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2014 MAR 25 AM 11: 19

Elizabeth A. Crum, Director  
Workers' Compensation Office of Adjudication  
WCAB/WCJ Regulations-Comments  
1010 North Seventh St.,  
Harrisburg, PA 17102

Dear Director Crum:

Being a member of the Rules Committee my concerns regarding the proposed Rules relating to UEGF procedures are well-known. With the initial publication of the proposed Rules in the Pennsylvania Bulletin, however, and the corresponding opportunity for comments, I wish to again voice my deep opposition to the proposed UEGF Rules as they would completely bar the exercise of discretion on the part of workers' compensation judges in procedural matters.

Initially, while proposed Rule 131.204 would appear to limit barring a waiver only to Rules 131.202, and 131.203, it is observed that proposed changes to Rule 131.3 expands the prohibition to "Subchapter D" ("proceedings involving the UEGF"). Accordingly, what may appear limited in 131.204 may be deemed to be expanded to all proceedings involving the UEGF in 131.3.

Moreover, Rule 131.204 provides for a waiver/modification only upon agreement of "all participating parties." This is to be distinguished from Rule 131.3 (applicable to other proceedings), which allows for a waiver/modification not only upon agreement of the parties, but alternatively, "upon the judge's own motion" for "good cause." The difference is important. With unanimity of all parties being required in UEGF matters (even where a party presents to the judge "good cause" to alter the proceedings even in a most insignificant way), UEGF proceedings are set apart from others. Importantly, it positions the uninsured employer (a potential felon) with rights not afforded to any carrier in the Pennsylvania workers' compensation insurance market, or to the thousands of law abiding employers who "play by the rules" and carry workers compensation insurance or otherwise obtain self-insured status by compliance with applicable requirements.

The requirement for unanimity before any waiver or modification is effective gives the uninsured employer "veto" power not only over the judge, and over the injured worker, but over the UEGF itself -- even when "good cause" exists for some minor change or modification to UEGF Rules. The good work of the UEGF may well be in jeopardy where it has "good cause" for some modification, but the uninsured employer objects. In this regard, given the potential for criminal sanctions against the uninsured employer, it can be expected that in many situations objections to any waiver or modification will be made by the uninsured employer (particularly where incriminating admissions might be made). While in the first instance these comments are offered to give emphasis to the challenge presented by the proposed Rules to the discretion of judges, it must be recognized that 5<sup>th</sup> Amendment concerns touch across the UEGF Rules.

Again, discretion is implicated in proposed Rule 131.53a (Consolidated hearing procedure), which allows the judge in all cases -- except, as proposed, in proceedings involving the UEGF -- to waive or modify hearing procedures "as may be appropriate and adopt and direct

procedures which are fair and just for a determination of the issues consistent with the act." This current Rule implicitly recognizes the importance of judicial discretion in matters of procedure -- the twist and turns of litigation take many a shape. Each requires a steady, but flexible hand, to set a "fair and just" course. A bar to all discretion may bring uniformity to procedures, but not necessarily a result which is "fair and just." Procedures matter -- in the end they can touch and influence matters of substance. The end result -- a "fair and just" decision -- is best achieved by employing procedures calculated to achieve such a result. Finding the right procedure under any given set of circumstances requires a mature judgment and understanding of the issues and the needs of the parties and witnesses -- in sum, procedures to assure the substantive rights of all parties must at times allow for adjustment to accommodate the "ebb and flow" of litigation; discretion alone sets the proper course in such situations.

A heavy burden, it is asserted, rests on those who would preclude judges from exercising discretion on procedural matters where "good cause" is presented; our system allows for review of an abuse of discretion. The exercise of discretion is fundamental to maintaining a fair system. It cannot be abdicated. See, e.g., *Gillespie v. Commonwealth of Pa, Dept. of Transportation, Bureau of Driver Licensing*, 886 A.2d 317 (*Pa. Cmwlth.* 2005) where the Court found an "abdication of the judge's role to an interested party" when a continuance would only be granted upon agreement by the parties. The lower court was found to have "essentially delegated its decision-making function to the attorneys."

The very "purpose" of the Judges' Rules is to "promote, consistent with fairness and due process, the orderly and expeditious determinations of proceedings before judges under the act and the Disease Law to implement the remedial intent of the act and the Disease Law." (Rule 131.1). Discretion, measured by a standard of "good cause" as currently in place, plays a major role in ensuring the purpose of the Rules is carried out without favor to one party over another. To remove, inhibit, or impinge upon this honored role of the judge should require compelling reasons of the highest order -- an over-arching principle to breach this judicial trust, one suggests, has not been demonstrated here. Barriers to this judicial trust, unless checked at first, will inevitably lead to more.

Hopefully, further review will earmark the matter as requiring additional reflection on the role of discretion in the judicial process, and the design of more appropriate Rules -- the needs of UEGF can be accommodated without abridgement of the "independence and integrity of the system" which workers' compensation judges are charged by statute to uphold. (Code of Ethics, Section 1404(a)(13) of the Act).

Prudentially, given the introduction and passage of Senate Bill 1195 by the Senate on March 11, 2014, with referral to the Labor and Industry Committee of the House on March 13, 2004, any final action on the proposed UEGF Rules should be delayed. The Bill, if enacted as currently written, would require the injured worker to give notice to UEGF "within 45 days after the worker has been advised by the employer or another source that the employer was uninsured." Under the proposed Rule, "another source" would clearly appear to be a judge -- who might become an actual witness on a "notice" issue. Failure to give timely notice, in turn, bars any recovery against the Fund under the Senate Bill. Moreover, the Bill addresses the proofs required for establishing wages earned at the time of injury, and also requires proof of

insurance from the employer within 10 days – these matters are relevant to proposed UEGF Rule 131.205 relating to subpoenas and interrogatories. There is interplay between the proposed legislation and the proposed UEGF Rules; delay appears appropriate pending the outcome of the legislative process.

Over the years, our workers' compensation system has become more and more professional – today we have stringent requirements to become a workers' compensation judge. The system is robust -- it works in large measure because judges, with strong backgrounds in the field, know from experience what is proper or not proper. No rule of procedure should diminish the importance of discretion in the judicial process. Indeed, given the concerns raised by the judges, including the Judges' Association, as related to the exercise of judicial discretion, it would indeed be anomalous to call these "Judges" Rules of Practice and Procedure if the proposed Rules barring discretion are finally adopted.

Our work today will reach the tomorrows of judges yet to come. From a perspective of over fifty (50) years of workers' compensation practice representing injured workers, employers, and carriers, and having been a workers' compensation judge approaching twenty-nine years, I believe we can do better, and if this were a campaign, the flag would boldly fly: "Pennsylvania Does Better." Thanks for listening.

Sincerely,



Joseph Hakun  
Workers' Compensation Judge

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4/10/14 10:00 AM

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