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Dear Mr. Krainak:

I welcome this opportunity to comment on rules recently proposed by the District of Columbia Office of Risk Management (ORM). No clients of mine have asked me to do so. I comment personally because the pervasive nature of statutory and regulatory actions which ORM has prompted and/or promulgated on its own initiative in recent years has caused such a significant reduction of Public Sector benefits, such a huge reduction in confidence in the District of Columbia to do what is right and proper for workers injured in the course of their District of Columbia employment, and such a widespread disparity and Public and Private Sector Workers' Compensation rights and benefits, that attention to your proposed actions and other statutory changes is an imperative at this time both for ORM and for the City Council.

Before commenting on the proposed rules, I ask why ORM provided in its preamble neither a brief statement of the underlying need for, and impact of, its changes, or a summary of the proposed rules so as to alert those that are or may be impacted by them. I question whether this is a means, similar to ORM's emergency rules and the extension of those rules, by which ORM is consciously avoiding meaningful disclosures of changes it makes to the Public Sector Workers' Compensation Program that are no doubt designed to limit and reduce benefits and make the claims process less, rather than more, user friendly. I understand ORM's preference to avoid adverse comment, but failing or refusing to inform ORM's injured-worker constituency of the impact that ORM's rules will have on them is objectionable, if not truly reprehensible. As you know, many of the Public Sector injured workers you serve are not well-versed in the law and ORM rules and they have suffered mightily from statutory changes ORM has caused the City Council to enact and from regulatory changes ORM has enacted on its own. Public sector workers' compensation recipients in the District of Columbia should not be subjected to rules and laws which are so wildly different from those in the private sector that these recipients have truly come to remark that they consider themselves inferior, second-class citizens.

Historically, there was long a presumption of compensability in the private sector that did not

exist in the public. At one time a physician-patient preference in administrative proceedings in the private sector also was not recognized in the public, but the Court of Appeals and ALJs subsequently recognized that preference in public proceedings as well. Those were pretty much the extent of what differentiated injured public and private sector workers until ORM began its deliberate effort to change the face of the Public Sector program and diminish the benefits which the Program confers.

Not long ago ORM changed the burden of proof in claim denial and termination proceedings by a rule which conflicts with District of Columbia law. OAH judges have not taken kindly to ORM's action as it not only departs from the District of Columbia Administrative Procedures Act, but also contravenes OAH's own rules of procedure. In recent times ORM has further restricted the attorneys' fees that the District must pay when a claimant is successful in prosecuting a claim regarding the denial or termination of benefits. Fees paid are now considerably less in the public sector than those paid to successful claimants in private sector matters. ORM has created a significant chasm regarding payments based on future wage and medical benefits in the public sector that is absent in the private.

Recently, ORM also imposed a "statute" of limitations which only a body which has statutory authority can lawfully create. ORM also has restricted notice and claim provisions, it has caused the elimination of emotional injury claims that are permitted in the private sector, it has precluded augmented pay, and restricted continuation of pay benefits. In addition, ORM has reduced scheduled awards by eliminating COLAs from payments and has limited TTD benefits and now it argues that there is not even a Permanent Total Disability classification that exists in the private sector despite the fact that the CMPA did not eliminate PTD benefits as ORM seems to believe. How much farther ORM intends to go to make injured Public Sector workers' compensation claimants inferior to private sector claimants is a question only ORM can address but it is a question the City Council will also be asked to address.

It is difficult to discern whether the notice, COP and claim rules recently adopted and now being amended are intended to make the Public Sector filing requirements clear or virtually impossible with which to comply. Whether it is ORM's intent to make the notice and claim rules so cumbersome that only a few supremely-capable injured workers can fulfill the requirements is unclear. In order to fashion rules to assist rather than deter claimants, if that is your intent, I recommend that the rules impose a specific burden on the Program and on claimants' employers to assist claimants to develop their claims so that those with limited or no computer or professional expertise can comply with ORM's rules. It should be made clear that the extensive rules and document filings being required are not being imposed in order to find some slight opportunity to deny or delay a claim. Department of Labor Office of Workers' Compensation Programs provides such an obligation on OWCP with respect to Federal claims and given the rules being imposed, this burden can only be considered fair, if not essential. In any event, there is no justification for ORM usurping to itself the right to determine eligibility for COP (deletion of Rule 111.1; Rule 111.2). That obligation has always rested with employers. This is just another vehicle in which ORM is seeking to take on the authority of the City Council, the ALJs and employers.

ORM seems to be imposing a new requirement for initial claims that claimants provide

IRS Forms 4506-T. At the initial stage of a claim, one can only question what right ORM has to intrude into the claimant's past Federal tax record. Once a claim is accepted ORM does have a right to insure that the claimant is not receiving other earnings, but at the initial stage of a claim, this requirement is excessive.

The burden of proof to supplement a claim or to show an aggravation is on the claimant as is the initial burden. Limiting the right to supplement a claim or prove an aggravation to add additional disabilities or conditions arising from the original injury should not be limited as the proposed rules would to two years from the earlier of the date the claimant first sought medical treatment OR the date on which the claimant first became disabled. Some latent disabilities and aggravated injuries may not appear for a period longer than two years from the date of the initial disability. Similarly, claims for the recurrence of a disability may not become apparent until more than one year after wage loss benefits have terminated. This rule provides a disincentive for injured workers to return to work and remain at work despite their injuries. Imposing a preponderance of the evidence burden (proposed Rule 119.3) provides a litigation-type burden that is far more onerous than an initial burden. This proposal should be eliminated.

The proposed rule imposes a new MR Request for Medical Reimbursement form. In circumstances where that form may be required, Rule 123.6 should also impose an obligation on the Program to inform the claimant of the form requirement and if ORM does not respond in 30 days he should not be required to jump through more hoops such as to request an audit. In a situation where an ALJ imposes a reimbursement obligation on ORM, the successful claimant should not be required to jump through further hoops in order to have his or her court-ordered medical obligations paid.

As to proposed Rule 124.6, it was understood that claimants can choose his or her medical provider as long as the provider is a panel provider. As worded, it now appears that the Program can direct the claimant to its choice of initial provider by limiting its list to just one ("a list of up to three..."). Rules 124.6 and 124.3 should be modified to make it clear that the names of at least three providers will be provided. Furthermore, utilization review should be a right that is not taken away by allowing a hearing before the CRO.

As to wage benefits, proposed Rule 130.13 is at best [illegible] punitive. It either should be modified or eliminated.

Permanent Total Disability (PTD) and Permanent Partial Disability (PPD) benefits are concepts that have been worked over and perhaps limited but have not been eliminated by statute. Reaching MMI is no justification for terminating TTD benefits or imposing a requirement to seek PPD benefits. Scheduled awards should not be limited to rates of pay at the date of injury. Rule 140 must be modified accordingly. In situations where a claimant suffers a head, heart or back injury where schedule awards are not available, ORM's action would have the unintended (at least by the City Council) effect of terminating benefits entirely. For example, a claimant who is totally and permanently disabled because of a heart transplant, or a permanently disabling head or back injury, would simply be left to welfare or social security on account of a District of Columbia workplace injury. This is not what the City Council intended when it limited TTD benefits to 500 weeks and imposed a hearing requirement in order to

qualify for PTD or permanent disability. Under 140.3, ORM MUST have the obligation to inform the claimant of the right to a hearing in sufficient time to allow him or her to requests the hearing. The Program should be required to pay the cost of 6th AMA required medical reports because claimants cannot generally afford these tests especially after their wage benefits have been terminated.

Under Rule 142, the Program should not be allowed to terminate a claimant's benefits if the claimant demonstrates, despite his best efforts, that he or she cannot find employment after being medically released and the Program is unsuccessful in securing the claimant modified or other duty. The return to work obligations should not fall exclusively on the claimants.

Under Rule 143.1, if the employee resumes employment and thereafter suffers a recurrence, the two-year reemployment requirement should start of from the date of the recurrence of disability and not from the date of the initial disability. It is important to give claimants incentives and assistance to return to work. Likewise, a change of condition under proposed Rule 144.1 cannot include vocational or other education studies that effect a claimant's mere ability to earn wages until the claimant resumes work and is able to earn wages. The proposed limitation would render claimants unlikely to improve their education standards in order to find different employment given their disabilities.

As noted above, proposed Rule 159.2 (b) is inconsistent with the DC APA and OAH Rule 2822. ORM does not have statutory authority to modify the APA. Only the City Council can do that.

Actual benefits secured for purposes of Section 2327 of the Act, should, just as in the private sector, include prospective wage loss and medical benefits. Anything to the contrary furthers the separation and the chasm between public and private sectors.

Like or not, ORM has a mission, an obligation and a fundamental responsibility to adhere to the humanitarian objectives of the Comprehensive Merit Personnel Act insofar as injured District of Columbia employees are concerned. Rules which tend to disparage injured workers and separate them further from the objectives of the CMPA should not be undertaken.

Thank you for giving me the opportunity to respond to your proposed rules.

Yours truly,

/s/

Harold L. Levi