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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

August 19, 1999

Honorable Johnny J. Butler, Secretary
Department of Labor & Industry
1700 Labor and Industry Building
Harrisburg, PA 17120

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

Dear Secretary Butler:

Enclosed are our Comments on the subject regulation. They are also available on our website at <http://www.irrc.state.pa.us>.

Our Comments list objections and suggestions for consideration when you prepare the final version of this regulation. We have also specified the regulatory criteria which have not been met. These Comments are not a formal approval or disapproval of the proposed version of this regulation.

If you would like to discuss these Comments, please contact Mary Lou Harris at 772-1284.

Sincerely,

Robert E. Nyce
Executive Director

REN:wbg
Enclosure
cc: Len Negley
Thomas Kuzma
Office of General Counsel
Office of Attorney General
Pete Tartline

COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION

ON

DEPARTMENT OF LABOR AND INDUSTRY REGULATION NO. 12-54

WORKERS' COMPENSATION HEALTH AND SAFETY

AUGUST 19, 1999

We have reviewed this proposed regulation from the Department of Labor and Industry (Department) and submit for your consideration the following objections and recommendations. Subsections 5.1(h) and 5.1(i) of the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) specify the criteria the Commission must employ to determine whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to consistency with statute, reasonableness, need and clarity. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

1. General. – Clarity.

Adequacy and adequate

The terms “adequacy” and “adequate” are used throughout the regulation. For example, the first sentence of Section 129.102 states that the “required accident and illness prevention services will be annually evaluated for adequacy.” Additionally, Section 129.113 includes a sentence that states, at the end of the 60-day correction period, “a final rating determination of adequate or inadequate will be assigned.” However, the term “adequate” is not defined.

The word “adequate” comes directly from Subsection 1001(a) of the Workers' Compensation Act (77 P.S. § 1038.1(a)). The statutory directive is that insurers must provide accident prevention services that are adequate to match the nature of their business or their policyholders' operation. To provide direction to insurers, the Department should identify the criteria, standards or requirements that it will use to determine if the regulated community is complying with the statutory directive.

Appropriate to policyholders' needs

Several provisions within the regulation use the phrase “appropriate to the policyholders' needs” or “appropriate to the members' needs” for group self-insurance funds. These phrases are found in Subsections 129.102(3)(ii)(D), 129.102(3)(ii)(E), 129.402(a)(6), 129.402(a)(7), 129.457(3) and 129.457(4). The phrases are used to describe industrial hygiene or health services provided by an insurer, individual self-insured employer or service provider. The words “appropriate” and “needs” are ambiguous. In accordance with Section 1001(a) of the Act, the types of services available must provide adequate prevention required by the nature of the insurer's business or its policyholders' operations. In other words, accident and illness prevention services should correspond with the exposures, hazards, loss experience and size of the policyholder's or employer's operation. The Department should delete the phrases “appropriate

to the policyholders' (or members') needs" from the regulation or revise these phrases to clarify their intent.

Subchapter A. Preliminary Provisions

2. Section 129.2. Definitions. – Consistency with statute; and Clarity.

Accident and illness prevention services.

These services are defined, in part, as "Services, within the context of the act, which include" (Emphasis added). The phrase "within the context of the act" is unnecessary. The Department could delete this phrase from the definition.

Audit.

The regulation defines an "audit" as "[a]n inspection of accident and illness prevention services or programs" The word inspection could be assumed to include on-site reviews of prevention services or programs in work areas. However, Sections 129.111, 129.410 and 129.461 identify the audit site as the subject's main office or the Department's headquarters. Related sections indicate that audits are reviews of records and written documentation. To clarify its intent, the Department should add the word "documentation" after the word "programs" in the definition.

Certification and certification renewal.

These two terms are limited by their definitions to the Department's approval process for a "workplace safety committee." However, Section 129.702 uses the term "certification" as an alternative form of an educational degree or as a designation by a professional organization. The latter usage of the term conflicts with the chapter's definition in Section 129.2. Provisions for certification of these committees are set forth in Sections 129.1007 and 129.1008. These two definitions should either be deleted from the regulation or moved from Section 129.2 to Subchapter F as definitions that apply only to Sections 129.1001 – 129.1011.

Effectiveness measures.

There are no examples of "various formulas or means" contained in the definition of "Effectiveness measures." As there are many formulas or means that may be relevant to this definition, the Department should reference the formulas and means that are authorized for use in relation to this term.

Group self-insurance fund initial report of accident and illness prevention services.

This definition appears to have been inadvertently misplaced in the proposed regulation. It should be placed after "Group self-insurance fund" and before "Hazard identification methods."

Program evaluation methods.

The definition of this term refers to methods used to review and critique accident and illness prevention services "to determine **adequacy**" (Emphasis added). The definition does not explain what these methods entail. As noted in **Issue #1**, there is no indication of what criteria or procedures will be used to evaluate the "adequacy" of these services.

Recommendations.

This definition indicates that “recommendations” are “suggestions made to employers to eliminate or reduce the occurrence of occupational accidents and resulting injury or illness.” However, the terms “recommendations” and “suggestions” are used interchangeably in various sections of the regulation. If the Department intends for the two terms to be used separately, the term “suggestions” should be defined. Alternatively, it should use the term “recommendations” exclusively, as this is a defined term.

Training program.

The proposed regulation defines “training program,” in part, as “Learning experiences” This phrase is vague and could be broadly interpreted. The Department should include a more specific description of the learning experiences (e.g., seminars, courses, exercises) that qualify as training programs.

Workplace.

There is a definition of “work site” included in the definition of “Workplace.” The “work site” definition should be listed separately in Section 129.2.

Subchapter B. Insurer’s Accident and Illness Prevention Services;

Subchapter C. Individual Self-Insured Employer’s Accident and Illness Prevention Programs; and

Subchapter D. Group Self-Insurance Fund’s Accident and Illness Prevention Programs

Subchapters B, C and D establish requirements relating to prevention services for insurers and prevention programs for individual self-insured employers and group self-insurance funds respectively. The structure and content of these three subchapters are very similar. The following paragraphs contain issues and questions that may relate to features that appear in all three subchapters. When the questions and issues involve provisions from more than one of the subchapters, the title of the paragraphs will identify the related sections.

3. Section 129.102. Accident and illness prevention services requirements. – Need; Reasonableness; and Clarity.

Need or request.

Subsections (2) and (3)(i) includes the phrase that requires insurers to provide services “to policyholders who **may need or request them**” (Emphasis added). The statute requires an insurer to have the capacity to furnish accident and illness prevention services required by the nature of its business or its policyholders’ operations. The phrase “may need or request them” is confusing, and extends beyond the insurer’s statutory obligation. Therefore, it should be deleted from Subsections (2) and (3)(i).

Onsite surveys.

Subsection (3)(ii)(A) lists “onsite surveys” as a required accident prevention service. Several commentators questioned this requirement and indicated that onsite surveys are not necessary for every policyholder. A commentator suggested that the need for onsite surveys

should be linked to the exposures, hazards, loss experiences and size of a policyholder's operation. If the Department intends to require across-the-board, on-site surveys, it should explain the need for them. The Department should also clarify the meaning of "appropriate follow-up" as it is used in this subsection.

Analyses and evaluations.

Subsections (3)(ii)(B) and (C) require analyses and evaluations. However, there are no further cites or references to the terms' meanings. The Department should clarify what it requires in these analyses and evaluations, as well as the manner in which they will be conducted.

4. Section 129.104 and 129.403. Accident and illness prevention services providers qualifications. – Clarity.

Section (b) states that the Department may require the insurer to provide "proof that "the qualifications ... have been met." What constitutes "proof" is not specified. The Department should identify what it will require as "proof."

5. Section 129.105. Reporting requirements—applicants for licensure. – Clarity.

Subsection (b) includes the phrase: "an inadequate rating determination will also be reported to the Director" (Emphasis added). The word "also" is superfluous, and should be deleted from Subsection (b) in the final-form regulation.

6. Sections 129.106, 129.404 and 129.455. Reporting requirements. – Reasonableness; and Clarity.

These sections indicate that Form AIPS, Form AIPPS, and Form LIBC-230G will be subject to "Bureau verification." The Department should define the term "verification."

Commentators identified other safety reporting requirements, for example, Occupational Safety and Health Administration and Mine Safety and Health Administration reports where similar data is required. Would the Department allow applicants to submit these forms in lieu of compiling similar information on two or more forms?

7. Section 129.108. Recordkeeping requirements. – Consistency with statute; and Clarity.

The list of required records in Section 129.108 does not conform to the list included in Subsection 1038.1(e)(1), (2) and (5) of the Act. We see an inconsistency between the two lists. It should be clear what the Department requires. For consistency, the reporting and recordkeeping provisions in the regulation should include references to information required by the Act.

8. Sections 129.109, 129.407 and 129.459. Periodic audits of accident and illness prevention services. - Clarity.

Subsection (a) of each Section states, "The Bureau may audit the accident and illness prevention program (or service)...at least once every two years." The regulation does not indicate the circumstances when an audit may be necessary or the reasons why the Department may initiate an audit. These subsections should include the criteria the Department will use to decide

when it will conduct an audit. At a minimum, the last subsection should direct the Department to describe the reasons for the audit in its written notice to the subject.

9. Sections 129.110, 129.408 and 129.460. Preaudit exchange of information. – Reasonableness; and Need.

There are three concerns with these sections. First, Subsection (a)(1) requires the submittal of annual AIPS or AIPPS reports for the previous one to three years. The regulated community has already submitted these reports annually to the Department. We question the need for these “resubmittals.”

Second, Subsection 129.110(a)(2) requires insurers to submit a list of current “employers/policyholders” that have certified workplace safety committees. Since the Department certifies these committees, requiring insurers to collect this information is unnecessary and duplicative.

Finally, each of these sections uses the phrase “in a timely manner” in relation to the submission of information for the audit. The Department should clarify what constitutes “in a timely manner.”

10. Sections 129.111, 129.409 and 129.461. Site of Audit. – Reasonableness.

Subsection (b) in each section requires that “all documentation requested or required by the Bureau be provided at the site where the audit will occur.” The previous sections require the submittal of information 45 days and 15 days before the date of the audit. It is unclear whether Subsection (b) is referring to this information or to supplemental documentation that the Department may need to examine during the audit at the site. The Department should clarify the intent and purpose of Subsection (b).

11. Sections 129.112, 129.410 and 129.462. Written report of audit. – Reasonableness; and Clarity.

In Subsection (a), there is no mention of the time frame within which the Department will write and notify the insurer, self-insured employer and group self-insurance fund of a rating determination. The Department has stated that it is its practice to notify the insurer, self-insured employer and group self-insurance fund of a rating determination within 60 calendar days. The Department should indicate in Subsection (a) that it will do so.

Subsection (c) indicates that the insurer, self-insured employer and group self-insurance fund “shall comply with these recommendations, and provide satisfactory proof of correction to the Bureau.” These sections do not include examples of “satisfactory proof.” The term is vague. The Department should identify what is meant by “satisfactory proof.” Additionally, Subsection (c) is a long paragraph with several provisions that appear to be sequential. The Department should consider dividing the elements of the paragraph into a list.

12. Section 129.113. Reports on progress on correcting deficiencies. – Reasonableness; and Clarity.

This section seems to refer to two different 60-day periods. First, it states that an insurer will file a plan of correction for any deficiency requiring more than 60 days to correct. If this is a reference to the 60-day period mentioned in Subsection 129.112(c), the reference should be

clearly indicated. The second "60-day" period in Section 129.113 states that "[a]t the end of the 60 calendar day correction period," a final rating determination will be assigned. The application and sequence of these two 60-day periods should be clarified.

13. Sections 129.410, 129.411, 129.462 and 129.463. Reports. – Reasonableness; and Clarity.

The final sentence in all four sections indicates that the Director will "initiate appropriate action" when he notifies the employer or group self-insurance fund administrator of an inadequate rating. The Department should define "appropriate action," and explain its purpose.

14. Sections 129.113, 129.411 and 129.463. Reports on progress on correcting deficiencies. – Reasonableness; and Clarity.

Periodic progress reports.

To monitor the correction of deficiencies, the Department requests "periodic progress reports" from the insurer, self-insured employer and group self-insurance fund. However, no timetable for these periodic reports is included in the regulation. The Department should clarify when these reports are due.

Periodic audits.

These three sections also state, "The Bureau may conduct periodic audits to confirm information submitted in progress reports." There is no further information about these periodic audits. The Department should describe the circumstances surrounding the audits and the process involved in conducting the audits.

15. Sections 129.114, 129.412 and 129.464. Failure to maintain or provide adequate services. – Consistency with statute; Reasonableness; and Clarity.

There are two concerns with these sections. First, the reference to the Act in the first sentence of these sections is inaccurate. "Chapter 7D of the Act (77 P.S. §§ 1037.1-1037.8)" refers to the Self-Insurance Guaranty Fund. The Department should either delete this reference, or replace it with one that is germane to these sections.

Second, these sections establish the penalties for failing to maintain adequate prevention services. Penalties include a maximum fine of \$2,000 per day. These sections, however, provide no indication of when and by whom the penalty may be imposed. At certain points in the regulation, the Director or Commissioner is given responsibility for certain actions. The Department should explain who has the authority to impose a penalty. In addition, it should clarify whether a party could be penalized if it faithfully implements a plan of correction pursuant to Sections 129.113, 129.411 or 129.463.

16. Sections 129.402 and 129.452. Program requirements. – Clarity.

Program coordinator.

Paragraph (2) in both Sections mentions a "program coordinator." There is no definition of the qualifications or description of duties for this position. The Department should insert a definition for "program coordinator" in Section 129.2.

Emergency action plans.

Paragraph (9) in Section 129.402 requires that individual self-insurers and group self-insurance funds regularly review and update emergency action plans. The Department should define the term “emergency action plans” and clarify the minimum frequency of reviews or updates.

Subchapter E. Accident and Illness Prevention Services Providers Qualification Standards

17. Section 129.702. Accident and illness prevention services providers qualifications. – Clarity.

Experience requirements.

Accident and illness prevention service providers must have at least two years of experience. Subsection (e) requires that at least 60 percent of the provider’s job activities during this two year experience is comprised of accident and illness prevention services. The Department’s Statement of Policy on Workers’ Compensation Health and Safety contained a 50 percent requirement. Why was the requirement increased?

Apprenticeship.

Subsection (g) allows up to five years to qualify as an accident and illness prevention services provider for those who do not already have Bureau-recognized qualifications. Until qualified, the person must work under the direction of a qualified accident and illness prevention services provider.

It is our understanding that the Department intended this provision to apply to both existing and newly hired employees. However, this provision might apply only to existing employees since the first sentence in Subsection (g) states, “A person who is currently employed....” The Department should amend Subsection (g) to clarify that anyone without Bureau-recognized qualifications has five years to obtain the necessary qualifications.

Subchapter F. Workplace Safety Committees

18. Section 129.1003. Minimum eligibility requirements. – Clarity.

Subsection (c) requires that committee membership “reasonably represent all of the job activities of the workplaces it represents.” It is unclear what standard meets the “reasonably represent all” criterion. Greater clarity would result if the Department specified what is intended by the phrase “reasonably represent all.”

19. Section 129.1004. Committee formation and membership. – Clarity.

Nonregulatory language.

Subsection (d)(2) requires that member rotation on a workplace safety committee “**should** be structured so that there is always at least a core group of experienced members serving on the committee at any given time” (Emphasis added). This provision is not a mandate; it is simply a suggestion for how the committee should address member rotation.

The Department could clarify this subsection by stating, “workplace safety committees shall establish procedures that retain a core group of experienced members serving on the committee at any given time.”

Another requirement in Subsection (d)(2) requires that committee members shall “Serve a continuous term of 1 year.” When does a member’s term begin? With appointment to the committee, or on the date of the first meeting after appointment? This should be clarified. In addition, since a committee member may resign his or her membership before completion of the one-year term, the word “Serve” is inappropriate and should be replaced.

Recordkeeping requirements.

Subsection (d)(2) also requires records of committee member rotation to be maintained by the applicant employer for five years from the date of application submission. Sections 129.1005(c)(5), 129.1006(f) and 129.1010 contain five-year and three-year record retention requirements. The Department should implement a consistent time frame for record retention throughout the Subchapter.

Subsection (d)(2) also states: “Records of member rotation shall be maintained ...for 5 years from the date of application submission.” The phrase “the date of application submission” is vague. The Department should define when “application submission” takes place (i.e. when mailed or received).

20. Section 129.1005. Committee responsibilities. – Clarity.

Definition of “timely.”

Subsection (a)(4) requires “timely” reviews of work-related deaths, injuries and illness and health and safety hazard complaints. The Department should clarify what it means by “timely.”

Definition of “reasonable.”

Subsection (b)(7) requires the workplace safety committee to “Set a reasonable time limit for the applicant-employer to respond in writing to all safety committee recommendations.” To improve the clarity of the regulation, the Department should specify the maximum amount of time the applicant-employer has to respond.

21. Section 129.1010. Recordkeeping requirements. – Clarity.

This section requires the applicant-employer to keep copies of the “required documents” of the committee for a minimum of three years. As discussed in **Issue #19**, the Department should make the time periods for record retention consistent throughout Subchapter F. In addition, the Department should clarify exactly what records or “required documents” must be kept.

Subchapter G. Hearings

22. Section 129.1301. Purpose. – Clarity.

This section refers to “appeals of final determinations under this chapter.” To improve the clarity of the regulation, the Department should include references to the specific sections within the chapter which address final determinations.

23. Section 129.1303. Hearing procedure. – Clarity.

This section does not completely outline the adjudicatory process. A new Subsection (f) should be added which provides that Subsections (a) – (e) supplement the General Rules of Administrative Practice and Procedure, 1 Pa. Code, Chapters 31 – 35.