STATEMENTS OF POLICY

Title 34—LABOR AND INDUSTRY

DEPARTMENT OF LABOR AND INDUSTRY
[34 PA. CODE CH. 122]
General Provisions of Act 57 of 1996

The Department of Labor and Industry (Department), Bureau of Workers' Compensation (Bureau), issues a statement of policy at Chapter 122 (relating to general provisions of Act 57 of 1996) to read as set forth in Annex A, to provide guidance regarding the Department's interpretation of the act of June 24, 1996 (P. L. 350, No. 57) (Act 57), which amended the Workers' Compensation Act (WC act) (77 P. S. §§ 1—2626).

Statutory Authority

This statement of policy is issued under the authority provided in section 435 of the WC act (77 P. S. § 991), which authorizes the Department's adoption of regulations which are reasonably calculated to explain and enforce the provisions of the WC act. Section 435 of the WC act charges the Department with promulgating rules and regulations which are reasonably calculated to expedite the reporting and processing of injury cases; insure full payment of compensation when due; expedite the hearing and determination of claims for compensation; and provide notice to disabled employes of their rights under the WC act. In addition, the following provisions of Act 57 specifically charge the Department with establishing regulations for their implementation: sections 204(d), 306 (f.2)(7) and 422(e) (77 P. S. §§ 71, 511.2(f.2)(7) and 835(e)).

Background

On June 24, 1996, Governor Tom Ridge signed into law Act 57, which substantially amended the WC act. Although the amendments provide for many changes, all the amendments are intended to address the rising costs of workers' compensation in this Commonwealth while preserving the rights of employes to be adequately compensated for their work-related injuries. Among the amendments are provisions which allow an executive officer of a nonprofit corporation to elect not to be an employe for purposes of workers' compensation coverage, and provisions which allow the offset of workers' compensation benefits from certain amounts received from severance, Social Security (old age) and pension benefits. The amendments also call for the abrogation of the reconsideration stage of the Utilization Review (UR) process and the placement of time limitations on health care providers wishing to file applications for Medical Fee Review. The amendments also require that an employe's earning power be determined by expert opinion, and that the Department establish the qualifications of vocational experts who will interview employes in order to assess their earning power. Further, Act 57 provides for an impairment rating evaluation after the receipt of 104 weeks of total disability compensation. If the impairment rating is less than 50%, the employe's benefit status shifts from total to partial disability with benefits capped at 500 weeks. In addition, Act 57 establishes an automatic request for supersedeas when a petition alleging an employe's full recovery is filed accompanied by a physician's affidavit to that effect. Act 57 added two sections to the WC act which address situations in which employes who have returned to work are receiving both wages and workers' compensation benefits. These sections call for the suspension or modification of benefits after notice and an affidavit are submitted which allege that the employe has returned to work. Act 57 also places new reporting requirements on employes who file for (or are receiving) compensation under section 306(a) or (b) of the WC act. Employes are required to regularly report amounts received from Social Security (old age), unemployment compensation, severance and pension benefits. Additionally, employes are required to report information regarding employment and self-employment, as well as any other information which is relevant in determining the entitlement to or amount of compensation. Further, insurers are permitted to submit forms to employes verifying that the employes' status regarding their entitlement to receive workers' compensation benefits has not changed. Act 57 also created an informal conference procedure to expedite the workers' compensation adjudication process, and permits employers and employes to enter into Compromise and Release Agreements which may extinguish the employer's liability for a work-related injury. Act 57 also transferred the authority for certification of Coordinated Care Organizations (CCO) from the Department of Health to the Department. Act 57 permits an employer and the recognized or certified exclusive representatives of its employes to collectively bargain over specified issues relating to workers' compensation in order to facilitate the resolution of claims. In an effort to promote workplace safety and reduce employe injuries and employer costs, Act 57 granted a 5% premium discount to employers with Department-certified safety committees for a maximum period of 5 years.

The Department published a notice at 26 Pa.B. 3979 (August 17, 1996) which invited parties interested in participating in the formulation of the statement of policy and the proposed rulemaking process to submit written comments to Richard A. Himler, Director, Bureau of Workers' Compensation. In addition to the notice, the Department prepared and published forms required by Act 57. These forms are available from the Bureau upon written request.

Since the passage of Act 57 and the publication of the Department's notice, the Department has received various written and verbal comments regarding how Act 57 should be interpreted. Additionally, consistent with the Governor's policy, as set forth in Executive Order 1996-1, the Department has consulted with various stakeholders affected by the passage and implementation of Act 57. Among those participating in the stakeholders' meetings were members of the Pennsylvania Bar Association's Workers' Compensation Section; the Insurance Federation of Pennsylvania, Inc.; the American Insurance Federation; the Pennsylvania Chamber of Business and Industry; the Hospital Association; the Pennsylvania Medical Society; the Executive Director of the Democratic House Labor Relations Committee; the Pennsylvania Retailers' Association; the Small Manufacturing Council; the Pennsylvania Physical Therapy Association; The pt Group; the Pennsylvania Association of Rehabilitation Facilities; the Restaurant Association; the Pennsylvania Trial Lawyers Association; the Pennsylvania Compensation Rating Bureau; the Pennsylvania Chiropractic Society; the Pennsylvania Manufacturing Association; the Pennsylvania Orthopaedic Society; the Pennsylvania League of Cities and Munici-

palities; the Occupational Health and Safety Nurses of Pennsylvania; Rehabilitation Sevices/LRC Inc.; the Pennsylvania Business Roundtable; the Manufacturing Association of North Western Pennsylvania; the Pennsylvania Motor Trucking Association; the Coal Mine Compensation Rating Bureau of Pennsylvania; the Montgomery County Bar Association Workers' Compensation Section; the General Contractors Association of Pennsylvania; the Pennsylvania State Building and Construction Trades Council, Lehigh County Carpenters Union; the State Workers' Insurance Fund; the Pennsylvania Conference of Teamsters; the House Majority Leader's Advisory Committee on Workers' Compensation Reform; and the National Association of Rehabilitation Professionals in the Private Sector. In addition to the stakeholders, the Department considered the comments and suggestions made by members of the Pension and Independent Medical Examination (IME) Task Forces, as well as the section 450 Subcommittee to the Governor's Committee on Labor-Management Partnerships, organized to lend interpretive guidance on the implementation of sections 204, 306(a.2) and 450 of the WC act respectively. All verbal and written comments submitted by the above-mentioned stakeholders and other interested parties were reviewed and considered. All parties have expressed an interest in the expeditious promulgation of regulations to provide definitive interpretations and guidance.

This statement of policy is issued so that all parties will have a clear understanding of their rights and obligations under Act 57. It is also issued in the spirit of implementing the provisions of Act 57 in the manner and form in which it was intended—achieving the greatest cost savings in amounts paid in workers' compensation premiums, benefit payments and litigation costs, while preserving the rights of employes to be adequately compensated for their work-related injuries.

In September 1996, under section 30(1) of Act 57, the Insurance Commissioner appointed Milliman and Robertson, Inc. as the independent actuary responsible for providing an estimate of the total cost savings resulting from the enactment and implementation of Act 57 and the act of July 2, 1993 (P. L. 190, No 44) (Act 44). The independent actuary projected that workers' compensation rates would be reduced by 25.4%. On January 16, 1997, the Insurance Commissioner approved a 25% rate reduction which is projected to result in a savings of $470 million. The 25% rate reduction is an average of the loss-cost changes affecting more than 300 employer classifications.

In addition to the rate decrease, employers can achieve additional savings in workers' compensation costs by demonstrating strong safety records and through a cooperative effort with labor in creating workplace safety committees. The Governor has established a Statewide initiative known as PENNSAFE in order to foster the creation of safety committees, encourage safety inspections and accident investigations, and increase awareness of safety hazards. For further information on PENNSAFE call 1-888-SAFE-422.

Force and Effect

This statement of policy provides guidance to Bureau staff, workers' compensation insurance carriers, self-insured employers, employes, workers' compensation practitioners and other interested parties with respect to the implementation and interpretation of the provisions of Act 57. This statement of policy does not constitute a rule or regulation with the force and effect of law, rather it is temporary in nature. The Department intends to promulgate regulations for this purpose as soon as practical.

Effective Date

This statement of policy will be effective immediately upon publication.

Further Information

Further information regarding this statement of policy may be obtained by writing to Richard A. Himler, Director, Bureau of Workers' Compensation, P. O. Box 3466, Harrisburg, PA 17105, telephone (717) 783-5421. This statement of policy will also be available on the Department's home page at WWW.LI.State.PA.US. In addition, parties wishing to comment on this statement of policy should do so by writing to Richard A. Himler, Director, at the address listed above. The Department will consider all written comments received by May 6, 1997, in promulgating the Act 57 proposed regulations.

Section 104 Corporate Officer Exemption

Prior to Act 57, section 104 of the WC (77 P. S. § 22) act permitted executive officers of Subchapter S and C Corporations to elect not to be employes of the corporation for purposes of workers' compensation coverage. Section 104 was amended by Act 57 to permit executive officers of nonprofit corporations to elect not to be employes of the corporation for purposes of securing workers' compensation coverage. Executive officers of nonprofit corporations are only entitled to make this election if they serve voluntarily and without remuneration.

Executive officer elections shall be filed directly with the insurer providing workers' compensation coverage. If the corporation does not have an insurance carrier, the executive officer election shall be filed with the Department.

Section 204 Offsets

Prior to Act 57, section 204 of the WC act provided for the offset of workers' compensation benefits by amounts received in unemployment compensation. Act 57 amended section 204 of the WC by providing additional offsets for Social Security (old age), severance and pension benefits. While the offset for unemployment compensation benefits applies to all work-related injuries, the offset for Social Security (old age), severance and pension benefits applies only to claims for injuries which are suffered on or after June 24, 1996.

Section 204 of the WC act requires employes to report the receipt of unemployment compensation, Social Security (old age), severance and pension benefits received subsequent to the date of injury. Section 204(c) of the WC act requires employes to regularly report the receipt of these benefits. The report shall be made on form LIBC-756A, "Employee's Report of Benefits (Unemployment Compensation, Social Security (old age), Severance and Pension Benefits) for Offsets." The term "regularly" has been interpreted by the Department to mean within 30 days of any change in the receipt of the benefits mentioned in this paragraph, but in any event no less than every 6 months. Additionally, employes may be subject to the fraud provisions of Article XI of the WC act for failure to regularly report receipt of the benefits mentioned in this paragraph.

The offset shall apply only to wage-loss benefits (as opposed to medical benefits, specific loss or survivor benefits). Wage-loss benefits shall be offset by the net amount received by the employe. The net amount is the

amount of any Social Security (old age), pension or severance benefits received by the employe after deductions for local, State and Federal taxes and amounts deducted under the Federal Insurance Contributions Act (FICA) (26 U.S.C.A. §§ 3101—3126).

a. *Application of Offsets in General:*

After receipt of a completed form under this section, an insurer may calculate and achieve the offset of benefits received by the employe from any of the sources enumerated in section 204 of the WC act. If the insurer receives information that the employe is receiving or has already received unemployment compensation, Social Security (old age), severance or pension benefits prior to receiving form LIBC-756A, the insurer shall be entitled to a credit towards future payments of workers' compensation benefits for amounts already received by the employe. The net amount received by the employe prior to notification to the insurer shall be divided by the weekly workers' compensation rate. The result shall be the number of weeks, and fraction thereof, the insurer is entitled to credit towards future payments of workers' compensation benefits.

The insurer shall notify the employe and the employe's counsel, if known, on a form designated by the Department, that the workers' compensation benefits will be offset. The notice shall be provided to the employe at least 15 days prior to the offset of workers' compensation benefits. This notice shall indicate the amount and type of the offset; how the offset was calculated, with supporting documentation; when the offset commences; and the amount of credit, if applicable. Additionally, the insurer shall provide a duplicate of the notice to the Department. The employe may challenge the offset by filing a Petition for Review with the Department. The failure to properly or accurately calculate an offset may result in the imposition of penalties under section 435 of the WC act (77 P. S. § 991). Furthermore, failure to notify the employe of the offset or provide documentation in support of the offset may subject the insurer to penalties under section 435 of the WC act. It is the insurer's burden to demonstrate that the employe has, in fact, been notified of the offset.

b. *Offset of Unemployment Compensation Benefits:*

Workers' compensation benefits otherwise payable shall be offset by the amount an employe receives in unemployment compensation benefits subsequent to the work-related injury. The offset for unemployment compensation benefits is applicable to all injuries regardless of the date of occurrence. The offset shall apply only to unemployment compensation benefits which an employe receives and which are attributable to the same time period in which an employe also receives workers' compensation benefits. The offset may not apply to benefits to which an employe may be eligible, but is not receiving.

In cases when an employe receives a lump-sum award from the Bureau of Unemployment Compensation Benefits and Allowances, the insurer may credit the amount received by the employe against future payments of workers' compensation wage-loss benefits. The amount received by the employe shall be divided by the weekly workers' compensation rate. The result shall be the number of weeks, and fraction thereof, the insurer is entitled to credit towards future payments of workers' compensation.

An employe, whose workers' compensation benefits have been offset by amounts received in unemployment compensation benefits, who is required to repay the unemployment compensation benefits based upon a determination of ineligibility, shall be entitled to an immediate repayment by the insurer of the amount of the workers' compensation benefits previously offset. The employe may request that the insurer remit the repayment directly to the Bureau of Unemployment Compensation Benefits and Allowances.

c. *Offset of Social Security (old age) Benefits*

The workers' compensation offset for Social Security (old age) benefits is equal to 50% of the Social Security (old age) benefits which an employe receives subsequent to the work injury. The offset may not apply to Social Security (old age) benefits which commenced prior to the work-related injury and which the employe continues to receive subsequent to the work-related injury. The offset does not apply to benefits to which an employe may be entitled, but is not receiving. The offset shall be applied on a weekly basis; therefore, 50% of the monthly Social Security (old age) benefits received by the employe should be divided by 4.34. The result is the amount the insurer is entitled to offset from the weekly workers' compensation benefit.

d. *Offset for Pension Benefits*

The Department has construed pension offsets to apply to benefits received from both defined-benefit plans and defined-contribution plans. The offset is applicable only to the extent funded by the employer directly liable for the payment of workers' compensation benefits. However, in calculating the appropriate offset for defined-contribution plans, investment income attributable to the employer's contribution shall be included in the offset on a pro rata basis. For example, if the employer's original contribution accounts for 50% of the combined contribution, 50% of the investment income shall be attributed to the employer for purposes of calculating the offset.

The offset of pension benefits received by an employe shall be calculated on a weekly basis. If the pension benefit is received on a monthly basis, the net amount received by the employe shall be divided by 4.34. The result is the amount of the weekly offset to the workers' compensation benefit.

When the employe receives the pension in the form of a lump-sum payout, the pension offset shall be calculated based on the actuarial equivalent of the lump sum with respect to normal form annuity options (qualified joint and survivor annuity or life annuity) available at the time of the employe's receipt. The monthly benefit amount attributable to the annuity option shall be divided by 4.34. The result is the amount of the offset to the workers' compensation benefit on a weekly basis.

Workers' compensation benefits may not be offset by pension benefits which are rolled over into an Individual Retirement Account (IRA) or other similarly restricted account provided that the employe does not utilize or otherwise withdraw funds from the account while at the same time receiving workers' compensation benefits from the liable employer. In addition, the employe shall report the subsequent receipt of funds from the restricted account to the insurer on forms LIBC-756A, "Employee's Report of Benefits (Unemployment Compensation, Social Security (old age), Severance and Pension Benefits) for Offsets"; LIBC-750, "Employee Report of Wages (other than Workers' Compensation Benefits Received)" and LIBC-760, "Employee Verification of Employment, Self-Employment or Change in Physical Condition."

If the employe, while receiving workers' compensation benefits from the liable employer, utilizes or otherwise withdraws funds from the restricted account, the amount

received by the employe shall be used as a credit towards future payments of workers' compensation. If the employe begins receiving a monthly payment from the restricted account, the insurer shall receive an offset to the workers' compensation benefit equal to the offset the insurer would be entitled to if the employe were receiving a monthly pension benefit.

Additionally, if the employe receives a pension from a multi-employer funded pension plan, the offset shall be calculated based on the proportion of the liable employer's contribution to the pension fund. Contributions from other employers in the multi-employer funded pension plan may not be included in the offset. Therefore, the "extent funded by the liable employer" shall be obtained by calculating that portion of the annuity which was actually contributed by the employer at the time of the employe's receipt of the pension benefits, as explained more fully in Annex A.

e. *Offset for Severance Benefits*

Severance benefits, which are received subsequent to the work-related injury, shall be offset to the extent funded by the employer directly liable for the payment of compensation. Severance benefits are defined as any benefit which is taxable to the employe and which is paid as a result of the employe's separation from employment. Severance benefits include benefits received in the form of tangible property. Severance benefits may not include earned income, such as payments based on an employe's unused vacation or sick leave.

If the severance benefits are received in a lump-sum payout, the insurer shall be entitled to a credit towards future payments of workers' compensation until the full amount of the offset has been captured. The net amount received by the employe shall be divided by the weekly workers' compensation rate. The result shall be the number of weeks, and fraction thereof, the insurer may credit towards future payments of workers' compensation benefits. In cases where the employe receives tangible property as a severance benefit, the insurer shall be entitled to an offset equal to the market value of the property received by the employe. The offset attributable to tangible property shall be achieved consistent with the manner in which the insurer achieves an offset with respect to lump-sum payouts of severance benefits as previously discussed.

Section 302(c) Agricultural Labor

Prior to Act 57, section 302(c) of the WC act (77 P. S. § 463) required employers of agricultural labor to provide workers' compensation coverage if during the calendar year the employer paid wages to one employe for agricultural labor totaling $150 or furnished employment to one employe in agricultural labor on 20 or more days. Act 57 amended this section by increasing the wage requirement to $1,200 dollars and increased the days of employment to 30 or more days. In addition, the amendments to section 302(c) of the WC act remove the employe status from a spouse or a child (under 18 years of age) of the employer for purposes of workers' compensation coverage, unless that family member has entered into a written contract of hire. A written contract of hire must be on file with the Department if the employer seeks to provide workers' compensation coverage to his spouse or child.

Section 306(a.2) Impairment Rating

Section 306 of the WC act (77 P. S. § 511) was amended by Act 57 to provide for an impairment rating evaluation to determine the percentage of impairment at the expiration of an employe's receipt of 104 weeks of total disability compensation. The impairment rating is a mechanism for adjusting the status of workers' compensation benefits between total and partial. Nothing in this section precludes an insurer from seeking a modification or suspension of benefits based upon earning power or a termination of benefits based upon medical recovery during the employe's receipt of 104 weeks of total disability compensation.

Section 306(a.2) of the WC act requires the insurer to request an impairment rating evaluation within 60 days of the employe's receipt of 104 weeks of total disability benefits. The Department has interpreted this section to allow an insurer to request an evaluation 60 days prior to the expiration of the 104 weeks. Additionally, the insurer may request an evaluation up to 60 days after the expiration of the 104 weeks. However, the evaluation may not be performed prior to the expiration of the employe's receipt of 104 weeks of total disability benefits.

The 104 weeks of total disability shall be calculated on a cumulative basis. Therefore, employes who have received benefits both partial and total in character may be subject to an impairment rating evaluation only upon their receiving a total of 104 weeks of total disability benefits.

The insurer shall request an impairment rating evaluation in accordance with section 314 of the WC act (77 P. S. § 651). The request shall be made in writing on a form designated by the Department to the employe and the employe's counsel (if known). Requests for impairment evaluations shall state with specificity the date, time and location of the evaluation. Additionally, the request shall indicate the name of the physician chosen by agreement of the parties to perform the evaluation. If the parties cannot reach agreement on a physician to perform the evaluation, the Department will designate a physician.

The physician performing the impairment rating evaluation shall be a physician licensed in this Commonwealth who is certified by an American Board of Medical Specialties-approved board or its osteopathic equivalent and who is active in clinical practice at least 20 hours per week. The phrase "active in clinical practice" means a physician who provides preventive care and evaluates, treats and manages medical conditions of patients on an ongoing basis. Physicians designated by the Department to perform impairment rating evaluations may also be subject to additional training requirements and other criteria.

Act 57 provides that the impairment rating evaluation shall be performed in accordance with the most recent edition of the American Medical Association "Guides to the Evaluation of Permanent Impairment" (Guides). Physician evaluations shall generate an impairment rating in all cases, unless the condition of the employe is expressly excluded by the Guides. When the Guides are silent as to a particular condition, the ratings for similar or analogous conditions found in the Guides shall be applicable. The insurer maintains the right to request and receive impairment rating evaluations twice in a 12-month period.

The physician performing the evaluation shall indicate the impairment rating on an "Impairment Rating Determination Face Sheet" (Face Sheet). The physician shall attach a written report of the evaluation findings to the Face Sheet. The Face Sheet and report shall be completed and provided to the insurer, employe, employe's counsel (if known) and the Department within 30 days of the date of the impairment rating evaluation.

If the evaluation results in an impairment rating that is equal to or greater than 50%, the employe shall be presumed to be totally disabled. If the evaluation results in an impairment rating that is less than 50%, the employe shall receive benefits partial in character. After receipt of the Face Sheet, the insurer may adjust the employe's benefit status by providing written notice, on a form prescribed by the Department, to the employe, employe's counsel (if known) and the Department that: (1) the evaluation has resulted in an impairment rating of less than 50%; (2) 60 days from the date of the notice the employe's benefit status shall be adjusted from total to partial; (3) the adjustment of benefit status may not change the amount of the weekly workers' compensation benefit; (4) the employe may challenge an adjustment of benefit status by filing a Petition for Review with the Department and producing a physician's determination of impairment which is equal to or greater than 50%; and (5) an employe may only receive partial disability benefits for a maximum of 500 weeks.

If an impairment rating evaluation is performed within 60 days of the expiration of the employe's receipt of 104 weeks of total disability benefits, the adjustment of benefit status from total to partial shall relate back to the date of the expiration of 104 weeks of total disability benefits. If the impairment evaluation is performed more than 60 days after the expiration of the employe's receipt of 104 weeks of total disability benefits, the adjustment of benefits from total to partial shall be effective as of the date of the evaluation.

At any time during the receipt of the 500 weeks of partial disability benefits, an employe may appeal the adjustment of disability status to a Workers' Compensation Judge by filing a Petition for Review with the Department. The employe shall produce a physician's determination that the employe's impairment rating is equal to or greater than 50% under the Guides.

The insurer maintains the right to request and receive an impairment rating evaluation twice in a 12-month period. This does not diminish the insurer's right to request and receive independent medical examinations and vocational evaluations under section 314 of the WC act. Furthermore, the insurer maintains the right, at any time, to produce evidence of the employe's earning power consistent with section 306(b)(2) of the WC act.

In addition, the phrase "unless otherwise agreed to" found in section 306(a.2) of the WC act, permits the parties to forego an impairment rating evaluation after the employe's receipt of 104 weeks of total disability benefits, for example, when the parties agree that the employe remains totally disabled. Further, parties may agree to forego the evaluation after the expiration of the employe's receipt of 104 weeks of total disability benefits, if they agree via supplemental agreement, that the employe is partially disabled and, therefore, the evaluation is unnecessary. Despite any agreement to forego the evaluation, neither the employe nor the insurer shall be precluded from requesting the evaluation at a later date. Furthermore, the parties may not agree to perform an impairment rating evaluation prior to the expiration of the employe's receipt of 104 weeks of total disability benefits.

Section 306(b)(2) Earning Power Determination

Act 57 substantially amended section 306(b)(2) of the WC act. For injuries which are suffered on and after June 24, 1996, earning power shall be determined by proof of the employe's capacity to perform a job and the existence of a job in the usual employment area. The requirement of locating a job offer for the employe established by *Kachinski v. WCAB (Vepco Construction Co.)*, 516 Pa. 240, 532 A.2d 374 (1987), is limited to the situation where a specific job vacancy exists with the employer liable for the payment of compensation, as described more fully as follows.

If there exists a specific job vacancy with the liable employer that the employe is capable of performing, the employer must offer that job to the employe prior to seeking a modification of benefits based on earning power. This is considered a threshold requirement for seeking a modification based on earning power. This threshold requirement is satisfied when the employer avers on the Petition for Modification that: (1) the employe was notified of a job vacancy and failed to respond; (2) a specific job vacancy was offered to the employe, which the employe refused; or (3) no job vacancy exists.

The employer's obligation to offer a specific job vacancy that the employe is capable of performing arises when the insurer notifies the employe that the employe is able to return to work and provides the notice as required under section 306(b)(3) of the WC act. The liable employer's obligation continues for 30 days from the date of the notice or until the insurer files a Petition for Modification, whichever is longer.

The employe may establish the existence of a specific job vacancy by demonstrating that during the period in which the employer has a duty to offer a specific job vacancy that the employe is capable of performing: (1) the employer is or was actively recruiting for a particular vacancy; (2) the vacancy is or has been posted; or (3) the employer has announced a vacancy exists that it intends to fill. In all situations, the employe shall meet or exceed the requirements of the position. A job may not be considered vacant if the employer is precluded from offering the job to a particular employe because a collective bargaining agreement limits the type of position that employe may hold.

Section 306(b)(2) of the WC act provides that the employe's earning power shall be determined based upon expert opinion. The expert contemplated by this section is a vocational evaluator. Further, this section provides that in order to accurately assess the earning power of the employe, the insurer may require the employe to submit to an interview by an expert approved by the Department. Requests for interviews by vocational evaluators shall be made in accordance with section 314 of the WC act.

In order to ensure the level of expertise and professionalism required to conduct earning power assessment interviews, the Department has established minimum qualifications for vocational evaluators. These qualifications are set forth in Annex A.

Section 306(b)(3) Notice

Act 57 amended the WC act by the addition of section 306(b)(3). This section requires insurers to provide prompt written notice to an employe when the insurer receives medical evidence that the employe is able to return to work in any capacity. The notice shall be provided on form LIBC-757, "Notice of Ability to Return to Work."

This notice shall be provided to the employe and the employe's counsel (if known), regardless of whether the insurer intends to seek a modification of the employe's benefits. If, based on the evidence, the insurer intends to seek a modification of the employe's benefits, the notice

must be provided to the employe prior to or contemporaneous with the filing of a Petition for Modification.

Section 306(f.1)

Act 57 amended the medical cost containment provisions of Act 44. The Department intends to amend the medical cost containment regulations of Chapter 127, Subchapter C (relating to medical treatment review) to accommodate the changes provided by Act 57. These amendments with respect to section 306(f.1) and (f.2) of the WC act shall be made contemporaneously with the proposed rulemaking process for other sections of Act 57.

Section 306(f.1)(1)(i)

Act 57 amended section 306(f.1)(1)(i) of the WC act by extending the time period when an injured employe must treat with an employer-designated health care provider from 30 days to 90 days. Act 57 further provides that an employe, who has been informed by an employer-designated health care provider of the necessity of invasive surgery, may seek an additional opinion from a health care provider of the employe's choice. However, if the additional opinion provides an alternate course of treatment to the invasive procedure, which the employe opts to follow, the employe shall choose a health care provider from the employer's designated list to perform the alternate course of treatment. The employe is required to treat with the chosen health care provider for 90 days. Therefore, in this situation, the employe may be required to treat with an employer-designated provider for up to 180 days.

Section 306(f.1)(5) Payment to Providers

The WC act requires insurers to make payment to health care providers within 30 days of receipt of the provider's bills and medical report. Insurers are permitted, however, to suspend payment to providers when the insurer or employer disputes the reasonableness and necessity of the treatment by filing an UR request. Act 57 amended this section of the WC act by providing that when the insurer receives a bill and medical report and disputes the reasonableness and necessity of a portion of the treatment listed on the bill, the nonpayment provision will only apply to the particular treatment which is the subject of dispute. Therefore, insurers shall submit payment to the provider for those portions of the treatment listed on the bill not challenged as unreasonable or unnecessary within 30 days.

Act 57 also creates a statute of limitations during which a provider shall file an Application for Fee Review. Providers shall file an Application for Fee Review no more than 30 days following notification of a disputed treatment or 90 days following the original billing date of treatment, whichever is later. The new statute of limitations applies only to treatment rendered on or after August 23, 1996. If an insurer has the right to suspend payment due to the filing of a UR request, the period during which the provider shall file an Application for Fee Review is tolled. Applications for Fee Review will continue to be processed under §§ 127.251—127.261 (relating to review of medical fee disputes).

Section 306(f.1)(6) UR

Requests for Reconsideration have been eliminated by Act 57. Requests for Reconsideration were no longer accepted by the Department on and after August 23, 1996. Additionally, all regulations promulgated under Act 44 with respect to Reconsideration requests are considered repealed to the extent that they are inconsistent with the provisions of Act 57. However, those regulations relating to payment for Reconsiderations shall remain in effect until all outstanding balances have been cleared.

If a party wishes to challenge the determination of the Utilization Review Organization (URO), the party must file a Petition for Review of Utilization Review Determination with the Department. The Petition for Review of Utilization Review Determination will be handled in the manner indicated in §§ 127.551—127.556 (relating to UR—petition for review). If a Petition for Review of Utilization Review Determination is filed by any party, the insurer's obligation to pay the bills submitted for the treatment under review shall be determined in accordance with § 127.208 (relating to time for payment of medical bills). This interpretation is consistent with the practice under Act 44, when a Petition for Review had been filed after a determination on reconsideration.

With respect to requests for UR, in the case of physical therapy or occupational therapy, the review shall be performed by a reviewer licensed in this Commonwealth in the same profession and having the same specialty as the provider of treatment under review, regardless of the profession or specialty of the provider who prescribed the treatment. This is a departure from the practice under § 127.466 (relating to the assignment of a UR request to a reviewer by a URO).

Under § 127.466, a UR request seeking review of both physical therapy and office visits of the referring physician were consolidated in one review which named only the referring physician as the provider under review. As such, the reviewer was a physician in the same specialty as that of the referring doctor.

Effective August 23, 1996, however, requests seeking review of physical therapy and review of the referring physician have been treated separately. Parties wishing to obtain UR of both physical therapy, including occupational therapy, and the treatment of the referring physician shall file separate UR requests for the physical or occupational therapy and other treatment sought to be reviewed. This practice ensures that the parties' filing dates are maintained until regulations reflect the new procedure for review of physical therapy and also ensures that the appropriate reviewer is assigned for the treatment under review.

In cases where a Petition for Review of Utilization Review Determination has been filed, it shall be the responsibility of the Department to forward the report of the reviewer to the Workers' Compensation Judge. The report shall become part of the record before the Workers' Compensation Judge. This is a departure from § 127.555 (relating to petition for review by Bureau—transmission of URO records to Workers' Compensation judge). Regulations which forbid the action ordered by this section are considered repealed to the extent that they are inconsistent with Act 57. However, transmission of the URO records to the Workers' Compensation Judge will continue to be governed by § 127.555 (relating to petition for review by Bureau—transmission of URO records to Workers' Compensation judge).

Section 306(f.2) CCOs

Act 57 amended section 306(f.2) of the WC act by transferring the authority for certification of CCOs from the Department of Health to the Department. Accordingly, the Department will develop procedures and issue an application form for CCO certification. CCOs currently certified by the Department of Health will continue to be certified until such time as the new procedures for CCO certification are published in the *Pennsylvania Bulletin.*

Section 31.2 of Act 57 provides that the regulations promulgated by the Department of Health under section 306(f.2)(7) of the WC act shall be deemed regulations of the Department. The Department intends to operate under the existing statement of policy published by the Department of Health at 28 Pa. Code Chapter 9, Subchapter B (relating to coordinated care organizations—statement of policy).

Section 311.1 Employe Reporting Requirements and Verification

Act 57 creates new reporting requirements for employes who file for, or are receiving, workers' compensation benefits. The reporting requirements are intended not only to facilitate the management of claims, but also to reduce fraud within the workers' compensation system. The insurer shall notify the employe, at the time of the work injury or upon commencing payment of compensation, of the duty to report under this section, and shall provide the employe with the necessary forms.

Under section 311.1(a) of the WC act (77 P. S. § 631.1), employes who file for, or are receiving, compensation shall report information to the insurer which is relevant to determining the entitlement to, or the amount of, compensation. The information includes information regarding employment, including voluntary employment, self-employment, wages earned and the receipt of any benefits referred to in section 204 of the WC act. The employe is obligated to report this information on form LIBC-750, "Employee Report of Wages (other than Workers' Compensation Benefits Received)" within 30 days of commencing employment and self-employment.

The employe's failure to file the reporting form under section 311.1(a) of the WC act may not result in the suspension of benefits. However, the failure to file the form may subject the employe to prosecution under the provisions of Article XI of the WC act relating to fraud.

Under section 311.1(d) of the WC act, insurers may submit form LIBC-760, "Employee Verification of Employment, Self-employment or Change in Physical Condition" to an employe and the employe's counsel (if known), to verify that the employe's status regarding the entitlement to receive compensation has not changed. It is the insurer's burden to demonstrate that the employe has, in fact, received the verification form. The form requires that the employe supply all information which is relevant to determining the amount of, or entitlement to, compensation. The employe shall complete and return the verification form to the insurer within 30 days of its receipt. The employe's failure to return the form in the specified time period may result in a suspension of the employe's workers' compensation benefits, under section 311.1(g) of the WC act.

The insurer shall suspend payments of compensation by providing written notice to the employe and the employe's counsel, if known, on a form designated by the Department, that the workers' compensation benefits have been suspended as a result of the employe's failure to return the verification form within the statutory time period. The notice shall further inform the employe that the workers' compensation benefits shall be reinstated immediately upon the insurer's receipt of the verification form. In addition, the notice shall inform the employe of the right to challenge the suspension of benefits by filing a Petition for Review with the Department. Employes are not entitled to payments of compensation during the period of noncompliance with this section. Furthermore, failure to comply with section 311.1(d) of the WC may subject the employe to prosecution under the provisions of Article XI of the WC act relating to fraud.

Upon receipt of the completed verification form, the insurer shall immediately reinstate benefits for which the employe is eligible. The insurer shall submit a notice of reinstatement of benefits to the employe, employe's counsel, if known, and the Department, indicating the date of receipt of the verification form and the date of reinstatement of workers' compensation benefits. A failure to do so may result in the imposition of penalties under section 435 of the WC act (77 P. S. § 991).

Section 314 Independent Medical Examination

Prior to Act 57, section 314 of the WC act provided the mechanism for insurers to compel an employe's attendance at an examination by a physician. Act 57 amended this section by creating a mechanism for insurers to request the employe's attendance at a physical examination or other expert interview by an appropriate health care provider or other expert. The term "other expert" under this section refers to the vocational evaluator in section 306(b)(2) of the WC act. The term "health care provider" shall be construed under section 109 of the WC act (77 P. S. § 29).

Additionally, this section provides the mechanism for an insurer to compel the employe's attendance at the evaluation referred to under section 306(a.2) of the WC act. An employe's failure to attend an examination, impairment rating evaluation or other expert interview under this section may result in a suspension of the employe's workers' compensation benefits.

Section 402.1 Informal Conferences

Act 57 amended the WC act by adding section 402.1 (77 P. S. § 711.1), which provides a mechanism for informal conferences. Act 57 intended that informal conferences would expedite the workers' compensation adjudication process by allowing parties to meet informally and discuss issues involved in an ongoing case. An informal conference will only be held when both parties agree to the conference. Additionally, for purposes of this section only, informal conferences are not considered adversary proceedings; therefore, the representation of a corporation by an agent or representative of the corporation other than an attorney are not considered the unauthorized practice of law. As such, it is not necessary or required that a corporation be represented by an attorney at an informal conference. However, when the case is transferred to a Workers' Compensation Judge for an adjudication, the corporation shall be represented by an attorney.

Section 413(a.1) Automatic Request for Supersedeas

Act 57 amended section 413 of the WC act by adding subsection (a.1) (77 P. S. § 771(a.1)), which provides for an automatic request for supersedeas when the insurer files a petition alleging an employe's full recovery, accompanied by a physician's affidavit to that effect. The physician's affidavit alleging full recovery must have been completed in connection with an examination which occurred within 21 days prior to the insurer's filing of the petition for termination. An employe is fully recovered when all disability related to the work injury has resolved, even when the injury leaves a physical deformity with no functional impairment. The physician's affidavit of recovery may be considered prima facie evidence of a change in the medical status of the employe warranting the grant of supersedeas by a Workers' Compensation Judge.

Consistent with the Special Rules of Administrative Practice and Procedure Before Workers' Compensation

Referees (Judges), if the Judge fails to conduct a special supersedeas hearing as required or fails to rule on the supersedeas within the 7 days of the special supersedeas hearing as prescribed under this section, the supersedeas shall be deemed denied. This interpretation is consistent with the current practice under § 131.43 (relating to disposition of request for supersedeas).

Other requests for supersedeas shall be governed by section 413(a.2) of the WC and the Special Rules of Administrative Practice and Procedure Before Referees (Judges) at §§ 131.41—131.43 (relating to supersedeas).

Section 413(c) and (d) Return to Work Suspension/Modification

Act 57 amended the WC act by adding section 413 (c) and (d), which allows an insurer to suspend or modify compensation upon the employe's return to work. If the employe is receiving wages greater than or equal to the pre-injury wage, the insurer is entitled to suspend the payment of wage-loss benefits. If the employe has returned to work at wages less than the pre-injury wage, the insurer is entitled to modify the workers' compensation benefits.

These sections require the insurer to notify the employe and the employe's counsel (if known), via forms LIBC-751, "Notification of Suspension or Modification pursuant to §§ 413(c) & (d)" and LIBC-752, "Insurer's Affidavit Pursuant to Section 413(C) & (D)," within 7 days of suspending or modifying benefits. It is the insurer's burden to demonstrate that the employe has, in fact, been notified of the change.

The employe may challenge the suspension or modification of compensation by checking off the Petition to Challenge box on form LIBC-751 and returning the form to the Department within 20 days of receipt.

If the employe challenges the insurer's suspension or modification, a special supersedeas hearing will be conducted by a Workers' Compensation Judge within 21 days of the challenge. If the Judge fails to hold a hearing within the prescribed time period or fails to rule on the special supersedeas within 14 days of the hearing, the insurer may not continue to suspend or modify the compensation. This interpretation is consistent with § 131.43 (relating to disposition of request for supersedeas).

Section 449 Compromise and Release Agreements

Act 57 amended the WC act by permitting the release of liability claimed to exist under the WC act on account of injury or death through Compromise and Release Agreements. Although the Department requires that Compromise and Release Agreements be completed on form LIBC-755, "Compromise and Release Agreement by Stipulation Pursuant to section 449 of the Workers' Compensation Act," parties may attach additional information if circumstances so require.

Parties to Compromise and Release Agreements may resolve claims through the use of structured settlements to provide periodic payments to injured workers for a defined period of time. In addition, in situations where the future medical expenses are speculative, parties may establish a medical reversionary trust. A medical reversionary trust provides security to an injured employe in terms of ensuring full funding for future medical care. A trust may be used in conjunction with a structured settlement to provide compensation for both medical expenses and wage losses.

Section 449(d) of the WC act contemplates the use of vocational evaluators. The vocational evaluators shall possess the minimum requirements established for vocational evaluators performing the earning power assessment interviews required by section 306(b)(2) of the WC act. The parties may agree to waive the requirement of a vocational evaluation, or the Workers' Compensation Judge may determine that it is inappropriate or unnecessary; however, the evaluation shall be performed if the Workers' Compensation Judge determines that it is necessary prior to approving the Compromise and Release Agreement.

A Compromise and Release Agreement is not a stipulation as that term is utilized in § 131.91 (relating to stipulations of fact).

Although a Compromise and Release Agreement may extinguish the employer's liability for a work-related injury, amounts paid under a Compromise and Release Agreement shall be considered benefits under the WC act.

Compromise and Release Agreements shall be submitted to a Workers' Compensation Judge at least 15 days prior to the hearing on the agreement. In determining whether to approve the Compromise and Release Agreement, the Workers' Compensation Judge will determine whether the employe understands the full legal significance of the agreement. Compromise and Release Agreements are not valid unless approved in a written order by a Worker's Compensation Judge.

Section 450 Collective Bargaining Agreements

Act 57 amended the WC act to permit any employer and the recognized or certified and exclusive representative of its employes to establish, through collective bargaining, certain binding obligations and procedures for the resolution of claims relating to workers' compensation. Act 57 encourages utilization of this enabling language and the Department's Office of Labor-Management Cooperation is available to provide assistance to interested parties.

It is envisioned that this section will provide flexibility between management and labor organizations to resolve workers' compensation claims in an expeditious manner, while preserving the benefits and protections of the WC act.

Collective bargaining agreements may provide an alternative dispute resolution (ADR) system which may include, but is not limited to, arbitration, mediation and conciliation, for the resolution of claims for work-related injuries.

An ADR system established under section 450 of the WC act (77 P. S. § 1000.6) shall be the exclusive system for resolving workers' compensation claims. All determinations made under an ADR system established under section 450 of the WC act shall be binding and enforceable. Appeals from determinations rendered under an ADR system are limited to those made under the conditions specified by 42 Pa.C.S.A. § 7314 (relating to vacating award by court). The ADR system in effect on the date of the employe's work-related injury shall be the exclusive system utilized to resolve any claim for benefits made by the employe in relation to the work-related injury.

Collective bargaining agreements may provide that in the event of the termination or expiration of the agreement, the parties shall be subject to the terms and conditions of the expired agreement until a new collective bargaining agreement becomes effective. In that instance,

ADR systems in place at the time the agreement expires shall continue to be the exclusive system for the resolution of the workers' compensation claims.

Section 1002 Safety Committee Discount

Act 44 amended the WC act by adding section 1002 (77 P. S. § 1038.2), which provided that employers who establish certified safety committees were entitled to receive a one-time 5% discount on their workers' compensation premium. Act 57 amended section 1002(b) of the WC act by extending the 5% discount for a total of 5 years, if the safety committee continues to operate and meet the certification requirements. Employers who took advantage of the one-time discount under Act 44 and whose safety committees continue to operate and meet the certification requirements may receive 4 more years of a discount on their workers' compensation premium.

The Department will soon publish proposed regulations in the *Pennsylvania Bulletin* which will provide the procedures for establishing safety committees under Act 44 and obtaining the additional discounts as provided under Act 57.

Employers who qualified for and received the 5% discount under Act 44, whose policies' renewal dates fell between the signing date of Act 57 (June 24, 1996) and the effective date of most provisions of Act 57 (August 23, 1996), were not entitled to the continuation of the 5% discount. In response to this situation, the Insurance Commissioner issued a press release dated October 28, 1996, encouraging insurers to voluntarily grant the 5% discount to those employers who met the certification and renewal criteria and whose policies' renewal dates fell between the signing and the effective date of Act 57.

(*Editor's Note*: The regulations of the Department, 34 Pa. Code, are amended by adding a statement of policy at §§ 122.1—122.11, 122.101—122.104, 122.201, 122.202, 122.301—122.303, 122.410, 122.501 and 122.502 to read as set forth in Annex A.)

JOHNNY J. BUTLER,
Secretary

Fiscal Note: 12-48. No fiscal impact; (8) recommends adoption. There will be undeterminable costs to the Department associated with this statement of policy. These costs will be offset by expected savings to the Commonwealth as a self-insured employer.

Annex A

TITLE 34. LABOR AND INDUSTRY

PART VIII. BUREAU OF WORKERS' COMPENSATION

CHAPTER 122. GENERAL PROVISIONS OF ACT 57 OF 1996—STATEMENT OF POLICY

Subch.
A. OFFSET OF UNEMPLOYMENT COMPENSATION, SOCIAL SECURITY (OLD AGE), PENSION AND SEVERANCE BENEFITS
B. IMPAIRMENT RATINGS
C. VOCATIONAL EXPERTS AND EARNING POWER ASSESSMENTS
D. EARNING POWER DETERMINATIONS
E. COLLECTIVE BARGAINING
F. EMPLOYE REPORTING REQUIREMENTS AND VERIFICATION

Subchapter A. OFFSET OF UNEMPLOYMENT COMPENSATION, SOCIAL SECURITY (OLD AGE), PENSION AND SEVERANCE BENEFITS

Sec.
122.1 Purpose.
122.2 Definitions.
122.3 Employe report of benefits subject to offset.
122.4 Application of the offset, generally.
122.5 Credit for benefits already received.
122.6 Application of offset for unemployment compensation (UC) benefits.
122.7 Application of offset for Social Security (old age) benefits.
122.8 Offset for pension benefits, generally.
122.9 Application of offset for pension benefits.
122.10 Multi-employer pension fund offsets.
122.11 Application of offset for severance benefits.

§ 122.1. Purpose.

This subchapter interprets the provisions of the act which require the offset of workers' compensation benefits by amounts received in unemployment compensation, Social Security (old age), pension and severance benefits, subsequent to the work-related injury.

§ 122.2. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

Act—The Workers' Compensation Act (77 P. S. §§ 1—2626).

Actuarial equivalent—The amount of money available under one set of assumptions which will result in the same present value under a different set of assumptions.

Defined-benefit plan—A pension plan in which the benefit level is established at the commencement of the plan and actuarial calculations determine the varying contributions necessary to fund the benefit at an employe's retirement.

Defined-contribution plan—A pension plan in which contributions accumulate and are invested in a separate account for each employe. At the time of retirement the accumulated contributions and earnings determine the amount of the employe's benefit either in the form of a lump-sum distribution or annuity.

IRA—Individual retirement account as that term is utilized in sections 219 and 408(a) (26 U.S.C.A. §§ 219 and 408(a)).

Investment income—Income earned on and which becomes part of the principal amount of pension funds by virtue of investment.

Multi-employer pension plan—A plan to which more than one employer is required to contribute and is maintained pursuant to one or more collective bargaining agreements between one or more employe organizations and more than one employer.

Net—The amount of Social Security (old age), pension or severance benefits received by the employe after deductions for local, State and Federal taxes and amounts deducted under the Federal Insurance Contributions Act (FICA) (26 U.S.C.A. §§ 3101—3126).

Pension—A plan or fund established or maintained by an employer, an employe organization, or both, which provides retirement income to employes or results in deferral of income by employes extending to termination of employment and beyond.

Severance benefits—A benefit which is taxable to the employe and paid as a result of the employe's separation from employment by the employer liable for the payment of workers' compensation, including benefits in the form of tangible property. The term does not include payments received by the employe based on unused vacation or sick leave or otherwise earned income.

Social Security (old age)—Benefits received by an employe under the Social Security Act (42 U.S.C.A. §§ 301—1397e) (relating to Social Security Retirement Income).

§ 122.3. Employe report of benefits subject to offset.

(a) Employes shall report to the insurer amounts received in unemployment compensation, Social Security (old age), severance and pension benefits on form LIBC-756(A). In addition, employes shall report the withdrawal or use of pension funds which were rolled over into an IRA or other similarly restricted account.

(b) Form LIBC-756(A) shall be completed and forwarded to the insurer within 30 days of the employe's receipt of any of the benefits specified in subsection (a) or within 30 days of any change in the receipt of the benefits specified in subsection (a), but in any event no less than every 6 months.

§ 122.4. Application of the offset, generally.

(a) After receipt of Form LIBC-756(A), the insurer may offset workers' compensation benefits by amounts received by the employe from any of the sources in § 122.3 (relating to employe). The offset of workers' compensation benefits shall only apply with respect to amounts of unemployment compensation, Social Security (old age), pension and severance benefits received subsequent to the work-related injury.

(1) The offset for amounts received in Social Security (old age), severance and pension benefits shall only apply to individuals with claims for injuries suffered on or after June 24, 1996.

(2) The offset for amounts received in unemployment compensation benefits applies to all claims regardless of the date of injury.

(b) At least 15 days prior to taking the offset, the insurer shall notify the employe, on a form prescribed by the Department, that the workers' compensation benefits will be offset. The notice shall indicate:

(1) The amount of the offset.

(2) The type of offset (that is, unemployment compensation, Social Security (old age), severance or pension).

(3) How the offset was calculated, with supporting documentation.

(4) When the offset commences.

(5) The amount of any credit, if applicable.

(c) Whenever the insurer's entitlement to the offset changes, the insurer shall notify the employe of the change at least 15 days prior to the adjustment on the form specified in subsection (b).

(d) The insurer shall provide a copy of the form specified in subsections (b) and (c) to the employe, the employe's counsel—if known—and the Department.

(e) The employe may challenge the offset by filing a Petition for Review with the Department.

(f) It is the insurer's burden to demonstrate that the employe has been notified of the offset.

§ 122.5. Credit for benefits already received.

(a) If the insurer receives information that the employe has received benefits for which an employer is entitled to offset from one or more of the sources in § 122.3 (relating to employe report of benefits subject to offset), the insurer may credit the amounts received towards future payments of workers' compensation benefits.

(b) The net amount received by the employe, prior to notification to the insurer, shall be divided by the weekly workers' compensation rate. The result shall be the number of weeks, and fraction thereof, the insurer is entitled to credit towards future payments of workers' compensation.

(c) The insurer shall notify the employe, the employe's counsel—if known—and the Department of the offset as specified in § 122.4(b) (relating to application of the offset, generally).

(d) The employe may challenge the offset by filing a Petition for Review with the Department.

§ 122.6. Application of offset for unemployment compensation (UC) benefits.

(a) Workers' compensation benefits otherwise payable shall be offset by the amount an employe receives in UC benefits subsequent to the work-related injury. This offset shall apply only to UC benefits which an employe receives and which are attributable to the same time period in which an employe also receives workers' compensation benefits.

(b) The offset may not apply to benefits for which an employe may be eligible, but is not receiving.

(c) When an employe receives UC benefits which the employe is later required to repay based upon a determination of ineligibility, the insurer may not offset the workers' compensation benefits.

(d) When an employe's workers' compensation benefits have been offset by the amount received in UC benefits and the employe is required to repay UC benefits based upon a determination of ineligibility, the insurer shall immediately repay the employe for the amounts previously offset from the workers' compensation benefits. The employe may request that the insurer remit the repayment directly to the Bureau of Unemployment Compensation Benefits and Allowances (Bureau).

(e) When an employe receives a lump-sum award from the Bureau, the insurer may credit the amount received by the employe towards future payments of workers' compensation benefits. The amount received by the employe shall be divided by the weekly workers' compensation rate. The result shall be the number of weeks, and fraction thereof, the insurer is entitled to credit towards future payments of workers' compensation.

§ 122.7. Application of offset for Social Security (old age) benefits.

(a) Workers' compensation benefits otherwise payable shall be offset by 50% of the amount received in Social Security (old age) benefits. The offset shall only apply to amounts which an employe receives subsequent to the work-related injury. The offset may not apply to Social Security (old age) benefits which commenced prior to the work-related injury and which the employe continues to receive subsequent to the work-related injury.

(b) The offset may not apply to benefits to which an employe may be entitled, but is not receiving.

(c) The offset shall be applied on a weekly basis. To calculate the weekly offset, 50% of the monthly Social Security (old age) benefits received by the employe shall be divided by 4.34. The result is the amount of the weekly offset to the workers' compensation benefit.

§ 122.8. Offset for pension benefits, generally.

(a) Workers' compensation benefits otherwise payable shall be offset by the amount an employe receives in

pension benefits to the extent funded by the employer directly liable for the payment of workers' compensation.

(b) The pension offset shall apply to amounts received from defined-benefit and defined-contribution pension plans.

(c) In calculating the offset amount for defined-contribution plans, investment income attributable to the employer's contribution to the pension plan shall be included on a pro rata basis.

§ 122.9. Application of offset for pension benefits.

(a) Offsets to amounts received from pension benefits shall be achieved on a weekly basis. If the employe receives the pension benefit on a monthly basis, the net amount received by the employe shall be divided by 4.34. The result is the amount of the weekly offset to the workers' compensation benefit.

(b) When the employe receives a pension benefit in the form of a lump-sum payment, the actuarial equivalent of the lump-sum with respect to the normal form annuity options (qualified joint and survivor annuity or life annuity) available at the time of the employe's receipt shall be used as the basis for calculating the offset to the workers' compensation benefit. The monthly annuity equivalent shall be divided by 4.34. The result shall be the offset to the workers' compensation benefit on a weekly basis.

(c) Pension benefits which are rolled over into an IRA or other similarly restricted account are not subject to the offset, so long as the employe does not utilize or otherwise withdraw funds from the account while simultaneously receiving workers' compensation benefits from the liable employer.

(d) If the employe, while receiving workers' compensation benefits from the liable employer, utilizes or otherwise withdraws funds from the IRA or other similarly restricted account, the insurer shall be entitled to an offset to workers' compensation benefits.

(1) If the employe begins receiving a monthly payment from the IRA or other similarly restricted account, the insurer shall receive an offset to the workers' compensation benefit equal to the offset the insurer would be entitled to if the employe were receiving a monthly pension benefit.

(2) If the employe utilizes or otherwise withdraws an amount from the IRA or other similarly restricted account which is greater than the actuarial equivalent of the lump sum with respect to the normal form annuity options (qualified joint and survivor annuity or life annuity) available at the time of the employe's receipt, the insurer may be entitled to a credit towards payments of future workers' compensation benefits equal to the amount of the funds utilized or otherwise withdrawn.

(e) The employe shall report the subsequent receipt of funds from the IRA or other similarly restricted account to the insurer on forms LIBC-756A, LIBC-750 and LIBC-760.

§ 122.10. Multi-employer pension fund offsets.

(a) When the pension benefit is payable from a multi-employer pension plan, only that amount which is directly contributed by the employer liable for the payment of workers' compensation shall be utilized in calculating the offset to workers' compensation benefits.

(b) To calculate the appropriate offset amount, the portion of the annuity purchased by the liable employer's contributions shall be as determined by the pension fund's actuary. The ratio of the portion of the annuity purchased by the liable employer's contributions to the total annuity shall be multiplied by the net amount received by the employe from the pension fund on a weekly basis. The result is the amount of the offset to be applied to the workers' compensation benefit on a weekly basis.

(c) If the employe receives the multi-employer pension benefit on a monthly basis, the net amount received by the employe shall be multiplied by the ratio of the liable employer's contribution to the pension plan on behalf of the employe; and that product shall be divided by 4.34. The result is the amount of the offset to the workers' compensation benefit on a weekly basis.

(d) If the employe receives the multi-employer pension benefit in a lump sum, the actuarial equivalent of the lump sum with respect to the normal form annuity options (qualified joint and survivor annuity or life annuity) available at the time of the employe's receipt of the benefit shall be used as the basis for calculating the offset to the workers' compensation benefit. The ratio of the employer's contribution to the pension plan shall be multiplied by the monthly annuity value of the pension benefit. The result shall be divided by 4.34 to achieve the offset to the workers' compensation benefit on a weekly basis.

§ 122.11. Application of offset for severance benefits.

(a) Workers' compensation benefits otherwise payable shall be offset by amounts an employe receives in severance benefits subsequent to the work-related injury.

(b) When the employe receives severance benefits in a lump-sum payment, the net amount received by the employe shall be divided by the weekly workers' compensation rate. The result is the number of weeks, and fraction thereof, the insurer may credit towards future payments of workers' compensation benefits.

(c) When an employe receives a severance benefit in the form of tangible property, the market value of the property shall be divided by the weekly workers' compensation rate. The result is the number of weeks, and fraction thereof, the employer may credit towards future payments of workers' compensation benefits.

Subchapter B. IMPAIRMENT RATINGS

Sec.

122.101 Purpose.
122.102 Impairment rating evaluation requests.
122.103 Physicians.
122.104 Impairment rating determination.

§ 122.101. Purpose.

This subchapter interprets section 306(a.2) of the act (77 P. S. § 511.2) which provides for a determination of whole body impairment after the receipt of 104 weeks of total disability compensation.

§ 122.102. Impairment rating evaluation requests.

(a) Within 60 days of an employe's receipt of 104 weeks of total disability compensation, the insurer may request the employe's attendance at an impairment rating evaluation. The insurer shall request the evaluation either 60 days prior to, or up to 60 days after, the expiration of the employe's receipt of 104 weeks of total disability compensation. The impairment rating evaluation may not take place prior to the expiration of the employe's receipt of 104 weeks of total disability compensation. The 104 weeks of total disability shall be calculated on a cumulative basis.

(b) The insurer shall request the employe's attendance at the impairment rating evaluation in writing on a form designated by the Department, and therein specify the date, time and location of the evaluation and the name of the physician chosen by agreement of the parties to perform the evaluation. The request shall be made to the employe and employe's counsel—if known.

(c) If the parties cannot agree upon the physician to perform the impairment rating evaluation, the Department will appoint a physician.

(d) The insurer's failure to request the evaluation within 60 days of the expiration of 104 weeks of total disability may not result in a waiver of the insurer's right to compel the employe's attendance at an impairment rating evaluation. The insurer maintains the right to request and receive an impairment rating evaluation twice in a 12-month period.

(e) The employe's failure to attend the impairment rating evaluation under this section may result in a suspension of the employe's right to benefits consistent with section 314(a) of the act (77 P. S. § 651(a)).

(f) The parties may agree to forego an impairment rating evaluation.

§ 122.103. Physicians.

(a) Physicians performing impairment rating evaluations shall:

(1) Be licensed in this Commonwealth and certified by an American Board of Medical Specialties-approved board or its osteopathic equivalent.

(2) Be active in clinical practice at least 20 hours per week.

(b) For purposes of this subchapter, the phrase "active in clinical practice" means providing preventive care and evaluating, treating and managing medical conditions of patients on an ongoing basis.

§ 122.104. Impairment rating determination.

(a) The physician performing the impairment rating evaluation shall complete an "Impairment Rating Determination Face Sheet" (Face Sheet), which sets forth the impairment rating as determined by the physician. The physician shall attach a written report of the impairment evaluation findings to the Face Sheet. The Face Sheet and report shall be provided to the employe, employe's counsel—if known—insurer and the Department within 30 days from the date of the impairment evaluation.

(b) If the evaluation results in an impairment rating that is equal to or greater than 50%, the employe shall be presumed to be totally disabled and shall continue to receive total disability compensation. The presumption of total disability may be rebutted at any time by a demonstration of earning power in accordance with section 306(b)(2) of the act (77 P. S. § 512(b)(2)).

(c) If the evaluation results in an impairment rating of less than 50%, the employe shall receive benefits partial in character. To adjust the status of the employe's benefits from total to partial, the insurer shall provide notice to the employe, the employe's counsel—if known—and the Department, on a form to be prescribed by the Department, of the following:

(1) The evaluation has resulted in an impairment rating of less than 50%.

(2) Sixty days from the date of the notice the employe's benefits status shall be adjusted from total to partial.

(3) The adjustment of benefit status may not change the amount of weekly workers' compensation benefit.

(4) An employe may only receive partial disability benefits for a maximum of 500 weeks.

(5) The employe may appeal the adjustment to partial disability status to a Workers' Compensation Judge by filing a Petition for Review with the Department and producing a physician's determination of impairment which is equal to or greater than 50%.

(d) The adjustment of benefit status shall be effective as of one of the following:

(1) The date of the expiration of the employe's receipt of 104 weeks of total disability compensation, so long as the impairment rating evaluation is performed within 60 days of the expiration of the employe's receipt of 104 weeks of total disability compensation.

(2) The date of the impairment rating evaluation.

(e) At any time during the receipt of 500 weeks of partial disability compensation, the employe may appeal the adjustment of disability status to a Workers' Compensation Judge by filing a Petition for Review with the Department. The employe shall produce a physician's determination of impairment which is equal to or greater than 50%.

Subchapter C. VOCATIONAL EXPERTS AND EARNING POWER ASSESSMENTS

Sec.
122.201. Purpose.
122.202. Qualifications.

§ 122.201. Purpose.

This subchapter interprets the provisions of the act which require the Department to approve experts who will conduct earning power assessment interviews under section 306(b)(2) of the act (77 P. S. § 512(b)(2)), as well as sections 314 and 449 of the act (77 P. S. §§ 651 and 1000.5). The experts contemplated by this subchapter are vocational evaluators.

§ 122.202. Qualifications.

In order to be an expert approved by the Department for the purposes of conducting earning power assessment interviews, the individual shall possess a minimum of one of the following:

(1) Both of the following:

(i) Certification by one of the following Nationally recognized professional organizations:

(A) The American Board of Vocational Evaluators.

(B) The National Board of Certified Counselors.

(C) The Commission on Rehabilitation Counselor Certification.

(ii) One year experience in analyzing labor market information and conditions, industrial and occupational trends, with primary duties providing actual vocational rehabilitation services, which include but are not limited to the following:

(A) Job seeking skills.

(B) Job development.

(C) Job analysis.

(D) Career exploration.

(E) Placement of individuals with disabilities.

(2) Certification by a Nationally recognized professional organization under the direct supervision of an individual possessing the criteria in paragraph (1).

(3) Experience testifying as a vocational evaluator in the social security system.

(4) Possession of a Bachelor's degree or a valid license issued by the Department of State's Bureau of Professional and Occupational Affairs, so long as the individual is under the direct supervision of an individual possessing the criteria in paragraph (1).

(5) At least 5 years experience in the Pennsylvania Workers' Compensation system prior to August 23, 1996, as a vocational evaluator, with experience in analyzing labor market information and conditions, industrial and occupational trends, with primary duties providing actual vocational rehabilitation services, which include but are not limited to the following:

(i) Job seeking skills.

(ii) Job development.

(iii) Job analysis.

(iv) Career exploration.

(v) Placement of individuals with disabilities.

Subchapter D. EARNING POWER DETERMINATIONS

Sec.
122.301. Notice of Ability to Return to Work.
122.302. Employer job offer obligation.
122.303. Evidence of earning power.

§ 122.301. Notice of Ability to Return to Work.

(a) After receipt of medical evidence which indicates that an employe is able to return to work in any capacity, the insurer shall provide prompt written notice on form LIBC-757, "Notice of Ability to Return to Work" to the employe regarding the following:

(1) The nature of the employe's physical condition or change in condition.

(2) The employe's obligation to seek available employment and that proof of available employment may jeopardize the employe's right to receive benefits.

(3) The employe's right to consult with an attorney.

(b) This notice shall be provided prior to, or contemporaneous with, the filing of a Petition for Modification. The insurer shall provide the notice required by subsection (a), to the employe and the employe's counsel, if known, regardless of whether the insurer intends to file a Petition for Modification.

§ 122.302. Employer job offer obligation.

(a) If a specific job vacancy exists with the liable employer, which the employe is capable of performing, the employer shall offer that job to the employe prior to seeking a modification of benefits based on earning power.

(b) The employer's obligation to offer a specific job vacancy to the employe commences upon the filing of the notice required by § 122.301 (relating to notice of ability to return to work) and shall continue for 30 days or until the filing of a Petition for Modification, whichever is longer.

(c) The employer's duty under subsections (a) and (b) may be satisfied if the employer avers on the Petition for Modification that one of the following exists:

(1) The employe was notified of a job vacancy and failed to respond.

(2) A specific job vacancy was offered to the employe, which the employe refused.

(3) No job vacancy exists.

(d) The employe may establish the existence of a specific job vacancy with the employer by demonstrating that during the period in which the employer has a duty to offer a specific job vacancy, which the employe is capable of performing, the following exist:

(1) The employer is or was actively recruiting for a particular vacancy; the vacancy is or has been posted; or the employer has announced a vacant position which it intends to fill.

(2) The employe meets or exceeds the requirements of the position.

(e) A job will not be considered vacant if the employe's ability to fill the position is precluded by any applicable collective bargaining agreement.

§ 122.303. Evidence of earning power.

An insurer may demonstrate an employe's earning power with expert testimony relative to the employe's capacity to perform a job and the existence of a job in the usual employment area of the employe. For injuries suffered on or after June 24, 1996, the employer's job offer obligation to the employe is limited as set forth in § 122.302 (relating to employer job offer obligation).

Subchapter E. COLLECTIVE BARGAINING

Sec.
122.401. Use of Alternative Dispute Resolution (ADR) Systems.

§ 122.401. Use of Alternative Dispute Resolution (ADR) Systems.

(a) Collective bargaining agreements may provide for an Alternative Dispute Resolution (ADR) System which may include arbitration, mediation and conciliation, for the resolution of claims for work-related injuries.

(b) ADR systems established under section 450 of the act (77 P. S. § 1000.6) shall be the exclusive system for resolving workers' compensation claims.

(c) Determinations made under an ADR system established under section 450 of the act shall be binding and enforceable.

(d) Appeals from determinations rendered under an ADR system are limited to those made under the conditions specified by 42 Pa.C.S. § 7314 (relating to vacating award by court).

(e) The ADR system in effect on the date of the employe's work-related injury shall be the exclusive system utilized to resolve a claim for benefits made by the employe in relation to the work-related injury.

Subchapter F. EMPLOYE REPORTING REQUIREMENTS AND VERIFICATON

Sec.
122.501. Reporting requirement.
122.502. Verification.

§ 122.501. Reporting requirement.

An insurer shall notify the employe of the employe's reporting requirements under sections 204 and 311.1(a) and (d) of the act (77 P. S. §§ 71 and 631.1(a) and (d)). In addition, the insurer shall provide to the employe necessary forms required to fulfill the employe's reporting and verification requirements.

§ 122.502. Verification.

(a) Insurers may submit Form LIBC-760, "Employee Verification of Employment, Self-employment or Change in Physical Condition," to the employe and employe's counsel—if known—to verify that the employe's status regarding the entitlement to receive compensation has not changed.

(b) The employe shall complete and return the verification form to the insurer within 30 days of receipt of the form.

(c) If the employe fails to comply with subsection (b), the insurer may suspend payments of compensation until the verification form is returned by the employe.

(d) To suspend payments of compensation due to the employe's failure to comply with subsection (b), the insurer shall provide written notice to the employe, the employe's counsel—if known—and the Department, on a form prescribed by the Department, of the following:

(1) The workers' compensation benefits have been suspended because of the employe's failure to return the verification form within the statutorily prescribed time period.

(2) The workers' compensation benefits shall be immediately reinstated by the insurer upon receipt of the completed verification form.

(3) The employe has the right to challenge the suspension of benefits by filing a Petition for Review with the Department.

(e) Upon receipt of the completed verification form, the insurer shall immediately reinstate the workers' compensation benefits for which the employe is eligible. The insurer shall provide written notice to the employe, employe's counsel— if known—and the Department, that the employe's workers' compensation benefits have been reinstated due to the return of the completed verification form. The notice shall further indicate the date the verification form was received by the insurer and the date of reinstatement of workers' compensation benefits.

(f) Employes are not entitled to payments of workers' compensation during periods of noncompliance with subsection (b).

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