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The Democratic Leader

Senate of Pennsylvania

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HAND DELIVERED

August 4, 2000
Original: 2038

Mr. Robert E. Nyce
Executive Director
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

2000 AUG -4 PM 3:53

Re: IRRC Regulation #12-54(#2038)
Department of Labor and Industry
Workers' Compensation Health and Safety

Dear Mr. Nyce:

As the prime sponsor of Act 44 of 1993, my fellow Democratic Senators on the Labor and Industry Committee and I, are forwarding comments concerning the above-referenced final form regulations of the Department of Labor and Industry on workers' compensation health and safety.

Act 44 of 1993 clearly expressed our concern for employees and their safety on the job through the statutory requirement that insurers must maintain or provide accident and illness prevention services to its policyholders as a prerequisite to write workers' compensation insurance. It is apparent that the Department has put in many hours in an attempt to address these concerns and we compliment them on their efforts. However, our offices are in receipt of written comments from the Pennsylvania AFL-CIO, which express concern with these final form regulations and the changes made in response to comments provided to the Department during the public comment period. We urge the Commission to review these concerns and, if possible , delay the consideration of the final form workers' compensation health and safety regulations until your September, 2000 meeting or until such time as these concerns are adequately addressed by the Department and the Commission. A copy of these written comments are enclosed for your review.

In addition to the written comments of the PA AFL-CIO, the undersigned Senators would like to express suggestions for revision of the following areas:

1. Section 129, 102(3)(I) - the language under this section should be returned to the original language under the proposed rulemaking. The former language which referred to services "that are adequate to furnish accident and illness prevention required by the nature of the insurer's business or its policyholder's operation" is part of the act and should carried forth in the regulations. To substitute language which provides that services should be provided "based on the insurer's determination of the policyholders' operational requirements" is not consistent with the statutory language.

2. Inspections - Section 1001(e)(3) of the act provides that insurers submit detailed information on the type of accident prevention services offered or provided to the insurer's policyholders. This information must include, among other things, the number of site inspections performed. The final form regulations changed the wording

inspection is merely a review of paper documentation at the headquarters of the insurer. The intent of the act was to include actual inspection of the workplace and the implementation of these accident and illness prevention services.

3. Section 129.114, in the proposed rulemaking, provided for an adequate penalty for the failure of an insurer to maintain or provide adequate services as required under this act. The final form regulations removes this section. The statute specifically provides for these provisions under 1001(a) and (f) and therefore, this penalty provision in the regulations is needed. We ask the Department to reinsert this language under Section 129.114, as it was provided in the proposed rulemaking.

4. Section 1001(a) and (b) of the statute provides that an insurer or the self insured employer shall employ or otherwise make available qualified accident and illness prevention personnel, which shall meet the "qualifications" set forth by the department by regulation. The proposed rulemaking under Section 129.403 provided for "provider qualifications." The final form regulations changed this term to "provider requirements." This is also reflected in Section 129.701 of the final form regulations. The statutory term is "qualification" and the final form regulations should be amended to reflect the statute.

We are confident that the Commission will take into consideration our above referenced concerns. In addition, we urge that you review the enclosed concerns of the Pennsylvania AFL-CIO and delay the consideration of these final-form regulations until your September, 2000 meeting or until such time as these concerns are adequately addressed by the Department and the Commission.

Sincerely,

Senator Robert J. Mellow
The Democratic Leader

Sen. Albert V. Belan
Democratic Chairman, Senate Labor and Industry Committee

Sen. Richard A. Kasunic

Sen. Gerald LaValle

Sen. Christine Tartaglione

Attachment
cc: William George, PA AFL-CIO
David Wilderman, PA AFL-CIO
Commissioner Arthur Coccodrilli
Commissioner John R. McGinley, Jr., Esq.
Commissioner Robert J. Harbison, III
Commissioner John F. Mizner, Esq.

COMMENTS OF THE PENNSYLVANIA AFL-CIO ON DEPARTMENT OF LABOR AND INDUSTRY

WORKERS' COMPENSATION HEALTH AND SAFETY REGULATIONS

34 PA. CODE CHS. 123,125,129 AND 143

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COMMENTS OF THE PENNSYLVANIA AFL-CIO
ON
WORKERS' COMPENSATION HEALTH AND SAFETY REGULATIONS

DEPARTMENT OF LABOR AND INDUSTRY

34 PA CODE CHS. 123, 125, 129 AND 143

Definitions Section 129.2

1. . No definitions of Affidavit for re-certification of Health and Safety Committees. The precise elements to be contained in an affidavit must be delineated.

2. "Centralized Work Place Safety Committee"

This definition does not recognize collective bargaining agent. Clearly sections 1001 (g) and 1002 envision that the collective bargaining representative appoint the workers in the collective bargaining unit on the Health and Safety Committee. To authorize the employer to choose the labor representatives on the Health and Safety Committees, violates, in addition, the National Labor Relations Act and a recent Supreme Court decision on employer created workplace committees. The final regulation makes no reference to collective bargaining agent and allows employers to select employee representatives outside the collective bargaining representative.

3. "Certification"

Simply having the employer attest that the Health and Safety Committee is properly functioning is not adequate oversight. Documentation at a minimum must be required. In addition to be consistent with the regulations on Workplace Safety Committee any verification must be signed by leaders, i.e., employer and employee representatives on the Health and Safety Committee.

4. "Consultation"

Deletion of the term "counsel" in the definition of consultation is in conflict with the Statute. Webster's 7th New Collegiate Dictionary definition of "consultation" is council. The regulations delete this provision and use counsel as legal counsel. The regulations should have corrected the spelling and kept in "council: as a deliberative interactive activity instead of leaving only advice which will come across as a weakening of the committees roll in providing council and advice.

5. "Effectiveness Measure"

Legislation specifies "...surveys, recommendations, training programs, consultations, analysis of accident causes, industrial hygiene and industrial health services to implement the program of accident prevention services..."

(a) Deletion of term "formulas" is in conflict with the concept of analysis of accident causes.

(b) Allowing for submission of OSHA data and experience modification clearly is in conflict with the Statute which requires insurers to be pro-active in offering accident and illness services to their insureds. The paper OSHA requirement does little to serve as a effectiveness measure in part because OSHA does not cover all employers (public employers, much of construction, small employers and mining are not covered by OSHA.) The other perimeter of "experience modification" is equally defective in that this factor is not sufficiently weighted to measure effectiveness. In addition, employers with premiums under $5,000 have no experience modification, nor is there experience modification for self insured employers or employers with large deductibles (basically self-insured).

6. "Credential"

The Department has moved away from the Statutory requirement of credentials and substituted a non regulatory definition that continues to leave the term "credential" undefined.

7. "Emergency Action Plan"

Provision for employers self-review of the "emergency action plan" provides no accountability. The failure to provide accountability conflicts with section 1001(G) which implies that self-insurance status is based on a plan as a pre-requisite to retaining self-insured status. The commission or the department can not determine compliance if no reporting is required.

8 "Evaluation Methods"

Must define term "periodic". This is a meaningless term without specificity.

9. "Workplace Safety Committees"

The definition wholly is inadequate. This should at a minimum refer to a collective bargaining agent where one is present or is established which is the exclusive representative of workers as a matter of federal law.

Subchapter B

Insurer's Accident and Illness Prevention Services

10. Section 129, 102 (3) (i)

The deletion of the language in subsection (i) is in direct conflict with section 1001 (a) which requires"...shall maintain or provide accident and illness prevention services as a prerequisite..." Proof of compliance with this section shall be provided to the Commissioner. Such services shall be adequate to furnish accident prevention required by the nature of the business or its policy holders operations and shall include...

Subsection (3)'s new language is again in direct conflict with above cited language regarding deletion of the provision that provides "...that are adequate to furnish accident and illness prevention required by the nature of the insurer's business or policy holder's operations comes right from the Statute word for word. This can not be deleted with a substitution that puts the requirement determination solely in the hands of the insurer.

The deletion of the language undermines the concept of pro-active insurer accident and prevention services given the nature of certain businesses. Certain business are, by nature, extremely hazardous and these services, according to the Statute, can be identified and services made available.

11. 129.102 (3) (ii) (a)

The deletion of the term " ...required..." violates a statutory mandate that services "shall include" section 1001(a) of Statute. Elimination of "...onsite and substituting discretionary on site review violates state under Section 1001 (a) in that ... accident prevention services..."required by the Statute involve interactive "training programs, consultation analysis of accident causes industrial hygiene and industrial health services as well as services are a composite that make up the statutory mandate of "accident prevention services". Paper reviews of an employer's self-reporting fails the test of required substantive, verifiable accident prevention services required by the Statute.

The regulations' only true accident prevention requirement appears under the new and wholly alien provision that create the concept of "imminent danger".

This is the reason the Statute requires an insurer to have the capacity to identify and provide accident prevention services "...required by the nature of its business..." (see section 1001 (a)

12. Section 129.102 (3) (ii) (b)

Proposed change to "request only" services in conflict with stationary language to"...maintain or provide..." and more pointedly services"...to furnish accident prevention required by the nature of the business or its policy holders operations..." Section 1001 (a).

Proposed change again diverges from Statute by leaving it up to the insurer to determine whether or not services are needed to"...meet the policyholder's operational requirement...".

13. Section 129.102 (3) (ii) (c) Same Comments as Above

14. Section 129.102 (3) (ii) (e)

Proposed change anticipates that "...new equipment or new materials..." have already been introduced in the workplace. Accident prevention requires that the Safety Committee review the plans prior to introduction as well as after introduction.

The original policy statement of the Department section 143.102 (7) appropriately states the right standard and grows out of the "consultation" and other requirements of Section 1001 (a) of Act 44.

15. Section 129.102 (ii) H and I

Both of these subsections should be re-inserted, as they are integral to accident prevention services.

Regarding all of Section 129.102, the re-draft reads out of the Statute the word prevention...(Section 1001(a) "...Prevention is a pro-active term according to Webster's Dictionary. Prevention means...the act of preventing... and "prevent" is defined to mean "...to come before, anticipate, forestall..."(Webster's 7th New Collegiate Dictionary.)

By the change in Section 129.102 (ii) E (after the fact) and the deletion of the former sections H & I of the Statement of Policy the statutory term prevention is read out of the Statute by these proposed final form regulations.

16. Section 129.104 Service Provider Requirements

The deletion of "qualification" conflicts with the Department's clear responsibility under Section 1001(a) that...personnel shall meet the qualifications...(of) the department. Again, "qualifications", according to Webster 7th Collegiate Dictionary, means ...An endowment or requirement that fits a person (as for an office)...

The new proposal reads out of the Statute that personnel involved be qualified and substitutes, out of whole cloth, a new line of inquiry about requirements none of which address the issue of "qualified".

17. Section 129.104 (a) Same Concerns As Stated Above

18. Section 129.104 (b)

The deletion of this section from the regulations removes the specific statutory authority to penalize an insurer for non-compliance provided for in the law.

The Statute requires this subsection to remain.

19. Section 129.105 (a)

Inserting the ambiguous term..."concerning"...makes this requirement a hollow shell

The Statute set forth specific standards in Section 1001(a) and requires...proof of compliance with this section shall be provided to the commissioner.

The new language doesn't require proof of anything.

20. Section 129.106 Reporting requirements licensed insurers

Section 1001 (e) of the Act is specific about what the reporting requirements for insurers are.

The regulations do not set forth what is in the AIPS report. They simply cross reference a non-regulatory form of the department.

The definition section should include AIPS as defined by the Statute in Section 1001(e).

As pointed out above, so called OSHA reports are incomplete and under inclusive as far as work places are concerned. These reports are not a substitute in any way for the statutory mandate and in many instances are not relevant to the issue at hand.

21. 129.107 Report Findings

The proposed regulations appropriately set forth the statutory standard.

Subsection B which applies to licensed insurers invents a new procedure with the potential for an intermediate step before imposition of the penalty provided for in Section 1001(f). This new step is an audit not provided for by the Statute.

22. 129.108 Record Keeping Requirements

Again, this regulation is only in partial compliance with the Statute.

Section 1001(e) requires a "...detailed information on the type of accident prevention services offered or provided to the insurers policy holders.

Section 129.108 makes no reference to the statutory requirement of services offered. It only documents services requested.

In addition, the deletion of the other information set forth in the policy statement fails to address the detailed information requirement of the Statute.

23. Section 129.109 Periodic Audits of Insurer's Accident and Illness Prevention Services

Section 129.109 (a), (b), (c) and (d) as re-written this subsection is in violation of the Statute Section 1001 (c). The Statute requires inspections not just audits (see section 1001 (c).) In addition, the regulation impermissibly limits the Department and Commissioner's Statutory authority in the following ways:

1) Limiting audits to insurers
2) Limiting inspections to once every 2 years
3) Pre-conditioning what may be audited or failure to file an AIPS
4) Pre-conditioning the audit on a requirement that the reasons for the audit be set forth
5) Giving 60 days advance notice of the audit
6)

None of these severely restrictive covenants is provided for in the Statute and are in direct conflict with the Statute, Section 1001 (c) which grants the department unfettered authority to conduct inspections (including audits).

24. Section 129.10 Pre-audit Exchange of Information

This whole subsection is an unauthorized imitation of the Department's clear and unfettered authority under Section 1001 (c) of the Statute.

25. Section 129.111 Site of Audit

Again, this subsection is in violation of the Statute Section 1001 (c) and (f) by limiting inspections to audits.

The new regulations severely restrict the audits, which are virtually vitiated.

The new regulations actually invert the Department's authority to audit and allow the insurer to determine what will be audited.

Subsection (b) provides a strict limitation on what can be audited and adds "...and other documentation chosen by the insurer supporting the existence and adequacy of the required services..." Again the Statute requires inspections. (Section 1001 (c)

26. Section 129.112 (a) Written Audit Report

Violation of the Statute section 1001 (c) and (f) by creating a new and unauthorized provision for an ...initial...determination of adequacy or inadequacy.

The Statute does not contemplate initial determinations but only final determinations.

27. Section 129.113 Plan of Correction

Same conflict with the Statute as cited above.

28. Section 129.114 Deletion of this Section

The Statute specifically defines the penalty for non-compliance.

Deletion of this section could be viewed as totally disregarding the statutory requirement and eliminate the regulatory guidance for action following non-compliance.

This section should be retained.

29. Section 129.403 Individual Self-Insured

Section 129.403 (a)

The title and subsection (a) are in direct conflict with the Statute. Changing the standard to requirements instead of qualifications is a downgrading of the legislative intent and language.

Section 1001 (b) provides...The self insured employer pursuant to its responsibilities under this section should employ or otherwise make available qualified accident and illness prevention personnel.

As pointed out above "qualified" is an operative and inclusive term substantiating that the individual can undertake the full scope of the responsibility. Requirements, by contrast, are digital iterations of specific duties and is not as inclusive as qualified.

Section 129.403 (b) Same Comments as for (a) above.

30. Section 129.405
Reporting requirements individual self-insured employers.

Since it is unclear what the AIPS reporting contains, we can not review this regulation. For that reason the regulations are incomplete to make a determination on their conformity with the Statute.

31. Section 129.406 Report Findings
Section 1001 (b) and (f) provide for specific standards and findings of compliance or non-compliance with the Statute.

Section 129.406 introduces a concept foreign to the Statute of "initial determinations resulting in audits". As such this procedure is not sanctioned by the Statute.

32. Section 129.407
Although Section 1001 (e) seems to apply only to insured employers, the tenor of the section is that "detailed information" be provided to the Department.

Each of the proposed changes is a step backwards from more detailed information to superficial reporting.

33. Section 129.408 Periodic Audits
Section 129.408 (a) limits the departments power to "audits".

The Statute provides Section 1001(c). "The Department may conduct inspections to determine the adequacy of the accident prevention services required by this section at least once every two (2) years for each insurer."

Two problems are created here. First, the proposed regulation attempts to limit audits to once every two years.

More importantly the statutory language is changed from inspections to audits. Audits, as discussed above, are strictly limited in scope and would most likely be paper reviews.

Inspections, as the Statute requires, contemplates actual visitations to the work-site.

The regulation is therefore impermissibly restrictive.

34. Section 129.409 Pre-Audit Exchanges Information
The Statute does not provide for pre-audit exchange of information.

There is no statutory provision for a limitation or restriction on inspections to audits.

In addition, the idea of an inspection is to find out what is really going on.

The procedure laid out here is made up out of whole cloth. The Statute provides solely for a determination without the advance notice; opportunity to fabricate documents and falsify information.

Stating the reasons for the audit is a perfect example of how to train those subject to inspection on what documents to fabricate.

The same is true of the 60 day advance notice requirement.

35. Section 129.410 Site of Audit
Statute calls for inspection of which a audit could be a part.

36. Section 129.411 Written Report of Audit
Again the Statute is not limited to "audits" but specifically provides for inspection. Section 1001 (c).

Section 1001 (f) does not provide for the procedure of "initial determinations" This is a new procedure not contemplated by the Statute and is simply designed to allow an offending self-insured to avoid penalties.

Hearings are the appropriate remedy as provided for in the Statute and Regulations.

37. Section 129.412 Plan of Correction
(a) same objection to limitation to audit.
(b) Same objection to corrective opportunities designed to avoid the specific penalties provided by the Act. Section 1001 (f)

38. Section 129.412 (old)
This section deleted the Department's remedy powers as part of the regulations.

Although the Statute remains, the regulations should provide guidance.

39. Section 129.453 Group Self-Insurance Policies

Regulations for group self-insurance correctly reflect the Statute's requirements. Since the insurers were able to delete these requirements for themselves and self-insured employers, this clearly demonstrates the correct interpretation of the Statute.

Same objections to changing statutory language on qualifications to requirement.

40. Section 129.455

(a) Same objections to limitations on reporting requirements using AIPS Report – content unknown

41. Section 129.456

Same objection to creation of new intermediate procedure of "initial reports".

42. Service Requirements

We support the "on-site" survey requirement which is the statutory requirement for all classes, but only applied to group self-insurance

In addition we support all of the other specific health and safety standards.

This is correct reading of the Statute and should be applied to <u>all</u> classes.

43. Section 129.459 Audits

Same objections to audits versus inspections.

Same objections to restricted access to information.

Same objections to advance notice.

Same objection to modified procedure – including prior notice and pre-audit exchanges.

Same objections to subject of inspections "audits".

Same objections to mutual determinations.

Same objections to plan for correction.

Same objections to deletion of statutory penalty and attendant procedures.

Subchapter E Accident and Illness Prevention Services Providers Requirements

44. Section 129.701 Purpose and Scope

Regulations are in conflict with Statute as explained above, i.e., "...Section 1001 (a) specifically requires the use of qualified accident and illness prevention personnel. Such personnel shall meet the qualification set forth in the regulations issued by the department..." Section 1001 (a).

The final proposed regulations delete verification of the qualifications by the Department and delegate that authority to the insurer. Under Section 1001 (a) requires that "... proof of compliance with this section (shall be provided to the commissioner..." and further provide... Such personnel shall meet the qualifications set forth in regulations by the Department. Both of these statutory provisions require that the commissioner and the Department shall ensure the qualifications of the Accident Illness Prevention Personnel. This verification can not be delegated to the subject of the verification i.e., the insurers.

In addition, the final draft regulation simply delegates to the Bureau what type of credential is satisfactory. The regulations should serve as a guideline to what is satisfactory in order to assure compliance with the act.

Subchapter F Workplace Safety Committees

45. Section 129.1003 Minimum Eligibility Requirements.

Subsection (f)

This subsection fails to require that if there is a collective bargaining agent, the employee representative must be designated by the collective bargaining agent.

The Statute anticipates this procedure by the immunity provisions of section 1001 (g).

In addition, it would be a violation of the National Labor Relations Act for the employer to select the employee representative of the Health and Safety Committee. A Supreme Court decision called GENERAL ELECTRIC COMPANY 397US965 (1970) affirms that employer selection on a committee such as this is a de facto company union committee in violation of the National Labor Relation Act.

46. Section 129.1004 (c) Committee Formation and Membership

Subsection (c) allows for an unbalanced committee with the agreement of the employee representative. There is no reason for this provision.

On the other hand, it would undercut the whole concept of joint Health and Safety Committees to have an unbalanced committee.

The standard protocol is for equal representation.

This provision should be deleted.

47. Section 129.1005 (a) committee Responsibilities

39. We strongly support this well thought out list of responsibilities. They represent proven protocol.

We would only suggest that the Committee be advised of new procedures, machinery or other major changes prior to their introduction into the work site.

48. Section 129.1005 (c)

(5) The deletion of the requirement to maintain the Committee minutes for 5 years is a serious undermining of accountability for both the workplace; the insurer or employer and the Department in its re-certification procedure.

Minutes provide a means of accountability which is at the core of a well functioning health and safety committee.

The deletion of a response requirement from the employer equally undermines well known principles of functioning health and safety committees. Cooperation requires mutual respect which comes from some degree of accountability.

Responses from management are broadly accepted as an essential component of long term working health and safety committees.

49. Certification Renewal Affidavit

Section 129.1008 Certification Renewal Affidavit

This is perhaps the most outrageous provision in the regulations.

To allow an employer to have the Committee re-certified and qualify for a 5% premium discount on the basis of an employer affidavit without any documentation is calling for abuse and undermines the whole system.

There are several alternatives that must be considered:

(1) Documents of meetings and other verifying information must be submitted with the affidavit.

(2) The affidavit should be signed by both the employee and employer chairs of the committee.

(3) The department should have the ability to do on site inspections and interview to verify the existence and operation of the committee.

(4) The minimum contents and attachments to the affidavit must be plainly listed and clearly articulated so as to avoid and prevent abuse.

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The Democratic Leader

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COMMITTEES

RULES AND EXECUTIVE NOMINATIONS
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COPY

August 22, 2000

The Honorable Johnny Butler
Department of Labor and Industry
1713 Labor and Industry Building
Harrisburg, Pennsylvania 17120

Dear Secretary Butler:

My office is aware that the Department intends to resubmit their final form "Workers' Compensation Health and Safety Regulations." According to correspondence from Sheilah Borne, Regulatory Coordinator, dated August 14, 2000 to David Wilderman, Director of Legislation for the Pennsylvania AFL-CIO, this resubmittal of the regulations will only contain technical changes recommended by the Independent Regulatory Review Commission.

As prime sponsor of Act 44 of 1993, I continue the fight for adequate workers' compensation and the health and safety of the worker. These issues are the fundamental basis of Act 44. Given this fundamental purpose, the AFL-CIO and other members of organized labor are representatives of the worker and wage a daily battle to address the concerns of the average worker. They serve as the collective voice best able to address the needs of working men and women.

Your agency has chosen not to address the concerns of the worker before the resubmittal of the regulations. Instead, you have offered to meet with the Pennsylvania AFL-CIO, while at the same time refusing to reopen the public comment period.

Although I am thoroughly aware of the provisions of the Regulatory Review Act and the purpose of the public comment period, I am also aware of the Department's flexibility in resubmittal of regulations. The Department has two years to resubmit regulations that they have withdrawn.

I urge you to reconsider your actions. Please do not resubmit the regulations; instead take this opportunity to fully address the concerns of the Pennsylvania AFL-CIO and other members of organized labor. Their issues and concerns must be addressed if you fully intend to protect the health and safety of the worker.

Sincerely,

ROBERT J. MELLOW
The Democratic Leader

RJM/GMB/sr

cc: Sheilah Borne
Regulatory Coordinator

Arthur Coccodrilli, Commissioner
Independent Regulatory Review Commission

William George
Pennsylvania AFL-CIO

David Wilderman, Esq.
Pennsylvania AFL-CIO