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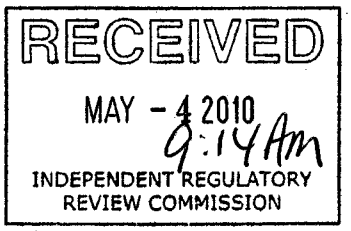

Regulatory Unit Counsel
Pennsylvania Department of State
P.O. Box 2649
Harrisburg, PA 17105-2649

Re: Proposed Regulation 16A-4315
Review of Chiropractic Treatment

Dear Regulatory Counsel:

The Insurance Federation of Pennsylvania on behalf of our member insurers writing workers compensation, personal lines and health insurance oppose the captioned regulation. While a full explanation is provided below, the essential problem is the State Board of Chiropractic ("Board") has vastly exceeded its jurisdiction in drafting this regulation. As a result, many of its provisions are in direct conflict with existing laws and regulations.

The Board has unquestioned authority to regulate what is required for chiropractic licensure and to establish the professional and ethical standards which must be met to maintain that status. On the other hand, the Board exceeds its authority and encroaches on the laws governing workers compensation, automobile insurance and health insurance by attempting to regulate such things as the use of chiropractors in contradiction of those laws and regulations.

As an example, where the Workers Compensation Act ("WCAct") prescribes how an independent medical examination ("IME") may be arranged and conducted, the Board has no authority to set special conditions and procedures for such IME's through its regulation just because chiropractors may

conduct such examinations. As demonstrated below, the proposed regulation intrudes on other existing laws and regulations in a number of instances. As a result, the Federation recommends the proposed regulation be withdrawn or disapproved by the Independent Regulatory Review Commission.

It is easiest to demonstrate these conflicts by referring to the specifics in each of the three areas of insurance. Several of the conflicts may be similar, but that is an additional problem in that it demonstrates the confusion which would be inherent were this regulation adopted.

The following analysis demonstrates the Board is without authority to promulgate the regulation in the areas cited, or, alternatively, has done so in such a fashion as to create major problems, rather than clarify, the use of chiropractors in these reviews.

1. Workers Compensation

a. Independent Medical Examinations

A workers compensation carrier may request that an injured employee undergo an IME under Section 306(a.2)(6) of the WCAct (77 P.S. Section 511.2(6)) and in accordance with Section 314 of the WCAct (77 P.S. Section 651). The latter section provides the employee must submit to examination by an "appropriate health care provider." Although there are regulations on qualifications for vocational experts, there are no restrictions on who an employer can select to perform an IME.

The proposed regulation purports to place an active practice requirement on such an examiner in Section 5.55. That is nowhere to be found in the WCAct. Further, Section 5.55(c) of the proposed regulation purports to require a chiropractor performing an IME to obtain and review the patient record of the current treating chiropractor. This requirement, too, has no support in the WCAct.

The net effect of Section 5.55 requirements would be to limit the number of chiropractors who can perform IME's. The same can be said of the 20 hours peer week requirement in Section 5.56 which would significantly narrow the available pool of reviewers.

The same is true of the additional procedural provisions and requirements contained in Section 5.55 purporting to govern how the examination is to be conducted, what the IME report must contain and the requirement the IME provider must provide a copy of the signed report to the chiropractor currently providing care of the claimant.

The difficulties attending the effectuation of these provisions are obvious and severe. The problems caused are significant. Can this regulation overrule the WCAct and limit an employer's ability to conduct an IME? What is the status of an IME conducted by a chiropractor or through procedures not consistent with the proposed regulation? Could an employer be penalized under the WCAct for arranging such an IME?

Even Section 5.55)f) requiring a chiropractor performing an IME to provide a copy of the signed report to the chiropractor currently taking care of the patient is a problem under current procedures. For one thing, the IME chiropractor does not necessarily know who or which other chiropractor meets that definition. Moreover, all these provisions in the regulation impose burdens on employers/insurers which is only one side of the issue in a given case. No obligations are placed on a "treating chiropractor" who testifies on behalf of a claimant.

b. Utilization Reviews (UR's)

Rather than present a conflict with the WCAct, the regulation when dealing with UR's in Section 5.56 appears to run afoul of the Chiropractic Practice Act, 63 P.S. Section 625.101 et seq. ("CPAct"). Some of the problems appear to be drafting difficulties, but others are real substantive conflicts.

Section 5.56(a)(2) of the proposed regulation requires a chiropractor to "be currently engaged in the active practice of chiropractic in the chiropractic specialty of the chiropractic treatment under review . . . " A review of the CPAct does not reveal any "chiropractic specialty" either in the definitions or licensure requirements.

Moreover, Section 5.56 either conflicts with or addresses areas already fully regulated under the WCAct. As an example, Section 5.56 sets forth requirements a chiropractor must meet before performing a UR. However, these qualifications are already extensively regulated under Section 127.661 of the Bureau's Medical Cost Containment regulations in Chapter 127 of Title 34.

For example, Section 5.56(b)(c) and (d) address when a chiropractor can perform a UR, what must be contained in any report and who receives a copy. These areas are already the subject of specific and detailed regulation in 34 Pa. Code Sections 127.467 to 474. These are not only duplicative and unnecessary, but in some respect contradictory. Section 5.56(c) requires a chiropractor "sign a report," but, 34 Pa. Code Section 127.473 specifically requires that reviewer to sign a verification pursuant to 18 Pa.C.S.A. Section 4904.

Moreover, 34 Pa. Code Section 127.474 directs the reviewing chiropractor to forward his or her report to the utilization review organization ("URO"). This is necessary in order to carry out the requirement of Section 127.475 that the URO check the reviewer's report. If the report has already been forwarded elsewhere, it would be impossible to carry this out.

2. Auto insurance

Auto insurers have similar problems with the regulation.

Section 5.55(a)(2) contains a 20 hour per week clinical practice requirement which is an unverifiable standard. The more significant issue is that as stated the standard seems to exclude those chiropractors who teach or

do research rather than currently carry on an actual clinical practice. This would be a bad result as some of our major insurers frequently need someone with expertise beyond standard clinical competence to review cases.

If such a standard were to be included, and the Federation suggests it should not, it would have to refer to an average number of hours and augment the definition of "clinical practice" by having it include researching treatments or teaching chiropractors or chiropractic students.

The requirements of Section 5.55(b)(1) are vague. If the intention is to make sure the reviewer did not previously have the person as a patient or have some affiliation with the chiropractor under review then it should say that.

Section 5.55(b)(2) is subject to the interpretation that once an examiner has performed an IME on a patient, he or she can no longer subsequently examine the patient. This is unacceptable and not even sensible public policy. The auto insurer may well want the patient reexamined by the same examiner in order to determine any changes in condition.

Without any provision for an arbiter and a mechanism for a decision, Section 5.55(b)(3)'s disqualification for partiality is a dead letter. One of our members suggested the Board itself could decide that, but added an agreement to retain a chiropractor to perform one more services under Sections 5.55 and 5.56 is not a reasonable basis on which to challenge impartiality unless the fees are contingent on the outcome.

Several members object strongly to Section 5.55(f) requiring a reviewing chiropractor to provide a copy of his or her report to the treating chiropractor. It has been suggested if such a requirement is to be retained, the subsection should be amended to provide the report need only be forwarded at the time a decision is made on the claim based on the content of the report.

The insurer has requested the report and has the right to see it and evaluate it before any further distribution is required. Again, the problem with the section is it fails to recognize who has ordered the report, for what purpose and to whom it belongs.

As to the definition of "independent chiropractic examination" following Section 5.55(h), there is no reference there to limiting the examination on the auto insurance side to those ordered by a court. The Board's "Description of the Proposed Amendments" preamble on page 2, paragraph 3 mentions a court order. That is not particularly significant, but it should be noted an auto insurer does not need a court order to proceed.

The same objections have been voiced to Section 5.56(a)(2, (b)(1), (2), (3) and (d).

A final significant question applicable particularly to auto is that the footnote following Section 5.55(h) and the tone of the regulation seems to limit the examiner to assessing current condition and prognosis. This perhaps inadvertently shuts down any role of the examination in determining causality.

For all these reasons, the proposed regulation causes more confusion and perhaps some significant harm.

3. Health Insurance

Managed care plans conduct peer review of chiropractic treatment. From the standpoint of Federation health insurers, it is important they be able to carry out these reviews by a wide variety of experts. These might include medical directors or managed care plan directors in other states who are not licensed Pennsylvania chiropractors much less maintain a clinical practice here.

While the proscriptive portions of Section 5.56 do not literally address this issue, the definition of "chiropractic peer review" might lead to an interpretation that these reviews are impermissible.

While the Federation would read (and health insurers would no doubt contend) the proposed regulation does not inhibit these practices, this should be clarified.

It is also questionable how the regulation might be deemed to apply to pre-certification reviews. Some health insurers utilize these. In that respect, it is common for the same reviewer to offer opinions on the same patient throughout the course of treatment because it improves understanding of the case and promotes better outcomes.

To the extent Section 5.55(b)(2) is applicable in such situations, it would be impossible to continue this practice. Indeed, this provision and the same prohibition in Section 5.56(b)(2) appear to give a chiropractor the ability to claim bias if the same chiropractor has ever reviewed him or her previously.

Consequently, health insurers are greatly troubled by the proposed regulation. At the very least, it creates great difficulties with current practices and at worst could operate to short circuit the industry's ability to carefully monitor chiropractic care and police irregularities in treatment patterns.

In sum, the Federation believes this regulation is not necessary or warranted at this time and we recommend it be withdrawn. It is hard to see how the regulation could be changed to be acceptable, given that it intrudes in so many areas of established law and regulation. Consequently, the Federation expects to oppose the regulation in front of the Commission if, as, and when it is submitted for final approval.

We appreciate your consideration of the Federation's comments.

Respectfully yours,

John R. Doubman

cc: The Honorable Robert M. Tomlinson, Majority Chairman. Consumer Protection & Professional Licensure
The Honorable Lisa M. Boscola, Minority Chairman, Consumer Protection & Professional Licensure
The Honorable Michael McGeehan, Majority Chairman, Professional Licensure
The Honorable Julie Harhart, Minority Chairman, Professional Licensure