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April 17, 2013

The Honorable Matthew Denn
Lieutenant Governor
Chairman, Workers' Compensation Task Force
820 N. French Street
Wilmington, DE 19801

Dear Mr. Denn:

The American Insurance Association (AIA) writes to comment on the issues considered at the April 12, 2013, meeting of the Workers' Compensation Task Force. AIA is a national property and casualty insurance trade association, headquartered in Washington, DC, whose members write a major share of property and liability insurance, including workers' compensation insurance, throughout the country and in Delaware. In 2011, the most recent year for which statistics are available, AIA's member companies wrote \$41,947,570 in direct written premiums for workers' compensation in Delaware, for a total of 30.5 percent of the market share in the state. Thus, our members have an abiding interest in the health and financial stability of the Delaware workers' compensation system, and in the employers and their employees that the system serves. Consequently, we work with lawmakers and policymakers to identify system cost drivers and address them, through legislation and regulation, to restore viable workers' compensation systems that provide high-quality medical treatment and adequate wage replacement benefits, at a cost employers can afford.

In light of the Delaware Compensation Rating Bureau's request last year for an average 38 percent increase in loss costs for most businesses, and a 43 percent increase for the residual market, we would think that the Task Force would be focused on addressing those aspects of the workers' compensation system that are driving these costs. Unfortunately, the proposals currently under consideration are ineffective in addressing the rising costs plaguing Delaware's workers' compensation system. These proposals not only fail to confront these cost drivers, but may even worsen system performance.

First, AIA strongly opposes the proposal to appoint an attorney to represent ratepayers throughout the rate-setting process. The Insurance Commissioner is delegated responsibility to administer and enforce Delaware's insurance laws. This includes responsibility for rating standards, common to all workers' compensation rating laws, that rates not be "excessive, inadequate or unfairly discriminatory." Interposing a so-called consumer advocate not only undermines the Commissioner's authority, it will effectively transfer matters within the administrative rating scheme to the judiciary. This step also will drive unnecessary disputes and litigation, serving only those who wish to litigate for the sake of litigating. The ultimate result is to risk further destabilization of Delaware's workers' compensation system. Furthermore, fiddling with the insurance mechanism, as does this proposal, does nothing to address system cost-drivers. Insurers are not driving costs; insurers' rates reflect costs. What is driving results are

excessive medical costs and weak return-to-work incentives. Changing the subject to insurance regulation won't bring down costs.

Second, AIA opposes the proposal to permit payment of total disability benefits to injured workers while they return to the workplace on "light duty" restrictions. Permitting claimants to collect total disability benefits while earning wages runs contrary to what should be the purpose of total disability: to compensate for the inability to earn *any* wages. A worker's earning wages, from "light duty" or otherwise, is proof of some residual earning capacity. The underlying problem that needs to be addressed is Delaware's approach to measuring disability. Although disability is an economic concept, not a medical concept, a number of states have used permanent impairment (a medical concept) as a proxy for disability in determining disability and paying permanency benefits. This approach is more objective and less dispute- and litigation-driven. Permanency, if any, is measured when the worker's condition is permanent and stationary, reaching maximum medical improvement (MMI). Based upon other objective factors, combined with the degree of impairment, as determined by the *AMA Guides to the Evaluation of Permanent Impairment*, a permanency factor is ascertained and a benefit factor applied to derive a dollar benefit. There are procedures for recognizing more serious impairments (and payment of higher permanency benefits). The Task Force should explore how other states treat permanency benefits.

The proposals under consideration also fail to address rising medical costs. Rather than focusing on what COLA to pay medical providers, the Task Force should recommend legislation to adopt a Medicare-based fee schedule for all medical services, along with a uniform conversion factor. It also should recommend adoption of nationally recognized evidence-based treatment guidelines, such as those promulgated by the American College of Occupational & Environmental Medicine (ACOEM), or ODG, and to accord treatment in accordance with these guidelines deference in adjudication.

As it stands, none of the recommendations under consideration will bend the cost curve in Delaware. Although we are critical of these recommendations, we also stand ready to assist the Task Force in a serious evaluation of the system's weaknesses and prescribing real solutions.

Sincerely,



Bruce C. Wood
Associate General Counsel &
Director, Workers' Compensation

cc: Workers' Compensation Task Force Members
Emily W. Cunningham
R. Taylor Cosby
Eric M. Goldberg