CONSOL Inc.
Consol Plaza
1800 Washington Road
Pittsburgh, PA 15241-1421
412-831-4000
FAX: 412-831-4916

July 16, 1999

ORIGINAL: 2038
MIZNER
COPIES: Harris
Wilmarth
Jewett
Markham
Sandusky
Legal

Mr. Len Negley
Chief - Health Safety
The Dept. of Labor and Industry
Bureau of Workers' Compensation
1171 South Cameron Street
Room 324
Harrisburg, PA 17104

Re: Proposed regulations covered in PA Bulletin, Vol. 29, No. 25, pp. 3161-3177, (June 19,1999)

Dear Mr. Negley:

The following are our concerns and comments regarding the above-referenced proposal:

SUBCHAPTER C. INDIVIDUAL SELF-INSURED EMPLOYER'S ACCIDENT AND ILLNESS PREVENTION PROGRAMS 129.401 - 129-412

CONSOL and its related operation companies ("CONSOL") totally agree with the approach to accept the "confirmation" that policies, programs, etc. are in place by identifying those items with an "x" on approved form 220E. This allows companies to outline those items presently being utilized to manage safety and health concerns, without having to produce large volumes of information that would serve no useful purpose at the time of a reapplication for renewal of self-insurance status. Should there be any question(s) concerning information provided on the annual submittal, the auditing function, also provided for in this regulation, will provide the mechanism to address any potential problem.

Also, two other issues need to be addressed. First of all, the safety programs and initiatives of today are very voluminous, and would require tremendous resources to reproduce for a review process. In addition to this consideration, a question may arise at some time concerning the confidential nature of some information. To address both of these concerns, CONSOL recommends that a provision be added to require that information requests be handled in a manner that would be subject to approval by both parties. While CONSOL does not anticipate any problems at the present time, it would be advantageous to eliminate any questions that may arise in the future.

SUBCHAPTER E. ACCIDENT AND ILLNESS PREVENTION SERVICES PROVIDERS QUALIFICATIONS STANDARDS 129.701 - 129.704

The qualifications for service providers are too defined, and therefore exclude many of the true safety professionals that are in industry today. Although these highly experienced, skilled and trained individuals do not meet the exact technical qualifications contained in the proposed regulation, they are extremely capable of addressing whatever concerns may arise in the areas of coal mine health and safety and of fulfilling the role of a "service provider."

Strong consideration should be given to expanding the requirements to allow acceptance of other educational degrees, as well as years of experience. The focus should be on whether the applicant has both knowledge and experience of the subject matter, and not strictly how it was obtained. Many of our best safety personnel do not meet the technical requirements of this regulation, yet have proven their ability to successfully design and implement industrial safety programs.

In the mining industry, for example, CONSOL's safety professionals not only have many years of experience, but also have certifications (e.g., mine foreman) that require extensive periods of studying and testing to achieve and require indepth knowledge of mine health and safety requirements and regulations. In situations such as these, consideration should be given to accepting certifications or experience that is industry specific. For applicants that meet all of the requirements, a general certification would be issued; however, for specific cases, such as mining, the approval would only apply to that industry.

Also, at one time there evidently was a window of opportunity to accept experience in some cases, in lieu of certain requirements. Due to the mobility of the workplace today, this consideration needs to be continued rather than be eliminated for the reasons outlined above. This would accommodate the transfer and relocation of experienced and highly qualified safety personnel between the various states where a company may be doing business.

SUBCHAPTER F. WORKPLACE SAFETY COMMITTEES 129.1001 - 129.1011

During a recent conference call with the Bureau of Workers' Compensation, it was clarified that it is the State's intent and position that these Safety Committees are and will continue to be optional for the self-insureds. CONSOL agrees and supports this position that these committees remain optional and would strongly suggest a clarification of the proposed regulation to eliminate

any ambiguity. Many companies have found tremendous success utilizing other methods to communicate with and involve their employees in their safety programs and initiatives. We have operated under such a philosophy in opening our two newest operations within Pennsylvania and have found it to be very successful.

Thank you very much for this opportunity to comment.

Sincerely,

J. A. Holt
Safety Director

P. W. Nicholson
Director
Salary & Workers' Compensation

PWN/jtb

CCAP INSURANCE PROGRAMS

The County Commissioners Association of Pennsylvania • P.O. Box 60769 • Harrisburg, PA • 17106-0769
Phone 717.232.4402 • FAX 717.232.4605 • email jsallade@pacounties.org

Property, Liability, Worker's Compensation, Unemployment Compensation, Inmate Medical Managed Care, Bonds, Behavioral Managed Care Insurance, and Nursing Home Insurance For Counties

ORIGINAL: 2038
MIZNER
COPIES: Harris
Wilmarth
Jewett
Markham
Sandusky
Legal

July 1, 1999

John H. Jewett
Independent Regulatory Review Commission
333 Market Street
14th Floor
Harrisburg, PA 17101

Dear Mr. Jewett:

On behalf of the County Commissioners Association of Pennsylvania, thank you for sending us the reminder concerning IRRC's review of the proposed Workers' Compensation Health and Safety regulations (June 19, 1999).

We have reviewed the proposed regulations and have no substantive problems with what is being proposed by L & I.

I might add that we have been very pleased with the efforts of the Bureau of Workers' Compensation to keep us informed of proposed changes.

Sincerely,

John R. Sallade,
Managing Director

cc: Doug Hill

(Untitled)

Alliance
of American Insurers

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

99 JUL 19 AM 10:47

July 16, 1999

ORIGINAL: 2038
MIZNER
COPIES: Harris
Wilmarth
Jewett
Markham
Sandusky
Legal

Mr. John R. McGinley, Jr.
Chairman
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, Pennsylvania 17101

Dear Mr. McGinley:

The Alliance of American Insurers is a national property and casualty insurance trade association representing 270 insurance companies. Our members are concerned about how the Pennsylvania Department of Labor and Industry, the Bureau of Workers' Compensation is proposing to implement sections of P.L. 190, No.44, which requires workers' compensation insurance companies to maintain or provide accident and illness prevention services.

Our members include some of the most innovative and aggressive providers of loss prevention services in the insurance industry. For over nine decades, insurers have provided quality loss prevention services, within the framework of a workers' compensation insurance policy, to assist employers in protecting their workers. We recognize the important role that the public sector plays in promoting workplace safety. As an association we support workplace safety public policy which is effective, efficient, and fair because it serves the interests of insurers as well as employers, workers, and the public sector.

Rules proposed by the Department in Chapter 129. Workers' Compensation Health and Safety, Subchapter B. Insurer's Accident and Illness Prevention Services are based on an over expansive interpretation of the statute. The program defined by the proposed rules create obligations beyond those necessary to implement the statute and do so in a way that will cause insurers, employers and the Department to incur additional expenses which will not enhance worker protection.

Enforcing the rules, as proposed, would require each insurance company to visit each and every policyholder to assess their safety needs and then to actually perform needed safety activities for each policyholder. The proposed rule makes the insurer responsible for implementing insured employers' safety programs. The additional resources the insurance industry would need to implement the proposed rule would require significant increases in workers compensation premiums. The increased quantity and breadth of service required by this proposed rule would also demand significant resource commitments from the department if the rule were to be administered and enforced effectively.

Enforcing this rule would dramatically change the nature of the loss control services insurers provide. Insurers, even in other states which regulate insurance loss control services, offer

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

safety advice and assistance to address major causes of workers compensation losses or exposures. They do not assume responsibility for implementing all needed safety activities for employers. Workers' compensation loss control departments rarely, if ever, provide some of the services proposed such as wellness program, health screening, or review of planned production changes.

Section 1038.1(a) of the statute defines insurers' obligations. It says that insurers must "...maintain or provide..." services. It does not require that insurers maintain and provide services. It also says that "Such services shall be adequate to furnish accident prevention required by the nature of its business or its policyholders' operations and shall include surveys, recommendations, training programs, consultations, analyses of accident causes, industrial hygiene and industrial health service to implement the program of accident prevention services." It does not say that the insurance industry is obligated to assume complete responsibility for implementing all of the safety activities listed above for every employer that purchases a workers compensation policy.

Modifying the proposed rule to require insurers to provide specifically defined services that are appropriately provided by an insurer to policyholders who ask for the service, will serve Pennsylvania's workers, employers, insurers, and taxpayers. Insured employers needing assistance and willing to use assistance will be able to get assistance and be sure that the assistance meets standards approved by the department As proposed, the rule places an extraordinary burden on the premium mechanism to require insurers to effectively assume the responsibility and expense for every insured employer's safety program. As proposed, the rule wastes resources when insurers provide services to employers who have no interest in using the services.

We propose that the following changes to the proposed rule would serve the purposes of the statute in a way that is dramatically more efficient, effective and fair:

1) Limit required insurance accident prevention services to policyholders that request services with the following changes.

   129.102(2):
   "...Capacity to provide services is defined as an insurer having established means to deliver services such as those listed in paragraph (3) to policyholders who ~~may need or~~ request them..."

   129.102(3)(i):
   "An insurer shall provide services to policyholder who ~~may need or~~ request them..."

2) Limit the kinds of services insurers shall provide to those that recognize and take advantage of insurers' unique roles in offering advise and assistance in cooperative, voluntary manner that focuses on workers' compensation loss causes with the following changes:

   129.102(3)(D):
   "Identify needed ~~i~~industrial hygiene surveys appropriate to address the policyholders' workers' compensation losses and exposures ~~needs – for example, air quality~~ and recommend providers or provide needed surveys.

   129.102(3)(E):

"Upon specific request, identify needed ~~I~~industrial health services appropriate to address the policyholders' workers' compensation losses and exposures ~~needs – for example, wellness programs, health screenings, substance abuse awareness and prevention training policies and programs~~ and recommend providers or provide needed services.

129.102(3)(F):
"Identify needed ~~A~~accident and illness prevention training programs to address the policyholders' workers' compensation losses and exposures and recommend providers or provide needed training.

129.102(3)(H):
"Upon specific request recommend providers or perform review of planned or newly introduced industrial material processes, equipment, layouts and techniques to identify potential hazards and to recommend methods to mitigate hazards identified."

3) Limit reporting to services which the department would regulate with the following change:

129.106:
"A licensed insurer shall, by March 1 of each year, provide the Bureau with information concerning accident and illness prevention services ~~offered or~~ provided ~~to~~ upon request from the insurer's policyholders...."

4) Finally, our members are concerned that proposed rules establishing personnel qualifications should describe some of the criteria, rather than leaving all criteria to the discretion of the Bureau. We propose including criteria deleted from the 1995 statement of policy as follows:

129.702(d)(2):
"One of the following ~~A~~ certifications or designations, or others recognized by the Bureau...:

(a) Certification as a Medical Doctor (M.D.) in Occupational Medicine granted by the American Board of Preventive Medicine (ABPM).
(b) Certification as an Industrial Hygienist (CIH) granted by the American Board of Industrial Hygiene (ABIH).
(c) Certification as a Safety Professional (CSP) granted by the Board of Certified Safety Professionals (BCSP).
(d) Certification as an Industrial Hygienist in Training (IHIT) granted by the American Board of Industrial Hygiene (ABIH).
(e) Certification as an Associate Safety Professional (ASP) granted by the Board of Certified Safety Professionals (BCSP).
(f) Certification as an Occupational Health Nurse (COHN) granted by the American Board for Occupational Health Nurses (ABOHN).
(g) Certification as an Occupational Health and Safety Technologist (COHST) granted by the American Board of Industrial Hygiene (ABIH)/Board of Certified Safety Professional (BCSP) Joint Committee.
(h) A diploma in safety and health earned from the National Safety Council's Safety Training Institute.
(i) An associate's degree in Loss Control Management (ALCM) earned from the Insurance Institute of America (IIA).

(j) An associate's degree in Risk Management (ARM) earned from the Insurance Institute of America (IIA).
(k) Or any other certification recognized by the Bureau.

We appreciate your consideration.

Sincerely,

Keith D. Lessner
Vice President – Safety and Environmental

Copies to:

Mr. Len Negley, Health and Safety Division, Bureau of Workers Compensation
Mr. Neil Malady, Alliance of American Insurers

G:\GENERAL\PATEST.DOC

nerican Insurance Association

Original: 2038
Mizner
cc: Harris
Wilmarth
Jewett
MArkham
Law Department
Sandusky, Legal

FORTHCOMING
Nyce
Sandusky
Gelnett

December 18, 1998

Mr. Donald A. Smith, Jr.
Deputy Secretary for Collections and Compensations
Department of Labor and Industry
1700 Labor and Industry Building
Harrisburg, PA 17120

Dear Mr. Smith:

The American Insurance Association welcomes the opportunity to comment on the draft regulations implementing the accident and illness prevention services provisions of the workers' compensation act. 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 expectation that safety or property conservation will be enhanced, or that insurance costs will be reduced, are frequently cited as the legislative intent. This, however, has not proven true. Insurers provide loss control services to policyholders to gain information for underwriting purposes and, when deemed appropriate, to provide assistance in the control and reduction of losses. The right, not duty, to provide loss control is an integral part of the insurance contract. Although the loss control survey is undertaken for the benefit of the insurance company, the policyholder may also 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.

AIA is a national trade association of more than 300 property and casualty insurers that write a major share of the workers' compensation insurance throughout the nation and in Pennsylvania. In 1997, AIA companies wrote almost $775,000 million in workers' compensation premiums in Pennsylvania, representing approximately 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.

Although the Department's draft regulations may be motivated to foster workplace safety, many of the requirements placed on insurers regarding the

1130 Connecticut Avenue, N.W., Suite 1000 ▼ Washington, DC 20036 ▼ Phone: 202/828-7100 ▼ Fax: 202/293-1219 ▼ www.aiadc.org

providing of loss control services, recordkeeping and reporting, and the conducting of audits, will only serve to increase a carrier's costs of doing business--costs that may ultimately be shifted to employers in the Commonwealth--and is not likely to improve workplace safety.

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

Section 129.102 Service Requirements:

Section 129.102 sets forth the accident and illness prevention services to be maintained by the insurer. The regulations should make clear 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 discretionary nature of the provision of services was recognized by the legislature. Section 1001(a) of the workers' compensation law provides "such services shall be adequate to furnish accident prevention required by the nature of the business or its policyholders' operations. . . (emphasis supplied). Requiring carriers to provide services to all policyholders, regardless of the type and danger of the hazard presented, would divert scarce resources from those employers who could benefit most from loss control services and is inconsistent with the statute.

Section 129.102(a)--On Site Surveys: This section should be clarified to indicate that it is not mandatory for carriers to conduct an on-site survey for every policyholder. The insurer is in the best position to know whether an on-site survey would be useful. Insurers do not conduct on-site surveys for the vast majority of policyholders because effective accident prevention and loss control services can be provided by telephone conversation, videos or educational materials. The determination of the types of services to provide is ultimately based on the nature of the employer and its loss history.

The regulations should clarify that carriers do not assume liability by conducting an on-site survey. The insurance industry is not a regulatory or enforcement agency and should not have the responsibility for, or assume the liability of, making safety recommendations and follow-up visits. Section 1001(g) of the law provides that the insurer "shall not be liable on any cause of action or in any proceeding, civil or criminal, arising out of or based upon allegations and pleadings relating to the performance of services under or in compliance with this article." This non-assumption of liability should be reiterated in the regulations.

Likewise, the requirement that carriers make a follow-up visit if there are "one or more imminent danger situations" is inappropriate. The

requirement is too ambiguous because "imminent" is undefined and fails to provide a workable standard. Moreover, requiring carriers to conduct follow-up visits and make recommendations regarding "imminent" dangers would put insurers in the inappropriate role of acting as a surrogate governmental policing authority. If required to provide recommendations and conduct follow-up visits, what is the insurer's responsibility if the recommendations are not followed, or do not fully fix the problem? If the carrier declines the risk due to the danger, is the carrier still responsible for a follow-up visit and recommendations? There also is no statutory authority for the requirement that insurers' conduct follow-up visits and make recommendations if there is an "imminent danger situation." The language in §129.102(a) regarding "imminent danger situations" should be deleted in its entirety.

Section 129.102(d)--Industrial Hygiene Surveys: This section states that insurers shall provide "Industrial Hygiene surveys appropriate to the policyholders needs." A standard of "policyholders' needs" is too far-reaching 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 section should be clarified to indicate that industrial hygiene surveys are discretionary with the carrier, based on joint consultation between the carrier and the policyholder to determine the potential exposures and whether the potential exposure would negatively impact loss experience. The section should also clarify that carriers need not employ or use the services of a Certified Industrial Hygienist or Industrial Hygienist In Training.

Section 129.102(e)--Industrial Health Services: Section 129.102(e) states insurers shall provide industrial health services, such as wellness programs, 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 employer and the insurer if the policyholder has a healthy work force, services such as health screenings, substance abuse programs and wellness programs are not workers' compensation carriers' responsibilities. The health services described in §129.102(e) more appropriately belong in the jurisdiction of a human resources department.

Section 129.102(f)--Safety Committee Training Programs: This section states insurers shall provide training programs designed for workplace safety committees. The functions of workplace safety committees, however, are separate and distinct from the type of loss control services provided by a carrier. Loss control services should not be mixed with the workings of a workplace safety committee. Moreover, carrier involvement in workplace safety committees would place the carrier at risk of an National Labor Relations Board suit. Recent cases have held that some types of safety

committees may run afoul of the National Labor Relations Act's prohibition on employer-dominated collective bargaining units.

Section 129.102(g)--Consultations Regarding "Specific" Safety Problems: Section 129.102(g) requires carriers to provide consultations regarding "specific" safety and health problems. 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 because it restricts an insurer's flexibility. 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.

Section 129.102(h)--Review of Newly Introduced Industrial Materials, Processes: This section states that carriers are to review "planned or newly introduced industrial materials, processes, equipment, layouts and techniques to identify potential hazards and recommend methods to mitigate hazards." This would place an impossible burden on the carrier. The insurer is not in a position to know more about a new material, process or technique than the manufacturer of the material or the user of such a new material or design. The carrier 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. There is no authority in §1001 of the law to impose this requirement on insurers.

Section 129.104 Obligations of an Insured Employer/Policyholder

Section 129.104 requires that a policyholder who requests accident and illness prevention services must grant the necessary information and access to allow the insurer to fulfill its requirements. because the purpose of workers' compensation loss control is to assist the employer in addressing preventable injuries and illnesses, the regulation should make clear that if the policyholder fails to grant the necessary information or access, the carrier's obligation ceases. The following language should be added to the end of § 129.104: "If the policyholder fails to provide the necessary information and access to the insurer, the insurer's obligation to provide accident and illness prevention services shall cease."

Section 129.105 Service Providers' Qualifications

Section 129.105 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 any event, the requirement should not be interpreted to require that separate affidavits be filed for each individual providing loss control services. Such a requirement would be burdensome and unwieldy. A single affidavit representing that each of the insurer's loss control representatives providing services in the state is qualified would be much more efficient, while still guaranteeing that a carrier's providers are qualified. In May 1997, several representatives of AIA met with staff of the Department, who indicated that they were amenable to this approach.

Section 129.107 Reporting Requirements

This section would require insurers to provide the Bureau with its report on accident and illness prevention services offered during the preceding year by March 1. We would request that this date be extended to June 1 due to the heavy volume of reports around the nation that are currently due on March 1.

Section 129.109 Recordkeeping Requirements

Section 129.109 sets forth extensive recordkeeping requirements for accident and illness prevention services. Recordkeeping requirements often lead to a misallocation of loss control resources from providing employers with accident and illness prevention services to 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 burdensome information.

As currently written, the regulation requires that records be maintained for all policyholders. However, records would be maintained and available only for those policyholders that request services. Accordingly, we would suggest the following modification: "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 . . ."

Moreover, we recommend that sections 129.109(d), 129.109(e), and 129.109(k), which request reporting on the number of hours expended providing services, the number of service visits, and the safety-related materials provided, respectively, seek non-relevant information and should be deleted. As long as efficient accident and illness prevention services are provided to the policyholder upon request, the actual number of hours spent and the number of actual visits is not material to the quality and effectiveness of the services provided. The goal should be to provide effective and efficient

loss control services. Spending more hours on a matter than necessary, or making an on-site visit when a telephone call would be sufficient, does not improve safety. Moreover, keeping detailed records of hours spent creates an unnecessary and costly administrative burden. Likewise, there is no need to make records of the safety-related materials provided to each policyholder.

Section 129.109(c), which would require information on the dates services were provided should be deleted as superfluous in light of § 129.109(g), which likewise requests information on the dates services were provided.

Section 129.110 Periodic Audits

Section 129.110 would provide 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. Insurers share the Bureau's interest in maintaining high-quality loss control services. Conducting audits 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. The administrative cost and time to comply with the audits serve to reduce the carrier's capability to provide effective loss control services. Rather than conducting audits on an arbitrary 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.

We therefore recommend that section 129.110(a) be modified to read: "The Bureau may audit the accident and illness prevention services of each licensed insurer, including accident and illness prevention services providers qualifications ~~at least once every two years~~ to determine the adequacy of the insurer's accident and illness prevention services."

Section 129.111 Pre-Audit Exchange of Information

Section 129.111 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, §129.111(a)(2) would require a list of all policyholders that 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 in no way relates to the quality of loss control services being provided by the insurer.

In addition, many of the information requests in §129.111 are redundant. Section 129.111(a)(1) requests AIPS reports for the preceding three years. These reports would already have been supplied to the Bureau. Section 129.111(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. The information required in §129.111(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.

Thank you for your consideration of these matters. We look forward to the opportunity to further discuss these concerns with you. If you have any questions or would like additional information, please call R. Taylor Cosby, AIA Vice President, at (410-267-9581), Loudon Campbell, AIA's Pennsylvania counsel at (717-234-3281) or me at (202-828-7131).

Sincerely,

Steven A. Bennett
Counsel

cc: Richard Himler
Len Negley
R. Taylor Cosby
Bruce C. Wood
Loudon L. Campbell

July 19, 1999

99 JUL 26 PM 4:55

EMPL. OF WORKERS' COMP

Jul 19 3 46 PM '99

LABOR & INDUSTRY

VIA FACSIMILE (1 total Page) 717-772-1639

ORIGINAL: 2038
MIZNER
COPIES: Harris
Wilmarth
Jewett
Markham
Sandusky
Legal

Len E. Negley, Chief
Health and Safety Division
Bureau of Workers' Compensation
P.O. Box 15121
Harrisburg, PA 17105-5121

Dear Mr. Negley:

I am writing on behalf of the nearly 1,300-agency business members of the Professional Insurance Agents Association of Pennsylvania, Maryland and Delaware concerning the proposed Workers' Compensation Health and Safety regulations (*Pennsylvania Bulletin*, Vol. 29, No. 25, June 19, 1999). As professional, independent insurance agents, PIA members provide a full array of insurance products and services to individuals, families and businesses, including workers' compensation insurance coverage.

PIA is generally supportive of the proposed amendments to the regulations. Our comments, however, are confined to the provisions in Subchapter F, (Workplace Safety Committees), sections 129.1007 and 129.1008. We suggest allowing an employer to designate their insurance agent as a contact person. In many circumstances, the insurance agent has already played a vital role in establishing the safety committee. This additional, optional provision would facilitate and improve communications between the employer, insurer and Bureau.

Thank you for the opportunity to comment on the proposal.

Sincerely,

Peter N. Calcara, Vice President
Government and Industry Affairs

5050 Ritter Road
P.O. Box 2023
Mechanicsburg, PA
17055-0763
Phone (717) 795-9100
Fax (717) 795-8347

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
HARRISBURG, PA 17120

July 21, 1999

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

ORIGINAL: 2038
MIZNER
COPIES: Harris
Wilmarth
Jewett
Markham
Sandusky
Legal

RE: IRRC Regluation #12-54

Dear Mr. Nyce:

Attached please find comments received in response to the publication of the Proposed Rulemaking by Department of Labor & Industry for Title 34, Part VII, Chapter 121 found in the September 5, 1998 edition of the *Pennsylvania Bulletin*. As the designated IRRC contact for the Department of Labor & Industry, I will continue to deliver comments to you as they are received by the Bureau of Workers' Compensation.

Thank you for your continued assistance with this matter. Please don't hesitate to contact me at 787-5087 if you need to discuss any related details.

Sincerely,

Sheilah A. Borne
Director
Office of Legislative Affairs

The Commons at Valley Forge
Unit No. 9 • P.O. Box 911
1220 Valley Forge Road
Valley Forge, PA 19482
(610) 935-7560 / FAX (610) 935-5556
1-800-246-9767
E-mail: CEC@CECASSOC.COM

cec
ASSOCIATES INCORPORATED

Jason Walker, Ed.D., C.R.C., C.C.M.
President
Esther V. Weiss, M.A., C.R.C., C.C.M.
Vice President

July 14, 1999

ORIGINAL: 2038
MIZNER
Copies: Harris
Wilmarth
Jewett
Markham
Sandusky
Legal

Len E. Negley
Chief, Health and Safety Division
Bureau of Workers' Compensation
P.O. Box 15121
Harrisburg, PA 17105-5121

RE: **A comment on the proposed Workers' Compensation Act amendments as they appeared in the Pennsylvania Bulletin of June 19, 1999.**

Dear Mr. Negley:

This letter is to comment on the Workers' Compensation Act amendments that appeared in the June 19th issue of the Pennsylvania Bulletin.

The end of the second paragraph on page 3161 reads, "Therefore, to ensure the proper interpretation of that section, the vocational testing and assessment requirement is deleted."

I believe deleting that proviso from the original act would be wrong. Certainly there are individuals who, by experience alone, are qualified to act as vocational experts and, presumably, they feel they can evaluate without applying testing and assessments.

However, I feel, as did the original drafters of this part of the Act, that testing and assessment are essential aspects of many, if not all, evaluations. For example, if the evaluator determines that an individual is not physically capable of performing one task, the individual may be found capable of doing a different work that is also productive. An individual who has been injured and can no longer accomplish the physical function performed before the accident may be able to accomplish a task that relies on intellectual skills. The only valid way to determine suitability and preference is through vocational assessment. A battery of tests available for such evaluations has long been standard practice in vocational rehabilitation.

The professionals who wrote this specific qualification into Act 57 felt that testing and assessment are essential components of vocational rehabilitation, and I certainly agree. It is also important to realize that there is an adequate number of professionals in

Pennsylvania who are qualified to administer tests and perform assessments, and that these professionals are in the majority. To amend the Act to qualify those few who currently lack credentials to test/assess would be to weaken the intended outcome of testing to serve the self-interests of a minority of non-qualified rehabilitationists.

Thank you for your interest in my concerns.

Sincerely,
CEC Associates, Inc.

Dr. Jasen M. Walker, Ed.D., C.R.C., C.C.M.
President

COMMONWEALTH OF PENNSYLVANIA

Original: 2038
Mizner
Copies: Harris
Wilmarth
Jewett
Markham
Sandusky
Wyatte

DATE: August 18, 1999

SUBJECT: Definition of "inspection"

TO: John H. Jewett, Regulatory Analyst
Independent Regulatory Review Commission

FROM: Len E. Negley, Chief
BWC Health and Safety Division

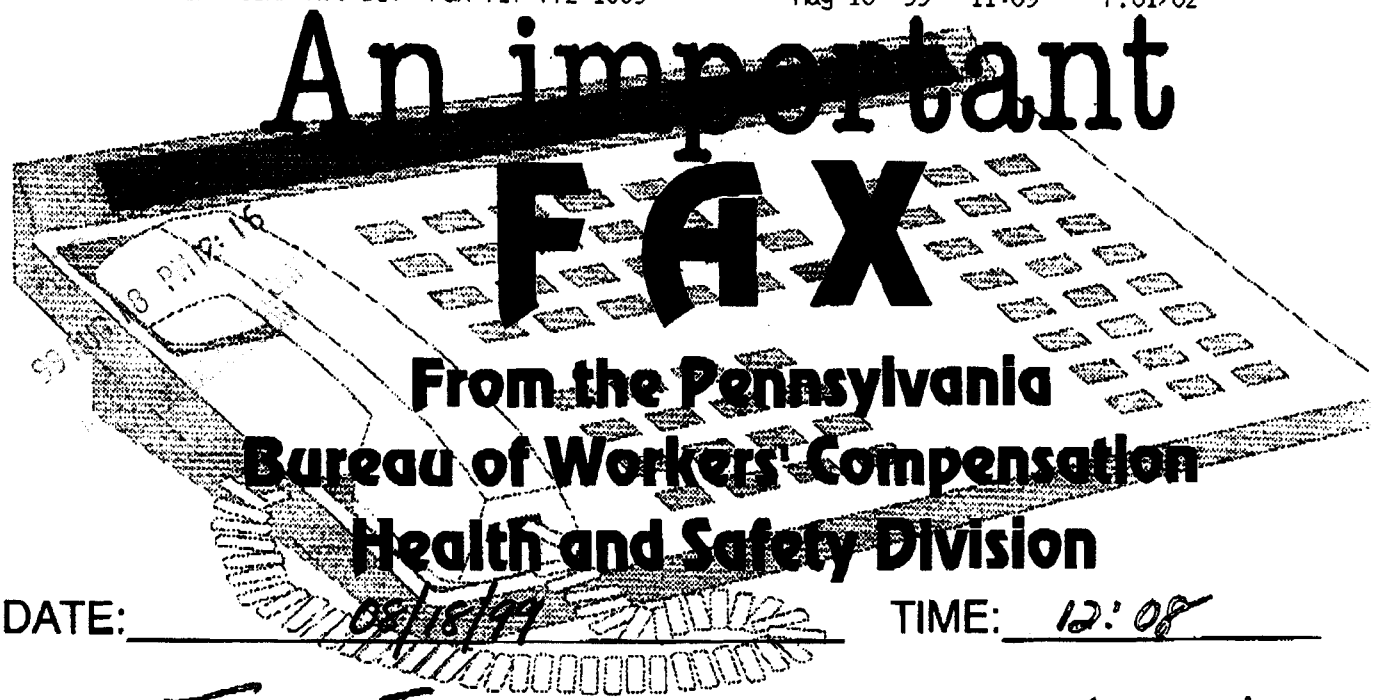
John, Marty Cunningham relayed your request for the definition of "inspection" to me. My understanding is that your request relates to those records/documents that we would examine during an on-site audit.

What we mean by an audit/inspection is an examination of documentation which supports the existence of required accident and illness prevention programs and services. The documentation would include written materials supporting the programs elements (required and optional) and services reported on the annual reports; information specified under recordkeeping requirements in the proposed rule-making; data provided during the pre-exchange of information period preceding the on-site audit, and any other records provided by the insurer, self-insured employer or group self-insurance fund to support the existence of an adequate accident and illness prevention program (this can take a variety of forms, but is generally existing data and records).

What we **don't** mean by an inspection is a physical examination of the workplace/site for hazards, which is what OSHA does. Audits/inspections are conducted in a conference meeting room and are purely a review of records and written materials.

Let me know if this is what you need or if I've missed the mark.

c: M. Cunningham
T. Kuzma
H. Redding



An important FAX

From the Pennsylvania Bureau of Workers' Compensation Health and Safety Division

DATE: 08/18/99 TIME: 12:08

TO: JOHN JEWETT FAX# 3-2664

FROM: LEN E. NEGLEY, DIVISION CHIEF

NUMBER OF PAGES, INCLUDING COVER PAGE: 2

MESSAGE:

John, the answer to your question re: inspections.

Please call (717) 772-1917 if any pages are not received.

Bureau of Workers' Compensation
Health and Safety Division
1171 South Cameron Street, Room 324
Harrisburg, PA 17104-2501
Telephone: (717) 772-1917 Fax: (717) 772-1639

The Insurance Federation of Pennsylvania, Inc.

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

July 19, 1999
ORIGINAL: 2038
MIZNER
COPIES: Harris
Wilmarth
Jewett
Markham
Sandusky
Legal

Len E. Negley, Chief
Health and Safety Division
Bureau of Workers' Compensation
P.O. Box 15121
Harrisburg, PA 17105-5121

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

Dear Mr. Negley:

The Insurance Federation submits the following comments on this proposed regulation on behalf of our members and our national counterparts, the American Insurance Association, the Alliance and the National Association of Independent Insurers.

At the outset, I want to emphasize our appreciation of your efforts to work with all parties, including insurers, in implementing the health and safety provisions of Article X of the Workers' Compensation Act. We believe further refinement is needed - but we also believe that the dialogue you have established will allow this to take place.

Subchapter B - Insurer's Accident and Illness Prevention Services

Section 129.102 - Accident and illness prevention services requirements

(1) Notice of availability of services

The Department proposes that this notice "shall include information about the incentive to form a workplace safety committee" in addition to information about the availability of accident and illness prevention services themselves.

It is unclear precisely what information the Department envisions being given here: Is it information only about the rating discounts available to those employers who form workplace safety committees, or is it also information about how such committees may be formed? Only the first part would seem to fit within the "incentive" description here.

It is also unclear whether the Department has the statutory authority to require notice of any incentive to form a workplace safety committee as part of the notice of availability of accident and illness prevention services. Section 1001(d) of the Workers' Compensation Act sets forth the only notice requisite for Article X, and it is expressly limited to a "notice that services required by this section are available to the employer from the insurer."

(2) Requirements to maintain accident and illness prevention services

This subsection requires that an insurer have sufficient accident and illness prevention "capacity" to meet not only the requests of the insurer's policyholders, but also whatever "needs" those policyholders may have.

Determining whether an insurer has adequate "capacity" to provide accident and illness prevention services may be an inherently vague test - but tying that capacity to needs policyholders may have makes it an impossibly vague test.

The key is that an insurer have the capacity to respond to any and all requests from its policyholders, not that it have the capacity to answer any and all accident and illness prevention services those policyholders may have - even if they do not request such services. The former is a capacity tied to real needs; the latter is a capacity tied to theoretical needs that may never occur - in essence, excess capacity that is a needless expense on everybody.

Because Article X took effect several years ago, both insurers and the Bureau have some credible experience on how many employers requests accident and illness prevention services. It makes sense to judge the adequacy of an insurer's capacity to provide those services based on that experience. Accordingly, we recommend the Bureau revise references in this and other subsections from services a policyholder "may need or request" to the standard now being applied by the Bureau - namely, <u>services a policyholder actually requests</u>.

(3)(ii) The required services

This subsection lists the nine services the Department wants included as part of an insurer's accident and illness prevention services.

The main problem is the ambiguity as to whether the insurer has to actually provide such services to a policyholder on request, or whether the insurer has to recommend them to the policyholder and/or analyze, survey, consult about, review or evaluate those programs a policyholder may have in place.

We recommend that services required of insurers be limited to making recommendations or performing analyses, surveys, consultations and the like in most of the areas set forth in this subsection. That seems the Bureau's intent, as most of the services listed come with that limitation - as in the services listed in (A) - (D) and (G).

Some of the listed services, however, do not have this limit. For instance, (E) suggests that the insurer would have to actually provide a wellness program, health screening or a substance abuse program - not simply recommend one or evaluate that offered by the employer. (F) and (I) suggest that the insurer would have to provide training programs; and (H) suggests that the insurer would have to review industrial materials processes, whatever they are.

Again, I am not sure that is the Bureau's intent. In any event, I doubt that is the intent of Section 1001(b) of the Act, which speaks in terms of services that are surveys, recommendations, consultations and analyses. Granted, Section 1001(b) also speaks of training programs - but not with the specificity the Bureau does in (I), and not tied to workplace safety committees as opposed to accident prevention.

If the Bureau intends the more extensive types of services, it should be mindful of the cost of them and who is to pay for them. For instance, health screening and wellness programs can be quite expensive (further, my experience is that these programs generally have more value on the general health insurance side); requiring that they be provided rather than recommended can be a significant cost factor.

We are also concerned with some of the specific services listed in this subsection. First, (D) refers to "industrial hygiene surveys appropriate to the policyholders' needs."

This should be limited to policyholders' "safety and health" needs - otherwise it raises the possibility that insurers' services would be tied to meeting compliance requirements such as those of OSHA, not to minimizing potential losses payable under the Workers Compensation Act, which is the purpose of Article X.

Second, (E) lists health services appropriate to policyholders' needs - but the services it lists are not necessarily tied to accident and loss control. Further, to the extent that the Bureau intends insurers to get in the business of providing drug abuse programs, it should be mindful of the legal liability and confidentiality concerns this creates; this again highlights the need to limit these services to ones insurers recommend, not directly provide.

Third, (H) should be deleted. I am not sure what it adds when compared with the consultations set forth in (G). All it seems to do is open a new area of liability, as where an insurer might not "identify a potential hazard" and the employer might therefore try to tie the insurer into any subsequent lawsuit.

Section 129.106 - Reporting requirements - licensed insurers

First, we recommend that the proposed March 1 reporting date be moved back to June 1. As a practical matter, two months is simply not sufficient time.

Second, consistent with the Bureau's language in Section 129.102 and our comments on that section, we recommend the report provide information on the services "requested (as opposed to "offered") and provided" to policyholders. Under Section 129.107, the information in this report will be used by the Bureau to determine whether an insurer's services are adequate. As noted in our comments on Section 129.102, whether an insurer maintains and provides adequate accident and illness prevention services should depend on its ability to meet the requests of its policyholders.

Further, the Bureau should incorporate Form AIPS into the text of the regulation, so that insurers have certainty that the reporting requirements in it will remain has firm as the regulation itself.

Section 129.108 - Recordkeeping requirements

We recommend this section be deleted. The recordkeeping it demands goes well beyond that required in Form AIPS or the information the Bureau wants to be provided in its audits, the only purposes the Bureau has for these records. Further, the Bureau already lists the information it wants for reporting in Form AIPS, and its lists the information it wants in its audits in Section 129.110 - so the recordkeeping requested here seems superfluous.

In any event, the recordkeeping required here is excessive. The items listed in subsections (1) through (3) should be sufficient: They list the services requested and provided and the dates on which all this is done. What more is needed, and for what purpose in terms of monitoring compliance with insurers' responsibilities under Article X?

Section 129.109 - Periodic audits of insurers' accident and illness prevention services

We have a drafting concern here. Is this section intended to require the Bureau to audit an insurer at least once every two years; is it intended to allow the Bureau to audit only once every two years (presumably absent a need to follow-up on an audit that reveals compliance problems); or is it intended to allow the Bureau to audit as often or as little as it deems necessary? The use of "may audit" and "at least once every two years" is the source of confusion.

Section 129.110 - Preaudit exchange of information

Subsection (a)(2) and the listing of employers with workplace safety committees should be modified to those known by the insurer; there is some confusion as to whether the insurer always knows if the employer has such a committee.

Subchapters C and D - Individual and group self-insured employers' accident and illness prevention programs

The same concerns we raised with respect to insurer programs hold true here, both with respect to the services that are part of those programs and the reporting on them to and auditing of them by the Bureau.

Our concern here is not merely academic: Many times, these self-insured employers will call upon an insurer to provide these services.

Subchapter E - Accident and illness prevention services providers qualification standards (sic)

Our main concern is that the regulation provide certainty as to what qualifications will and will not be approved. In the past, the Bureau has listed the specific qualifications, designations and certifications it wants. It should do the same in this regulation, rather than merely stating it will be whatever "the Bureau recognizes." That provides little guidance, predictability or certainty for insurers entering into contracts with these providers.

Further, the Bureau should grandfather those who, although lacking certain certifications and the like, have ten years of experience in a given area. The adage "there is no substitute for experience" holds true here.

Subchapter F - Workplace safety committees

Section 129.1006 - Committee member training

The main concern is as with the services listed in section 129.102: The training for workplace safety committee members should be limited to areas applicable to reducing workers compensation claims. As noted in our earlier comments, some of the items required here potentially go far beyond that, as with substance abuse awareness programs.

In addition, we have a concern with excessive recordkeeping requirements, as with our comments on Section 129.108: The point should be maintaining enough records to allow the Bureau (and, here, insurers) to monitor whether a safety committee is able to achieve its function; some of the records here seem destined to become dust collectors.

Section 129.1010 - Recordkeeping requirements

The three years set forth here and in Section 129.1006 should be made consistent with the five years set forth in Section 129.1005(c)(5) - with three years probably being adequate in all instances.

This regulation presents a difficult balancing act: On the one hand, it needs to ensure that the accident and illness prevention services of insurers are meaningful and able to be properly reviewed. On the other, it needs to make sure that the cost of providing those services and reporting on them to the Bureau not exceed the value of them.

The above recommendations are aimed at better achieving that balance - which we believe is the best way to achieve the goal of Article X of the Workers Compensation Act, whereby insurers are to work with policyholders in reducing the number of work-related accidents and illnesses and therefore the number of workers compensation claims, not just the amounts paid in those claims.

Thank you for the opportunity to comment on this. We welcome the chance to discuss these concerns and recommendations with you in the weeks ahead.

Sincerely,

Samuel R. Marshall

c: Richard Himler, Director
Bureau of Workers Compensation

Taylor Cosby, Vice President
American Insurance Association

Michael Harrold, Director
National Association of Independent Insurers

Neil Malady, Regional Manager
Alliance of American Insurers

FAX

INSURANCE FEDERATION OF PA
1600 MARKET STREET
SUITE 1520
PHILADELPHIA, PA 19103

Date 7.19.99

Number of pages including cover sheet ____

To:
Len Wegley

From:
Jon Marold

Phone

Fax Phone 717-772-1639

CC:

Phone 215-665-0500

Fax Phone 215-665-0540

REMARKS:

☐ Urgent ☐ For your review ☐ Reply ASAP ☐ Please comment

Pennsylvania Gas Association

800 NORTH THIRD STREET, HARRISBURG, PA 17102-2025 (717) 233-5814 FAX (717) 233-7946

99 JUL 26 PM 4:56

ORIGINAL: 2038
MIZNER
COPIES: Harris
Wilmarth
Jewett
Markham
Sandusky
Legal

July 19, 1999

LABOR & INDUSTRY
RECEIVED
JUL 19 1999
Health & Safety
Bureau of Workers' Comp.

Mr. Len E. Negley
Chief, Health and Safety Division
Pennsylvania Department of Labor and Industry
Bureau of Workers' Compensation
1171 S. Cameron St.
Harrisburg, PA 17105-5121

VIA HAND DELIVERY

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

Dear Mr. Negley:

Enclosed for filing please find the "Comments of the Pennsylvania Gas Association." To confirm receipt, please stamp the two copies accompanying the original.

Respectfully submitted,

Daniel R. Tunnell
President

Enclosure

cc: PGA Job Safety and Health Committee (w/ enc.)

BEFORE THE
PENNSYLVANIA DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF WORKERS' COMPENSATION
HEALTH AND SAFETY DIVISION

Workers' Compensation Health and Safety (Proposed Amendments to 34 Pa. Code Chapters 123, 125, 129 and 143)	))))	Regulation No. 12–54

COMMENTS OF THE PENNSYLVANIA GAS ASSOCIATION

Pursuant to the notice of proposed rulemaking ("Rulemaking Notice") appearing in the June 19, 1999 issue of the *Pennsylvania Bulletin* at page 3161 *et seq.*, the Pennsylvania Gas Association ("PGA") submits the following comments on proposed Chapter 129, Subchapter C, which would establish program and recordkeeping requirements for accident and illness prevention programs maintained by employers which are "self-insured" under Pennsylvania's Workers Compensation Act, as amended (the "Act"). For the practical and legal reasons described below, the adequacy of self-insureds' accident and illness prevention plans should continue to be governed by advisory guidelines, *i.e.*, those established in the Department's September 1995 policy statement,[1] rather than regulatory mandates. The Department should therefore reject proposed Subchapter C and maintain its current course.

A. Mandatory Standards, and the Associated Increases in Compliance Costs Are Unwarranted: The Current System of Advisory Guidelines Has Proven More Than Adequate to Ensure the Adequacy of Self-Insureds' Accident and Illness Prevention Plans.

Act 44 of 1993 set the statutory requirements for self-insureds' accident and illness prevention plans:

---

[1] "Workers' Compensation Health and Safety—Statement of Policy," 25 Pa. Bull. 3943 (1995) [hereinafter "September 1995 Policy Statement"].

> A self-insured employer shall maintain an accident and illness prevention program as a prerequisite for retention of its self-insured status. Such program shall be adequate to furnish accident prevention required by the nature of its business and shall include surveys, recommendations, training programs, consultations, analyses of accident causes, industrial hygiene and industrial health services.[2]

In September 1995 the Department issued a policy statement establishing substantive and recordkeeping guidelines for self-insureds' plans. By all accounts, the policy statement has provided the department a useful standard for examining individual plans as they come before the Department for annual review. At the same time, since the guidelines were not legally binding, an employer could tailor its plan to its unique operating and regulatory environment. For example, PGA members include most of Pennsylvania's major natural gas distribution utilities and a number of natural gas interstate pipelines. These utilities and pipelines are subject to pervasive safety regulations issued by the United States Department of Transportation ("USDOT"),[3] including provisions that constitute "consultation" and "industrial health services" in the context of Section 1038.1(b). As long as the Department's guidelines remained advisory, PGA members could integrate them with the governing USDOT requirements, resulting in cost-effective accident and illness prevention plans that our members are proud of.

Nothing in the Rulemaking Notice indicates that the advisory guidelines have failed to provide the Department a workable means to ensure the adequacy of self-insureds' plans. For nearly four years, employers have been submitting their plans for Department approval. It would appear that the majority of these plans have been found adequate, and in those relatively few cases where a plan has been found inadequate, one can assume the Department used its guidelines to consult with the employer and remedy the problem.

In short, for self-insureds the current system of advisory standards worked well. If the Department adopts Subchapter C, and elevates these standards to legally binding regulations, self-insureds would lose the flexibility to harmonize their plans with other legal requirements, and would

---

2 P.L. 190, No. 44 § 1001(b), *codified at*, 77 P.S. § 1038.1(b)[hereinafter "Section 1038.1(b)"].

3 *See, e.g.*, 40 C.F.R. Parts 191 and 192.

incur compliance costs to satisfy mandates that are inappropriate if not completely unnecessary. Experience shows it is far better for the Department to maintain its current enforcement approach, identifying the handful of deficient self-insureds and dealing with them on a case-by-case basis, than to impose across-the-board regulations which presume, in effect, that the overwhelming majority self-insured plans, historically found adequate, are now inadequate because they fall short of some regulatorily imposed content or recordkeeping standard.[4]

B. To the Extent It Would Impose Standards More Stringent Than Current Regulations Promulgated by the Occupational Safety and Health Administration, Proposed Subchapter C Would Run Counter to Pennsylvania's Executive Order 1996-1.

Executive Order 1996-1 directs that for a state regulation to require a standard more stringent than federal law, the promulgating agency must demonstrate a "compelling and articulable Pennsylvania interest" or a requirement of state law.[5] As proposed, Subchapter C would require self-insureds' plans to contain a number of "protocols or standard operating procedures" covering areas already subject to regulation by the Occupational Safety and Health Administration ("OSHA").[6] To the extent proposed Subchapter C would impose standards beyond

---

4 This is not to say whether a regulatory approach woud have value in the context of plans and services provided by workers' compensation carriers. Carriers might welcome regulatory standards as providing a common underwriting criterion, or as enhancing their ability to trade policies among themselves or obtain reinsurance. However, even if regulation would provide these benefits to carriers, there are no analogous benefits to self-insured employers.

5 Executive Order 1996-1, 26 Pa.B. 856 (1996), *codified at* 4 Pa. Code § 1.371(5).

6 *E.g.*, Proposed Section 129.402(a)(16)(i)(electrical and machine safeguarding) covered by 40 C.F.R. Subpart O (§§ 1910.211-.219); Proposed Section 129.402(a)(16)(ii)(personal protective equipment) covered by 40 C.F.R. Subpart I (§§ 1910.132-.139); Proposed Section 129.402(a)(16)(iv)(lockout/tagout procedures) covered by 40 C.F.R. § 1910.147); Proposed Section 129.402(a)(16)(v)(hazardous materials handling, storage and disposal) covered by 40 C.F.R. Subpart H (§§ 1910.101-.120); Proposed Section 129.402(a)(16)(vi)(confined space) covered by 40 C.F.R. §§ 1910.146); Proposed Section 129.402(a)(16)(i)(electrical and machine safeguarding) covered by 40 C.F.R. Subpart O (§§ 1910.211-.219); Proposed Section 129.402(a)(16)(vii)(fire prevention and control) covered by 40 C.F.R. Subpart L (§§ 1910.155-.165). This list is not exhaustive, but is intended to illustrate the overlap between elements of Proposed Subchapter C and existing OSHA requirements.

the OSHA requirements, the Department is compelled to satisfy the demanding standard established in Executive Order 1996-1. The Rulemaking Notice provides no such argument or basis, and Subchapter C must therefore be rejected to the extent it would hold self-insureds to standards more stringent than OSHA already requires.[7] If the Department rejects PGA's arguments and goes forward with Subchapter C, it must, at a minimum, provide that a self-insured's compliance with an applicable OSHA regulation shall be deemed to satisfy the counterpart content requirement for the self-insured's accident and illness prevention plan.

WHEREFORE, in light of the facts and arguments presented above, the Pennsylvania Gas Association urges the Department to reject proposed Subchapter C in favor of maintaining the advisory guidelines provided in its September 1995 Policy Statement.

Respectfully submitted,

Daniel R. Tunnell
President

Dated: July 19, 1999

[7] As Executive Order 1996-1 applies soley to regulations, it does not govern the standards contained in the September 1995 Policy Statement.

Pennsylvania Coal Association
212 North Third Street • Suite 102 • Harrisburg, PA 17101

(717) 233-7900
(800) COAL NOW (PA Only)
(717) 231-7610 Fax

GEORGE ELLIS
President

July 19, 1999

Mr. Len E. Negley
Chief, Health and Safety Division
Bureau of Workers' Compensation
P.O. Box 15121
Harrisburg, PA 17105-5121

Re: Proposed Workers Compensation Health and Safety Regulations (34 Pa. Code CHS. 123, 125, 129 and 143)

Dear Mr. Negley:

The Pennsylvania Coal Association (PCA), pursuant to notice published in the *Pennsylvania Bulletin* on June 19, 1999 (Vol. 29, No. 25), submits the following comments on the above referenced proposed 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 according to DEP preliminary data exceeded 78 million tons in 1998. Pennsylvania coal operators directly employ 8,000 people who are among the highest paid industrial workers in Pennsylvania with average annual earnings of $45,533. In addition to direct employment, a Penn State University study concluded that up to 10 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 relating to processing and administering various health and safety requirements. Referred to as the "Workers Compensation Health and Safety Regulations", the proposal is intended to reduce the number and severity of accidents within the workplace.

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

A major problem with the proposed rule is its failure to recognize the unique status of the coal mining industry and the manner in which it is regulated under Federal and state law. Unlike other industries, the mining industry is not regulated by OSHA. 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 laws establish a comprehensive scheme of regulation and enforcement that is vastly different than the regulatory scheme established by OSHA. Recognizing that this proposed rulemaking is aimed at industries regulated by OSHA and based on OSHA-related requirements and realizing the marked difference between MSHA and OSHA rules, **PCA requests that the Pennsylvania coal mining industry be exempted from these regulations. If this cannot be done, we ask 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.**

BACKGROUND

The federal government has had a significant and longstanding role in fostering occupational safety and health in our nation's mines, dating back to the establishment of the Bureau of Mines in 1910. In 1952, long before OSHA came onto the scene, the Bureau of Mines began inspecting coal mines.

In 1969, again before OSHA, Congress passed the Federal Mine Act. The Act was amended in 1977 to include regulation of all mines in the U.S. under what is now called MSHA.

In 1961, Pennsylvania enacted both the Bituminous and Anthracite Coal Mine Safety Acts that provide for the regulation of underground coal mines in Pennsylvania.

These acts have served to focus the attention of industry and miners on the prevention of hazardous conditions that lead to major disasters and loss of life. One clear purpose was to develop a safety "culture" within the mining community designed to ensure not only compliance with regulatory standards relating to the physical conditions of the mine but also to emphasize the importance of risk analysis in reducing or minimizing the "causes" of accidents.

These laws, coupled with federal and state regulators working in tandem with mine operators and their employees and the tremendous advances that have been made in mining technology, have unquestionably been effective in reducing the frequency of accidents and fatalities in the Nation's coal mines.

MSHA data on coal mine fatal accidents clearly demonstrates these improvements:

- The average fatal incident rate (based on hours worked) at coal mines in the 10 year period (1960's) prior to implementation of the 1969 Coal Mine Safety and Health Act was 21.2.

- In the first 10 years (1970's) following passage of the Mine Act the average fatal incidence rate was reduced by more than half to 9.9. The fatal incidence rate continued to dramatically decline during the next 10 year period (1980's), averaging 5.4.

- The fatal incidence rates during the 1990's continued to drop with the average fatal rate at 3.6 through 1997.

Pennsylvania's mine safety record is also exemplary. Last year marked the second time in the state's history that the bituminous coal mining industry achieved a zero fatality rate for the entire year (the last time was in 1991).

Further, on June 25, the industry reached another milestone – setting a new all time record for the longest period without a fatal accident, 710 days. The previous record of 709 days occurred between June 10, 1990 and May 19, 1992. With our last fatality having occurred on July 15, 1997, we have now gone over two years without a fatality and, with each passing day, the record continues to grow.

Also, Pennsylvania's bituminous mining industry achieved a 17.5% reduction in accident frequency over a three-year period, from the second quarter of 1996 through the first quarter of 1999.

CURRENT REQUIREMENTS

Under the Federal Mine Act, MSHA is required to inspect every underground mine four times per year and every surface mine twice per year, but the agency also conducts thousands of what it call "spot" inspections aimed at measuring compliance with standards governing specific conditions or practices. This does not mean inspections for one or two days, respectively. Rather, it can mean a continual MSHA inspector presence at the mine throughout the year. MSHA's statistics show that a large underground coal mine can have as many as 3,000 - 4,000 onsite inspection hours a year. Smaller mines may have 1500 – 2000 onsite inspections every year. In addition, BDMS conducts regular mine inspections. As a result, this level of inspection presence means that there are inspectors at any given mine almost every weekday.

In addition to the inspection mandates required by the Federal Mine Act, each coal mine operator has extensive self-monitoring requirements under that statute and its regulations (e.g., preshift and onshift examinations and other types of inspections for

underground mines. See, e.g., 30 C.F.R. § 75.360, 75.362, 75.364, 77.1713). Such inspections are performed underground by certified mine officials. See, 30 C.F.R. § 75.2. Officials only become certified after a period of experience coupled with a testing requirement. See, e.g., 52 P.S. § 701-206. MSHA also has the requirements, for example, for industrial hygiene monitoring for respirable coal mine dust on both the surface and underground. 30 C.F.R. Parts 70 and 71. These self-monitoring requirements also require extensive recordkeeping by employers.

There are also extensive training requirements under the Federal Mine Act. See 30 C.F.R. Part 48. For example, underground miners are required to undergo an initial 40 hours of training and both underground and surface miners undergo 8 hours of annual refresher training.

MSHA vs OSHA STANDARDS

The proposed rulemaking is more reflective of OSHA-based requirements and not MSHA-based rules or BDMS' policies which require coal industry compliance. For example, the accident and illness prevention programs that are described and mandated in the proposed rules focus primarily on the requirements under the Occupational Safety and Health Act of 1970 ("OSHA"), 29 U.S.C. § 651. The difficulty with this is that the coal mining industry is regulated under a different and more stringent regulatory standard than OSHA's and the rules fail to account for this fact.

The requirements set out in proposed Section 129.402 highlight the regulatory disparity between the coal mining industry and other industries. For example, one of the methods identified in Section 129.402(15)(i) for evaluating health and safety programs is a comparison of the individual self-insured employer's incident rate to the industry wide rate as derived from OSHA's data. The mining industry has an entirely separate and different reporting system for accidents and illnesses under the Federal Mine Act. Cf. 30 C.F.R. Part 50 and 29 C.F.R. Part 1904. The Federal Mine Act requires the reporting of various types of illnesses and injuries and the criteria for that reporting are different than under OSHA's.

This disparity is further emphasized by the criteria set out in proposed Section 129.402(16), which describes certain protocols for standard operating procedures. MSHA has its own protocol for such procedures but it is different than that promulgated by OSHA.

Another clear example of the proposal's inconsistency with MSHA's standards is the requirement for qualification as an accident and illness prevention services provider. All coal mines have a person designated as the chief health and safety officer. Most mines have a multiple-person safety staff who are dedicated to compliance and safety issues. Many of these people have extensive experience in mine safety, are certified as trainers by MSHA and are certified as mine officials by the Commonwealth of Pennsylvania. Yet, under the existing guidelines, and presumably the proposed rules in Section 129.403, they would not qualify as accident and illness

services providers. No industry dedicates the resources to safety and health issues that coal mine operators do, yet the proposed rules fail to take this into account.

Moreover, the proposed rules fail to recognize the burden that will be placed upon coal mine operators to maintain their self-insured status especially if an audit is required. For example, in Section 129.406, there are extensive recordkeeping requirements. Many of these requirements mirror the requirements in the Federal Mine Act and its regulations but fail to consider the volume of records the average mining company must maintain. The mining industry maintains daily preshift and on-shift examination records which are designed to detect and correct hazards. The proposed rules could be construed to require audits of such records, which would require a company to duplicate large volumes of data that would serve no useful purpose. There are many other records that a non-MSHA regulated employer would not have but a mining company would. Thus, an audit of the records would be burdensome and unnecessary.

CONCLUSION

The proposed regulations are based on OSHA requirements and are intended to improve workplace safety at OSHA regulated sites. Unfortunately, it extends these OSHA-based requirements to an entity not regulated by OSHA but is subject to a far different regulatory scheme.

Consequently, the difficulty and complexity attendant with trying to comply with two different sets of rules would be a formidable task that will be time-consuming, costly, redundant and unnecessary.

Therefore, PCA requests that the Department of Labor and Industry modify the proposed rules to provide an exemption for the underground and surface coal mining industries in Pennsylvania which are regulated by MSHA and BDMS. Failing this, we ask the Department to promulgate a separate set of regulations for the Pennsylvania coal mining industry that is reflective of and consistent with our current regulatory scheme.

PCA and its companies would be happy to meet with you at your convenience to discuss in more detail our unique regulatory scheme and the problems this rulemaking would pose on the industry before you finalize this proposal.

Thank you for your consideration of these comments.

Sincerely,

George Ellis

George Ellis
President, Pennsylvania Coal Association

TravelersPropertyCasualty
A member of citigroup

John H. Cheffer CSP, P.E.
Manager Regulatory Compliance
Loss Prevention & Engineering, 8-CR
Phone: 860.277.4900
FAX: 860.954.6727
Internet: John.H.Cheffer@Travelers.Com

One Tower Square
Hartford, CT 06183

July 16, 1999

ORIGINAL: 2038
MIZNER
COPIES: Harris
Wilmarth
Jewett
Markham
Sandusky
Legal

Mr. Len, E. Negley
Chief, Health and Safety Division
Commonwealth Of Pennsylvania
Department of Labor and Industry
Bureau of Workers' Compensation
117 South Cameron Street, Room 310
Harrisburg, PA 17104-2501

Dear Mr. Negley,

Re: Proposed Rulemaking Chapter 129 Workers' Compensation Health And Safety

The Travelers Loss Prevention & Engineering Division appreciates the opportunity to comment on the proposed rules implementing health and safety provisions 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 companywide, 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.

Travelers has observed and participated in the rule development process since the passage of Senate Bill1 in 1993. In 1993, Travelers Loss Prevention & Engineering participated in some of the early workers' compensation reform act outreach training regarding health and safety. We also began a dialog in 1993 with Mr. Gerard Foulke and Mr. Leo Luciano of the Division about Act 44, Title X. While we did not have the opportunity to directly participate in the development of the original version of the draft rules, we feel we have been actively engaged in commenting about rule content during the process.

Our current comments result from a review of the June 19, 1999 notice of proposed rulemaking. These comments specifically address Chapter 129. Workers' Compensation Health And Safety , including Subchapter B. Insurer's Accident And Illness Prevention Services.

Specifically, we 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. We believe the proposed rules will improve understanding of the intent of the revisions to the Workers Compensation Act. However, we offer the following observations and comments for your consideration.

As the proposed rules provide for provision of services broader than carriers may contemplate as part of coverage, and as the proposed rules appear to mandate provision of services which may be beyond the technical scope and competency of carrier personnel, we believe that the final rules should provide for immunity for carrier personnel as they perform duties in compliance with the final rules.

We believe the specificity of the proposed rule may be detrimental to the Division in the future as technology, the insurer industry and state government changes to address a changing world. We suggest the proposed rules also do not take into consideration the diversity of employers insured by carriers, nor the diversity of the carriers who underwrite workers' compensation in the Commonwealth. It appears the aim of the proposed rule is to be a "one size fits all" mandate. However this format creates the potential for penalty to any carrier that does not exactly conform to the rule. Such a proposal 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.

Chapter 129. Workers' Compensation Health And Safety

Subchapter A – Preliminary Provisions §129.2. Definitions.

Consultation – The definition uses the terms "counsel' and "advice." However, "counsel" is defined in the dictionary as " advice resulting from consultation.."

We suggest the following modified wording: *Consultation*-Providing ~~counsel and~~ advice relative to existing and potential hazards.

Industrial Health Services – The definition specifies consultation regarding the "well-being of people in relation to their job and working environment." The concept may run counter to the coverage of workers' compensation and confuses the role of the service provider as stated in the specific definitions regarding industrial hygiene and other services. The examples used in §129.102. accident and Illness prevention services requirements.(3)(ii)(E) suggest responsibilities which properly come under the purview of the employer's human resources programs and not workers' compensation. We are concerned that being required to offer such unfettered services

creates liability for the insurer, or, at the very least coverage is implied where none may exist. As this definition is used in many ways to denote varying outcomes, it may be best to define the term in a way that best focuses on workplace safety results.

We suggest the following modified wording: *Industrial health services* – **If an insurer chooses, industrial health Sservices ~~that~~ may** include a consultation concerning the well-being of people in relation to their job and working environment in relation to the coverage provided. ~~This consultation may produce recommendations aimed at identifying, controlling and preventing exposures as part of the implementation of a program of accident and illness prevention services~~. **Such services may include wellness programs and substance abuse program advice.**

Loss run- This definition uses the term " incurred losses" and specifies that each element of the incurred cost be shown separately along with type and cause of injury. It may be prudent to allow the insurer to produce a loss run that shows paid and reserved vs. paid, reserved and medical cost. For many insureds the distinctions are not understood, nor important. Also, by specifying type and cause of injury the proposed rule implies not having the loss run in the specific configuration portends potential penalties for non compliance with the rule. This may be a difficult definition to follow as "cause" is not always reported, or accurately reported by the insured. This is a situation that is beyond the control of the insurer. Also, as an effective loss run depends upon the needs of the insured and the results desired, the carrier should be able to provide loss data meeting the specific needs of the insured.

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,** ~~medical cost, compensation paid and moneys reserved for claim payment~~ and paid and reserved costs of the claim.

Subchapter B. Insurer's Accident And Illness Prevention Services

§129.102. Accident and illness prevention service requirements.

(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.

§129.102(3) Requirements to provide accident and illness prevention services.
We suggest (i),the first paragraph, is sufficient in its content and scope. This provides a broad area of response a carrier can react to and still gives the Division the scope of service it seems to conclude is necessary.

If the Division decides to include -- (ii) Required services include the following:, we ask you to consider the wording implies that all surveys, and potentially all service, must include (A) through (I).

We suggest the following: (ii) Required services **may** include **any one of the** following **elements, or any combination of these elements to assist the insured with accident prevention activities:**

We suggest adding the following new paragraph: **(A) Depending upon the assessment of the carrier accident prevention person, responding to an insured's request for assistance may be accomplished by phone consultation and/or the provision of appropriate accident prevention material.**

The exiting paragraphs can be re-lettered as appropriate.

Existing (3)(ii)(A), first sentence – The mandate that an onsite survey identify existing or potential accident and illness hazards or safety program deficiencies reads as an absolute statement. Consider that the surveyor only gets a "snapshot in time" regarding a work site. Therefore to mandate that the surveyor identify existing and potential accident and illness hazards or safety program deficiencies places a burden upon the surveyor they probably cannot meet.

We suggest the following wording: Onsite surveys to identify **observed** ~~existing or potential~~ accident and illness hazards or safety program deficiencies **to assist the insured improve accident prevention activities**.

Existing (3)(ii)(A), second sentence – specifically states that recommendations Shall be made if hazards or program deficiencies are identified. Please consider that some carriers do not make recommendations as conceived in this sentence. Often, deficiencies will be addressed in a report as part of a discussion of areas, issues, activities or processes surveyed.

We suggest the following wording: Surveys ~~shall~~ **should** include **comments in reports, suggestions or** recommendations made to **assist** the policyholder concerning abatement of hazards or program deficiencies identified as a result of the surveys.

Existing (3)(ii)(A), third sentence states -- If one or more imminent danger situations or significant program deficiencies are identified, appropriate follow-up by the insurer shall be made to determine what corrective actions a policyholder has taken and to make further recommendations as required. The presumption is that the recommendation(s) was/were made by the current carrier. Also, if there is a recommendation follow up by the carrier, there should not be a mandate to make additional recommendations, particularly when one would expect a carrier to make appropriate statements to the insured if deficiencies are found.

We suggest the following wording: -- If one or more imminent danger situations or significant program deficiencies are identified **by the current insurer**, appropriate follow-up by the insurer ~~shall~~ **should** be made to determine what corrective actions a policyholder has taken ~~and to make further recommendations, as required.~~

Existing (3)(ii)(E) Industrial Health Services – Industrial health services appropriate to the policyholder needs – for example, wellness programs, health screening, substance abuse awareness and prevention training policies and programs.

These are not accident prevention services in the normal scope of carrier services. This section implies as well as states that carriers will provide or contract for health screening, wellness programs or substance abuse programs. This opens up an entire new area for potential professional liability litigation. These programs are part of an emerging area of human resources, EEOC and discrimination law. Also, such programs (wellness programs, health screening and substance abuse) need significant medical perspective for effective implementation. In light of the lack of a direct evidence of beneficial accident prevention relationship by these programs, it may not be wise for the rule to mandate that carriers must respond to (any) insured requested "need." It is feasible that a well thought out plan by an insured can ensnare a carrier in a employee vs employer contest where the carrier ends up bearing the responsibility for not only the program but potential litigation.

We suggest the following wording: Industrial Health Services – **Carriers may make available** industrial health services appropriate to the policyholder needs; **or direct policyholders to appropriate resources** ~~—for example, wellness programs, health screening, substance abuse awareness and prevention training policies and programs.~~

Existing (3)(ii)(H) Review of planned or newly introduced industrial materials processes....

This section appears to establish a mandate for the carrier to engage in analysis and diagnostics of "state of the art/science" technology when they may not be, or cannot be, expert in that field. There will be situations where "state of the art/science technology" will be considered to be secret and the carrier will not be allowed sufficient access to technology to evaluate hazards and exposures. Further, as technology races forward at an increasingly faster pace, it is conceivable that the technology developer/owner and the insured/user may not know all of the associated hazards for the technology. To impute such a responsibility to the carrier establishes the "higher level of knowledge" principle as fact for carriers in the Commonwealth. The result will probably lead to the invariable impleading of the carrier in third party litigation for their professional liability contribution.

We suggest it is more realistic to have the section mean that the carrier can to assist the insured in evaluating processes, equipment, materials new to the worksite.

We suggest the following wording: **Assist the insured, within the scope of the surveyor's competency, as defined within the rules in Subchapter E, with the** review of planned or newly introduced **to the worksite** industrial materials processes, equipment, layouts and techniques to identify potential hazards and to recommend methods to mitigate hazards identified.

§129.108 Recordkeeping requirements

This section implies that the carrier shall keep records for the specified time for all underwriting, service and requested work performed in the Commonwealth. We understand that the purpose of recordkeeping was to document a carrier's response to insureds who requested assistance. We

believe such data is already available as carriers report about insured requests for service in the annual report.

We suggest the following wording: Insurers shall maintain records of accident and illness prevention services by policyholder **requesting assistance** for the most complete current calendar year and two preceding consecutive calendar years, **if insured by the current carrier for the prior years,** which include:
We suggest that §129.108 (3) (6) and (7) are redundant. As dates are included with reports, or phone logs, the intent of the rule can be met by deleting (3) and (7) and retaining (6).

§129.108(4) We do not understand the importance to the Division of how many hours a carrier expends providing service to insureds. One assumption is that time spent with an insured equates with quality. Another assumption is that the Division can develop base lines for comparison. This can be misleading as the level of service varies by carrier, agreements with insureds, extent of hazard, extent of exposure, book of business and location of the servicing staff. Is it a fair comparison if in-state staff spends "less time" servicing accounts vs out-of-state staff who must travel a greater distance (presumably expending more time) to the accounts?

We suggest that this element be deleted.

§129.109 Periodic Audit.

There is no indication that the purpose of the audit is the examination of the carrier accident prevention program, and files **associated with requests by insureds for service**. That is our understanding of the audit process.

We suggest that all carriers will not require biennial audit. By giving the Division leeway to audit carriers on a schedule that reflects problems or lack of problems, the Division will be better able to manage resources and focus on carriers who need assistance.

We suggest the following wording: (a) The ~~bureau~~ **Division** may audit the accident and illness prevention services of each licensed insurer **associated with requests by insureds for service**, including accident and illness prevention services provider's qualifications, ~~at least once every 2 years~~ **within 2 years of rule implementation** to determine the adequacy of the insurer's accident prevention services. **Based upon audit results the Division will determine the audit schedule. An insurer audit shall be accomplished at least once every five years.**

§129.110 Pre-audit exchange of information

This section clearly states the preaudit process. However, the process repeats annual report information already on file with the Division. [See §129.110(a)91) and (3)] To save time and resources, we suggest the Division utilize the information already on record during the preaudit process allowing the carrier to concentrate on gathering the additional information required.

Specifically:

§129.110(a)(2) mandates the carrier provide a current list of workers' compensation insureds in the Commonwealth who received services and requested but did not receive services. The statement is confusing if the intent is to only audit files for insureds requesting service.

Also, the mandate to include workers' compensation insureds that have certified workplace safety committees (receive credits.) raises a question as the credit is an underwriting not an accident prevention issue. Further, such a credit is unrelated to accident prevention activities. We see no purpose in creating another data pick when gathering policyholder information.

We suggest that the mandate to identify certified safety committee insureds in a policyholder list be deleted.

The mandate to describe accident prevention services for each insured receiving service in the Commonwealth in the last completed calendar year as a part of the policyholder list is an excessive burden; unless this relates solely to insureds requesting service. In either case, if the files are to be audited, such information is in file. To summarize the information will take significant staff time and not necessarily provide any value added at the time of audit.

We suggest the following wording: §129.110(a)(2) A list of current ~~insured employers/~~policyholders specifying name and premium size grouping which: **requested and** received services **or** requested but did not receive services; ~~have certified workplace safety committees; and a description of the type of accident and illness prevention services provided~~ during the last completed calendar year.

§129.110 (c) specifies that the Bureau (Division?) will notify the insurer of the accounts selected for audit as well as the accident and illness prevention services information required concerning these accounts. If §129.110(a)(2) specifies a description of the type of accident and illness prevention services provided during the last completed calendar year is to be included with the policyholder list, what more would be required? This appears redundant, particularly if the file which contains service information is to be audited. Also, if §129.108 Recordkeeping Requirements specifies what is to be recorded, what more would be required? We suggest the sentence be deleted.

We suggest the following wording: (c) Within 10 calendar days of receipt of the list of ~~insured employers/~~policyholders, the ~~Bureau~~ **Division** will notify the insurer of the accounts selected for audit ~~and the accident and illness prevention services information required concerning these accounts.~~

§129.111 Site of audit

§129.111(b) The insurer shall provide the documentation requested or required by the Bureau at the site where the audit will occur. This is an open ended mandate that potentially enables the

Commonwealth to access any records no matter how unrelated to accident prevention services. We perceive the intent is to allow the Division access to pertinent accident prevention and service file during the audit.

We suggest the following wording - - The insurer shall provide at the site where the audit will occur ~~the~~ documentation requested ~~or required~~ by the ~~Bureau~~ **Division directly related to the insurer's accident prevention services made available, or denied, to insureds requesting service**.

§129.112(c) The indication that the carrier will comply with any deficiencies identified during the audit process without any indication of an appeal process is misleading as there is no reference to Subchapter G.. While there is the presumption that the audit conclusions are appropriate and correct, the absence of any mention of an appeal process leaves this section, and the reader, with the presumption there is no recourse regardless of the challenge to the validity of audit recommendations. We suggest that mention of the appeal process be included in this section.

We suggest the following wording: 129.112 (d) An insurer may appeal the conclusion of the audit, any recommendations and the rating conferred as a result of the audit as specified within Subchapter G. HEARINGS.

§129.113 Report of progress on correcting deficiencies. This section allows for periodic audit to verify compliance. This section elevates the audit process to a level greater than a simple audit. The ability of the Bureau to periodically audit for compliance conceivably takes the carrier personnel working to correct deficiencies off their time table or plan process as they spend time with auditors. Conceivably, the reaudits can have the carrier changing action plan elements or time tables, both of which can delay rapid and practical remediation. We suggest such interim audits be restricted to unusual cases and be authorized only by the Bureau Director.

We suggest the following wording: .....The ~~Bureau~~ **Division** may conduct periodic audits to confirm information submitted in progress reports. **Such audits can only be authorized by the Bureau Director and only with cause, such as evidence that the carrier is not responding to the agreed to corrective action in good faith.....**

§129.114 Failure to maintain or provide adequate services

§129.114(2) This paragraph implies that the Bureau (Division) can fine carriers on a daily basis for audit identified deficiencies. This capability coupled with no appeal process presents confiscatory process put in place by the Bureau. There needs to be clarity about this issue. We suggest the paragraph be clarified to indicate that the penalty process will not be used at the time of audit if the carrier corrects agreed to deficiencies.

We suggest the following wording: (2) Finding of a civil violation of the act, subject to a maximum penalty of $2,000 per day, under section 1001 of the act (77 P.S. § 1038.1). **Such penalties will be stayed for carriers who are complying with agreed to corrective actions**

presented by the Bureau as a result of an accident prevention services audit. Such penalties will also be stayed during any appeal process as described in this rule.

Travelers Loss Prevention & Engineering management thanks you for taking the time to review our comments. We trust the comments were clear and relevant. If you have any questions regarding our comments please contact me. If public hearings are to be held regarding this rulemaking, please notify me as we may choose to appear to present public testimony.

Sincerely,

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

cc:
S. A. Bennett
R. Brody
H. Dufault
H. Redding

American Insurance Association

Law Department

99 JUL 26 PM 4:56

July 19, 1999

ORIGINAL: 2038
MIZNER
COPIES: Harris
Wilmarth
Jewett
Markham
Sandusky
Legal

Mr. Len E. Negley
Chief, Health and Safety Division
Department Of Labor & Industry
Bureau of Workers' Compensation
P.O. Box 15121
Harrisburg, PA 17105-5121

Dear Mr. Negley:

Re: Proposed Rulemaking Chapter 129 Workers' Compensation Health and Safety

The American Insurance Association welcomes the opportunity to comment on the Department of Labor & Industry's proposed regulations implementing the accident and illness prevention services provisions of the workers' compensation act. 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 providing of effective loss control services is in the insurer's self-interest. The policyholder may also 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 proposed regulations are motivated to foster workplace safety, some of the requirements regarding the providing of loss control services, record-keeping and reporting, and the audit process will not improve safety, but will only serve to increase a carrier's costs of doing business--costs that ultimately may be shifted to employers in the Commonwealth. The proposed 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 the provision of appropriate and effective loss cost services, rather than spend unnecessary costs and time complying with administrative issues.

1130 Connecticut Avenue, N.W., Suite 1000 ▼ Washington, DC 20036 ▼ Phone: 202/828-7100 ▼ Fax: 202/293-1219 ▼ www.aiadc.org

AIA is a national trade association of more than 300 property and casualty insurers that write a major share of the workers' compensation insurance throughout the nation and in Pennsylvania. In 1997, AIA companies wrote almost $775,000 million in workers' compensation premiums in Pennsylvania, representing approximately 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.

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

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 make clear 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 language in the proposed regulation that availability of services is to be judged by services the policyholder "may need or request" is too ambiguous and uncertain. Applying an ambiguous standard based on what the policyholder "may need" will subject the carrier to potential after the fact second guessing.

Section 129.102(2) should be modified as follows:

"Capacity to provide services is defined as an insurer having established means to deliver services. . . to policyholders who ~~may need or~~ request them."

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 and the policyholder after joint consultation of the wants and needs of the policyholder. The proposed

regulation, however, eliminates the discretion of the carrier and the policyholder by making it mandatory to provide services to "policyholders who may need or request them. . ." Requiring carriers to provide services to all policyholders, regardless of the type and danger of the hazard presented, would divert scarce resources from those policyholders who could benefit most from accident and illness prevention services. The "may need" standard will subject the carrier to after the fact second guessing.

The regulations should clarify that carriers do not assume liability by conducting an on-site survey. The insurance industry is not a regulatory or enforcement agency and should not have the responsibility for, or assume the liability of, making safety recommendations and follow-up visits. Section 1001(g) of the act provides that the insurer "shall not be liable on any cause of action or in any proceeding, civil or criminal, arising out of or based upon allegations and pleadings relating to the performance of services under or in compliance with this article." This non-assumption of liability should be reiterated in the regulations.

We recommend the following language to §129.102(3)(i):

"An insurer shall provide services to policyholders who may ~~need or~~ request them that are adequate to furnish accident and illness prevention required by the nature of the insurer's business or its policyholders' operations. Services shall be provided through an insurer's own or contracted staff who meets requirements established by the Department in Subchapter E. The insurer, the agent, servant or employe of the insurer shall not be liable on any cause of action or in any proceeding, civil or criminal, arising out of or based upon allegations and pleadings relating to the performance of services under or in compliance with these regulations."

Section 129.102(3)(ii) Requirements to Provide Accident and Illness Prevention Services: The proposed language states "Required services include the following:" and subsequently lists certain loss control services. This proposed language could be interpreted to require a carrier to provide each identified loss control service to all policyholders. The actual provision of loss control services should be based on the particular business operations of the insured and should be discretionary, based on the request of the policyholder.

We recommend the following language to §129.102(3)(ii):

"~~Required~~ Services may include the following:"

Section 129.102(3)(ii)(A) On Site Surveys: This section should clarify that it is not mandatory for carriers to conduct an on-site survey for every policyholder. The insurer is in the best position to know whether an on-site survey would be useful. Insurers do not conduct on-site surveys for the vast majority of policyholders because effective accident prevention and loss control services can be provided by telephone conversation, videos or educational materials. The determination of the types of services to provide is ultimately based on the nature of the employer and its loss history.

Likewise, the requirement that carriers make a follow-up visit if there are "one or more imminent danger situations" is inappropriate. The requirement is too ambiguous because "imminent" is undefined and fails to provide a workable standard. Moreover, requiring carriers to conduct follow-up visits and make recommendations regarding "imminent" dangers would put insurers in the inappropriate role of acting as a surrogate governmental policing authority. If required to provide recommendations and conduct follow-up visits, what is the insurer's responsibility if the recommendations are not followed, or do not fully fix the problem? If the carrier declines the risk due to the danger, is the carrier still responsible for a follow-up visit and recommendations? There also is no statutory authority for the requirement that insurers' conduct follow-up visits and 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.

We suggest the following revision of §129.102(3)(ii)(A):

"Onsite surveys <u>may be performed</u> to identify existing or potential accident and illness hazards or safety program deficiencies. Surveys shall include recommendations made to the policyholder concerning abatement of hazards or program deficiencies identified as a result of the surveys. ~~If one or more imminent danger situations or significant program deficiencies are identified, appropriate follow-up by the insurer shall be made to determine what corrective actions a policyholder has taken and to make further recommendations, as required.~~"

Section 129.102(3)(ii)(D) Industrial Hygiene Surveys: This section states that insurers shall provide "Industrial Hygiene surveys appropriate to the policyholders needs." A standard of "policyholders' needs" is too far-reaching 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 workers' compensation accidents, rather than the all-encompassing "policyholder needs." The section should be clarified to indicate that industrial hygiene surveys are discretionary with the carrier, based on joint consultation between the carrier and the policyholder to determine the potential exposures and whether the potential exposure would negatively impact workers' compensation loss experience.

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

"Industrial hygiene surveys may be conducted at the policyholder's request as appropriate to respond to workers' compensation accidents ~~appropriate to the policyholders' needs for example, air quality~~.

Section 129.102(3)(ii)(E) Industrial Health Services: Section 129.102(3)(ii)(E) states insurers shall provide industrial health services, such as wellness programs, 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 employer and the insurer if the policyholder has a healthy work force, services such as health screenings, substance abuse programs and wellness programs are not workers' compensation carriers' responsibilities. The health services described in §129.102(3)(ii)(e) more appropriately belong in the jurisdiction of a human resources department.

We recommend that §129.102(3)(ii)(E) be deleted.

~~"Industrial health services appropriate to the policyholders' needs for example, wellness programs, health screenings, substance abuse awareness and prevention training policies and programs."~~

Section 129.102(3)(ii)(G) Consultations Regarding "Specific" Safety Problems: This section requires carriers to provide consultations regarding "specific" safety and health problems. 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.

We recommend that §129.102(3)(ii)(G) be revised as follow:

"Consultations regarding ~~specific~~ safety and health problems and hazard abatement programs and techniques."

Section 129.102(3)(ii)(H) Review of Planned or Newly Introduced Industrial Materials Processes: This section states that carriers are to review "planned or newly introduced industrial materials processes, equipment, layouts and techniques to identify potential hazards and recommend methods to mitigate hazards identified." This places an impossible burden on the carrier. The insurer is not in a position to know more about a new material, process or technique than the manufacturer of the material or the user of such a new material or design. The carrier 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. There is no authority in §1001 of the act to impose this requirement on insurers.

We recommend that §129.102(3)(ii)(H) be deleted:

~~"Review of planned or newly introduced industrial materials processes, equipment, layouts and techniques to identify potential hazards and to recommend methods to mitigate hazards identified.'~~

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 any event, the requirement should not be interpreted to require that separate affidavits be filed for each individual providing loss control services. Such a requirement would be burdensome and unwieldy. A single affidavit representing that each of the insurer's loss control representatives providing services in the state is qualified would be much more efficient, while still guaranteeing that a carrier's providers are qualified.

Section 129.106 Reporting Requirements: This section requires insurers to provide the Bureau with its report on accident and illness prevention services offered during the preceding year by March 1. We would request that this date be extended to June 1 due to the heavy volume of reports around the nation that are currently due on March 1.

We would recommend the following change to §129.106:

"A licensed insurer shall, by ~~March~~ June 1 of each year, provide the Bureau with information concerning accident and illness prevention services offered or provided to the insurer's policyholders during the preceding calendar year."

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 from providing employers with accident and illness prevention services to 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 proposed regulation could be interpreted to require that records be maintained for all policyholders. However, records would be maintained and available 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.

Subsections 129.108(4), 129.108(5), and 129.108(11), which request reporting on the number of hours expended providing services, the number of service visits, and the safety-related materials provided, respectively, seek non-relevant information and should be deleted. As long as efficient accident and illness prevention services are provided to the policyholder upon request, the actual number of hours spent and the number of actual visits is not material to the quality and effectiveness of the services provided. The goal should be to provide effective and efficient loss control services. Spending more hours on a matter than necessary, or making an on-site visit when a telephone call would be sufficient, does not improve safety. Moreover, keeping detailed records of hours spent creates an unnecessary and costly administrative burden. Likewise, there is no need to make records of the safety-related materials provided to each policyholder.

Section 129.108(3), which would require information on the dates services were provided should be deleted as superfluous in light of § 129.108(7), which likewise requests information on the dates services were provided.

We would suggest the following modifications to §129.108:
"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:

(1) The date of the requests for service.

(2) The services requested or problems presented.

~~(3) The dates on which services were provided.~~

~~(4) The number of hours expended providing services, including both onsite and preparatory time.~~

~~(5) The number of service visits.~~

(6) Service reports including recommendations.

(7) The dates on which services were provided and policyholder's responses to recommendations.

(8) The final disposition of requests.

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

(10) Accident and illness prevention training conducted.

~~(11) Safety-related materials provided.~~

Section 129.109(a) 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. Insurers share the Bureau's interest in maintaining high-quality loss control services. Conducting audits 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. The administrative cost and time to comply with the audits serve to reduce the carrier's capability to provide effective loss control services. Rather than conducting audits on an arbitrary 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.

We recommend that §129.109(a) be modified to read:

"The Bureau may audit the accident and illness prevention services of each licensed insurer, including accident and illness prevention services providers qualifications ~~at least once every two years~~ to determine the adequacy of the insurer's 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 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)(1) requests AIPS reports for the preceding three years. These reports would already have been supplied to the Bureau. 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. 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.

We recommend the following changes to §129.110(a):

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

~~(1) A completed annual AIPS report for the most recently completed calendar year and if requested, the AIPS report for the two preceding consecutive calendar years including those of its affiliated companies, if applicable.~~

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

~~(3) The name, address, business telephone number, qualifications, 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 (202-828-7131).

Sincerely,

Steven A. Bennett
Counsel

cc: R. Taylor Cosby
Bruce C. Wood
Loudon L. Campbell

INSURANCE SERVICES OFFICE, INC.

7 WORLD TRADE CENTER NEW YORK, N.Y. 10048-1199 (212) 898-6657 FAX: (212) 898-6660

JOHN PAUL HALVORSEN
COUNSEL

July 16, 1999

ORIGINAL: 2038
MIZNER
COPIES: Harris
Wilmarth
Jewett
Markham
Sandusky
Legal

EXPRESS DELIVERY
Len E. Negley, Chief, Health and Safety Division
Department of Labor and Industry
Bureau of Workers Compensation
P. O. Box 15121
Harrisburg, PA 17105-5121

Re: Proposed Rulemaking, Chapter 129, Workers Compensation Health and Safety

Dear Mr. Negley:

The Engineering & Safety Service (E&S) is a division of Insurance Services Office, Inc. We are the insurance industry's leading source of vital loss control information. E&S provides technical reports, legislative and regulatory information, consultative assistance, and educational programs. E&S staff also represents the industry through active participation in national standards committees and boards. E&S serves approximately 70% of all loss control personnel employed by the commercial property casualty industry.

E&S appreciates the opportunity to comment on the Workers Compensation Health & Safety regulations noticed for public comment in the *Pennsylvania Bulletin*, Vol 29, No. 25, June 19, 1999. These comments are submitted on behalf of our Engineering and Safety Service division and its subscribing insurance companies.

At the outset, we are concerned with both the added administrative burden and added cost the proposed rule will add to insurers' cost of doing business in the Commonwealth. The added cost may ultimately be borne by policyholders. We believe that the proposed rulemaking greatly understates the magnitude of the cost estimate. The rulemaking introduction mentions "some potential costs to insurers." This statement suggests that carriers do not recognize that loss prevention can effectively reduce the carrier's operating costs and improve profitability. While we believe that all carriers recognize the benefits of loss prevention and routinely provide such services where there are benefits through cost savings, we know that mandated requirements do increase insurer costs. The rulemaking introduction suggests that the only cost associated with the rule is the indirect cost of changing some computer systems and providing 5% premium discounts where certified safety committees exist. However, we believe that a large part of the costs associated with the rulemaking involves the time spent capturing and compiling the information required for the annual report and audit process. These activities detract from the more important

loss prevention activities that insurers perform for the benefit of their policyholders. Among the more important loss prevention activities that insurers perform are surveys and recommendations. Insurers routinely monitor policyholder losses and identify those policyholders that have excessive loss experience. Those policyholders are then targeted for safety surveys at which time insurers make recommendations to the policyholder to improve loss experience. Insurers then routinely monitor performance.

The following are our comments on specific sections.

Section 129.102 Accident and illness prevention service requirements

Section 129.102 (1) -- *Notice of availability of services*.

The proposed rule requires that the notice to policyholders provide the name of a contact person. People change jobs quickly in today's economy. The requirement for a specific name in the policyholder notice could cause unnecessary confusion for both policyholders and insurer personnel in cases where the named individual has vacated the position. We believe the policyholder notice should contain the name of the insurer's department or operating unit that is responsible for providing loss control services in lieu of a named individual. We accordingly recommend that the requirement for a specific contact person in the policyholder notice be eliminated, and that the last sentence of Section 129.102 be replaced by the following: "The required elements of the notice include the company address, name of the department or operating unit providing accident and illness prevention services and telephone number for additional information about the services."

Section 129.102(3)(i) – Requirements to provide accident and illness prevention services.

The proposed rule provides that an insurer shall provide services to policyholders who may need or request them and that are adequate to provide accident and illness prevention required by the nature of the insurer's business or its policyholders' operations. We recommend that the words "may need or" should be deleted. The "needs" standard is not defined, open to differing interpretations, and lacks sufficient precision to be workable in practice.

We also believe that the language in the proposed rule should be more specific as to the insurer's ability to determine when "services" are required and when they are not required "by the nature of the insurer's business or its policyholder's operations." Accordingly, we suggest that the following language be added at the end of §129.102 (2): "Insurers are obligated to provide such services that are reasonably commensurate with the exposures, hazards, loss experience and size of the employer's operation."

Section 129.102(3)(ii)(A): On site surveys.

This section lists as a required service on-site surveys to identify existing or potential

accident and illness hazards or safety program deficiencies.

We have three concerns with this section as drafted.

First, we are concerned that the language imposing the requirement to provide on-site surveys is not limited to those policyholders whose operations could benefit from on-site surveys. Unlike Section 129.102(3)(ii)(D) (relating to industrial hygiene surveys), this section does not state that on-site surveys will be provided "appropriate to policyholders' needs." A requirement for insurers to perform an on-site survey for each insured location of each policyholder would create an onerous inspection burden on all insurers operating in the Commonwealth and would divert important insurer loss control resources from the policyholders that could gain the most benefit from these services. We strongly urge that the following language be inserted after the word "surveys" in the first line in § 129.102 (3)(ii)(A): "reasonably commensurate with the exposures, hazards, loss experience and size of the employer's operation."

Second, we believe that this section should also provide that insurers do not assume liability in connection with providing loss control services under or in compliance with Article X of the Workers' Compensation law. This is a legal requirement appearing in Section 1001(g) of the Workers Compensation Law that should also appear in the rule governing accident and illness prevention services.

Third, we note that the subsection requires "follow-up" in cases of "one or more imminent danger situations" or "significant program deficiencies." These terms are not defined and will be difficult for the Bureau to administer and for insurers to follow. The purpose of the follow-up is "to determine what corrective actions have been taken." We believe that mandated follow-up changes the role of the loss control representative from that of consultant to surrogate government official, reducing cooperation between policyholder and insurer and the likelihood of success of the insurer's loss control program.

For the foregoing reasons, we recommend that the second sentence of Section 129.102 (3)(ii)(A) be deleted.

Section 129.102(3)(ii)(D) -- Industrial hygiene surveys.

This section states that insurers shall provide "Industrial hygiene surveys appropriate to the policyholders' needs." We believe that the "policyholder needs" standard is too vague to be workable and in any event, is not appropriate for industrial hygiene surveys. The language should be clarified to provide that industrial hygiene surveys are discretionary with the insurer based on the insurer's determination of each insured's potential exposures having an adverse impact on that insured's loss experience.

Section 129.102(3)(ii)(E) -- Industrial health services.

This section requires insurers to provide industrial health services "appropriate to the policyholders' needs such as wellness programs, health screenings, substance abuse awareness, prevention training policies and programs." Once again, the "policyholder needs" standard is too vague to be workable. Also, we believe that this is an area that insurers can recommend as part of a comprehensive program and give some guidance, but can do little more. Industrial health services require a high level of coordination with other people, both inside and outside an insurer's organization. These services also require more specialization than many insurers we currently possess. Many smaller insurers do not have the in-house ability to offer this type of service. The provision of this type of service through contract personnel would increase costs for all policyholders of these insurers. We believe that this provision tends to place employer responsibility for safety and loss prevention on insurers who do not have the ability to affect employer/employee relations. Most importantly, we believe that these services are more appropriately provided by employers, rather than by workers' compensation carriers.

We recommend that this section be eliminated.

Section 129.102(3)(ii)(G) -- Consultations regarding specific safety and health problems.

This section requires carriers to provide consultations regarding "specific" safety and health problems and hazard abatement programs and techniques. We believe that the word "specific" should be deleted. Insurer-provided loss control services are not designed to address every "specific" policyholder health and safety problem.

Section 129.102(3)(ii)(H) -- Review of newly introduced industrial materials and processes.

Insurers must review "planned or newly introduced industrial materials, processes, equipment, layouts and techniques to identify potential hazards and recommend methods to mitigate hazards." We recommend that this section be deleted as impractical and not cost effective. Insurers cannot reasonably be required to have the same depth of knowledge regarding equipment as an equipment manufacturer, or the same understanding of a process that the process designer has. Furthermore, the increasing frequency of material, process, equipment, layout and technique changes that we are seeing today precludes an insurer from realistically providing these services.

Section 129.102(I) – Training for Safety Committee Members.

This section requires insurers to provide training for workplace safety committees. We note that workplace safety committee functions -- discussed in Subchapter F, Section 129.1005 – differ from most traditional carrier-provided loss control services and should not be combined with these services.

We have concerns regarding the issue of safety committee support and premium reductions. While we believe that safety committees can be a good tool to assist in communicating safety initiatives throughout an organization, we seriously question their effectiveness in reducing employer claims frequency and/or severity. If the committee is neglected and mismanaged, it remains a "paper" committee that will likely have little or no impact on loss reduction. We disagree that the carrier must provide the training specified in the regulation. Some of the topics (especially, the comment that the carrier must provide training in substance abuse awareness/prevention/training) require very specialized knowledge and training unavailable to many insurers.

We recommend that this section be deleted.

Section 129.103 Obligations of an insured employer/policyholder

This section requires that a policyholder who requests accident and illness prevention services must grant the necessary information and access to allow the insurer to fulfill its legal requirements. We believe that the regulation should state that the insurer's obligation to provide accident and illness prevention services will be satisfied if the policyholder fails to provide the necessary information or access.

Section 129.106 Reporting requirements

We recommend two changes to this section.

First, we note that this section requires insurers to provide the Bureau with a report on accident and illness prevention services offered during the preceding year by March 1 of each year. Many insurers doing business in the Commonwealth are multi-state writers faced with a large number of reports that are due in other states on March 1. In many companies, most year-end reports are not available until late January. This availability provides the insurer only 3 weeks to compile/analyze the data and create the reports. Based on the number of states that require this action, the timetable is unreasonable. The addition of another report due on this date would add to the already large administrative burden on insurers and would not increase workplace safety. We therefore recommend that the annual reporting date be changed from March 1 to June 1.

Second, Section 129.106 requires that reporting be done by "licensed insurer." This means that company groups with multiple licensed companies must separately report the loss control services provided to policyholders. We believe it is burdensome to separate policyholders by specific group sub-company for recordkeeping purposes only. E&S urges the Bureau of Workers Compensation to permit insurers to report loss control services provided to policyholders in aggregate as opposed to specific sub-company. This alternative will enable insurers to concentrate their resources on policyholder service rather than on recordkeeping.

Section 129.108 Recordkeeping requirements

This section provides extensive recordkeeping requirements by policyholder for accident and illness prevention services for the current calendar year and 2 proceeding consecutive calendar years. The section also requires that records be maintained for all policyholders, not just for those that request services.

We believe that the recordkeeping requirements are onerous and do not measure the actual effectiveness of the insurer-provided services. Some requirements are duplicative or irrelevant. For example, the number of hours expended providing services, the number of service visits, and the safety-related materials provided may not capture the actual quality and effectiveness of an insurer's services.

We recommend these changes.

Records should be maintained only for those policyholders that have requested services during the required recordkeeping period. Accordingly, we recommend that the words "requesting such services" be added to Section 129.108 after the word "policyholder:"

Subsection 129.108 (3) requires the dates on which services were provided. This information is also required by Section 129.108 (7). We recommend that subsection 129.108(3) be deleted.

Subsection 129.108 (4) and (5) require insurers to maintain records of the number of hours expended in providing services including both on-site and preparatory time and the number of service visits. We recommend that these sections be deleted since the time spent and number of visits – while quantitatively easy to measure -- do not capture the effectiveness of the loss control services that insurers actually provide.

Section 129.109 Periodic audits

Subsection (a) permits the Bureau to audit an insurer's accident and illness prevention services at least once every two years to determine the adequacy of the insurer's services. Insurers spend much time preparing for audits. In many cases, preparation time exceeds a week plus the time spent on-site with the auditors. This is real time that would be better spent providing loss prevention value to customers. We believe that a 2-year period is arbitrary, and in any event, audits should only be performed if the Bureau receives a complaint about an insurer or suspects a problem. We recommend that the words "at least once every 2 years" be stricken.

Subsection (b) requires the Bureau to provide written notification to the insurer at least 60 days in advance of the date the audit will occur. We believe that the 60-day notice requirement is too short. It is insufficient for many insurers to properly prepare in light of

decreased staffing levels and increased work requirements. A 90-day notice requirement would provide insurers with more time to prepare for audits. We therefore recommend that Section 129(b) be changed as follows: "At least 90 calendar days prior to an audit...."

Section 129.110 Pre-audit exchange of information

Section 129.110 sets forth the information the insurer must provide the Bureau at least 45 days prior to an audit.

Insurers must name all policyholders that have a certified workplace safety committee. We note that workplace safety committees are a separate and distinct function from the loss control services that insurers provide. Furthermore, it is more appropriate that employers provide this information, since insurers may not know whether an insured has such a committee. We believe that requiring insurers to provide this information will only add to the insurer administrative burdens imposed by this regulation. We recommend that this provision be deleted.

Information requests that duplicate information insurers have already filed with the Bureau should also be deleted. For example, the AIPS Reports are filed with the Bureau. Also, a description of the type of accident and illness prevention services provided during the preceding year and the name, address, qualifications, and status of each person acting as an accident and illness prevention services provider should be in the insurer's annual report that is provided to the Bureau.

Finally, we strongly believe that the audit process would be improved if the Bureau were required to specify in advance of the audit the number (or percent) of accounts subject to the audit and other information that will be required.

Section 129.702 – Accident and illness prevention services provider qualifications

This section (in Subchapter E) sets forth the qualification standards for accident and illness prevention services providers. A provider must possess one or more of the stated qualifications. We firmly believe that these requirements are both onerous and arbitrary. We are not aware of any studies that demonstrate the courses or credentials listed can validly predict that a person will be an effective loss control representative. Furthermore, a minimum safety experience requirement overly limits an insurers' ability to recruit staff and service customers. We recommend that this section be deleted.

Alternatively, we note that subsection (g) states that a person employed by an insurer to provide accident and illness prevention services and who does not possess any Bureau recognized qualifications will have 5 years to become qualified. We believe that the intent of this section is to permit "personnel-in-training" to perform insurer loss control services under the direction of a qualified provider. To clarify, we recommend that the following language be added after the first sentence of subsection (g): "Persons described in the

previous sentence may perform accident and illness prevention services subject to the requirements of this subsection."

Conclusion

The new Chapter 129 provides requirements that will have an adverse impact on all insurers writing workers compensation insurance in Pennsylvania. We believe that the present business environment, and the sophistication of most commercial insurance buyers, necessitates results-oriented carrier loss prevention services. If a carrier does not provide the services that the customer expects, the customer will transfer the business to another carrier that does have the capability. We believe that the Commonwealth does not need another state regulation that mandates how insurers do their jobs and that adds real expense dollars to the cost of doing business.

We appreciate your consideration of these comments. If you have any questions regarding the foregoing, please do not hesitate to call me at (212) 898-6657.

Sincerely,

John P. Halvorsen