

# Comments of the Independent Regulatory Review Commission



## Department of Labor and Industry Regulation #12-99 (IRRC #3047)

### Special Rules of Administrative Practice and Procedure Before the Workers' Compensation Appeal Board and Workers' Compensation Judges

April 23, 2014

We submit for your consideration the following comments on the proposed rulemaking published in the February 22, 2014 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (71 P.S. § 745.5b). Section 5.1(a) of the RRA (71 P.S. § 745.5a(a)) directs the Department of Labor and Industry (Department) to respond to all comments received from us or any other source.

#### 1. RRA Section 2 – Reaching of consensus.

Section 2 of the RRA (71 P.S. § 745.2) explains why the General Assembly felt it was necessary to establish a regulatory review process. Given the interest this proposal has generated, we believe it is appropriate to highlight the following provision of Section 2(a) of the RRA. The provision states, “To the greatest extent possible, this act is intended to encourage the resolution of objections to a regulation and the reaching of a consensus among the commission, the standing committees, interested parties and the agency.”

The Department provides a thorough response regarding the lengthy process it undertook in drafting the proposed regulation. The Department concludes, “The Committee reached a final consensus regarding the proposed revisions to the Rules at a meeting conducted on May 2, 2013.” However, comments were submitted by the Pennsylvania Workers’ Compensation Judges Professional Association (PWCJPA) and four workers’ compensation judges (who work for the Department), including one who is on the Rules Committee, raising numerous concerns about the regulation. Also, the Insurance Federation of Pennsylvania states that insurers were not part of the drafting process. We recommend that the Department make every effort to resolve and reach consensus among the regulated community as the Department prepares the final-form regulation.

#### 2. Need for the regulation.

The *Summary of Proposed Rulemaking* in the Preamble states that the “proposed rulemaking clarifies and provides detailed guidance for practice and procedure.” However, we find that the Department does not make clear why some of the changes are being made. While we address specific concerns in our comments below, we ask the Department to ensure that the Preamble

and final-form Regulatory Analysis Form (RAF) make clear the need for any changes implemented by the final-form regulation, including any problems that are being addressed by the regulation.

**3. Section 111.3. Definitions. – Clarity and lack of ambiguity; Reasonableness of requirements.**

Under Subsection (a), the Department proposes to define *common carrier* as “an entity which is subject to the authority of the Pennsylvania Public Utility Commission [(PUC)] or the United States National Surface Transportation Board.” We note that taxicabs and utility companies are among the entities subject to the authority of the PUC. Is it the Department’s intent to include these entities? If so, the definition would seem to be insufficient. For example, there are taxicabs subject to the authority of the Philadelphia Parking Authority rather than the PUC. We ask the Department to clarify the definition of *common carrier* as appropriate.

Regarding the term *party*, we ask the Department to explain the need for amending the definition to include “employee.” How does an employee differ from a claimant?

**4. Section 111.11. Content and form. – Clarity and lack of ambiguity; Need for the regulation; Reasonableness of requirements; Implementation procedures.**

The Department is proposing to add to Paragraph (a)(1) the following language: “An appeal from a workers’ compensation judge’s decision is deemed to include all claims, disputes and petitions referenced in the decision and order which are the subject of the appeal.” A commentator asks if the Department’s intent is to disallow partial appeals. If so, we ask the Department to explain the need for and reasonableness of this requirement. If not, we ask the Department to clarify this provision for the regulated community.

**5. Section 111.12. Filing, service and proof of service. – Clarity and lack of ambiguity; Implementation procedures.**

Subsection (b) states that when filing electronically, a petitioner shall “follow the online procedures . . .” The Department does not provide further information on where these procedures will be located. We ask the Department to clarify how electronic filing is to be implemented in the final-form regulation.

**6. Section 131.3. Waiver and modification of rules. – Clarity and lack of ambiguity; Reasonableness of requirements; Implementation procedures.**

The Department is amending the language in Subsection (a) to include Subchapter D as an exception. Subsection (a) is proposed to state, “The judge may, for good cause, waive or modify a provision of this chapter, except as otherwise provided in Section 131.59b(a) **and Subchapter D . . .**” We note that Section 131.204 of Subchapter D relates to waiver and modification. However, we do not see that another type of waiver or modification rule is otherwise provided for in the other sections of Subchapter D. We ask the Department to explain the reasonableness

of including the entire Subchapter D, or to revise the amended language to clarify the specific provision(s) the Department is addressing regarding waiver and modification of rules.

**7. Section 131.11. Filing, service and proof of service. – Clarity and lack of ambiguity; Implementation procedures.**

We find the amended language under Paragraph (a)(3) to be unclear. We ask the Department to ensure that Paragraph (a)(3) provides clear filing requirement for the regulated community.

Under Subsection (e), we recommend that the Department require that this information related to filing and service be published in **both** the *Pennsylvania Bulletin* and on the Department's web site. The Department should ensure that any changes in implementation procedures are documented in hard copy in the *Pennsylvania Bulletin*.

**8. Section 131.52. First hearing procedures. – Need for the regulation; Reasonableness of requirements; Implementation procedures.**

Subsection (e) removes the requirement that the parties provide the judge with all documents required to be filed with the Department. The amended language seems to move responsibility for obtaining documents to the judge. What is the need for this change in first hearing procedures? We ask the Department to explain the reasonableness of placing responsibility for obtaining the documents on the judge.

**9. Section 131.53b. Bifurcation and summary disposition. – Clarity and lack of ambiguity; Need for the regulation; Reasonableness of requirements; Implementation procedures.**

The Department adds language in Subsection (b) that allows a motion to be filed at any time. The new language states that the judge will rule on the motion within 45 days. The Department is silent as to whether the opposing party has the opportunity to file a response to the motion, and when the opposing party may do so. We ask the Department to explain the need for and reasonableness of this new provision. We also ask the Department to ensure that the procedures for implementation are clear.

**10. Section 131.55. Attorney fees and costs. – Clarity and lack of ambiguity; Need for the regulation; Reasonableness of requirements; Implementation procedures.**

Several commenters sought clarity as to whether an attorney must seek approval for payment of fees and costs from a workers' compensation judge in every instance. Must an attorney be expected to advance costs on behalf of a client, even where there is a contingent fee agreement in place? Some attorneys may not be in a position to advance costs or it may be against their policy, and this requirement could delay legal representation or eliminate it altogether for a claimant seeking assistance. What is the need for this provision?

**11. Section 131.81. Subpoenas. – Need for the regulation; Reasonableness of requirements; Implementation procedures.**

The Department is adding new language related to subpoenas in Subsection (b). We have several concerns. What is the need for changing these procedures? What is to occur following the filing of an objection to a subpoena? Why are objections required to be made to a request for a subpoena rather than to the service of an actual subpoena? We ask the Department to explain the need for and reasonableness of this provision, to ensure the procedures for implementation are clear. We also ask the Department to explain how it determined that seven days is the appropriate length of time within which objections must be made.

**12. Subchapter D. PROCEEDINGS INVOLVING THE UEGF – Need for the regulation; Reasonableness of requirements; Implementation procedures.**

Based on the concerns raised by commentators regarding certain provisions in the newly proposed Subchapter D, we ask the Department to explain the need for and reasonableness of adding Subchapter D and implementing the new provisions thereunder.

**13. Section 131.202. First hearing information and stay. – Need for the regulation; Reasonableness of requirements.**

In Subsection (a), the Department provides for the judge to inform the claimant of the existence of the Uninsured Employers Guaranty Fund (UEGF). The PWCJPA suggests that involvement of the judge in providing written legal information as provided by the Office of Adjudication is contrary to Section 1404(a) of the Workers' Compensation Act (Act) (77 P.S. § 2504(a)). Why does the Department believe it is reasonable for the judge to inform the claimant of the existence of the UEGF? We ask the Department to explain the need for and reasonableness of this requirement.

**14. Section 131.204. Waiver and modification of §§ 131.202 and 131.203. – Determining whether the regulation is in the public interest; Need for the regulation; Reasonableness of requirements.**

Section 131.204(a) proposes that the judge cannot waive Rules 131.201 or 131.202 unless all parties agree. PWCJPA notes that the proposed requirement gives the uninsured employer, who may be guilty of a felony of the 3<sup>rd</sup> degree under Section 305(b) of the Act, veto power over law-abiding employers, their insurers, and the judge. Is this the Department's intent? What is the basis for requiring all participating parties to agree and for removing the judge's discretion, as provided for in Sections 131.3 and 131.53a? In the Preamble and RAF of the final-form regulation, we ask the Department to explain the need for and reasonableness of this provision, and how this requirement is in the public interest.