the existing regulations were effective (November 11, 1995 and January 17, 1998).

Overall, the Section is satisfied with the results of the proposed regulations. The due process concerns raised by the decision of Commonwealth Court in *County of Allegheny v. Workers' Compensation Appeal Board (Geisler)*, 875 A.2d 1222 (Pa. Cmwlth. 2005), were particularly well addressed. The Section believes that 34 Pa. Code §127.861 and §127.906 adequately preserve the due process rights of injured workers while creating an incentive for the health care provider to submit records timely. There are two specific areas where the Section believes that serious errors have been made in the proposed regulations, however.

The first area involves 34 Pa. Code §127.856. That regulation permits **only** insurers to submit "peer-reviewed, independently funded studies and articles and reliable medical literature" as part of the UR process. It is the experience of the Section that even health care providers can dispute whether a study, an article or literature is independently funded or reliable. A good example of recent origin is the use of a publication from the Harvard Medical School regarding carpal tunnel syndrome (CTS).

A number of physicians have been citing to this particular publication as a "reliable" source regarding causation of CTS. In fact, the publication relied upon is a marketing tool of Harvard Medical School, that has never been peer reviewed. It was not written by a physician or peer-reviewed. Yet, because there are statements in the brochure which supports the conclusions that the physician wishes to reach, it is claimed that the article is a "reliable" source. Such reliance on a marketing brochure would not meet the requirements of the proposed regulations.

There is nothing in Section 127.856 that provides for the reviewer to make a determination that the submission meets the standards set forth. Nor is there another regulation which permits the review to do so. There is no way then to measure if the submission is peer-reviewed, independently funded or reliable and if it is relevant to reasonableness and necessity. This only expands opportunities for disputes over the UR decision if a Petition for Review is filed.

The proposed regulation is also one-sided. It does not allow the injured worker or the health care provider under review to submit similar studies, articles or literature.

The Section believes that the submission of these additional documents, if permitted, should not be restricted to only the insurer.

It is certain that the insurer will only submit studies, articles or literature that is favorable to its position. Where there are studies, articles or literature that is favorable to the position of the injured worker / provider under review, the reviewer will not have been provided them. This is unquestionably inequitable and skews the process against the injured worker / provider under review.

The Section believes that this proposed regulation should be eliminated. It does not aid in the resolution of the issue before the reviewer. If the reviewer meets the requirements of the regulations regarding competency, then the reviewer should aware of the applicable studies, articles and literature. There is no need for the parties to resort to providing dueling learned treatises and introduce into the process disputes over whether the study or article is "peer-reviewed" or whether the literature is "reliable."

The second area involves the proposed regulations regarding the assignment of initial UR petitions and the selection of UR organizations. It is stated in the initial discussion of the proposal, with reference to the new Subchapter E, that the "Department proposes rescinding §§ 127.153 – 127.161 and adding Subchapter E (relating to medical treatment review)." The regulations referred to, §§ 127.153 – 127.161, are actually the regulations regarding Medical Fee Updates in Subchapter B and not UR procedures in Subchapter C. It is, therefore, unclear what regulations the Department proposes to rescind.

It appears, however, that the Department is intending to rescind Subchapter C, or portions thereof, and implement a new Subchapter E regarding UR process and procedure. This inconsistency makes it difficult to directly comment on what the Department is doing, since there is no indication in the regulations that 34 Pa. Code § 127.401 -- §127.670 are changing at all. However, Subchapter E is overlapping and inconsistent with what is currently in Subchapter C. The Section will endeavor to comment on the proposed regulations in Subchapter E that are of particular and serious concern.

Under 34 Pa. Code §127.453(a), "The Bureau will randomly assign a properly filed request for UR to an authorized URO." The proposed regulation at §127.806(a) provides, "The Bureau will assign a properly filed request for UR to an authorized URO." The word "randomly" is eliminated from the regulation. This is of grave concern to the Section, as will be addressed below.

In a related action, it appears that the proposed regulations completely eliminated 34 Pa. Code §127.651 -- §127.760, Authorization of UROs and PROs. This appears to be done in favor of proposed regulations §127.1051 and §127.1052. It is the position of the Section, in conjunction with proposed regulation §127.806, that this is a serious error and will most certainly undermine the UR process.

The current regulations with regard to authorization of UROs and PROs provides for a greater array of reviews than the proposed regulations. The proposed regulations appear to set no standards as now exist for the approval of a URO or PRO. The only standard that would appear to exist under Section 127.1051 is that the URO or PRO be the lowest bidder when an RFP is submitted.

The detailed regulations regarding the contents of an application, general qualifications, local business office accessibility, confidentiality, and availability and qualification of reviewers has been eliminated. Further, the existing regulations require quality assurance systems, annual reports and a review process regarding the requirements of the WC Act and regulations that is sorely missing from the proposed regulations.

The suggestion that UROs and PROs can be authorized through a "competitive" bidding process will result in the authorization of only the lowest cost review organizations. That raises concerns about the quality and qualifications of the URO/PRO and the reviewers who are associated with those entities. With authorization to be given only to the lowest cost providers, better, more qualified reviewers will be driven from the field because they cannot reduce their costs to meet the potential, lesser qualifications of the low cost reviewers. This is a recipe to eliminate the best reviewers from the system.

The mere fact that the RFPs will set forth the "means" by which the review organizations will conduct their operations is cold comfort. Those "means" can shift from administration to administration. This leaves the process at the whim of the political appointees of each successive administration. Such a procedure will make the review process a political football each time a new administration takes over the Department and Bureau.

The current regulations prevent such a politicization of the process. The standards for authorizing UROs and PROs are well set forth in the regulations. The process for maintaining the standards by which the review organization does business and can have its authority suspended or revoked is clearly set forth, including a hearing process for suspensions or revocations, 34 Pa. Code §127.670. This is clearly missing from the proposed regulations.

The proposed Authorization regulation also allows the monopolization of the review process by one or two review organizations. It gives the Bureau the opportunity to select only one or two URO/PRO for the entire process. As there is nothing in the proposed regulations to eliminate the possibility of one entity to the process, for example, the Pennsylvania Trial Lawyers Associations or the Pennsylvania Insurance Federation, from creating a reviewing organization and then winning the sole contract to be let under the RFP process. Since these are umbrella organizations, the conflict of interest regulations would not be implicated by the reviewers. However, the impartiality of the process would certainly be called into question by such a review organization.

This also goes back to the point made above about the random assignment of UR petitions to UROs. Potential elimination of the numerous review organizations does not allow for such random appointment. It creates a process which smacks of favoritism for one side or the other. Having a much larger pool of review organizations, as is now the current practice, and having random assignment lends more credibility to the system of review. Seeing the same reviewers time and again, as would the case under the proposed system, will most certainly lead to the cynical view that the process is stacked against one party or another.

It is true under the current regulations that the Bureau has the discretion to approve a URO or PRO application. 34 Pa. Code §127.653. But denials are then subject to appeal under 34 Pa. Code §127.760, and subsequently, under the Administrative Agency Act. Subchapter E provides no such procedures since it appears that the proposed Authorization regulations are intended to substantially limit the pool of UROs and PROs available in the system.

Elimination of the current Authorization regulations and the random assignment of review petitions will, in the opinion of the Section, result in the future failure of the UR process. It will result in even more litigation in this area than is currently seen (1,833 in the 2004/2005 Annual Fiscal Report of the Department).

The Workers' Compensation Section of the Pennsylvania Trial Lawyers Association urges the Department to withdraw Subchapter E of the proposed regulations and make the appropriate changes it seeks to the current Subchapter C. In no event should the Authorization provisions, 34 Pa. Code §127.651 -- §127.760, be revoked in favor of proposed regulations §127.1051 and §127.1052.