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April 20, 2016

Ms. Rachel Bayless
Workers' Compensation Administration
Office of General Counsel
2410 Centre Avenue S.E.
Albuquerque, NM 87106

via email

RE: Comments to proposed new rules regarding tests, testing and cutoff levels for intoxication or influence, as well as other miscellaneous revisions to Part 3.

Ms. Bayless:

The National Association of Mutual Insurance Companies (NAMIC) appreciates the opportunity to share its comments on the proposed rule change mentioned above.

NAMIC is the largest property/casualty insurance trade association in the country, with more than 1,400 member companies representing 40 percent of the total market. NAMIC member companies serve more than 170 million policyholders and write nearly $225 billion in annual premiums. Our members account for 54 percent of homeowners, 43 percent of automobile, and 32 percent of the business insurance markets. In New Mexico, 131 member companies do business in the state, comprising over 43 percent of the market.

We would suggest the following changes to the proposed 11.4.3.12:

Section B, Definition (5): "Drug" is defined to "mean[ ] any chemical agent that affects living processes and has the potential to impair those processes, including substances listed under the New Mexico Controlled Substances Act." We would suggest adding "but not limited to" between the words "including" and "substances." We feel this addition is necessary since synthetic drug components are constantly evolving.

Section B, Definition (10): The definition of "Testing facility" raises a number of questions. As referenced in Section 52-1-12.1(F), a testing facility is selected by the employer to collect or to test a sample. The collection sites and testing site are not normally the same. Specimen collections can be done at various locations but the testing is done at a government certified lab. Combining them into one definition is problematic.

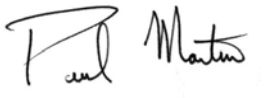
Section D, Testing & Cut Off Levels (7)(f): We are concerned this provision may undermine the legislative intent of SB 214. As you know, Subsection (D) of Section 52-1-12.1 states "The director shall adopt rules regarding tests, testing and the cutoff levels for intoxication or influence."

However, in the proposed Subsection (7)(f) of the regulation, it states "The cut off levels established in these rules do not create a presumption of impairment." The obvious concern here is that by affirmatively stating that a presumption is not created when an employee exceeds a cut off level, an employer or insurer will have much more difficulty proving impairment. In other words, the cut off level creates a presumption of impairment by the mere fact that the cut off level exists.

It seems counterintuitive to us to define "actual knowledge" in Subsection (B)(1) to include subjective observation of "clear physical symptoms or manifestations of impaired behavior of the worker" only to then discount scientific tests results indicating an employee exceeded a cut off level designed to set a threshold for determining impairment. We suggest striking Subsection (7)(f) from the proposal.

Thanks for taking time to hear our concerns. Please contact me if you would like to discuss further.

Sincerely,



Paul Martin
Director – State Affairs
Southwest Region