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May 6, 2006

Re: Pennsylvania Workers' Compensation Act Reform

Dear Member of the Pennsylvania Workers' Compensation Community:

During the week of April 18, 2006 negotiations between the Pennsylvania Chamber of Commerce and the Pennsylvania Trial Lawyers' Association culminated in a compromise agreement that will seek to bring about limited workers' compensation legislative reform.

I have been informed that the proposed legislation will be brought to a vote in the Pennsylvania House of Representatives when it convenes in June 2006.

Below, I have included a summary of the Amendments to the Act proposed by the Chamber/PATLA negotiation as well as thoughts and observations regarding the ramifications of the proposal:

Section of Act	Proposed Changes to Act	Ramifications of Proposal
Section 306(h)	The language of the proposed legislation seeks to provide an increased minimum total disability compensation rate of \$100.00 per week to those employees injured prior August 31, 1993, the effective date of Act 44 of 1993.	This proposal applies only to workers who continue to receive compensation benefits for work injuries suffered in 1982 or earlier. Prior to August 31, 1993 Pennsylvania workers were entitled to a "minimum" total disability rate of one-third of the yearly Statewide Average Weekly Wage (which equals the maximum total disability rate for the given year). For example, for injuries occurring between January 1, 1993 through August 30, 1993 Pennsylvania workers were entitled to a minimum total disability rate of \$158.33 per week (\$475.00 Statewide

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		<p>Average Weekly Wage x 1/3 = \$158.33 per week). Accordingly, a worker injured on August 30, 1993, while generating an average weekly wage of \$150.00, was entitled to a minimum total disability rate of \$158.33 per week. For injuries occurring on or after August 31, 1993, workers were no longer entitled to a "minimum" compensation rate, meaning that a worker injured on August 31, 1993, while generating an average weekly wage of \$150.00, was now entitled to a total disability rate of 90% of the average weekly wage calculation or \$135.00 per week. In 1982 the Statewide Average Weekly Wage was \$284.00, yielding a minimum total disability rate of \$94.67 per week. In 1981 the minimum rate was \$87.33 per week. In 1976 the minimum rate was \$62.33 per week. The proposed amendment to Section 306(h) would provide a raise to workers receiving the minimum rate for injuries occurring in 1982 or earlier. I have been informed by Jerry M. Lehocky, Esquire of PaTLA that the proposed amendment would affect about 1,000 Pennsylvania workers. Presumably the "raise" would also apply to claimants' counsel still receiving fees for such claims.</p>
Section 401	<p>The proposed legislation would formally establish a "Resolution Court" in each of the four Bureau of Workers' Compensation Districts throughout the Commonwealth of Pennsylvania in order to afford litigants expedited access to a Compromise & Release hearing</p>	<p>An informal "Resolution Court" has been in place in Philadelphia for the past few years. Most believe that the Court has facilitated the disposition of cases settled by way of Compromise and Release Agreement in Southeastern Pennsylvania. It should be noted that WCJs operating</p>

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	before a WCJ.	outside Philadelphia have created other mechanisms for expediting the disposition of Compromise and Release matters. For example, WCJ Michael J. Rosen of Bucks County regularly publishes in advance a Notice advising of dates upon which he will hear nothing but Compromise and Release Petitions. The reader should be mindful because many Compromise and Release Agreements require substantial document preparation addressing Child Support matters, Medicare Set-Asides and other peripheral employment issues, the kind of expedited proceeding contemplated by the proposal will often not always be feasible or necessary.
Section 401	The proposed legislation re-defines the concept/process of workers' compensation "Informal Conferences" or "Mediation." Under the proposal "Mediation" equals a conference conducted by a WCJ requiring in-person attendance of all parties including the claimant, the employer (or insurer) and their attorneys. The provision requires the in-attendance employer to have settlement authority or immediate access to such authority during the course of the Mediation.	As discussed below, the proposed legislation appears to set the stage for a subtle but significant change in the Mediation regime that has been in place under Section 402.1 of the Act since the enactment of Act 57 of 1996 – the introduction of mandatory mediation . Requiring that the in-attendance employer have settlement authority or access to that authority would seem appropriate since a Mediation conducted in the absence of such authority usually renders the proceeding superfluous. It should be noted that under Article IV of the Act the word "employer" is interchangeable with the word "insurer" meaning that the proposed legislation does not mandate that the actual "employer" participate in the negotiating session, but rather the defending party authorized to

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		<p>effectuate settlements. Query whether the proposal's insistence that the employer appear live before the WCJ prohibits employers from participating by telephone conference or perhaps by e-mail?</p>
<p>Section 401.1</p>	<p>The proposed legislation would require a WCJ assigned to a Petition filed by one of the parties, to "set forth a mandatory trial schedule at the first hearing that must include specific deadlines for the presentation of evidence by the parties and dates for future hearings." Furthermore, the proposed legislation insists that WCJs "strictly enforce their schedules" and that the WCJ's scheduling order include "a specific date and time for a mediation conference" that must take place no more than thirty days before the date set for the filing of proposed findings of fact and conclusions of law.</p>	<p>Since the proposal does not presume to rescind or modify those time deadlines set forth in the Special Rules of Administrative Practice and Procedure Before Judges that already govern litigation scheduling, and since many WCJs already impose litigation schedules during first hearings, one wonders whether the statutory mandate will have any practical impact upon the present litigation regime. Clearly, the most significant aspect of the proposal is its enactment of mandatory Mediation in all cases where a Petition is filed with the Bureau. While the proposal recognizes that Mediation will not always be possible - where it is determined that it would be "futile," the proposal necessarily requires the prospect of Mediation to be formally addressed at the commencement of every case. Whether that can be done so early in the process is certainly questionable. Perhaps even more significant is the proposal's apparent sanctioning of the WCJ assigned to the underlying litigation to preside over the Mediation proceeding. Indeed, the legislation instructs that the assigned WCJ will "not necessarily" preside over the Mediation - it does not prohibit the assigned WCJ from doing so. Again, the proposal requires the assigned WCJ to decide</p>

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		<p>from the outset of the litigation process whether Mediation in the particular case would be appropriate or "futile," meaning that from the commencement of the litigation process the assigned WCJ will be intimately involved in the prospect of settlement. Granting the WCJ the power to assess the need for settlement and/or to preside over the Mediation will bring about a fundamental change in the character of Act 57 Mediation scheme. Since mediation was introduced to the Pennsylvania workers' compensation community ten years ago the role of the WCJ has always been that of a "facilitator." Since under the present regime a party cannot be compelled to participate in a Mediation or be required to participate in a Mediation conducted before the WCJ assigned to the underlying litigation, the Mediator cannot assume the role of "settlement hammer" i.e. he or she cannot compel settlement through leverage he or she possesses in connection with the underlying litigation. The proposed regime - which compels Mediation and changes the role of the assigned WCJ - will perhaps reduce or eliminate the good will that has normally accompanied the present voluntary system. It should be noted that during hearings conducted before the House Labor Relations Committee in September, 2005 the Department of Labor & Industry urged that the voluntary mediation regime remain in place.</p>

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Section 401.1	<p>The proposed legislation seeks to facilitate expedited dispositions of Compromise & Release matters by requiring the presiding WCJ to conduct a Compromise & Release hearing within 14 days of receipt of notification of the parties' agreement to settle and by requiring the presiding WCJ to circulate his or her decision adjudicating the Compromise and Release Agreement within five business days of the Compromise and Release hearing.</p>	<p>As noted above, many WCJs have established mechanisms for expediting Compromise and Release hearings. And, for the most part, once a Compromise and Release hearing is held, WCJs typically circulate decisions approving or disapproving the settlement expeditiously. Still, the expedited scheduling of Compromise and Release hearings has been difficult to bring about in certain Districts. The proposed legislation obviously seeks to bring about expedited dispositions throughout the Commonwealth. Whether it will do so in practice is unclear. Indeed, one wonders what remedy might be available to those parties confronted with a WCJ who refuses, for whatever reason, to conduct a Compromise and Release hearing within the 14-day time period or fails to circulate a decision approving or disapproving the Compromise and Release Agreement within five business days of the Compromise and Release hearing.</p>
Section 401.2	<p>The proposed legislation seeks to "professionalize" the Workers' Compensation Appeal Board and allow the Board to act more expeditiously. It presumes to do so by requiring as follows: (a) the Appeal Board shall consist of at least three but not more than fifteen appointed members or commissioners; (b) if the Appeal Board consists of more than three appointed members, it may sit in "panels" consisting of three commissioners; (c) a majority of a three-member panel will have the</p>	<p>The proposed legislation seeks to expedite the disposition of matters before the Appeal Board by allowing three member panels to write and issue binding Decisions. Furthermore, the Legislation seeks to improve the legal acumen of the Appeal Board by requiring commissioners to be attorneys and to have substantial workers' compensation experience. The promulgation of a "Code of Ethics for Appeal Board Commissioners" seeks to promote the ethical and impartial disposition of appellate</p>

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	right to take action binding on the parties; (d) a member of the Workers' Compensation Appeal Board must be an attorney in good standing before the Supreme Court and must have five years of workers' compensation practice before administrative agencies or equivalent experience and must conform to a detailed code of ethics.	matters filed with the Appeal Board. Finally, the legislation seeks to expedite the adjudication process by requiring the Department of Labor and Industry to provide at least two opinion writers to each member of the Board. The legislative acknowledgment that opinions are often written by non-members of the Board might cause some consternation.
Section 414	The proposed legislation instructs the Bureau not to assign a particular WCJ more than 75% of the Petitions from a particular county.	The proposed legislation seeks to control WCJ work assignments.
Section 426	The proposed legislation instructs that where any party seeks a re-hearing of any Petition upon which the Appeal Board has issued a ruling, the re-hearing "shall be conducted by the Board en banc."	The proposal seeks to afford the party aggrieved by an Appeal Board ruling issued by a "panel" a full and fair opportunity to present argument to the full Board.
Section 442	The proposed legislation seeks to control counsel fees in matters involving Compromise and Release Agreements.	The proposal instructs that in cases settled by Compromise and Release where there is no underlying litigation between the parties; claimant's counsel's fees shall not exceed 20% of the workers' compensation settlement amount. One wonders whether counsel fees may exceed the standard 20% rate where there is underlying litigation.
Section 1401(e)	The proposed legislation provides for WCJ pay raises consistent with the pay range for Administrative Law Judges appointed under Section 212 of the Pennsylvania Liquor Code.	Pennsylvania WCJs have been seeking pay increases for a number of years.
Section 1601-	The proposed legislation establishes the Uninsured Employer's	Precisely how the Fund will be supported financially remains

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1607	<p>Guarantee Fund. The proposed Guarantee Fund will provide workers' compensation benefits to those injured workers or their dependents for claims arising out of injuries or death sustained while in the course and scope of employment with employers who fail to carry workers' compensation insurance coverage as of the date of injury or death. The Fund shall be supported by appropriations made by the general assembly, by "reimbursements or restitution" and "interest on money in the Fund." The Fund shall not be considered an insurance company and will not be subject to the imposition of penalties, unreasonable contest fees, or any reporting and liability requirements under Section 440 of the Act.</p>	<p>unclear. The proposal creates a subtle change in standard workers' compensation practice by permitting the employee of an uninsured employer to seek both workers' compensation benefits through the Uninsured Employers Guarantee Fund and civil damages from the employer though the filing of an action in the Court of Common Pleas. At present, the claimant has a choice – he or she can either pursue benefits under the Act or file a direct civil action against the non-compliant employer who is stripped of the traditional affirmative defenses, assumption of risk, co-employee negligence rule and contributory negligence.</p>

The enactment of mandatory Mediation along with the proposed statutory sanctioning of assigned WCJs presiding over such mandatory settlement proceedings will further precipitate a fundamental change in the character of Pennsylvania Workers' Compensation from a system designed to afford injured workers with medical coverage and weekly compensation for work-related wage loss, to a settlement-based system designed to close medical/indemnity files quickly through the awarding of lump sum settlements.

The system contemplated by the new settlement scheme will permit claimant's counsel to generate significant revenue, will likely reduce the number of WCJs needed in the Commonwealth, will perhaps encourage workers to embellish minor injuries and to retain counsel in order to procure quick lump sum settlements, and will likely not decrease the cost of work injuries in Pennsylvania. The system proposed by PTLA and apparently adopted by the Chamber of Commerce seems more intent upon enhancing the legal fees of attorneys retained by injured workers than reducing the workers' compensation costs of employers and insurers while ignoring almost completely the basic policy underlying the Act.

Moreover, the proposed legislation fails to address a number of problems in the Pennsylvania Workers' Compensation system. For example: (1) the legislation does not facilitate the informal administration of minor work injuries; (2) the legislation does not address needed changes with respect to misguided legal "presumptions" in connection with occupations

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disease cases; (3) the legislation does not facilitate the development of a more effective vocational mechanism for assessing an injured worker's earning power; (4) the legislation does not address the sky rocketing cost of expert medical depositions and (5) the legislation does not address refinement of the Medicare-based fee caps that were instituted and calculated in 1993.

I will provide you with updated reports as Legislative matters progress.

Thank you very much for your courtesy and cooperation.

Very truly yours,

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By: _____
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