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INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

November 5, 2008

Honorable Sandi Vito, Acting Secretary
Department of Labor and Industry
1700 Labor and Industry Building
Harrisburg, PA 17120

Re: Regulation #12-84 (IRRC #2721)
Department of Labor and Industry
Special Rules of Administrative Practice and Procedure Before the Workers'
Compensation Appeals Board; Special Rules of Administrative Practice and
Procedure Before the Workers' Compensation Judges

Dear Acting Secretary Vito:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman
Executive Director

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Enclosure

cc: Honorable John R. Gordner, Chairman, Senate Labor and Industry Committee
Honorable Christine M. Tartaglione, Minority Chairman, Senate Labor and Industry
Committee
Honorable Robert E. Belfanti, Jr., Majority Chairman, House Labor Relations Committee
Honorable Gene DiGirolamo, Minority Chairman, House Labor Relations Committee

Comments of the Independent Regulatory Review Commission



Department of Labor and Industry Regulation #12-84 (IRRC #2721)

Special Rules of Administrative Practice and Procedure Before the Workers' Compensation Appeals Board; Special Rules of Administrative Practice and Procedure Before the Workers' Compensation Judges

November 5, 2008

We submit for your consideration the following comments on the proposed rulemaking published in the September 6, 2008 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Department of Labor and Industry to respond to all comments received from us or any other source.

Section 111.3. Definitions. - Implementation procedures; Clarity.

The definition of “filing” references the electronic filing of documents, but the regulation does not define that phrase. Additionally, it is our understanding that the Department lacks the technological capability to accept electronic filings, and that it is uncertain when it will be able to do so. While we agree with the Department’s assessment that electronic filing will likely result in time and cost savings for all parties, we must also conclude that referencing electronic filing in regulations before such a thing exists will likely result in unnecessary confusion for the regulated community.

The final-form regulation should omit specific references to electronic filing. This concern also applies to sections 111.11, 111.12, and 131.11.

Should the Department retain the phrase “electronic filing,” the final-form regulation should further explain what is meant by the term and explicitly state when the Department expects to implement it.

Section 111.11. Content and form. - Clarity.

This section references “paper forms or an electronic format prescribed by the Board.” As noted in our comments pertaining to section 111.3, we recommend that all references to electronic filing be omitted. The final-form regulation should provide specific instruction as to where the prescribed paper forms (and the electronic format, should the Department choose to retain the reference) may be accessed.

Section 111.12. Filing, service and proof of service. - Clarity.

Subsection (b) requires that “[w]hen filing electronically, an original of each appeal and cross-appeal shall be filed.” For purposes of electronic filing, what is an “original”? As noted in our comments pertaining to section 111.3, we recommend that all references to electronic filing be omitted. Should the Department elect to retain them, the final-form regulation should clarify what is required of a document to be filed in this manner.

Additionally, subsection (f) states that it supersedes multiple sections of the General Rules of Administrative Practice and Procedure (GRAPP). Some of the GRAPP sections mentioned appear to be entirely unrelated to this section. Pursuant to existing regulations of the Joint Committee on Documents, “a superseding special rule shall be limited in scope of subject matter to the scope of the general rule which it is intended to supersede.” 1 Pa. Code § 13.38(b). In the final-form regulation, the Department should only list the GRAPP provisions that are actually superseded by the specific regulatory language in that section.

The same concern applies to sections 131.50a, 131.52, 131.53b, 131.56, 131.59a, 131.59b, 131.60, 131.111.

Section 131.5. Definitions. - Clarity.

The proposed regulation defines “mediation” in part as “a conference conducted by a judge, as authorized by sections 401 and 401.1 of the act...” The terms “judge” and “mediating judge” are separately defined. The final-form regulation should clarify how a mediation could be conducted by a judge other than a “mediating judge.”

Section 131.11. Filing, service and proof of service. - Clarity.

Subsections (a)(2) and (b)(2) reference “a format prescribed by the Department and published in the *Pennsylvania Bulletin*,” and subsection (e) references “a format as prescribed by the Bureau and published in the *Pennsylvania Bulletin*.” Because the *Bulletin* may be an unfamiliar resource for many, we recommend that the Department make the required format readily available on

the Department's website. The final-form regulation should provide specific instruction as to where the prescribed format may be accessed.

Section 131.50a. Employee request for special supersedeas hearing under sections 413(c) and 413(d) of the act. - Clarity.

Subsection (c) limits issues to be determined in a challenge hearing to two: 1) whether the claimant has stopped working; and 2) whether the claimant is earning the wages stated in the Notice of Suspension or Modification. With regard to the first decidable issue, by when must the claimant have stopped working? May the claimant have returned to work at any point? The final-form regulation should include additional detail to fully inform the regulated community of decidable issues at this kind of hearing.

Also, 131.50a(c) refers to a "challenge hearing." The existing regulation defines the term "challenge proceeding." The final-form regulation should use consistent terminology.

Section 131.53. Procedures subsequent to the first hearing. - Clarity; Reasonableness.

This proposal deletes subsection (f), which requires medical examinations to be scheduled within 45 days after the first hearing is actually held. The preamble states that proposed section 131.52 will now govern the scheduling of such examinations; however, that provision does not provide a specific timeframe during which the examinations must occur. The final-form regulation should explain why omission of a specific timeframe better serves public welfare.

Section 131.59. Alternative dispute resolution. - Clarity.

Although this regulation defines the related terms "mediation" and "voluntary settlement conference," it does not define "alternative dispute resolution." To improve clarity, the final-form regulation should define this term or include a cross-reference to an appropriate statutory definition.

Section 131.59b. Mandatory mediation. - Clarity; Statutory authority.

This section creates new rules governing mandatory mediations. We raise three concerns.

First, the undefined term "mandatory mediation," which appears throughout the regulation and is spotlighted in this provision, is ambiguous. It is unclear when a mediation becomes "mandatory" for purposes of this regulation: is it mandatory pursuant to statute, mandatory pursuant to court order, or both? The final-form regulation should clarify in the definitions section whether a

mediation is “mandatory” pursuant to Act 147, or whether another event could make it so for purposes of this regulation.

Second, we note a possible conflict between subsection (a) and the enabling statute. Subsection (a), which may not be waived, prohibits a mandatory mediation from being assigned to the adjudicating judge. Act 147 defines “mediation” as a “conference conducted by a worker’s compensation judge, but not necessarily the judge assigned to the actual case involving the parties.” From this, it appears that the General Assembly intended to permit adjudicating judges to handle mediations in some circumstances. What is the Department’s authority for creating a blanket prohibition against assigning a mandatory mediation to an adjudicating judge?

Third, subsection (b) poses a question of statutory authority. Without this provision, would 42 Pa.C.S. § 5949 (relating to confidential mediation communications and documents) apply to proceedings governed by this section? If so, what is the Department’s authority for limiting confidentiality in paragraph (b)(2)?

Section 131.60. Resolution hearings. - Clarity.

Subsection (g) states that the judge “will require proof that a petition has been filed with the Bureau, and will make the proof a part of the record.” The final form regulation should clarify what would satisfy the proof requirement. Additionally, it should define “resolution hearing” or include a cross-reference to an appropriate statutory definition.

Facsimile Cover Sheet



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Date: November 5, 2008
Pages: 6

INDEPENDENT REGULATORY
REVIEW COMMISSION

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Comments: We are submitting the Independent Regulatory Review Commission's comments on the Department of Labor & Industry's regulation #12-84 (IRRC #2721). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: *Daniel S. Bryansky* Date: 11/5/08