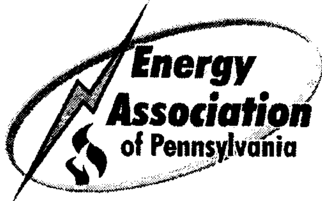
ORIGINAL: 2038



800 N. 3rd St., Suite 301 • Harrisburg, PA 17102
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2001 APR 16 AM 10: 35
REGULATORY REVIEW COMMISSION

April 13, 2001

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

VIA ELECTRONIC MAIL: HARD COPY TO FOLLOW

Re: Regulation No. 12-54: Workers' Compensation Health and Safety (Proposed Amendments to Pa. Code Chapters 123, 125, 129 and 143)

Dear Mr. Nyce:

On behalf of its natural gas distribution company members, the Energy Association of Pennsylvania (the "Energy Association") respectfully urges the Commission to disapprove the referenced final-form regulations.

Through this docket, the Department of Labor and Industry ("L&I") seeks to transform well-functioning policy statements into binding regulations. In comments filed July 19, 1999, the Energy Association's predecessor urged L&I not to take this step. We noted that our members are already subject to extensive federal safety regulations promulgated under the Occupational Safety and Health Act and the Natural Gas Pipeline Safety Act, and we argued that our members could harmonize those requirements with L&I's expectations as long as those expectations were embodied in non-binding policy statements.

Regrettably, L&I has elected to persist in pursuing binding regulations, and the Energy Association is therefore constrained to argue for disapproval on grounds of federal pre-emption. The specifics of the pre-emption argument are laid out both in our July 1999 comments and in National Fuel Gas Distribution Corporation's letter to you of April 12, 2001, and we will not repeated those points here. We would only add that even to the extent one characterized L&I's proposed regulations as exceeding the federal standards, rather than conflicting with them, L&I has demonstrated neither a "compelling and articulable" state interest, nor a state law requirement, as directed under Pennsylvania's Executive Order 1996-1, 26 Pa.B. 856 (1996), *codified at* 1 Pa. Code § 1.371(5).

The Energy Association further concurs in National Fuel's arguments for disapproval of the proposed grandfathering clause for establishing who is qualified to provide accident and illness prevention services.

Respectfully submitted,

Dan Regan

Dan Regan
Vice President: Regulatory Affairs

cc: Energy Association Accident Prevention Committee

From: Dan Regan [Dregan@ENERGYPA.ORG]
Sent: Friday, April 13, 2001 10:40 AM
To: irrc@irrc.state.pa.us
Subject: Regulation No. 12-54: Workers Compensation Health and Safety

Importance: High

20010416 IRRC Letter (Workers ...

Good morning:

Please forward the attached letter to Executive Director Nyce and the Regulatory Analysts examining the referenced matter. As this matter is scheduled for the Commission's April 19th meeting, your expeditious handling is greatly appreciated.

Best regards,
Dan Regan
Vice President: Regulatory Affairs
Energy Association of Pennsylvania
800 North Third St. #301
Harrisburg, PA 17102
717-901-0631
Fax: 717-901-0611

<<20010416 IRRC Letter (Workers Comp).doc>>

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The Insurance Federation of Pennsylvania, Inc.

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2000 AUG -2 PM 3:39
REVIEW COMMISSION

1600 Market Street
Suite 1520
Philadelphia, PA 19103
Tel: (215) 665-0500 Fax: (215) 665-0540

Robert W. Kloss
Chairman
Donald H. Nikolaus
Vice Chairman
Samuel R. Marshall
President &
Chief Executive Officer
John R. Doubman
Secretary & Counsel
Marybeth H. Dob
Treasurer
Birchard T. Clothier
Investment Officer &
Assistant Treasurer
Danielle D. Witwer
Director of
Government Affairs

August 2, 2000

Original: 2038

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

Re: Chapter 129 - Workers' Compensation Health and Safety - final form regulation

Dear Mr. Nyce:

This morning, we had a conference call of companies and the national trade associations to review this regulation. We are not yet at the point of recommending approval or disapproval (we hope it is the former, and we will send our letter early next week). That will depend on interpretations that the Department of Labor and Industry provides with respect to Subchapter B.

Briefly, Subchapter B sets forth the requirement that insurers be proactive in offering and providing accident and illness prevention services to their policyholders, with the Department collecting reports and auditing insurers to determine the adequacy of their efforts and programs.

Our concern is with what is an adequate effort or program. Section 129.102 requires that insurers give notice to policyholders of the availability of accident and illness prevention services. It also sets forth the services that every insurer must be able to provide, which are essentially surveys and proposals of ways to make a safer workplace.

The preamble to this section calls for insurers to be "proactive" in this. We are not sure just what this means for an insurer. We believe it means that every insurer must give to every policyholder a notice of the availability of these services, an offer to provide them and a general description f the services. If the policyholder requests the services, the insurer then must be able to come in and provide them on an individual basis.

Section 129.102, however, could be read to require that an insurer provide the services to individual policyholders even without being requested to do so.

Essentially, the question is whether an insurer has met its obligations under this regulation by offering the services in Section 129.102 and performing them when requested, with the policyholder initiating the request for surveys and proposals; or whether the insurer must actually provide surveys and proposals for individual policyholders, with the policyholder then making the decision whether to accept them.

We recommend the former interpretation. It fulfills the requirements of Article X of the act and the regulation's goal of getting the information out to employers. The latter would subject policyholders to expenses (they are the ones paying for the services) they have not sought, and would place insurers in the untenable position of stepping into the shoes of their policyholders, not just insuring them.

We understand you are meeting with the Department tomorrow; we are raising this concern with it, too, and would be happy to discuss this further with both of you.

Sincerely,

Samuel R. Marshall

C: Len K. Negley

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FAX

Original: 2038

INSURANCE FEDERATION OF PENNSYLVANIA
500 NORTH THIRD STREET
3RD FLOOR
HARRISBURG, PA 17101

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2000 AUG -2 PM 3:39
REVIEW COMMISSION

Date: ____________

Number of pages including cover sheet: ______

To: Robert Nyce	From:
John Jewett	
IRRC	
Cen Wegley	
BLX	

TEL:	TEL: 215-665-0500
FAX:	FAX: 215-665-0540

REMARKS

ORIGINAL: 2038

Pennsylvania Coal Association
212 North Third Street • Suite 102 • Harrisburg, PA 17101 (717) 233-7909
(717) 236-5901
FAX (717) 231-7610

George L. Ellis
President

April 16, 2001

2001 APR 16 PM 4: 36
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Robert E. Nyce
Executive Director
IRRC
333 Market St.
14th Floor
Harrisburg, PA 17101

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

Dear Mr. Nyce:

The Pennsylvania Coal Association (PCA) submits the following comments on the above referenced final-form rulemaking.

PCA is a trade association organized and operating under the laws of Pennsylvania representing producers of bituminous coal in the Commonwealth in regulatory matters affecting the coal industry. PCA's members produce over 75% of the bituminous coal annually mined in Pennsylvania, which exceeded 73 million tons in 1999. Pennsylvania coal operators directly employ almost 8,000 people who are among the highest paid industrial workers in Pennsylvania, with average annual earnings of $47,565. In addition to direct employment, a Penn State University study concluded that up to ten indirect mining jobs are supported by each direct mining job within the state economy. Many of these indirect employees work for PCA's 80 associate members, who provide services to the coal industry ranging from engineering and consulting to finance, insurance and the sale of mining equipment.

The proposed regulations would implement provisions of Act 44 of 1993 and Act 57 of 1996, and would require, among other things, that insurers and self-insurers have accident and illness prevention programs and would encourage the creation of workplace safety committees.

PCA member companies are qualified as individual self-insured employers and therefore have a substantial interest in the outcome of this proposal. PCA submitted comments on the proposed

regulations to the Department of Labor and Industry on July 7, 1999. We now offer the following comments to the final-form regulations.

The Department, apparently, did not consider any of PCA's comments when it modified its proposed regulation. Furthermore, the Department did not feel the need to even discuss the mining industry's comments in the preamble or explain the basis for the Bureau's decision not to include our suggestions in the final-form regulation.

Most troubling to PCA is the Department's failure to recognize the coal industry's unique regulatory status in the regulations. Unlike other industries, the mining industry is not regulated by the Occupational Safety and Health Administration (OSHA), whose regulatory program serves as the template for this regulation.

Instead, federal regulation of underground and surface coal mines come under the purview of the Federal Mine Safety and Health Administration (MSHA) pursuant to the Federal Mine Act. In addition, the underground coal mine industry is regulated under the Pennsylvania Bituminous Coal Mine Act, 52 P.S. § 701-101 et seq., and the Pennsylvania Anthracite Coal Mine Act, 52 P.S. § 701-101 et seq. The state entity responsible for implementing these laws is the Bureau of Deep Mine Safety (BDMS) within the Department of Environmental Protection (DEP).

Both the federal and state mine safety programs establish a comprehensive scheme of regulation and enforcement that is vastly different than the regulatory scheme established by OSHA. In our initial comments on this rulemaking we explained that the Department's regulation is aimed at industries regulated by OSHA and is based on OSHA-related requirements. We explained the federal requirements governing mine safety under MSHA's program (including 30 CFR Part 48 for training, Parts 62, 70 and 71 for industrial hygiene, and Parts 75 and 77 relating to overall safety issues) and identified the many differences between the MSHA and OSHA programs. We further explained the difficulty and complexity attendant with the mining industry trying to comply with two different sets of rules would be a formidable task that would be time consuming, costly, redundant, unnecessary and would not measurably improve mine health and safety.

Given this, PCA requested that the Pennsylvania coal mining industry be exempted from these regulations. If this could not be done, we asked that the mining industry be treated as a separate entity and that the Department promulgate a different regulatory package that is consistent with MSHA rules and BDMS policies. Unfortunately, the Department decided to ignore both requests without offering any explanation.

The following are some examples of the disparity between the two programs and the difficulties that the mining industry would have in trying to comply with this regulation without modifications to reflect its unique status.

First, Subchapter F of the proposed Health and Safety Regulations addresses Workplace Safety Committees and sets out a number of requirements to obtain or renew certification of an employer's workplace safety committee. Many employers, including a number of PCA members, maintain health and safety committees pursuant to collective bargaining agreements with their employees. Memberships in and the composition of such committees are, of course, governed by the terms of the collective bargaining agreement. The operation of the committees, the training of committee members, and similar matters are also addressed by the collective bargaining agreements. While it

is our understanding that the Bureau of Worker's Compensation would accept these agreements for certification, this practice is not embodied in the final-form regulations. We would suggest that specific language be included in the regulations to recognize such committees, even if the organization and operation of the committees might differ from what is proposed in the regulations.

In addition to daily preshift and on-shift examination requirements, the mining industry also has accident and injury reporting requirements that are very different from industries regulated under OSHA. See, e.g., 30 CFR Part 50 and 29 CFR Part 1904. This renders the provisions of Section 129.402(a)(15) with respect to evaluating the effectiveness of a self-insured employer's accident and illness prevention program based on an OSHA formula meaningless or inoperative for an industry where there are many self-insured companies that are not regulated by OSHA.

Coal mines are also subject to a comprehensive enforcement by federal mine inspectors. Two complete inspections of every surface mine and four complete inspections of every underground mine by federal inspectors are required every year as well as "spot" inspections. See 30 USC § 813(a). These inspections may total 3000-4000 onsite inspection hours a year at large mines and 1500-2000 onsite inspection hours at smaller mines.

In addition, the underground coal mine industry is regulated under the Pennsylvania Bituminous Coal Mine Act, 52 P.S. § 701-101 et seq. and the Pennsylvania Anthracite Coal Mine Act, 52 P.S. § 70-101 et seq. Not only are there extensive health and safety requirements under those statutes, the inspectors of the Bureau of the Deep Mine Safety within the Department of Environmental Protection may inspect a large underground coal mine 200 days a year.

The requirements for accident and illness prevention service providers under this regulation would exclude mine personnel who are directly responsible for health and safety at mine sites. These people have extensive experience in mine safety, are certified as trainers by MSHA and certified as mine officials by the Commonwealth. Yet, under the proposed and final-form regulation, these individuals would not qualify as accident and illness prevention service providers.

These are some of the inequities that should be addressed by the regulations. PCA appreciates this opportunity to provide comments and would be willing to meet with you or your staff and discuss these issues in more detail.

Sincerely,

George Ellis
President, Pennsylvania Coal Association

ORIGINAL: 2038

IRRC

From: Pacoal1@aol.com

Sent: Monday, April 16, 2001 4:28 PM

To: irrc@irrc.state.pa.us

Subject: Attn: Nyce PA Coal's Comments

Bob - Please find the Pennsylvania Coal Association's comments attached.

Thank you.

George Ellis

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2001 APR 16 PM 4:36
REVIEW COMMISSION

Original: 2038

National Fuel

April 9, 2001

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2001 APR 16 AM 9:00
REVIEW COMMISSION

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

Dear Mr. Nyce:

We are writing to you on behalf of our employers National Fuel Gas Distribution Corporation, a natural gas utility, and National Fuel Gas Supply Corporation, a natural gas transmission and storage company. Both companies are self-insured and operate in the Commonwealth of Pennsylvania, having a combined workforce of 550 employees.

On April 19, 2001, the Independent Regulatory Review Commission (IRRC) will consider final-form Health and Safety Regulations, added as Chapter 129 of the Workers Compensation Act (77 P.S. §§ 1-1041.4 and 2501-2626), by the Department of Labor and Industry, Bureau of Workers' Compensation. We ask that IRRC not approve the final-form Health and Safety Regulations proposed by the Department of Labor and Industry for two reasons: 1) their proposed regulations are preempted by existing federal law, and 2) the regulations lack a grandfather provision for experienced safety professionals providing prevention services.

I. FEDERAL PREEMPTION

Chapter 129 imposes an additional layer of regulatory oversight on the natural gas industry which will be time consuming and cause additional expense to our customers. The regulations proposed in Chapter 129 are similar to existing state and federal regulations. The Occupational Safety & Health Administration, United States Department of Transportation, and the Pennsylvania Public Utility Commission Bureau of Gas Safety already administer and enforce safety standards and practices for the natural gas industry. These agencies provide safety oversight based upon existing federal and state regulations. Moreover, inspectors for these agencies are experts in their respective fields and are best suited to inspect/audit a workplace and advise the employer regarding safety and health issues and compliance with the regulations. The proposed regulations in Chapter 129 conflict with the authority of other state and federal agencies with respect to compliance issues, particularly the Occupational Health & Safety Administration and the United States Department of Labor.

Under the proposed language in Chapter 129, Pennsylvania is attempting to implement occupational safety and health standards for self-insured companies such as National Fuel. The Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq.* ("OSHA") provides that a state may exercise jurisdiction over an occupational safety or health issue for which a federal standard has not been established. However, in order to assume responsibility for the development and enforcement therein of any occupational safety and health standards which have been addressed by the federal regulations, a state must submit a state plan to the United States Secretary of Labor. See, 29 U.S.C. § 667. Until such plan is approved, the United States Department of Labor maintains jurisdiction over all occupational safety and health matters. Because Pennsylvania has not submitted a plan, all occupational safety and health issues arising in Pennsylvania are subject to federal jurisdiction.

Without an approved state plan, Pennsylvania agencies do not have the authority to audit or investigate an employer's safety methods and programs. This power rests with the United States Department of Labor. Additionally, the federal standards for occupational safety and health are quite extensive (containing about 659 separate rules) and include numerous provisions regarding training and safety program implementation, which all Pennsylvania employers are already subject to. See generally, 29 C.F.R. §§ 1900 *et seq.* Reviewing the proposed "program requirements" of § 129.402, reveals numerous references to standards that are already addressed in the OSHA regulations. As stated above, a state without an approved plan may not develop or enforce safety and health standards established under OSHA. Therefore, to the extent Chapter 129 is attempting to grant the Pennsylvania Bureau of Workers' Compensation the authority to define and/or develop an "adequate accident and illness prevention program" for an employer, it is usurping federal jurisdiction and power, and will result in OSHA preempting 77 P. S. §§ 1038.1 and 1038.2 and Chapter 129. Pennsylvania may not circumvent the formality and expense of implementing an OSHA State Plan by enacting occupational safety and health regulations under the guise of workers' compensation law.

II. GRANDFATHER PROVISION

Chapter 129, Subchapter E, Accident and Illness Prevention Services Providers ("AIPSP") Requirements, if enacted, would impose strict requirements on employees and contractors that provide accident and illness prevention services. While we agree that accident and illness providers should be qualified, we disagree with the proposed regulations' failure to approve or give credit to experienced safety professionals who do not possess formal educational degrees or professional association credentials. Subchapter E does not contain a "grandfather" provision for such individuals, and it fails to grant credit for numerous years of experience. Ironically, the authors of Chapter 129 permitted the grandfathering of some 500 individuals from the proposed AIPSP requirements by way of a one-time filing, which recognized those employees with long standing safety experience. The Department of Labor and Industry allowed the grandfathering prior to the adoption of these proposed regulations based upon the following

statutory language: the insurer or self-insured employer "pursuant to its responsibilities under this section shall employ or otherwise make available qualified accident and illness prevention personnel. Such personnel shall meet the qualifications set forth in regulations issued by the department." See, 77 P.S. § 1038.1 (a) and (b). By permitting grandfathering, the Department of Labor and Industry obviously interpreted "qualified accident and illness prevention personnel" to include those with numerous years of experience. Therefore, the new regulation should be consistent with this past practice and interpretation. Furthermore, it is unfair to not qualify those highly experienced safety professionals (and their employers) who may have failed to apply for the grandfathered AIPSP experience designation offered by the Department of Labor and Industry, due to lack of publicity or because they couldn't predict what the regulations were going to require. Therefore, in order for it to be approved, Subchapter E must contain a grandfather provision, otherwise, the double standard proposed by the Department of Labor and Industry will force many employers to pay substantial sums of money in order to train and certify their already experienced safety professionals in practices that they currently perform or perhaps pioneered.

In closing, we would like to thank you for the opportunity to present these comments for your consideration prior to the upcoming meeting of the IRRC on April 19, 2001. Additionally, we ask you to please share these comments with the members of the IRRC board prior to the upcoming meeting.

If you need any clarification on the issues raised in these comments, please contact us at 814-871-8100.

Very truly yours,

Henry L. Martin
Christopher M. Trejchel, Esquire

CODE OF FEDERAL REGULATIONS
TITLE 29--LABOR
SUBTITLE B--REGULATIONS RELATING TO LABOR
CHAPTER XVII--OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DEPARTMENT OF LABOR
PART 1910--OCCUPATIONAL SAFETY AND HEALTH STANDARDS
SUBPART A--GENERAL

Current through March 6, 2001; 66 FR 13635

§ 1910.1 Purpose and scope.

(a) Section 6(a) of the Williams-Steiger Occupational Safety and Health Act of 1970 (84 Stat. 1593) provides that "without regard to chapter 5 of title 5, United States Code, or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this Act and ending 2 years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees." The legislative purpose of this provision is to establish, as rapidly as possible and without regard to the rule-making provisions of the Administrative Procedure Act, standards with which industries are generally familiar, and on whose adoption interested and affected persons have already had an opportunity to express their views. Such standards are either (1) national consensus standards on whose adoption affected persons have reached substantial agreement, or (2) Federal standards already established by Federal statutes or regulations.

(b) This part carries out the directive to the Secretary of Labor under section 6(a) of the Act. It contains occupational safety and health standards which have been found to be national consensus standards or established Federal standards.

<General Materials (GM) - References, Annotations, or Tables>

29 C. F. R. § 1910.1

29 CFR § 1910.1

END OF DOCUMENT

2001 APR 16 9:00
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-CITE-

29 USC Sec. 657 01/23/00

-EXPCITE-

TITLE 29 - LABOR

CHAPTER 15 - OCCUPATIONAL SAFETY AND HEALTH

-HEAD-

Sec. 657. Inspections, investigations, and recordkeeping

-STATUTE-

(a) Authority of Secretary to enter, inspect, and investigate places of employment; time and manner

In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized -

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee.

(b) Attendance and testimony of witnesses and production of evidence; enforcement of subpoena

In making his inspections and investigations under this chapter the Secretary may require the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid

the same fees and mileage that are paid witnesses in the courts of the United States. In case of a contumacy, failure, or refusal of any person to obey such an order, any district court of the United States or the United States courts of any territory or possession, within the jurisdiction of which such person is found, or resides or transacts business, upon the application by the Secretary, shall have jurisdiction to issue to such person an order requiring such person to appear to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question, and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(c) Maintenance, preservation, and availability of records; issuance of regulations; scope of records; periodic inspections by employer; posting of notices by employer; notification of employee of corrective action

(1) Each employer shall make, keep and preserve, and make available to the Secretary or the Secretary of Health and Human Services, such records regarding his activities relating to this chapter as the Secretary, in cooperation with the Secretary of Health and Human Services, may prescribe by regulation as necessary or appropriate for the enforcement of this chapter or for developing information regarding the causes and prevention of occupational accidents and illnesses. In order to carry out the provisions of this paragraph such regulations may include provisions requiring employers to conduct periodic inspections. The Secretary shall also issue regulations requiring that employers, through posting of notices or other appropriate means, keep their employees informed of their protections and obligations under this chapter, including the provisions of applicable standards.

(2) The Secretary, in cooperation with the Secretary of Health and Human Services, shall prescribe regulations requiring employers

to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job.

(3) The Secretary, in cooperation with the Secretary of Health and Human Services, shall issue regulations requiring employers to maintain accurate records of employee exposures to potentially toxic materials or harmful physical agents which are required to be monitored or measured under section 655 of this title. Such regulations shall provide employees or their representatives with an opportunity to observe such monitoring or measuring, and to have access to the records thereof. Such regulations shall also make appropriate provision for each employee or former employee to have access to such records as will indicate his own exposure to toxic materials or harmful physical agents. Each employer shall promptly notify any employee who has been or is being exposed to toxic materials or harmful physical agents in concentrations or at levels which exceed those prescribed by an applicable occupational safety and health standard promulgated under section 655 of this title, and shall inform any employee who is being thus exposed of the corrective action being taken.

(d) Obtaining of information

Any information obtained by the Secretary, the Secretary of Health and Human Services, or a State agency under this chapter shall be obtained with a minimum burden upon employers, especially those operating small businesses. Unnecessary duplication of efforts in obtaining information shall be reduced to the maximum extent feasible.

(e) Employer and authorized employee representatives to accompany Secretary or his authorized representative on inspection of workplace; consultation with employees where no authorized

employee representative is present

Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) of this section for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.

(f) Request for inspection by employees or representative of employees; grounds; procedure; determination of request; notification of Secretary or representative prior to or during any inspection of violations; procedure for review of refusal by representative of Secretary to issue citation for alleged violations

(1) Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in

accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

(2) Prior to or during any inspection of a workplace, any employees or representative of employees employed in such workplace may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this chapter which they have reason to believe exists in such workplace. The Secretary shall, by regulation, establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation with respect to any such alleged violation and shall furnish the employees or representative of employees requesting such review a written statement of the reasons for the Secretary's final disposition of the case.

(g) Compilation, analysis, and publication of reports and information; rules and regulations

(1) The Secretary and Secretary of Health and Human Services are authorized to compile, analyze, and publish, either in summary or detailed form, all reports or information obtained under this section.

(2) The Secretary and the Secretary of Health and Human Services shall each prescribe such rules and regulations as he may deem necessary to carry out their responsibilities under this chapter, including rules and regulations dealing with the inspection of an employer's establishment.

(h) Use of results of enforcement activities

The Secretary shall not use the results of enforcement activities, such as the number of citations issued or penalties assessed, to evaluate employees directly involved in enforcement activities under this chapter or to impose quotas or goals with

regard to the results of such activities.

-SOURCE-

(Pub. L. 91-596, Sec. 8, Dec. 29, 1970, 84 Stat. 1598; Pub. L. 96-88, title V, Sec. 509(b), Oct. 17, 1979, 93 Stat. 695; Pub. L. 105-198, Sec. 1, July 16, 1998, 112 Stat. 640.)

-MISC1-

AMENDMENTS

1998 - Subsec. (h). Pub. L. 105-198 added subsec. (h).

-CHANGE-

CHANGE OF NAME

''Secretary of Health and Human Services'' substituted for ''Secretary of Health, Education, and Welfare'' in subsecs. (c), (d), and (g) pursuant to section 509(b) of Pub. L. 96-88 which is classified to section 3508(b) of Title 20, Education.

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 667, 669, 670, 673 of this title; title 2 section 1341; title 3 section 425.

2001 APR 16 AM 9:01

REVIEW COMMISSION

-CITE-

29 USC Sec. 651 01/23/00

-EXPCITE-

TITLE 29 - LABOR

CHAPTER 15 - OCCUPATIONAL SAFETY AND HEALTH

-HEAD-

Sec. 651. Congressional statement of findings and declaration of purpose and policy

-STATUTE-

(a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources -

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under this chapter;

(4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

(5) by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

(6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

(8) by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

(9) by providing for the development and promulgation of occupational safety and health standards;

(10) by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition;

(11) by encouraging the States to assume the fullest

responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this chapter, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith;

(12) by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this chapter and accurately describe the nature of the occupational safety and health problem;

(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

-SOURCE-

(Pub. L. 91-596, Sec. 2, Dec. 29, 1970, 84 Stat. 1590.)

-REFTEXT-

REFERENCES IN TEXT

This chapter, referred to in subsec. (b)(3), (11), and (12), was in the original ''this Act'', meaning Pub. L. 91-596, Dec. 29, 1970, 84 Stat. 1590, as amended. For complete classification of this Act to the Code, see Short Title note set out under this section and Tables.

-MISC2-

EFFECTIVE DATE

Section 34 of Pub. L. 91-596 provided that: ''This Act (enacting this chapter and section 3142-1 of Title 42, The Public Health and Welfare, amending section 553 of this title, sections 5108, 5314, 5315, and 7902 of Title 5, Government Organization and Employees, sections 633 and 636 of Title 15, Commerce and Trade, section 1114 of Title 18, Crimes and Criminal Procedure, and section 1421 of

former Title 49, Transportation, and enacting provisions set out as notes under this section and section 1114 of Title 18) shall take effect one hundred and twenty days after the date of its enactment (Dec. 29, 1970).''

SHORT TITLE OF 1998 AMENDMENT

Pub. L. 105-197, Sec. 1, July 16, 1998, 112 Stat. 638, provided that: ''This Act (amending section 670 of this title) may be cited as the 'Occupational Safety and Health Administration Compliance Assistance Authorization Act of 1998'.''

SHORT TITLE

Section 1 of Pub. L. 91-596 provided: ''That this Act (enacting this chapter and section 3142-1 of Title 42, The Public Health and Welfare, amending section 553 of this title, sections 5108, 5314, 5315, and 7902 of Title 5, Government Organization and Employees, sections 633 and 636 of Title 15, Commerce and Trade, section 1114 of Title 18, Crimes and Criminal Procedure, and section 1421 of former Title 49, Transportation, and enacting provisions set out as notes under this section and section 1114 of Title 18) may be cited as the 'Occupational Safety and Health Act of 1970'.''

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 671 of this title.

Search USC, About Database, Download USC, Classification Tables, Codification

2001 APR 16 AM 9:01
REVIEW COMMISSION

-CITE-

29 USC Sec. ***667*** 01/23/00

-EXPCITE-

TITLE 29 - LABOR

CHAPTER 15 - OCCUPATIONAL SAFETY AND HEALTH

-HEAD-

Sec. 667. State jurisdiction and plans

-STATUTE-

(a) Assertion of State standards in absence of applicable Federal standards

Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

(b) Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards

Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

(c) Conditions for approval of plan

The Secretary shall approve the plan submitted by a State under subsection (b) of this section, or any modification thereof, if such plan in his judgment -

(1) designates a State agency or agencies as the agency or agencies responsible for administering the plan throughout the

State,

(2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 655 of this title which relate to the same issues, and which standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce,

(3) provides for a right of entry and inspection of all workplaces subject to this chapter which is at least as effective as that provided in section 657 of this title, and includes a prohibition on advance notice of inspections,

(4) contains satisfactory assurances that such agency or agencies have or will have the legal authority and qualified personnel necessary for the enforcement of such standards,

(5) gives satisfactory assurances that such State will devote adequate funds to the administration and enforcement of such standards,

(6) contains satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is as effective as the standards contained in an approved plan,

(7) requires employers in the State to make reports to the Secretary in the same manner and to the same extent as if the plan were not in effect, and

(8) provides that the State agency will make such reports to the Secretary in such form and containing such information, as

the Secretary shall from time to time require.

(d) Rejection of plan; notice and opportunity for hearing

If the Secretary rejects a plan submitted under subsection (b) of this section, he shall afford the State submitting the plan due notice and opportunity for a hearing before so doing.

(e) Discretion of Secretary to exercise authority over comparable standards subsequent to approval of State plan; duration; retention of jurisdiction by Secretary upon determination of enforcement of plan by State

After the Secretary approves a State plan submitted under subsection (b) of this section, he may, but shall not be required to, exercise his authority under sections 657, 658, 659, 662, and 666 of this title with respect to comparable standards promulgated under section 655 of this title, for the period specified in the next sentence. The Secretary may exercise the authority referred to above until he determines, on the basis of actual operations under the State plan, that the criteria set forth in subsection (c) of this section are being applied, but he shall not make such determination for at least three years after the plan's approval under subsection (c) of this section. Upon making the determination referred to in the preceding sentence, the provisions of sections 654(a)(2), 657 (except for the purpose of carrying out subsection (f) of this section), 658, 659, 662, and 666 of this title, and standards promulgated under section 655 of this title, shall not apply with respect to any occupational safety or health issues covered under the plan, but the Secretary may retain jurisdiction under the above provisions in any proceeding commenced under section 658 or 659 of this title before the date of determination.

(f) Continuing evaluation by Secretary of State enforcement of approved plan; withdrawal of approval of plan by Secretary; grounds; procedure; conditions for retention of jurisdiction by

State

The Secretary shall, on the basis of reports submitted by the State agency and his own inspections make a continuing evaluation of the manner in which each State having a plan approved under this section is carrying out such plan. Whenever the Secretary finds, after affording due notice and opportunity for a hearing, that in the administration of the State plan there is a failure to comply substantially with any provision of the State plan (or any assurance contained therein), he shall notify the State agency of his withdrawal of approval of such plan and upon receipt of such notice such plan shall cease to be in effect, but the State may retain jurisdiction in any case commenced before the withdrawal of the plan in order to enforce standards under the plan whenever the issues involved do not relate to the reasons for the withdrawal of the plan.

(g) Judicial review of Secretary's withdrawal of approval or rejection of plan; jurisdiction; venue; procedure; appropriate relief; finality of judgment

The State may obtain a review of a decision of the Secretary withdrawing approval of or rejecting its plan by the United States court of appeals for the circuit in which the State is located by filing in such court within thirty days following receipt of notice of such decision a petition to modify or set aside in whole or in part the action of the Secretary. A copy of such petition shall forthwith be served upon the Secretary, and thereupon the Secretary shall certify and file in the court the record upon which the decision complained of was issued as provided in section 2112 of title 28. Unless the court finds that the Secretary's decision in rejecting a proposed State plan or withdrawing his approval of such a plan is not supported by substantial evidence the court shall affirm the Secretary's decision. The judgment of the court shall be subject to review by the Supreme Court of the United States upon

certiorari or certification as provided in section 1254 of title 28.

(h) Temporary enforcement of State standards

The Secretary may enter into an agreement with a State under which the State will be permitted to continue to enforce one or more occupational health and safety standards in effect in such State until final action is taken by the Secretary with respect to a plan submitted by a State under subsection (b) of this section, or two years from December 29, 1970, whichever is earlier.

-SOURCE-

(Pub. L. 91-596, Sec. 18, Dec. 29, 1970, 84 Stat. 1608.)

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 670, 671a, 672 of this title; title 7 section 1942.

KEITH D. LESSNER
Vice President – Safety and Environmental
klessner@allianceai.org

RECEIVED
2000 AUG 28 AM 8:38
INDEPENDENT REGULATORY
REVIEW COMMISSION

August 23, 2000

Mr. Len Negley
Chief
Health and Safety Division
Bureau of Workers' Compensation
1171 S. Cameron Street
Room 324
Harrisburg, Pennsylvania 17104-2501

Original: 2038

Dear Mr. Negley:

Re: Final Rulemaking – Chapter 129, Workers' Compensation Health and Safety

The Alliance of American Insurers applauds the Department of Labor and Industry's decision to withdraw the final-form regulation implementing the health and safety program. We believe this decision provides an opportunity to fully explore optimal ways to design a program that protects workers and lower workers compensation costs. Our association supports workplace safety public policy that is efficient, fair and most important, effective. The content and form of regulations that implement the safety provisions of Article X will be a primary determinant of law's impact. We believe the challenge of going beyond statutory requirement to structure a program that meets statutory requirements and at the same time improves workplace safety is worth the extra effort.

Over the past seven years, the Alliance has appreciated the Department of Labor and Industry's willingness, and the opportunities provided us, to participate in discussions, meetings and public hearings dealing with the safety provisions of Act 44. The Department has made significant progress in developing rules to implement statutory requirements fairly, efficiently and effectively. However, the draft final form regulations released August 26, 2000 still contained two flaws which, if not corrected, will stand in the way of implementing a successful program.

<u>The most significant impediment to a successful program is the Department's intention to regulate all insurance loss control services, regardless of whether services are requested or provided voluntarily</u>. Regulating all insurance loss control services broadens the program to address issues which do not present legitimate public policy problems; dramatically increases program costs for the state, insurers, and employers with little promise of additional benefit, and is not required by statute.

3025 Highland Parkway, Suite 800 • Downers Grove, Illinois 60515-1289
tel: 630.724.2138 • *fax:* 630.724.2190 • www.allianceai.org

A strict reading of the draft rule limits the Department's regulatory control to only the loss control services insurers provide on request. The Department's comments and audit procedures proposed in the regulation, however, make clear the Department's intention to regulate all services insurers provide. Section 129.102 (2) describes the services an insurer must maintain and Section 129.102(3)(i) describes the services an insurer must provide. Both sections define services as those a policyholder's requests or as what an insurer determines a policyholder needs. We read the "or" in this rule to mean one or the other. Not, one in certain cases and the other in different cases. The Department, however, does not concur. In the "Response to Comments" section of the draft rule it is noted that comments were received proposing that the capacity to maintain services should apply only to policyholders requesting services. The Department responded by noting that "... the obligation to maintain or provide accident and illness prevention services is interpreted by the Department as requiring proactive action by insurers in the review, analysis and proposal of preventive corrective actions whether or not services are requested." Further, "...it is the Department's interpretation that the determination of the 'adequacy' of the accident and illness prevention services and programs also requires an examination of not only of policyholder requests, but proactive insurer actions to address client exposures and to recommend or implement corrective actions." This Department's expansive interpretation of the statute is problematic for the following reasons

The draft rules do not tell insurers when or how they believe insurers should engage in proactive actions to address client exposures when services are not requested. If the Department's criterion for determining the adequacy of services voluntarily provided is "the insurer's determination of the policyholders' operational requirements" (as stated in the draft), the insurer not the Department determines adequacy and there is no grounds for the Department to regulate. If this is not the case, does the Department expect insurers to provide all the services described in Section 129.102(3)(ii) to all policyholders? Some of the services to all policyholders? Some of the services to some policyholders? The regulations cannot be assessed without the Department describing what they expect insurers to provide to policyholders that have not requested services.

Regulating the services insurers voluntarily provide to their policyholders is an inappropriate public sector interference in a voluntary agreement between private parties where no issues are in dispute and where there is no public value to be enhanced. If a policyholder believes they are entitled to more services a simple request o triggers regulation. A legitimate public policy purpose is served by requiring insurers to provide safety services to policyholders who wish to use, but do receive services from their insurer. These policyholders are likely to use the services provided to improve workplace safety. The same cannot be said of requiring insurers to provide services that the Department believes to be adequate if the policyholder wants fewer or different services. Insurers cannot coerce their

policyholders to use the services they provide. Requiring insurers to provide services that will not be used does not advance workplace safety.

Regulating the services insurer voluntarily provide requires spending public and private resources to make certain that insurers provide services which policyholders do not particularly wish to receive, and, therefore, are not likely to use. Broadening compliance and reporting to cover all of the services insurers provide increases the cost of implementing the program for the state, insurers and employers. Safety improvements, at best, can only be minimal. Additional implementation costs to cover all services will be a significant share of program costs. The likely outcome of this expansive regulation will be to dilute compliance for requested services, and therefore the effectiveness of addressing the legitimate public policy problem of insuring those policyholder who want and will use service receive them.

The statute is sufficiently ambiguous to allow alternative interpretations, and thereby enable the Department to select the interpretation that provides the greatest assurance of achieving positive results. The statute requires that the services which must be maintained or provided shall be adequate to furnish accident prevention required by the nature of either 1) the insurer's business or 2) the insurer's policyholders' operations. The nature of an insurer's business may include providing safety services which the insurer believes will assist a policyholder in reducing workers' compensation costs but most certainly does not include providing services which the policyholder does not intend to use. Further, the Department's interpretation that the insurer should proactively seek to identify policyholders' unmet needs is satisfied without regulating voluntary services by notify all policyholders of the availability of services upon request. The legislature has left the Department sufficient discretion to structure a manageable program that addresses a public policy problem at reasonable cost.

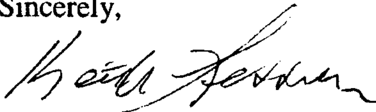
We encourage the Department to redefine service requirements to exclude voluntarily provide services and thereby limit audits to only those services that are requested. This is the single most important step the Department can take in structuring a realistic, cost-effective program to utilize the insurance mechanism to address a public policy problem.

<u>The second flaw that needs to be addressed in the draft regulations is the inappropriate shifting of responsibility for implementing and administering safety program components from the employer to the insurer.</u> The parameters of an insurer's ability to promote workplace safety are defined by the context of the insurance policy. The insurer's role is different than the employer's role. Insurers provide advice, counsel and assistance. Insurers cannot allocate the employer's resources not control the employer's work practices. As a result, insurers cannot be directly responsible for implementing and administering a safety program, or parts of a safety program. Section 129.102(3)(ii)

defines the services that an insurer must provide to include a survey and specific safety mitigations that include industrial hygiene services, industrial health services, training programs and hazard abatement consultation needed as the result of new equipment or material. The first two of these mitigations appropriately qualify required services by establishing an obligation to provide or propose corrective action. The last two do not. The role of the insurer is the same for all four activities. For both training and hazard abatement consultations, the insurer should be required to provide or propose the training or the consultations.

Promulgating regulations to regulate insurance safety services at first blush may seem to be straightforward. However, in practice the ambiguities and contradictions inherent in the nature of safety and particularly of safety in the context of an insurance policy, make this a difficult task.. Pennsylvanians will benefit from adopting regulations that support a program that can work and that can work at reasonable costs. Attached are changes to the July 26, 2000 final form regulations that address the concerns we propose.

Sincerely,



Keith Lessner
Vice President-Safety and Environmental

KDL:jar
Attachments

Copies to: James White
Neil Malady
Michael McCann
Robert Nyce
Richard Thompson
William Carney

ALLIANCE OF AMERICAN INSURERS
PROPOSED CHANGES TO FINAL FORM REGULATION
CHAPTER 129, WORKERS' COMPENSATION HEALTH AND SAFETY
(8/1/00)

1. 129.102 (3) (i)

An insurer shall provide accident and illness prevention services to policyholders who request them ~~or based on the insurer's determination of the policyholders' operational requirements~~.

2. 129.102(3)(ii)(D)

Providing or proposing ~~A~~accident and illness prevention training programs which may include training for safety committee members as outlined under Subchapter F.

3. 129.102(3)(ii)(E)

Providing or proposing ~~C~~consultations regarding specific safety and health problems and hazard abatement programs and techniques, as caused by the introduction of new equipment or new materials.

4. 129.105(a) Revise the LIBC-210I referred to in this section as follows:
   Item 5. Number of Policyholders by Premium Size Requesting and that Received Accident and Illness Prevention Services:
   Item 11 Delete
   Item 12. Check the Type(s) of Accident and Illness Prevention Services Provided upon Request and Performed by Insurer Staff and/or Contracted Personnel:
   Item 14 Delete
   Item 15 Delete

129.108

Insurers shall maintain records of accident and illness prevention services requested by policyholders for the most complete current calendar year and 2 preceding consecutive calendar years which include:

(1) The dates of requests for services
(2) The services requested or problems presented.
(3) Reports from any site inspections performed.
(4) Any ~~O~~other service reports including proposed corrective actions.

(5) The dates on which services were provided ~~and policyholder's responses to proposed corrective actions~~.

(6) The results of any industrial hygiene and health surveys and consultations.

(7) Any ~~A~~accident and illness prevention training conducted.

~~(8) Documentation supporting the funds expended for the delivery of accident and illness prevention services.~~

~~(9)~~(8) Evidence of the effectiveness and accomplishments of accident and illness prevention services.

129.109(a)

The Bureau may audit ~~an insurer's~~ the accident and illness prevention services an insurer is required to provide at least once every 2 years.

129.110(a)(2)

A ~~description of the type of accident and illness prevention services provided during the last completed calendar year and a~~ list of current insured employers/policyholders requesting services specifying name and premium size groupings which: receive services; requested but did not receive services; and have reported to the carrier that they have a certified workplace safety committee.

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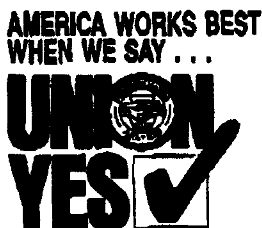


PENNSYLVANIA AFL-CIO

WILLIAM M. GEORGE
President

RICHARD W. BLOOMINGDALE
Secretary-Treasurer

RECEIVED
2000 AUG 21 PM 4:16

FAX

August 21, 2000

Sheilah A. Borne
Regulatory Coordinator/Legislative Affairs
Department of Labor and Industry
1713 Labor and Industry Building
Harrisburg, PA 17120

Re: Workers' Compensation Health and Safety Regulations

Dear Sheilah:

Thank you for your letter of August 14th, 2000. I am disappointed that the Department has decided to re-submit the Worker's Health and Safety Regulations "immediately" without the opportunity for input from organized labor or any other directly impacted organization of workers. We urge you to reconsider this decision for the purpose of getting the well-reasoned regulations in compliance with the law.

We are simply requesting a roundtable meeting with the affected stakeholders to discuss the issues outlined in our comments submitted to the Department and IRRC. As submitted we believe the regulations, although sound in many areas, show evidence of bias. We believe the Department's regulations should rise above the appearance of bias. This is particularly true where the Department has sought out the input of insurers and made no attempt to reach out to the parties for whom the regulations are intended to provide protection.

As published in the PA Bulletin regarding the Department's history in developing the regulations, the Department states:

> "From March through August 1994, the Department convened an ad hoc committee to obtain input regarding requirements for accident and illness prevention services providers. The committee included representatives from the academic, insurer, self-insured employer, healthcare provider and other communities. Recommendations included in the final committee report were utilized in compiling the list of credentials and requirement included in the September 1995 statement of policy. Additional comments received from members of the regulated community and the findings of subsequent research are reflected in these amendments.
>
> In September 1995, the Department called a series of three meetings with representatives of insurers, self-insured employers and group self-insurance funds respectively. Draft annual reports required under the health and safety provisions of Act 44 were reviewed at these sessions by the represented parties. Comments and suggestions were included in later report versions, draft copies of which were released to

all affected parties in April 1996. Recipients were asked to voluntarily complete and return these reports as part of a voluntary report field test. Final report drafts were mailed to members of the regulated community requesting completion and official filing with the Department as required by Act 44. Reports were sent to insurers on February 28, 1997, requesting return within 60 days. Favorable comments and responses to report format and content have been volunteered by affected parities.

In August 1996, in response to the passage of Act 57, the Department implemented procedures to renew the initial certification of employers. These amendments extended the one-time, 5% discount offered under Act 44 to a total of 5 years if, by affidavit, an employer attests to the continued operation of its certified committee according to Department criteria. Completed certification renewal affidavit were produced and mailed to employers commencing the August 23, 1996, due dates. To expedite renewal, affidavits are produced with all needed information completed, necessitating that employers only update data as required, and include a notarized signature before return for processing.

From April through June of 1997, the Department conducted official tests of the complete reporting and onsite auditing process with the assistance of three volunteer members from each of the three affected groups: licensed insurers: individual self-insured employers; and group self-insurance funds. Input from affected participants resulted in modification and revision to several areas of the process and information requirements.

Since the passage of Act 44 and Act 57, members of the Bureau have continued to participate in meetings with numerous professional organizations, safety and labor conferences and various seminars. At those meetings, the Bureau members described the Department's interpretation of the health and safety provisions and processes that have been implemented to effect them. This participation has also provided an important vehicle for affected parties to comment and input.

At 29 Pa.B. 25 (June 19, 1999), the Department published the notice of proposed rulemaking, again inviting all interested parties to provide written comments to the Department regarding the Department's interpretation of Acts 44 and 57. As a result, the Department received comments from the following groups and individuals: Dr. Jasen M. Walker, CEC Associates, Inc.; John P. Halvorsen, Insurance Services Office, Inc.; George Ellis, Pennsylvania Coal Association; Peter N. Calcara, Professional Insurance Agents Association of Pennsylvania, Maryland, and Delaware; J. A. Hold and P. W. Nicholson, Consol, Inc.; John H. Cheffer, Travelers Property and Casualty; Daniel R. Tunnell, Pennsylvania Gas Association; Steven A. Bennett, American Insurance Association; and Samuel R. Marshall, The Insurance Federation of Pennsylvania. The

Department also received written comments from the Independent Regulatory Review Commission (IRRC), by means of a letter dated August 19, 1999.

This notice of final rulemaking supplants and further clarifies and expands upon the previous interpretation of Act 44 and Act 57 health and safety provisions provided in the notice of proposed rulemaking. In response to comments received, some changes have been made to previously published interpretation." **emphasis added**

This history shows (1) the Department was pro-active in convening meetings with insurers and, in some cases, employers, and (2) no similar effort was made to convene representatives of working men and women.

This history is one sided and a review of the final regulations demonstrates that <u>all</u> final revisions were made to benefit insurers and to some extent employers. The intent of rule making process is to take input from all parties and reach a balanced result. This is part of the concept of the Independent Regulatory Review Act.

In response to your letter, we do believe that a meeting is still necessary and will gladly participate.

We believe that the most effective meeting would be with all affected parties in a roundtable session to clarify each issue and suggest to the Department regulations that meet the intent and language of Act 44 and Act 57.

Thank you.

Sincerely,

David H. Wilderman
Assistant to the President, Director of Legislation

DHW/jv/UFCW-1776

cc: William M. George, President, PA AFL-CIO
Richard H. Bloomingdale, Secretary-Treasurer, PA AFL-CIO
Honorable Johnny J. Butler, Secretary, Labor and Industry
William Carney, Deputy Secretary, Labor and Industry
Richard Thompson, Director, Bureau of Workers' Compensation
Len Negley, Unit Manager
Stephen C. MacNett, Esquire
Robert Nyce, Executive Director, IRRC

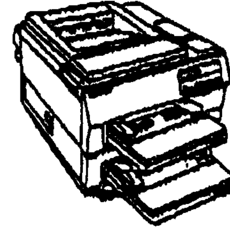
Honorable John McGinley, Jr., Chairman, IRRC
Honorable Arthur Coccodrilli, Commissioner, IRRC
Honorable Robert J. Harbison, III, Commissioner, IRRC
Honorable Alvin C. Bush, Vice Chairman, IRRC
Honorable John F. Mizner, Commissioner, IRRC
Honorable Robert J. Mellow, Minority Leader
Honorable William DeWeese, Minority Leader
Honorable Robert Belfanti, Minority Chair, House Labor Relations Committee
Irwin Aronson, Esquire
PA AFL-CIO Executive Council

PENNSYLVANIA AFL-CIO

WILLIAM M. GEORGE
President

RICHARD W. BLOOMINGDALE
Secretary-Treasurer

FAX



Original: 2038

RECEIVED
2000 AUG 21 PM 4:16
REVIEW COMMISSION

Date: August 21, 2000

TO: Robert E. Nyce, Ex Dir, IRRC

Fax Number: 783-2664

FROM: David N. Wilderman

Department: Legislation

Comments: RE: Workers' Compensation Health + Safety Regulations

FACSIMILE Transmission

There is/are 4 page(s) following this cover page.

Please call us if you have any questions:
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We can automatically receive transmissions 24 hours a day.

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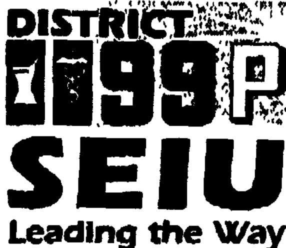

Service Employees International Union, AFL-CIO, CLC

THE HEALTH CARE WORKERS UNION

Original: 2038

Leading the Way

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President

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MEMORANDUM

Fax Communication: (717) 783-2664

TO: Robert Nyce, Executive Director, IRRC

FROM: Jeff Hunsicker, Political Program Director

DATE: August 8, 2000

RE: Workers' Compensation Health and Safety Regulations

RECEIVED
2000 AUG -8 AM 9:54
REVIEW COMMISSION

We are writing on behalf of the more than 15,000 health care workers represented by our Union. Our members work in nursing homes, hospitals, and state facilities and will be profoundly impacted by the Department of Labor and Industry's proposed Final Form Regulation on Workers' Compensation.

The Department's original Statement of Policy and draft regulations were well-balanced and reflected a positive approach promoting work place safety.

Following meetings between the Department, representatives from the insurance industry and employer associations, the regulations were significantly revised. Each of these revisions favor the insurance industry and/or employer. No unions were invited to meet with the Department before these revisions were adopted for Final Form Regulation on Workers' Compensation.

We ask that the IRRC reject the regulations or that action be deferred so that the Pennsylvania AFL-CIO and others representing working men and women can meet with the Department to discuss the regulations.

Thank you for considering our request.

/hk

cc: Thomas V. De Bruin, District 1199P President
Eileen Connelly, District Secretary-Treasurer
David Wilderman, Pennsylvania AFL-CIO Director of Legislation
file (2)

District Office
1402 South Atherton Street
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Harrisburg, PA 17102
(717) 238-3030
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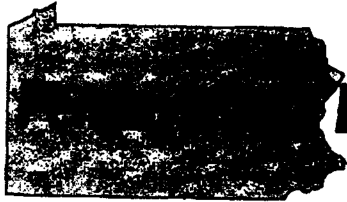

Building and Construction Trades Council
AFL-CIO
800 N. Third Street, Fourth Floor, Harrisburg, PA 17102-2527
(717) 233-5726 • FAX (717) 233-3112

RECEIVED
2000 AUG -8 AM 9:22
REVIEW COMMISSION

August 8, 2000

Original: 2038

Mr. Robert Nyce
Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown 2
333 Market Street
Harrisburg, PA 17101

Re: Department of Labor and Industry
Workers' Compensation Health and Safety Regulations

Dear Mr. Nyce:

Please be advised that this Council supports the comments submitted by the Pennsylvania AFL-CIO regarding the Department of Labor and Industry's proposed Final Form Regulations on Workers' Compensation.

We ask that you reject the regulations at this time or, in the alternative, refer action at this time giving the Pennsylvania AFL-CIO and others representing working men and women an opportunity to meet with the Department to discuss the regulations.

If you have any questions on our position on these Regulations, please do not hesitate to contact me.

Sincerely,

Glenn A. Schaeffer

Glenn A. Schaeffer
President

GAS/ca

Cc: William M. George, President PA AFL-CIO
Richard W. Bloomingdale, Secretary-Treasurer, PA AFL-CIO

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2000 AUG -8 AM 10: 20
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INCOMPLETE DRAFT 8/8/00

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

Dear Mr. Nyce:

Original: 2038

Re: Final Rulemaking – Chapter 129, Workers' Compensation Health and Safety

The Alliance of American Insurers is a national property and casualty insurance trade association representing over 300 companies. Our association supports workplace safety public policy that is efficient, fair and most important, effective. The content and form of regulations that are adopted to implement the safety provisions of Act 44 will be a primary determinant of law's impact. If we are equal to the challenge of meeting of structuring a program that both works and meets statutory requirements all parties benefit.

Over the past seven years, the Allaince has appreciated the Department of Labor and Industry's willingness, and the opportunity they have provided us, to participatein discussions, meetings and public hearings dealing with the safety provisions of Act 44. The Department has made significant progress in developing rules to implement statutory requirements fairly, efficiently and effectively. However, the draft final form regulations released August 26, 2000 still contain flaws which, if not corrected, will stand in the way of a successful program implementation.

<u>The most significant impediment to a successful program is the Department's intention to regulate all insurance loss control services, regardless of whether services are requested or provided voluntarily</u>. Regulating all insurance loss control services broadens the program to include addressing issues which do not present legitimate public policy problems; dramatically increases program costs for the state, insurers ,and employers; and is not required by statute.

A strict reading of the draft rule limits the Department's regulatory control to the loss control services insurers provide on request. The Department's comments and audit procedures, however, make clear their intention to regulate all services insurers provide. Section 129.102 (2) describes the services an insurer must maintain and Section 129.102(3)(i) describes the services an insurer must provide. Both sections define services as those a policyholder's requests or as those based on an insurer's evaluation of the policyholder's requirements. We read the "or" in this rule to mean one <u>or</u> the other. Not, one in certain cases <u>and</u> the other in different cases. The Department, however, in

the "Response to Comments" section of the draft rule notes that they received comments proposing that the capacity to maintain services should apply only to policyholders requesting services. They respond to this comment by noting that "... the obligation to maintain or provide accident and illness prevention services is interpreted by the Department as requiring proactive action by insurers in the review, analysis and proposal of preventive corrective actions whether or not services are requested." Further, "...it is the Department's interpretation that the determination of the 'adequacy' of the accident and illness prevention services and programs also requires an examination of not only of policyholder requests, but proactive insurer actions to address client exposures and to recommend or implement corrective actions." This Department's expansive interpretation of the statute is problematic for the following reasons

The draft rules provide no guidance on the Department's view of when or how insurers are to engage in proactive actions to address client exposures when services are not requests. If the Department's basis for determining the adequacy of services voluntarily provided is "the insurer's determination of the policyholders' operational requirements" (as stated in the draft), on what grounds does the Department challenge the insurer's determination? Does the Department expect insurers to provide all the services described in Section 129.102(3)(ii) to all policyholders? Some of the services to all policyholders? Some of the services to some policyholders? It is impossible to assess these regulations without the Department describing what they expect insurers to provide to policyholders who have not requested services.

Regulating the services insurers voluntarily provide to their policyholders is an inappropirate interference in a voluntary agreement between private parties where no issues are at dispute and where there is no public value at stake. Where issues are at dispute the policyholder merely needs to request services to trigger regulation. A legitimate public policy purpose is served by requiring insurers to provide safety services to policyholders who wish to use, but do receive services from their insurer. These policyholders are likely to use the services provided to improve workplace safety. The same cannot be said of requiring insurers to provide services which the Department believes to be adequate when the policyholder wants fewer or different services. Insurers cannot coerce their policyholders to use the services they provide. Workplace safety is not advanced by requiring insurers to provide services which a policyholder is not willing to use.

Regulating the services insurer voluntarily provide spends public and private resources for the purpose of making certain insurers provide services which

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FAX / TRANSMITTAL

To: Mary Lou Harris
Date: 8-8-00
Fax: 717 783 2664
Pages including this one: 4
From: Keith Lissner
Subject: Chapter 129, WC Health + Safety - Final Rulemaking

The documents accompanying this fax/transmittal contain confidential information belonging to the sender which is legally privileged. The information is intended only for use of the individual(s) or entity named above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, or distribution is strictly prohibited. If you received this fax/transmittal in error, please notify us immediately by telephone at the number below to arrange for the return of the documents to us. Thank you.

3025 Highland Parkway, Suite 800 - Downers Grove, Illinois 60515-1289
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The Insurance Federation of Pennsylvania, Inc.

1600 Market Street
Suite 1520
Philadelphia, PA 19103
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2000 AUG -8 AM 10: 42
REVIEW COMMISSION

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Danielle D. Witwer
Director of
Government Affairs

Original: 2038

August 8, 2000

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

Re: Chapter 129 - Workers' Compensation Health and Safety Regulation

Dear Mr. Nyce:

This is to recommend that the IRRC disapprove the final-form health and safety regulation submitted by the Department of Labor and Industry. This recommendation comes not just from the Insurance Federation, but from our national counterparts, the American Insurance Association, the Alliance and the National Association of Independent Insurers, and the combined members of those organizations.

Our objection is with the ambiguity in Sections 129.102(2) and (3)(i), setting forth the requirements for insurers to have, offer and provide accident and illness prevention services. The first subsection requires that insurers have the capacity to deliver those services "based upon anticipated policyholder requests for services or based upon an insurer's evaluation of policyholder requirements." The second subsection requires that insurers "shall provide accident and illness prevention services to policyholders who request them or based on the insurer's determination of the policyholders' operational requirements."

The problem is the "or" in both sections. The "ors" suggest that an insurer must have the capacity to provide and actually provide accident and illness prevention services even if a policyholder does not request them.

That requirement makes no sense. Nothing in Article X suggests such a duty. Further, it would be impractical, if not impossible, to fulfill that duty: How could an insurer, having notified a policyholder of the availability of these services (as required in Section 129.102(1)), provide them even if a policyholder, for whatever reason, declined them? How could an insurer charge for services a policyholder expressly rejected?

We raised this concern with the regulation when it was submitted in proposed form, and we recommended that insurers have the capacity to provide and provide only those services policyholders actually request. The Department itself seemed to at least sympathize with our concerns: In its preamble commenting on this recommendation, it states that it "is in general agreement with this interpretation."

In that preamble, however, the Department goes on to state that it wants "proactive action by insurers in the review, analysis and proposal of preventive corrective actions whether or not services are requested." Presumably, the "ors" in Sections 129.102(2) and (3)(i) reflect that. That, however, is an obligation that goes beyond Article X. It also leaves unanswered the question of what an insurer is to do when a policyholder rejects his offer to provide accident and illness services. How is the insurer to provide them and bill for them?

This problem could be effectively solved by changing those "ors" to "ands." That would fulfill the requisite of Article X: Insurers would be required to have capacity and actually provide accident and illness prevention services that a policyholder requests and that are suited to that policyholder's needs. The Department's concern that insurers be "proactive" in offering these services is still satisfied by Section 129.102(1), with its required notice.

In discussions with the Department, it has suggested that this added requirement - providing services that a policyholder does not request, even after being offered them - should not be a problem; it has suggested that insurers do this already. If that is true, it highlights the need to resolve the ambiguity created by the "ors" in these sections because insurers themselves do not believe they are doing this.

Article X requires that insurers have the ability to provide accident and illness prevention services. We believe that the bulk of this regulation adequately sets forth the standards for this. We also believe that the regulation achieves the intent of Article X, that these services be promoted with our policyholders - that is the purpose of the notice section.

But we do not believe Article X, either expressly or implicitly, requires insurers to provide these services even when a policyholder does not request them. That, however, is arguably the requirement of Sections 129.102(2) and (3)(i), and the regulation should be disapproved to allow this impractical ambiguity to be fixed.

Sincerely,

Samuel R. Marshall

C: Len E. Negley, Chief
Health and Safety Division
Bureau of Workers' Compensation

RECEIVED
2000 AUG -8 AM 10:42
REVIEW COMMISSION

FAX

INSURANCE FEDERATION OF PENNSYLVANIA
500 NORTH THIRD STREET
3RD FLOOR
HARRISBURG, PA 17101

Date: ______

Number of pages including cover sheet: ______

To: Robert Nyce	From: Sam Marshall
John Jewett	

TEL:	TEL: 215-665-0500
FAX:	FAX: 215-665-0540

REMARKS:

American Insurance Association

RECEIVED
2000 AUG -7 PM 2:41
REVIEW COMMISSION

August 7, 2000

Original: 2038

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

Dear Mr. Nyce:

Re: Final Rulemaking - Chapter 129, Workers' Compensation Health and Safety

The American Insurance Association welcomes the opportunity to comment on the Department of Labor & Industry's final regulations implementing the accident and illness prevention services provisions of the workers' compensation act.

AIA is a national trade association of more than 370 property and casualty insurers that write a major share of the workers' compensation insurance throughout the nation. In 1998 (the most recent year for which data is available), AIA companies wrote almost $700 million in workers' compensation premiums in Pennsylvania, representing more than 50% of the private market for workers' compensation. AIA has a long-standing interest in and support for the workers' compensation system. We are committed to a modern, effective workers' compensation system in Pennsylvania, one that provides a fair level of income support and necessary medical care for injured workers, at an affordable and stable price for employers. When there are problems with a state's workers' compensation program, we are dedicated to working with others who share this commitment to find remedies for these problems.

The motivations behind regulating the adequacy of insurers' loss control services are generally well-intentioned and represent goals that the insurance industry and the loss control profession support. The provision of quality, effective loss control services is in the insurer's self-interest. The policyholder can also

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Ramani Ayer *Chairman* | Robert C. Gowdy *Chairman Elect* | Bernard L. Hengesbaugh *Vice Chairman* | Robert P. Restrepo Jr. *Vice Chairman* | Robert E. Vagley *President*

benefit if it is committed to improving workplace safety and follows the recommendations of the loss control representative and, as a result, losses are reduced.

Although the Department's regulations are intended to foster workplace safety, some of the requirements regarding the provision of loss control services, record-keeping and reporting, and the audit process will not improve workplace safety, but will only serve to increase an insurer's costs of doing business--costs that ultimately may be shifted to employers in the Commonwealth. The regulations should be modified to clarify that the actual provision of loss control services to a particular policyholder is discretionary, not mandatory, and should be based on consultation by the insurer and the policyholder. In addition, onerous record-keeping requirements should be modified so that an insurer can devote its resources to providing appropriate and effective loss cost services, rather than complying with administrative issues that have no impact on workplace safety.

Following are our comments to the specific provisions of the draft regulations:

MAJOR ISSUES

Section 129.102(3)(ii)(A) On Site Surveys: This section would require insurers, in the event of "one or more imminent danger situations," to both inquire as to the corrective actions a policyholder has taken and propose further corrective actions if necessary. The requirement is too ambiguous because "imminent" is undefined and fails to provide a workable standard. Moreover, requiring insurers to make recommendations regarding "imminent" dangers would put them in the inappropriate role of acting as a surrogate governmental policing authority. If required to provide recommendations, what is the insurer's responsibility if the policyholder does not follow the recommendations, or if the problem is not fully resolved? If the insurer declines the risk due to the danger, is it still responsible for recommendations? Furthermore, there is no statutory authority for the requirement that insurers make recommendations if there is an "imminent danger situation." The language in ɜ129.102(3)(ii)(A) regarding "imminent danger situations" should be deleted in its entirety.

Section 129.102(3)(ii)(B) Industrial Hygiene Surveys: This section states that insurers shall provide or propose "corrective actions in the area of industrial hygiene

services as requested by the policyholder or as determined by the insurer to meet the policyholder's operational requirements, for example, air quality testing." This standard is both too far-reaching and too vague for industrial hygiene services. For example, industrial hygiene services should not be conducted when the exposures and controls, or lack thereof, have already been documented to the policyholder, but no action was taken or required. The industrial hygiene services should address reducing potential work-related illnesses, rather than the all-encompassing "policyholder's operational requirements." The section should be clarified to indicate that industrial hygiene surveys are discretionary with the insurer, based on joint consultation between the insurer and the policyholder to determine the potential exposures and whether the potential exposure would negatively impact work-related illnesses.

Section 129.102(3)(ii)(B) should be amended as follows:

"Providing or proposing corrective actions in the area of industrial hygiene services as requested by the policyholder ~~or as determined by the insurer to meet the policyholder's operational requirements, for example, air quality testing~~ as an appropriate response to workers' compensation illnesses or accidents."

Section 129.102(3)(ii)(C) Industrial Health Services: Section 129.102(3)(ii)(E) states that insurers shall provide industrial health services, such as health screenings, and substance abuse awareness programs. Loss control services are concerned with accident prevention at the workplace. Although it is in the best interests of both the policyholder and the insurer if the policyholder has a healthy work force, services such as health screenings and substance abuse programs are not the responsibility of workers' compensation insurers. The health services described in ϶129.102(3)(ii)(e) more appropriately belong in the jurisdiction of a human resources department. We therefore recommend that ϶129.102(3)(ii)(C) be deleted.

Section 129.102(3)(ii)(E) Consultations Regarding "Specific" Safety Problems: This section requires insurers to provide consultations regarding "specific" safety and health problems and hazard abatement programs and techniques, as caused by the introduction of new equipment or new materials. While it is common for insurers to make recommendations to their policyholders regarding workplace health and safety, we recommend that the word "specific" be deleted from the section. Loss

control services are designed to gain information for underwriting purposes on a policyholder's risk and, if appropriate, to provide assistance in the control and reduction of losses. Such services cannot possibly address each and every "specific" risk of a particular policyholder.

The portion of this section requiring insurers to identify a causal link between the introduction of new equipment or materials and specific safety and health problems places an impossible burden on the insurer. The insurer is not in a position to know more about a new material, process, or technique than its manufacturer or user. The insurer cannot be required to know all state of the art materials and processes, particularly if sufficient testing has not been conducted. The burden of such testing properly falls on the manufacturer, the ultimate user or a regulatory authority. Furthermore, there is no authority in §1001 of the act to impose this requirement on insurers.

Section 129.102(3)(ii)(G) should be amended as follows:

"Consultations regarding ~~specific~~ safety and health problems and hazard abatement programs and techniques~~, as caused by the introduction of new equipment or new materials~~."

Section 129.104(b) Service Providers' Qualifications: This section states that the Bureau may require the insurer to provide proof that the qualifications for accident and illness prevention services providers have been met by each individual offering such services. We would suggest that this requirement be met in the application process. In addition, this section should be interpreted to permit insurers to file a single affidavit certifying the qualifications of all loss control representatives providing services in the state. <u>This interpretation was agreed to by representatives of the Bureau during a May 1997 meeting with AIA staff and local counsel.</u> Requiring a single affidavit would promote far greater efficiency than requiring separate affidavits for each individual providing services, while still guaranteeing that an insurer's providers are qualified.

Section 129.109 Periodic Audits: Section 129.109 provides that the Bureau may audit the accident and illness prevention services of each licensed insurer at least once every two years to determine the adequacy of the insurer's services. While this language tracks the relevant statute (77 P.S. §1038.1), it is important to note

that this time frame is not mandatory. Insurers share the Bureau's interest in maintaining high-quality loss control services. Conducting audits of every insurer every two years, however, would appear to be an inefficient use of both the insurer's and the state's resources. Audits impose an administrative expense in the form of staff time and procedures for the insurer, as well as a drain on state resources to carry out the audits. Furthermore, the administrative costs and time needed to comply with the audits reduce the insurer's capability to provide effective loss control services. Rather than conducting audits on a two-year basis, audits should only take place if policyholders have filed complaints regarding an insurer, or if the Bureau becomes aware of potential problems with an insurer. Finally, if the failure to meet any requirement of the subchapter may occasion an audit, it is redundant to specify a particular type of violation (such as failure to file an AIPS by specified timeframes) as an audit trigger.

Section 129.109 should be amended as follows:

(a) "The Bureau may audit an insurer's accident and illness prevention services ~~at least once every two years~~ if the insurer fails to meet the requirements of this subchapter, or if there has been a pattern of policyholder complaints regarding the provision of loss control services.

~~(b) The Bureau may audit an insurer's accident and illness prevention services if the insurer fails to file an AIPS by specified timeframes or fails to meet the requirements of this subchapter.~~

~~(c)~~ (b) The notice of the audit will include the reasons for audit.

~~(d)~~ (c) At least 60 calendar days prior to an audit, the Bureau will notify the insurer in writing of the date on which the audit will occur."

Section 129.702 Accident and Illness Prevention Services Providers Requirements: Section 129.702 sets forth the requirements for accident and illness prevention services providers, including the mandate that such providers possess certain educational degrees or credentials in addition to at least two years of acceptable experience. The two-year experience requirement should be deleted because it will exacerbate the staffing problems of an already aging loss control profession. Prohibiting insurers from hiring recent college graduates and other

individuals who meet the educational or certification requirements will eventually lead to a serious shortage in qualified providers of accident and illness prevention services. The two-year experience requirement also harms the state in the sense that Pennsylvania graduates will be forced to leave the state to seek comparable positions. Possible solutions include (i) permitting insurers to hire these otherwise qualified individuals provided that they work under the direction of, or have their work reviewed by, a qualified provider; and (ii) restricting providers with less than two years experience to smaller policyholder accounts (e.g., those with premiums below $100,000 or loss ratios below 70%).

OTHER ISSUES

Section 129.102(2) Requirements to Maintain Accident and Illness Prevention Services: Section 129.102 sets forth the accident and illness prevention services to be maintained by the insurer. The regulations should clarify that it is not mandatory to provide the services for every policyholder. Instead, the provision of loss control services should be at the discretion of the insurer and the policyholder after joint consultation of the wants and needs of the policyholder. The availability of an insurer's accident and illness prevention services should be determined solely by whether it has the capacity to respond to requests for services by its policyholders. The regulation defines "capacity" with reference to services the insurer anticipates the policyholder will request, or to the insurer's evaluation of policyholder requirements. The anticipation of policyholder requests component is too arbitrary and speculative a standard, as a policyholder may well request services that are unreasonable in light of the insurer's evaluation of policyholder requirements.

Section 129.102(2) should be amended as follows:

"Capacity to provide services is defined as an insurer having ~~established~~ means<u>, as established in general protocols applicable to all policyholders,</u> to deliver services such as those listed in paragraph (3) of this section based upon ~~anticipated policyholder requests for services or based upon~~ an insurer's evaluation of policyholder requirements."

Section 129.102(3)(i) Requirements to Provide Accident and Illness Prevention Services: As stated in the comments to §129.102(2), the actual provision of loss control services should be at the discretion of the insurer after evaluating the wants

and needs of the policyholder. The imposition of a standard of reasonableness on policyholder requests for services is warranted in light of the statutory limitation (found in 77 P.S. э1038.1) that services only be adequate to furnish accident prevention required by the nature of either an insurer's business or its policyholders' operations.

Section 129.102(3)(i) should be amended as follows:

"An insurer shall provide services to policyholders who request them or based on the insurer's determination of the policyholder's operational requirements. Services shall be commensurate with the size, hazard, and experience of the employer, and shall be provided through an insurer's own or contracted staff who meets requirements established by the Department in Subchapter E.

Section 129.102(3)(ii) Requirements to Provide Accident and Illness Prevention Services: This provision lists certain loss control services, and could be interpreted to require an insurer to provide each identified loss control service to all policyholders. As stated in the comments to э129.102(2) and э129.102(3)(i), the actual provision of loss control services should be discretionary, based on the reasonable request of the policyholder, the nature of the insurer's business, or the nature of its policyholders' operations.

Section 129.102(3)(ii) should be amended as follows:

"Services may include the following:"

Section 129.108 Recordkeeping Requirements: Section 129.108 sets forth extensive recordkeeping requirements for accident and illness prevention services. Recordkeeping requirements often lead to a misallocation of loss control resources - instead of providing employers with accident and illness prevention services, insurers must spend more time filling out and maintaining documents for state officials. Costs are increased for both the insurer and the state, without a reduction in workplace injuries. Recordkeeping requirements, thus, should be kept to a minimum, and there should not be demands for non-relevant, redundant or overly burdensome information.

The regulation could be interpreted to require that records be maintained for all policyholders. However, records should be maintained only for those policyholders that request services. The section should be amended to clarify that records must be retained for those policyholders requesting loss control services.

In addition, subsection 129.108(8), which requests documentation supporting the funds expended for the delivery of accident and illness prevention services, exceeds the statutory mandate that the insurer submit information on the amount of money spent on accident prevention services.

Section 129.108 should be amended as follows:

"Insurers shall maintain records of accident and illness prevention services by policyholders that requested such services for the most current calendar year and two preceding consecutive calendar years which include:

(8) ~~Documentation supporting the funds expended for the delivery of~~ The amount of money spent by the insurer on accident and illness prevention services.

Section 129.110(a) Pre-Audit Exchange of Information: Section 129.110(a) sets forth the information the insurer must provide the Bureau at least 45 days prior to an audit. Some of the information requested is not relevant to the audit. For example, §129.110(a)(2) would require a list of all policyholders that have reported to the insurer that they have a certified workplace safety committee. Loss control services provided by the insurer and workplace safety committees implemented by the employer and employees are separate and distinct functions. Compiling information on which employers have safety committees would be an unnecessary administrative expense that does not relate to the quality of loss control services provided by the insurer.

In addition, many of the information requests in §129.110(a) are redundant. Section 129.110(a)(2) would require the insurer to provide a description of the type of accident and illness prevention services provided during the preceding year. This information would have been provided already in the annual report. Similarly, the information required in §129.110(a)(3) regarding the name, address, qualifications, and status of each person acting as an accident and illness prevention services provider likewise would have been contained in the annual report.

Section 129.110(a) should be amended as follows:

"At least 45 calendar days prior to an audit, the insurer shall provide the Bureau with:

(2) ~~A description of the type of accident and illness prevention services provided during the last completed calendar year and~~ A list of current insured employers/policyholders specifying name and premium size grouping which: received services~~;~~ or requested but did not receive services~~; and have reported to the carrier that they have a certified workplace safety committee~~.

~~(3) The name, address, business telephone number, credentials, experience and status (whether employed or contracted) of each person acting as an accident and illness prevention services provider for the insurer~~.

Thank you for your consideration of these issues. If you have any questions regarding these comments, please contact R. Taylor Cosby, AIA Vice President, at (410-267-9581), Loudon Campbell, AIA's Pennsylvania counsel at (717-237-6028) or me at (202-828-7167).

Sincerely,

Kenneth A. Stoller
Associate Counsel

cc: Mary Lou Harris
Len E. Negley
Loudon L. Campbell
R. Taylor Cosby
Bruce C. Wood
Eric M. Goldberg

Gelnett, Wanda B.

From: Stoller, Ken [KStoller@aiadc.org]
Sent: Monday, August 07, 2000 11:34 AM
To: 'IRRC@irrc.state.pa.us'
Subject: Comments to Health and Safety Regulations: American Insurance Ass ociation

pa_ch_129_aia_comments.doc

Attached you will find an electronic copy of the American Insurance Association's comments to Chapter 129 of the Department of Labor's final Health and Safety Regulations. As a backup, hard copies were sent via facsimile to Robert E. Nyce and Mary Lou Harris earlier today. If you encounter difficulties with any of these transmissions, please call me at
(202) 828-7167. Thank you for your assistance.

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REVIEW COMMISSION

American Insurance Association

RECEIVED
2000 AUG -7 AM 9:16
REVIEW COMMISSION

August 7, 2000

Original: 2038

Ms. Mary Lou Harris
Senior Regulatory Analyst
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, Pennsylvania 17101

Dear Ms. Harris:

Re: Final Rulemaking - Chapter 129, Workers' Compensation Health and Safety

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Although the Department's regulations are intended to foster workplace safety, some of the requirements regarding the provision of loss control services, record-keeping and reporting, and the audit process will not improve workplace safety, but will only serve to increase an insurer's costs of doing business--costs that ultimately may be shifted to employers in the Commonwealth. The regulations should be modified to clarify that the actual provision of loss control services to a particular policyholder is discretionary, not mandatory, and should be based on consultation by the insurer and the policyholder. In addition, onerous record-keeping requirements should be modified so that an insurer can devote its resources to providing appropriate and effective loss cost services, rather than complying with administrative issues that have no impact on workplace safety.

Following are our comments to the specific provisions of the draft regulations:

MAJOR ISSUES

Section 129.102(3)(ii)(A) On Site Surveys: This section would require insurers, in the event of "one or more imminent danger situations," to both inquire as to the corrective actions a policyholder has taken and propose further corrective actions if necessary. The requirement is too ambiguous because "imminent" is undefined and fails to provide a workable standard. Moreover, requiring insurers to make recommendations regarding "imminent" dangers would put them in the inappropriate role of acting as a surrogate governmental policing authority. If required to provide recommendations, what is the insurer's responsibility if the policyholder does not follow the recommendations, or if the problem is not fully resolved? If the insurer declines the risk due to the danger, is it still responsible for recommendations? Furthermore, there is no statutory authority for the requirement that insurers make recommendations if there is an "imminent danger situation." The language in §129.102(3)(ii)(A) regarding "imminent danger situations" should be deleted in its entirety.

Section 129.102(3)(ii)(B) Industrial Hygiene Surveys: This section states that insurers shall provide or propose "corrective actions in the area of industrial hygiene

services as requested by the policyholder or as determined by the insurer to meet the policyholder's operational requirements, for example, air quality testing." This standard is both too far-reaching and too vague for industrial hygiene services. For example, industrial hygiene services should not be conducted when the exposures and controls, or lack thereof, have already been documented to the policyholder, but no action was taken or required. The industrial hygiene services should address reducing potential work-related illnesses, rather than the all-encompassing "policyholder's operational requirements." The section should be clarified to indicate that industrial hygiene surveys are discretionary with the insurer, based on joint consultation between the insurer and the policyholder to determine the potential exposures and whether the potential exposure would negatively impact work-related illnesses.

Section 129.102(3)(ii)(B) should be amended as follows:

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Section 129.102(3)(ii)(C) Industrial Health Services: Section 129.102(3)(ii)(E) states that insurers shall provide industrial health services, such as health screenings, and substance abuse awareness programs. Loss control services are concerned with accident prevention at the workplace. Although it is in the best interests of both the policyholder and the insurer if the policyholder has a healthy work force, services such as health screenings and substance abuse programs are not the responsibility of workers' compensation insurers. The health services described in §129.102(3)(ii)(e) more appropriately belong in the jurisdiction of a human resources department. We therefore recommend that §129.102(3)(ii)(C) be deleted.

Section 129.102(3)(ii)(E) Consultations Regarding "Specific" Safety Problems: This section requires insurers to provide consultations regarding "specific" safety and health problems and hazard abatement programs and techniques, as caused by the introduction of new equipment or new materials. While it is common for insurers to make recommendations to their policyholders regarding workplace health and safety, we recommend that the word "specific" be deleted from the section. Loss

control services are designed to gain information for underwriting purposes on a policyholder's risk and, if appropriate, to provide assistance in the control and reduction of losses. Such services cannot possibly address each and every "specific" risk of a particular policyholder.

The portion of this section requiring insurers to identify a causal link between the introduction of new equipment or materials and specific safety and health problems places an impossible burden on the insurer. The insurer is not in a position to know more about a new material, process, or technique than its manufacturer or user. The insurer cannot be required to know all state of the art materials and processes, particularly if sufficient testing has not been conducted. The burden of such testing properly falls on the manufacturer, the ultimate user or a regulatory authority. Furthermore, there is no authority in §1001 of the act to impose this requirement on insurers.

Section 129.102(3)(ii)(G) should be amended as follows:

"Consultations regarding ~~specific~~ safety and health problems and hazard abatement programs and techniques~~, as caused by the introduction of new equipment or new materials~~."

Section 129.104(b) Service Providers' Qualifications: This section states that the Bureau may require the insurer to provide proof that the qualifications for accident and illness prevention services providers have been met by each individual offering such services. We would suggest that this requirement be met in the application process. In addition, this section should be interpreted to permit insurers to file a single affidavit certifying the qualifications of all loss control representatives providing services in the state. This interpretation was agreed to by representatives of the Bureau during a May 1997 meeting with AIA staff and local counsel. Requiring a single affidavit would promote far greater efficiency than requiring separate affidavits for each individual providing services, while still guaranteeing that an insurer's providers are qualified.

Section 129.109 Periodic Audits: Section 129.109 provides that the Bureau may audit the accident and illness prevention services of each licensed insurer at least once every two years to determine the adequacy of the insurer's services. While this language tracks the relevant statute (77 P.S. §1038.1), it is important to note

that this time frame is not mandatory. Insurers share the Bureau's interest in maintaining high-quality loss control services. Conducting audits of every insurer every two years, however, would appear to be an inefficient use of both the insurer's and the state's resources. Audits impose an administrative expense in the form of staff time and procedures for the insurer, as well as a drain on state resources to carry out the audits. Furthermore, the administrative costs and time needed to comply with the audits reduce the insurer's capability to provide effective loss control services. Rather than conducting audits on a two-year basis, audits should only take place if policyholders have filed complaints regarding an insurer, or if the Bureau becomes aware of potential problems with an insurer. Finally, if the failure to meet any requirement of the subchapter may occasion an audit, it is redundant to specify a particular type of violation (such as failure to file an AIPS by specified timeframes) as an audit trigger.

Section 129.109 should be amended as follows:

(a) "The Bureau may audit an insurer's accident and illness prevention services ~~at least once every two years~~ if the insurer fails to meet the requirements of this subchapter, or if there has been a pattern of policyholder complaints regarding the provision of loss control services.

~~(b) The Bureau may audit an insurer's accident and illness prevention services if the insurer fails to file an AIPS by specified timeframes or fails to meet the requirements of this subchapter.~~

~~(c)~~ (b) The notice of the audit will include the reasons for audit.

~~(d)~~ (c) At least 60 calendar days prior to an audit, the Bureau will notify the insurer in writing of the date on which the audit will occur."

Section 129.702 Accident and Illness Prevention Services Providers Requirements: Section 129.702 sets forth the requirements for accident and illness prevention services providers, including the mandate that such providers possess certain educational degrees or credentials in addition to at least two years of acceptable experience. The two-year experience requirement should be deleted because it will exacerbate the staffing problems of an already aging loss control profession. Prohibiting insurers from hiring recent college graduates and other

individuals who meet the educational or certification requirements will eventually lead to a serious shortage in qualified providers of accident and illness prevention services. The two-year experience requirement also harms the state in the sense that Pennsylvania graduates will be forced to leave the state to seek comparable positions. Possible solutions include (i) permitting insurers to hire these otherwise qualified individuals provided that they work under the direction of, or have their work reviewed by, a qualified provider; and (ii) restricting providers with less than two years experience to smaller policyholder accounts (e.g., those with premiums below $100,000 or loss ratios below 70%).

OTHER ISSUES

Section 129.102(2) Requirements to Maintain Accident and Illness Prevention Services: Section 129.102 sets forth the accident and illness prevention services to be maintained by the insurer. The regulations should clarify that it is not mandatory to provide the services for every policyholder. Instead, the provision of loss control services should be at the discretion of the insurer and the policyholder after joint consultation of the wants and needs of the policyholder. The availability of an insurer's accident and illness prevention services should be determined solely by whether it has the capacity to respond to requests for services by its policyholders. The regulation defines "capacity" with reference to services the insurer anticipates the policyholder will request, or to the insurer's evaluation of policyholder requirements. The anticipation of policyholder requests component is too arbitrary and speculative a standard, as a policyholder may well request services that are unreasonable in light of the insurer's evaluation of policyholder requirements.

Section 129.102(2) should be amended as follows:

"Capacity to provide services is defined as an insurer having ~~established~~ means, as established in general protocols applicable to all policyholders, to deliver services such as those listed in paragraph (3) of this section based upon ~~anticipated policyholder requests for services or based upon~~ an insurer's evaluation of policyholder requirements."

Section 129.102(3)(i) Requirements to Provide Accident and Illness Prevention Services: As stated in the comments to §129.102(2), the actual provision of loss control services should be at the discretion of the insurer after evaluating the wants

and needs of the policyholder. The imposition of a standard of reasonableness on policyholder requests for services is warranted in light of the statutory limitation (found in 77 P.S. §1038.1) that services only be adequate to furnish accident prevention required by the nature of either an insurer's business or its policyholders' operations.

Section 129.102(3)(i) should be amended as follows:

"An insurer shall provide services to policyholders who request them or based on the insurer's determination of the policyholder's operational requirements. Services shall be commensurate with the size, hazard, and experience of the employer, and shall be provided through an insurer's own or contracted staff who meets requirements established by the Department in Subchapter E.

Section 129.102(3)(ii) Requirements to Provide Accident and Illness Prevention Services: This provision lists certain loss control services, and could be interpreted to require an insurer to provide each identified loss control service to all policyholders. As stated in the comments to §129.102(2) and §129.102(3)(i), the actual provision of loss control services should be discretionary, based on the reasonable request of the policyholder, the nature of the insurer's business, or the nature of its policyholders' operations.

Section 129.102(3)(ii) should be amended as follows:

"Services may include the following:"

Section 129.108 Recordkeeping Requirements: Section 129.108 sets forth extensive recordkeeping requirements for accident and illness prevention services. Recordkeeping requirements often lead to a misallocation of loss control resources - instead of providing employers with accident and illness prevention services, insurers must spend more time filling out and maintaining documents for state officials. Costs are increased for both the insurer and the state, without a reduction in workplace injuries. Recordkeeping requirements, thus, should be kept to a minimum, and there should not be demands for non-relevant, redundant or overly burdensome information.

The regulation could be interpreted to require that records be maintained for all policyholders. However, records should be maintained only for those policyholders that request services. The section should be amended to clarify that records must be retained for those policyholders requesting loss control services.

In addition, subsection 129.108(8), which requests documentation supporting the funds expended for the delivery of accident and illness prevention services, exceeds the statutory mandate that the insurer submit information on the amount of money spent on accident prevention services.

Section 129.108 should be amended as follows:

"Insurers shall maintain records of accident and illness prevention services by policyholders that requested such services for the most current calendar year and two preceding consecutive calendar years which include:

(8) ~~Documentation supporting the funds expended for the delivery of~~ The amount of money spent by the insurer on accident and illness prevention services.

Section 129.110(a) Pre-Audit Exchange of Information: Section 129.110(a) sets forth the information the insurer must provide the Bureau at least 45 days prior to an audit. Some of the information requested is not relevant to the audit. For example, §129.110(a)(2) would require a list of all policyholders that have reported to the insurer that they have a certified workplace safety committee. Loss control services provided by the insurer and workplace safety committees implemented by the employer and employees are separate and distinct functions. Compiling information on which employers have safety committees would be an unnecessary administrative expense that does not relate to the quality of loss control services provided by the insurer.

In addition, many of the information requests in §129.110(a) are redundant. Section 129.110(a)(2) would require the insurer to provide a description of the type of accident and illness prevention services provided during the preceding year. This information would have been provided already in the annual report. Similarly, the information required in §129.110(a)(3) regarding the name, address, qualifications, and status of each person acting as an accident and illness prevention services provider likewise would have been contained in the annual report.

Section 129.110(a) should be amended as follows:

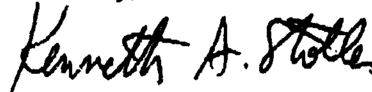
"At least 45 calendar days prior to an audit, the insurer shall provide the Bureau with:

(2) ~~A description of the type of accident and illness prevention services provided during the last completed calendar year and~~ A list of current insured employers/policyholders specifying name and premium size grouping which: received services~~;~~ or requested but did not receive services~~; and have reported to the carrier that they have a certified workplace safety committee~~.

~~(3) The name, address, business telephone number, credentials, experience and status (whether employed or contracted) of each person acting as an accident and illness prevention services provider for the insurer.~~

Thank you for your consideration of these issues. If you have any questions regarding these comments, please contact R. Taylor Cosby, AIA Vice President, at (410-267-9581), Loudon Campbell, AIA's Pennsylvania counsel at (717-237-6028) or me at (202-828-7167).

Sincerely,



Kenneth A. Stoller
Associate Counsel

cc: Robert E. Nyce
Len E. Negley
Loudon L. Campbell
R. Taylor Cosby
Bruce C. Wood
Eric M. Goldberg

American Insurance Association

FAX

TO:	Mary Lou Harris	**FROM:**	Kenneth A. Stoller
COMPANY:	IRRC	**COMPANY:**	American Insurance Association
FAX#:	(717) 783-2664	**FAX#:**	202-293-1219
PHONE#:	(717) 772-1284	**PHONE#:**	(202) 828-7167
DATE:	August 7, 2000	**PAGES:**	10 (including cover)

Comments:

Attached you will find the American Insurance Association's comments to Pennsylvania's Health and Safety Regulations, Chapter 129.

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2000 AUG -7 AM 9:16
REVIEW COMMISSION

If there are any problems with this fax transmission please call 202-828-7152.

John H. Cheffer CSP, P.E.
Manager Regulatory Compliance
Loss Prevention & Engineering, 13-CR
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One Tower Square
Hartford, CT 06183

Original: 2038

August 4, 2000

RECEIVED
2000 AUG -7 AM 8:07
REVIEW COMMISSION

(Via E-Mail)
Mr. Robert E. Nyce
Executive Director
IRRC
333 Market Street, 14th Floor
Harrisburg, PA 17110

Dear Mr. Nyce,

Re: Final Rulemaking -- Chapter 129, Workers' Compensation Health And Safety Regulations

Travelers Property Casualty Corp., Loss Prevention & Engineering Division appreciates the opportunity to comment on the Department of Labor & Industry's proposed final regulations to implement the accident and illness prevention services portions of the workers' compensation act.

The Travelers property casualty companies are one of the largest underwriters of workers compensation insurance in the country. This business is supported by the Travelers Loss Prevention & Engineering Division. The Division grew from the hiring of the industry's first safety person in 1895. The structure of the current Division was created over ninety years ago to address the safety and health issues underwriters and their insureds face. While our primary role is to assist in maintaining the integrity of the underwriting process, we employ a professional staff of almost 400 consultants that can provide insureds with safety and health services to address company-wide, site and/or situation specific issues. Our field staff works with general industry, construction, transportation as well as governmental entities. We support our staff of field consultants with specialists in human factors and ergonomics, industrial hygiene, fleet, customer training and workers' compensation cost containment, including -- safety management, post injury management and behavioral safety.

Understanding what is required for compliance is important to us; thus, we remain engaged in the rulemaking process. This builds upon Travelers observation and participation in the rule development process, including, in 1993, participation in some of the early workers' compensation reform act outreach training regarding health and safety and our dialog with Mr. Gerard Folk and Mr. Leo Lucian of the Division about Act 44, Title X. Our current comments result from a review of the June 19, 1999 notice of proposed rulemaking, our comments addressing that proposal plus our reading of the current proposed final rule.

We again commend the Division on drafting a rule that will better communicate the role the insurer, insured and Division will play in loss control and loss reduction activities. Further, we

specifically comment the Health And Safety Division's Chief, Len Negley, and Supervisor, Harold Redding for their professionalism and openness to comments during this rulemaking process.

Comments And Observations:

RULES AND REGULATIONS, DEPARTMENT OF LABOR AND INDUSTRY, 34 PA. CODE CHS. 123, 125, 129 AND 143, Workers' Compensation Health and Safety

General Comments:

While we acknowledge the positive revisions to the proposed regulations, we continue to believe the proposed rules mandate the provision of services broader than carriers may contemplate as part of coverage. Based upon the implied and stated scope of carrier mandates, we believe that the final rules should provide for immunity for carrier personnel as they perform duties in compliance with the final rules.

We again suggest the proposed rules do not fully take into consideration the diversity of employers insured by carriers, nor the diversity of the carriers who underwrite workers' compensation in the Commonwealth. It still appears the proposed rules focus on a "one size fits all" approach. Thus, this approach creates the potential for penalty to any carrier that does not exactly conform to the rule. Such an approach does not consider the carriers that write "niche" business or the large national carrier that underwrites a variety of business. In both instances, the carriers need the ability to apply accident prevention techniques and practices that address the specific hazards and exposures of their insureds.

Responses to Comments And §129.102(1):

The response suggests that the Department may not appreciate the importance of the agent/insured relationship, nor the NLRA concerns we expressed. It appears that the provision is crafted with the concept of a carrier having a single in-state location, without multiple business unit niche underwriters who underwrite and distribute all Pennsylvania policies. Such a scenario is not common to the industry which has multiple underwriting units and multistate offices which can issue a policy for Pennsylvania.

Travelers pointed out in our prior comments that this provision intruded upon the relationship of the insured and agent. We are also concerned about the potential creation of liability regarding NLRA mandates. For the purposes of clarity, I repeat our prior comments in total to reinforce our suggested solution --

....(1) Notice of availability of services.

The second part of the provision calls for the inclusion of information about the incentive to form a workplace safety committee; however, the premium credit is an underwriting issue, not a loss prevention issue. As such, the contact for premium credits is not an engineering person, it is an agent/broker and underwriter issue. As a matter of protocol, the relationship of an insured is with the agent/broker. We suggest that agents and brokers will demand a role in assisting their customers with regard to this credit. These independent parties are the legal insurance advisors for insureds. The concept also holds true for direct writers where the insureds works with an in-house agent.

You should also consider that national carriers have underwriters in offices around the country who are the contact for an agent/broker or insured about this issue. It also becomes unwieldy to list the underwriting contact offices and numbers as this will conflict with the contact list for accident prevention services. Therefore, we suggest that the provision should be removed from the rules.

We suggest you also consider the consequences of mandating a safety committee statement in the accident prevention notice, particularly with regard to non-organized workplaces. Such a statement offers the opportunity for encouraging a non-union employer to establish a safety committee in violation of the National Labor Relations Act. By mandating that carriers make specific statements in the policyholder notice, without the ability to add a caveat about NLRB potential action, puts carriers at risk for litigation.

If you decide to mandate the inclusion of premium credit wording in the notice, we suggest the following option: Carriers be allowed to provide for such notification by using an addenda to the policyholder notice. Such an addenda would be specifically worded to state - -

IMPORTANT NOTICE TO POLICYHOLDERS

The Commonwealth Of Pennsylvania requires Workers' compensation carriers to notify insureds of the availability of a 5% workers' compensation premium discount program for insureds who implement and maintain a certified safety committee. If you are interested in this program, please contact your agent or broker to review the safety committee premium credit program.

Please be aware if you are a non-union employer, the National Labor Relations Act precludes you from creating a management dominated employee representative group. If you choose to create a safety committee, you should thoroughly review your options for forming such a committee.

....

<u>Responses to Comments</u> And §129.102(2):

In the Response, the Department states --"...Although the Department is in general agreement with this interpretation and has made appropriate wording changes, the obligation to maintain and provide accident and illness prevention services is interpreted by the Department as requiring proactive action by insurers in the review, analysis and the proposal of preventive corrective

actions whether or not services are requested." This statement establishes the intent of the words presented in the rule content.

We suggest the idea that a carrier, in the normal course of doing business, would underwrite loss producing business and not take action conflicts with underwriting protocols. We further submit that by stipulating this interpretation, the regulation establishes a burden on carriers to maintain records to prove such actions have been taken. Thus the interpretation puts an non-required fiscal mandate upon carriers as, in most instances, the records needed to prove compliance with such a mandate will be separate from, and in addition to, normal business records.

Please consider, if the Department is in general agreement with the concept that the intent of the law and the resulting regulations focus upon insureds who ask for service, then the broader interpretation seems superfluous and should be deleted in any future Preamble or Response.

However, if the intent of the interpretation is to suggest that carriers have in place a demonstrable process to evaluate their book of business, on an on-going basis, to identify insureds with loss experience exceeding a predetermined norm, then that concept should be so stated.

Responses to Comments And §129.102(3)(ii)(A):

In the Response, the Department explains the changes made to the Section. However, the changes still do not reflect the ever present issue of creation of liability for the carriers and their accident prevention providers. The inclusion of the imminent danger classification, an undefined recommendation category, potentially "raises the bar" for carrier service providers. Is the intent to establish a higher level of performance for such a situation? If so, what is the basis for such a requirement? And, what is the expected beneficial outcome?

We suggest the imminent danger portion of §129.102(3)(ii)(A) be deleted from the proposed rule as it does not add substantively to the recommendation processes carriers already have in place.

Responses to Comments And §129.102(3)(ii)(D)AND (E):

We commend the Department on balancing the need to assist insureds with the carriers ability to respond to specific issues.

§129.2 Definitions:

We remain concerned about the definition of "Loss Run." listed in §129.2 Definitions.

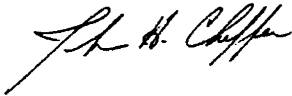
The implication is, the definition is the only loss information product a carrier may use. Such a concept begs the reality of what information is available to a carrier and what information is needed for the insured.

We believe our prior comments provided a practical alternative definition which addressed the point the Division intended to make.

We suggest the following modified wording: "*Loss Run-* A report containing an employer's incurred losses including some or all of the following information concerning an employee's injury or illness; employee name, date of injury or illness, type; cause, if available, and paid and reserved costs of the claim."

We trust our comments are cogent and understandable. If you require additional information, please contact me at the address or phone number listed above.

Sincerely



John H. Cheffer CSP, P.E.
Manager Regulatory Compliance

cc:

R. Brody
H. Dufault
L. Negley
H. Redding
K. Skogen
K. Stoller
papfrclt

PENNSYLVANIA AFL-CIO

WILLIAM M. GEORGE
President

RICHARD W. BLOOMINGDALE
Secretary-Treasurer

August 3, 2000

Original: 2038

RECEIVED
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REVIEW COMMISSION

Robert Nyce, Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown 2
333 Market Street
Harrisburg, PA 17101

RE: Labor and Industry Final Form Regulations
Workers' Compensation Health and Safety

Dear Bob:

Enclosed please find the Pennsylvania AFL-CIO comments on Department of Labor and Industry proposed Final Form Regulations Workers' Compensation Health and Safety.

As you can tell from our comments, the draft regulations violate the language and intent the Statute, particularly Act 44 of 1993.

The original Statement of Policy by the Department was very well done.

The record, as set forth in the history section of the PA Bulletin, draws a clear line regarding the deterioration of the regulations from the original policy statement and draft regulations. The Department convened meeting solely with insurers and employer associations. The Department made no outreach, in any way, to organized labor or workers who are the direct subject of these regulations. We believe this to be extreme bias and resulted in the shift in position by the Department.

We urge that the Regulations be rejected at this time or, in the alternative, that the Commission delay action so that workers are given fair process by having the opportunity to meet with the Department to discuss our concerns.

We look forward to meeting with and discussing our concerns.

Sincerely,

David H. Wilderman
Assistant to the President, Director of Legislation

DHW/jv/UFCW-1776

cc: William M. George, President, PA AFL-CIO
Richard W. Bloomingdale, Secretary-Treasurer, PA AFL-CIO
Mary Lou Harris, Senior Regulatory Analyst,

Enclosure

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.

AMERICA WORKS BEST WHEN WE SAY ... UNION YES

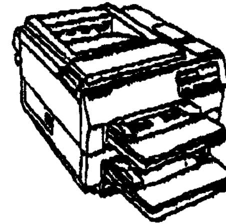
RE[illegible] 2000 AUG [illegible] REVIEW COMMISSION

PENNSYLVANIA AFL-CIO

WILLIAM M. GEORGE
President

RICHARD W. BLOOMINGDALE
Secretary-Treasurer

FAX



Date: 8/03/00

TO: Robert Nyce, Executive Director IRRC

Fax Number: 717-783-2664

FROM: David Wilderman

Department: LEGISLATION/PRESIDENT'S

Comments: Following please find the COMMENTS OF The PA AFL-CIO ON the Dept. of Labor and Industry Regulations ON WORKERS' COMPENSATION - Health AND SAFETY - I AM TAKING The liberty of also faxing Mary Lou Harris's copy - Thank You Dave

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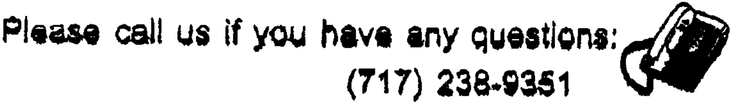
Please call us if you have any questions: (717) 238-9351



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RECEIVED
2000 AUG -4 PM 3:46
REVIEW COMMISSION

August 4, 2000

Original: 2038

Via Facsimile 717.783.2664
Robert Nice, Executive Director
IRC
333 Market Street, 14th Floor
Harrisburg, PA 17101

RE: Proposed Rules and Regulations of the Health and Safety Provisions of the Workers' Compensation Act

Dear Mr. Nice:

This office represents the Pennsylvania Federation of Injured Workers, an organization which has been in existence for over five years and which has 3,000 members. I am sure you are aware that many of our members have suffered their injuries on the job and are presently receiving Worker's Compensation benefits. Our group is very interested in maintaining high standards for the health and safety of all workers throughout the state of Pennsylvania. The amendments to the Workers' Compensation Act also reflect the legislature's recognition for the importance of health and safety in the workplace.

I have just received a set of Rules and Regulations proposed to help enforce the Health and Safety Provisions of the Act, Sections 1001 and 1002. Unfortunately, the Pennsylvania Federation of Injured Workers did not have an earlier opportunity to review the proposed draft.

As will be seen below there are a number of changes which should seriously be considered prior to the implementation of the Rules in order to maximize and carry out the Health and Safety amendments to the Act. Because of such short notice, we are requesting the proposals be rejected or, at least, a deferral on action so a more comprehensive discussion can take place.

Sections 101 and 102 of the Act provide the maintenance of accident and illness prevention services as a prerequisite for a license to write workers' compensation insurance in Pennsylvania. There are specific details in

the legislation as to how this policy is to be carried out and the proof required by an employer/insured to establish that such policy is active and working in place.

Yet some of the proposed regulations will not be of any benefit unless amended. For example, the Act provides specifically for certification of a safety group which includes an employee representative. Proposed Regulation 129.1003(f) should contain clear language to require that if there is a collective bargaining agent, the employee representatives come from the collective bargaining unit. This would eliminate any questions regarding the "procedure" by which the employer picks such representatives and give more credibility to the recommendations from the committee. It should also be noted that any vague language which may allow the employer to pick the employee representative would be a violation of National Labor Relations Act.

Also, in this context, Section 129.1004(c) should be clarified to ensure that only a balanced committee be allowed to exist. The Federation sees no reason to provide for a "unbalanced committee". The procedure should be for equal representation. Obviously, having an explanation signed by the employer and a "employee representative" from an unbalanced committee would not remedy inherent damage created by the existence of such a committee.

Section 1002(b) of the Act refers to a discount to be given to an employer if it continues, by affidavit, for five years to provide verification that the Safety committee continues to cooperate and meet certification requirements. Yet, in Proposed Regulation 129.1005(c) language has been extracted which would require the employer to maintain minutes of the committee's meetings for a period of five years. This defeats the purpose of allowing a comprehensive inspection and review of whether an employer is following the requirements of the Act. This language should remain part of the Regulation and should not be deleted.

Also, language setting a specific time limit for response by the employer should be incorporated in the deleted section originally numbered 129.1005(7). To leave a question like this open ended by not having specific language would defeat the spirit of cooperation and communication which the amendments encourage in order to

provide a high level of safety.

Finally, Section 1001 of the Act emphasizes the importance of specificity in reporting by an employer/insured regarding types of programs, money spent and other references which may effect the accident and illness prevention program (Section 1001(a)(b)(e)). Yet, proposed Rule 129.1008 does not give any definitive guideline as to what should be included and/or attached in an employer's affidavit for certification renewal. The Federation is extremely worried that general, vague representations without appropriate evidence will be submitted for such renewals. Consideration must be given for documentation of meetings, affidavits signed by not only the employer but also the employee representative; and information which would aid and abet the ability of the Department to carry out its right of an inspection, if needed.

There are other considerations which we believe should be reviewed prior to the approval of the proposed regulations. I think it would be important to look at the definitions in order to add to the list or to expand specific definitions. However, we believe in order to have a complete and overall review of these Regulations will take more time than is presently allotted.

We appreciate your consideration of our request and look forward to engaging in further discussions to help maintain and improve the increased Health and Safety to workers which has been instituted by this legislation.

Very truly yours,

MARC S. JACOBS

MSJ/dem
cc: Mary Lou Harris, Sr. Analyst
(via facsimile 717.783.2664)
Tim Wagner, President, PFIW
(via facsimile 717.526.4556)

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Law Offices
GALFAND BERGER, LLP.
1818 Market St., Suite 2300, Philadelphia, PA 19103
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FACSIMILE TRANSMISSION COVER SHEET

Date: August 4, 2000 File Number: 1.1012

RE: Health and Safety Provisions

Transmission From: Marc S. Jacobs, Esquire

PLEASE DELIVER THE FOLLOWING TO:

Name: Robert Nice

Firm: IRC

Fax Number: 717.783.2664

Total Number of Pages (Including this Cover Sheet): 4

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ORIGINAL: 2038

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2001 MAY 17 AM 9:00
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INSERVCO
INSURANCE SERVICES, INC.

May 14, 2001

John R. McGinley, Jr. ESQ
Chairman, by Proxy
INDEPENDENT REGULATORY
REVIEW COMMISSION
333 Market Street – 14th Floor
Harrisburg, PA 17101

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

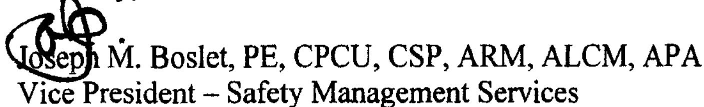
Dear Mr. McGinley:

I just received a copy of the above regulation from one of our Claims Department staff and I wanted to share a few thoughts with you.

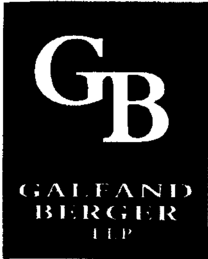
I have been repeatedly inquiring of the Bureau of WC, Health and Safety Division Field Auditors, and Misters Negley and Redding on how Individual Self-Insured requirements under Subchapter C, section 129.402 (a) can be extended under Bureau interpretation to Group Self Insured requirements under Subchapter D., section 129.452 (a). If you review the information requested by the Bureau on the Annual report forms - LIBC–220E (for Individual SI), and LIBC-221E (for Group SI) – it is basically the same information which, for Group SI, is an extension of requirements under the above referenced paragraphs. Now why would the best legal minds in the Commonwealth and our elected representatives draft regulation that differentiates between the two groups of self-insured entities if there was not some intent to hold them to distinct levels of legal responsibility?

As a safety professional and in the "business" for about 25 years, I do not disagree that we need to hold all business to a higher standard in safety and health program performance, and I am a solid supporter of the State's Act 44 and Act 57 initiatives to promulgate Accident and Illness Prevention program activity but what is the explanation for Bureau interpretation here when it is obviously contrary to the letter of the regulation. The Bureau people have not been able to explain this to my Group Self-Insured clients, and I am a loss to understand this justification when the regulation is rather specific on program requirements for Individual and Group Self-Insured programs. If Group programs are "officially" supposed to have all these elements – and the Bureau Field Auditors *are holding them accountable* – then why wasn't the regulation written to cover these additional provisions? I would appreciate your counsel. Thank you for your kind attention.

Sincerely,



Joseph M. Boslet, PE, CPCU, CSP, ARM, ALCM, APA
Vice President – Safety Management Services



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2000 AUG -8 AM 8:44
REVIEW COMMISSION

August 4, 2000

Original: 2038

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Very truly yours,

MARC S. JACOBS

MSJ/dem
cc: Mary Lou Harris, Sr. Analyst
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Tim Wagner, President, PFIW
(via facsimile 717.526.4556)

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Original: 2038

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REGULATORY REVIEW COMMISSION

April 17, 2001

Mr. Robert E. Nyce
Executive Director
Independent e Review Commission
333 Market Street
14th Floor
Harrisburg, PA 17110

Dear Mr. Nyce:

Re: Final Rulemaking - Chapter 129, Workers' Compensation Health and Safety

The Alliance of American Insurers is pleased to have another opportunity to comment on regulations proposed by the Department of Labor and Industry to implement the accident and illness prevention services provisions of the workers' compensation act. We believe the current final-form regulations contain two significant impediments to implementing a successful program.

First, as the IRRC noted in their August 19, 1999 comments under point **3. Section 129.102. Accident and illness prevention services requirements. - Need; Reasonableness; and Clarity**: "The phrase 'may need or request them' is confusing, and extends beyond the insurer's statutory obligation. Therefore it should be deleted from Subsections (2) and (3)(i)." The current version of the final-form regulations in (2) replaced the phrase with "...anticipated policyholder requests for services or based upon an insurer's evaluation of policyholder requirements" and in (3)(i) with "...requests them or based on the insurer's determination of the policyholders' operational requirements."

This new language fails to address these concerns raised by IRRC as follows:

Clarity - It is unclear by what standard the Bureau will assess insurers' evaluations of when services must be provided if they are not requested as neither an insurers' evaluation of policyholder requirements nor operational requirements is defined in the rule. The definition of adequacy in the rules enables the Bureau to determine when an insurer has fulfilled program requirements but provides no guidance to insurers in this area.

Need - If the goal of this program is to improve workplace safety through the application of insurance safety services there is no need to require insurers to evaluate policyholder safety needs if policyholders do not intend to use the services. Insurers can only affect policyholders' workplace safety needs when policyholders use the services insurers provide. The need for insurance safety services (that improve safety) is predicated by a policyholders' willingness to use the services. As a result, the need to regulate insurance safety services only arises when a policyholder wishes to use more services than an

insurer provides. Insurers are required to notify policyholders of the availability of services. Policyholders wishing to use insurance services that are not provided only need to ask to engage regulatory requirements. There is no need to regulate services that are not requested. Requiring insurers to provide services that are not used wastes insurers' resources and the Bureau's regulatory resources.

Reasonableness - The provision requiring insurers to provide services based on the insurers, assessment of need discourages insurers from voluntarily providing safety services and wastes scarce safety resources. In the first case, where an insurer may voluntarily provide limited services to a policyholder without this rule, under this rule, if they choose to provide services these services must meet all the requirements (3)(ii) and as well carry additional reporting and audit costs for the insurer. In the second case, requiring insurers to provide safety to services to policyholders who provide no indication of a willingness to use the services is wasteful.

Second, as the IRRC noted under **1. General. - Clarity.** in discussing Adequacy and adequate and under **2. Section 129.2. Definitions. - Consistency with stature; and Clarity**. Training Program, "To provide direction to insurers, the Department should identify the criteria, standards or requirements that it will use to determine if the regulated community is complying with the statutory directive.

The new language fails to address this concern about clarity as follows:

Training Programs - Under 129.102(3)(ii)(D) insurers are required to provide accident and illness prevention training programs which are described as "Training which enables employers and employes to enhance knowledge, skills, attitudes and motivations concerning health and safety issues, and requirements relating to operations, processes, materials and specific work environments" This definition offers little guidance. It is broad enough to encompass a single brochure or an extensive series of classes covering a multitude of topics.

New Equipment and Materials - Under 129.102(3)(ii)(E) insurers are required to provide "Consultations regarding specific safety and health problems and hazard abatement programs and techniques related to the introduction of new equipment or new materials" Where consultation is described as "Providing advice relative to existing and potential hazards." Again, advice can range from an admonition to be careful to a thorough engineering analysis describing in detail how to be careful.

Efforts to regulate the broad range of services that include the services insurers provide voluntarily create inefficiencies for the insurers and the state, address a problem that doesn't exist (i.e. policyholders' failure to obtain and use insurers' safety advice) and generalizes safety requirements by including a broader range of site-specific applications that ultimately minimize clarity. The statutory language does not require the Bureau to include these provisions. Eliminating them will give Pennsylvania a manageable

program that can realistically address the real problem of policyholders' inability to receive insurance safety services that they wish to use.

Sincerely,

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