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October 3, 2008

Elizabeth A. Crum
Deputy Secretary for Compensation and Insurance
Department of Labor and Industry
651 Boas Street
Harrisburg, PA 17121

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2008 OCT 15 PM 2:44
INDEPENDENT REGULATORY
REVIEW COMMISSION

Re: Proposed revisions to Chapters 111 and 131

Dear Ms. Crum:

On behalf of our members and the members of our national counterparts, the Insurance Federation submits the following comments on the proposed revisions to Chapters 111 and 131 as published in the September 6 **Pennsylvania Bulletin**.

Chapter 111 - Special Rules of Administrative Practice and Procedure before the Workers' Compensation Appeal Board

Section 111.11 - Content and form

As we have commented in previous Department regulations, we believe that forms and formats "prescribed by the Board" should be part of the regulation and reviewable with the regulation. Otherwise, the regulation - as here - gives the Board (or Bureau or Department) unlimited and unilateral discretion to prescribe forms without any consideration of their practicality and without any standards in the regulation to guide its efforts.

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Our other concern with referring to forms and formats "prescribed by the Board" is that it leaves the timing of any changes in the regulation in limbo: They don't happen under the regulation, but only when the Board decides it wants to prescribe the underlying forms and formats. We assume the Board has forms and formats in mind as part of proposing this regulation; they should be included.

Chapter 131 - Special Rules of Administrative Practice and Procedure before the Workers' Compensation Judges

Section 131.5 - Definitions

"Adjudicating judge": We believe this is a needless definition, as it is no different than a "judge" as defined herein (a "mediating judge" is different and merits the proposed separate definition). Further, if a separate "adjudicating judge" definition is warranted, it would be clearer to define to this type of judge as one "to whom the petition is assigned", as in the definition of a "judge".

"Mediating judge": The question here, and in the proposed Section 131.59b, is whether the "mediating judge" must be different than the adjudicating judge. The proposed regulation says they must be different judges, but Section 401 of the Act does not. It says the judge conducting the mediation is "not necessarily the judge assigned to the actual case involving the parties." While we might agree with the Department that the adjudicating and mediating judges should be different, the Act does not.

"Mediation": The judge referred to in this definition should be the mediating judge.

"Voluntary settlement conference": This definition is the same as the definition of "mediation", with the only apparent difference that the judge at this conference is

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the adjudicating judge. That should be made clear - otherwise, there is not distinction between this and a mediation conference.

Section 131.11 - Filing, service and proof of service

The references to "formats as prescribed by the Department" in subsection (a)(2), (b)(2) and (e) raise the same concerns noted in Section 111.11: Formats and forms are themselves regulations and should be subject to public comment rather than become unilateral decrees. Well-meaning though this may be, formats prescribed by the Department may inadvertently be impractical or incomplete, which will benefit nobody; that's what public comment is meant to avoid.

And again, we are concerned that the Department has sole control over when (or if) to prescribe the promised formats. This regulation provides for electronic submission, which we support. It should make sure that happens in a timely and practical matter by setting forth the formats now, not leaving that within the sole discretion of the Department at some uncertain future date.

Section 131.50a - Employee request for special supersedeas hearing under Sections 413(c) and (d) of the Act

Subsection (d): The reference to "if the judge determines the claimant will not be prejudiced by a ruling at that time" should be deleted. It has no statutory authority or support and is not found in the U.S. Airways v. W.C.A.B (Rumbaugh) decision cited in the preamble as legal authority. Further, it makes no sense: Arguably, any supersedeas ruling favoring the employer is to the claimant's prejudice, albeit justified.

Section 131.52 - First hearing procedures

Subsection (b) (1): This repeats - with one notable exception - rather than implements Section 401.1 of the Act. We recommend it be revised to allow the judge to extend or modify deadlines for good cause shown. This is particularly important for medical depositions, where availability of providers is subject to change. This may be how this section is supposed to work with (and be overridden by) Section 131.53a, but that needs to be better explained. Timing with medical professionals, especially in the more specialized areas, needs flexibility on all sides.

The notable exception is that this requires a judge to establish all these dates and deadlines "at or before the initial hearing" - whereas the Act provides that it be done "at the first hearing." We are not sure how or why a judge would set forth all of these dates and deadline before the first hearing, and therefore recommend deletion of "or before" as lacking statutory authority and being impractical.

Section 131.53b - Bifurcation

We are concerned with granting the judge unilateral power to bifurcate issues. That seems without statutory authority or standards, and we recommend it only be allowed upon request of one of the parties, and subject to a hearing and review.

Section 131.59 - Alternative dispute resolution

This goes to our confusion with the definitions of mediating and adjudicating judges and the section on "voluntary settlement conferences". We gather the purpose here is to clarify that the parties are not only subject to mediation under Section 401.1 of the Act, but they may also agree to other forms of dispute resolutions (itself a

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confusing term in the context of the Act, as it is different or broader than the "resolution hearings" for presenting a compromise and release to a judge).

The question is whether this section is meant to encompass dispute resolutions agreed to by the parties only outside the Act, or to encompass those inside the act as well - meaning mediation and "voluntary settlement conferences".

To the extent it is meant to cover resolutions outside those listed in the Act, it should be clarified as such. But to the extent it covers such resolutions, we are not sure why it is needed here, as the judge has to approve any settlement in any event.

To the extent it covers resolutions listed in the Act - as with mediations and, for compromise and release, resolution hearings as defined in the Act, it may also be an unnecessary section, as those resolutions are already covered in other sections.

In any event, the "goal" mentioned in subsection (a) needs greater clarity. We are not sure what is meant by "conventional adjustment of the claim" - what is an unconventional adjustment? Granted, the preamble says the purpose is to allow for alternative dispute resolutions agreed to by the parties that go beyond only trying to achieve a compromise and release agreement; but that still leaves the question of just what is envisioned beyond mediation and voluntary settlement conferences.

Section 131.59a - Voluntary settlement conferences

Again, we are not sure of the difference between this and mediations. Our read is that one is voluntary and conducted by the adjudicating judge; the other is mandatory and conducted by a different mediating judge. But as the adjudicating judge must set up mediation, and the two procedures are otherwise identical, what is the purpose here? It seems to invite a needless layer not contemplated by (or mentioned in) the Act.

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Section 131.59b - Mandatory mediation

First, under the Act, mediation is not mandatory, as it is not required where "upon good cause shown, the workers' compensation judge determines mediation would be futile."

Second, subsection (a) prohibits the adjudicating judge to handle a mediation, which is inconsistent with the Act and its provision that the judge "is not necessarily the judge assigned to the actual case involving the parties." We recognize the need for standards to determine when a mediation may stay with the adjudicating judge and when it should be assigned to a different judge - but that is different than a blanket prohibition.

Third, subsection (c) should be clarified to explain the sanctions a judge may impose, and to provide that sanctions can be imposed on either party.

Section 131.111 - Decisions of judges

Subsection (c): This should provide that the payment of interest is suspended while waiting for the claimant's statement, at least past a certain point. Otherwise, the insurer is unfairly penalized for the claimant's delay.

We appreciate that the proposed revisions to Chapters 111 and 131 are designed not only to implement Act 147 of 2006, but to bring some needed improvements to the adjudicatory process. Our comments are in furtherance of that, and we look forward to working with the Department and others through the IRRC process to get this done.

Sincerely,

Samuel R. Marshall

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C: Independent Regulatory Review Commission

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Honorable Christine M. Tartaglione, Minority Chairman
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Honorable Robert E. Belfanti, Jr., Chairman
Honorable Gene DoGirolamo, Minority Chairman
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