



INDEPENDENT MEDICAL EXAMINATION ADVISORY COMMITTEE RECOMMENDATIONS

2019

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BACKGROUND

In the New York State workers' compensation system, carriers¹ and injured workers are permitted to request an independent medical examination (IME) for a variety of reasons. Over the life of a claim, IMEs are most often requested by carriers and self-insured employers to evaluate the nature of the injuries, the degree and extent of disability or the injured worker's ability to return to work. In addition, IME providers may be asked to comment on the need for treatment and/or medications prescribed by the injured worker's medical provider.

2017 Reforms

In recent years, IMEs have been the subject of controversy. Questions have been raised about IME availability, quality and potential fraud. In 2017, lawmakers passed legislation directing the New York State Workers' Compensation Board (Board) to examine these issues and identify if, and how, IMEs in New York could be improved. The *New York State Workers' Compensation Law (WCL) §137(12) (Appendix 1)* was added as part of the 2017 reforms.

2018 IME Utilization Study & Preliminary Report

WCL §137(12) directed the Board Chair to conduct a study of the utilization of IMEs in 2018 and present a preliminary report to an advisory committee set to commence in early 2019.

The Board Chair conducted the required study and published the **2018 Independent Medical Examination Utilization Study (2018 IME Utilization Study)** on February 6, 2019.

The **2018 IME Utilization Study** is available on the Board's website at wcb.ny.gov/content/main/TheBoard/ime-advisory-committee.jsp (*Appendix 2*). The information gathered in the course of that study and the findings included in it are incorporated herein by reference.

¹ For the purposes of this report, the term carrier shall include insurance carriers providing workers' compensation coverage, as well as the State Insurance Fund and self-insured employers.

ADVISORY COMMITTEE

WCL §137(12) provided for the creation of an advisory committee, consisting of representatives of organized labor, business, carriers, self-insured employers, medical providers, and other stakeholders and experts.

The statute charges the advisory committee with presenting, by the end of 2019, detailed recommendations to the Governor, Speaker of the Assembly, and Majority Leader of the Senate regarding administrative improvements and regulatory and statutory proposals “that will ensure fairness and highest medical quality while improving methods of combatting fraud.”

Additionally, the committee’s final report will consider “the feasibility of new methods of assigning independent medical examinations, through rotating providers or panels, statewide networks, or other arrangements.” The Committee agreed that recommendations would only be put forward if there was unanimous support among committee members.

Advisory Committee Members:

Pursuant to the statutory directive, the Chair formed the IME Advisory Committee (Committee) and appointed the following Committee members.

Stakeholder Group	Committee Member	Committee Member’s Organization
WCB Chair	Clarissa Rodriguez, Esq.	NYS Workers’ Compensation Board
Organized Labor	Joseph Canovas, Esq.	NYS AFL-CIO
Business	Lev Ginsburg, Esq.	NYS Business Council
Carrier	Glen Pitruzzello Jeffrey Fenster, Esq.	AmTrust
Carrier	Robert Sammons Joseph Nolte	NY State Insurance Fund
Self-Insured Employer	Brian Trick	Wegmans
Self-Insured Employer	Mindy Roller, Esq.	NYC Law Department (Workers’ Compensation Division)
Medical Providers	Robert Goldberg, DO	Medical Society of the State of New York (MSSNY)
Medical Providers	Winston Kwa, MD	Icahn School of Medicine at Mount Sinai
Medical Providers	Richard N. Weinstein, MD	NYS Society of Orthopaedic Surgeons (NYSSOS)
Injured Worker Attorney	Justin Teff, Esq.	Kirk and Teff
Defense Attorney	Matthew Mead, Esq.	Stockton, Barker & Mead, LLP

Committee members were asked to send a substitute representative for any meetings they were unable to attend. In addition to the Committee members, several subject matter experts from the Board were available to answer technical questions. Additionally, a facilitator was engaged to help moderate the meetings.

NYS Open Meetings Law

The Committee meetings were subject to the NYS Open Meetings law, thus, were open to the public to attend. Each three-hour meeting was videoconferenced in four New York State locations (Schenectady, Rochester, White Plains and Manhattan) for ease of the Committee members and the public. Videos of the proceedings, as well as presentation materials, are posted to the Board's website at the following URL:

wcb.ny.gov/content/main/TheBoard/ime-advisory-committee.jsp.

Additionally, the Board set up and monitored an email account, IMEComments@wcb.ny.gov, to gather comments from interested parties. All correspondence sent to this email account was shared with Committee members (and any substitute representatives).

In 2017, *WCL §137(12)* directed the Board Chair to conduct a study of the utilization of IMEs in 2018 and present a preliminary report to an advisory committee set to commence in early 2019. The IME Advisory Committee (Committee) was appointed by the Chair and met throughout 2019 to consider administrative improvements and regulatory and statutory proposals “that will ensure fairness and highest medical quality while improving methods of combatting fraud.” The Committee also considered “the feasibility of new methods of assigning independent medical examinations, through rotating providers or panels, statewide networks, or other arrangements.”

The *2018 IME Utilization Study* was prepared from a compilation of IME data from Board-registered IME entities and the Board’s Claims Information System. The Board also sought input from injured workers through a mailed survey. To further the study goals, the Board also comparatively evaluated other states’ statutory frameworks with regards to IME utilization, costs and procedures. The study focused on several stakeholder concerns — IME providers, scheduling and timing, injured worker experience, IME costs and quality of reports. Key observations for each section follow:

- **IME Providers:** Over the last several years, there has been a drop in the number of authorized IME providers resulting in inadequate coverage in certain NYS counties. A majority of IME providers also actively treated injured workers. Most IMEs were performed by orthopedic surgeons; 72% (286,656 out of 395,713) of the total IMEs during the three-year study period were performed by 2.5% (104 out of 4,089) of the eligible authorized providers. Ten IME providers conducted 16.5% of exams (65,105) over the three-year study period.
- **Scheduling and timing:** On average, it takes 46 calendar days from the initial IME request to Board receipt of the IME report. Most of the IME reports (90%) are submitted timely to the Board although certain provider specialty types take longer to schedule. More than three-quarters of IMEs are performed as scheduled; the remainder are either cancelled or the injured worker does not show. There is no significant difference throughout New York State when it comes to cancellations and no-shows.
- **Injured Worker Experience:** The majority of injured workers who responded to the survey indicated that the IME location was convenient and accessible, the medical office where the IME was held was clean, and the provider and office staff acted in a professional manner. Almost two-thirds of respondents indicated that they had to wait 15 minutes or more to be seen by the provider. Almost half of respondents indicated that the physical examination was less than 15 minutes long. Similarly, almost half of respondents indicated that their IME report was not a fair representation of their examination.

- **IME Costs:** IME costs are usually paid by the carrier or the self-insured employer. The cost of an IME varies significantly by specialty type, and, even within specialties, there is a wide range. Carriers do not pay for no-shows just over half of the time. When carriers do pay for no-shows, the average payment is approximately \$204.
- **Quality of Reports, Need for Follow-Up, and Duplicate Filings:** The Board receives approximately 250,000 IME reports (corresponding to 160,000 unique IMEs) each year; 57% of these have no issues, i.e., are not duplicates, precluded nor require clarification. Approximately 71% of IMEs require additional information be communicated between the IME provider and the carrier, either prior to or after the exam.

Over the course of the year, the Committee discussed dozens of key topics and made recommendations found in this report only if there was unanimity among those who voted. Two topics were ultimately recommended: continuing education and training for medical providers; and flexible scheduling of IMEs with the consent and for the convenience of the claimant.

In February 2019, the IME Advisory Committee (Committee) began meeting monthly to discuss IME-related topics with the goal of developing recommendations. These meetings were hosted by the Board at its Administrative Office in Schenectady, New York. Alternate Board locations were made available across the state to allow Committee members to join the meetings by way of videoconference. All Committee meetings were recorded by the Board and were made available on the Board’s website, including meeting materials and handouts.

Each Committee meeting focused on the seven major topics covered in the **2018 IME Utilization Report**. Findings from the report were summarized and presented by the Board to the Committee, including additional supporting data, as requested by Committee members. After reviewing the relevant data, Committee members participated in a facilitated discussion to identify recommendations that would improve the IME process and that were acceptable to all Committee members.

In between meetings, based on Committee feedback, Board staff conducted additional research and compiled presentation materials, which were then provided to Committee members in advance of the next meeting. In some instances, the Board arranged for outside system participants and stakeholders to present at the Committee meetings. For instance, at the IME Cost meeting on June 13, 2019, three IME entities, Exam Works, Genex and Brookside, participated in a discussion with Committee members and offered their recommendations to improve the IME process. At the Fraud & Abuse meeting held on September 10, 2019, Audrey Cunningham, Deputy Inspector General for Workers’ Compensation Fraud from the Office of the New York State Inspector General, provided the Committee with an understanding of the potential crimes that may be encountered and how those crimes are addressed.

The Board compiled and condensed proposed recommendations from the Committee meetings held throughout 2019 and presented them to Committee members in a draft survey. Committee members reviewed the draft and recommended changes. Once finalized, each Committee member provided responses to the Board. The Board then compiled member responses and presented them back to the Committee for further discussion in September 2019. The Board made refinements based on Committee feedback. These refinements were subsequently reviewed at the meeting on October 10, 2019.

The Board also assisted the Committee by drafting the **2019 IME Committee Recommendations** report. At the meeting held on September 10, 2019, the Board presented an initial draft of the report to Committee members for review.

Committee member feedback was incorporated into the report and presented again at the October 10, 2019, and November 13, 2019, meetings for further review and discussion. Information compiled from the Committee survey was merged into the report in preparation for submission to the Legislature by the end of 2019.

TOPICS CONSIDERED

There are four specific areas that *WCL §137(12)* directs the Committee to address:

- Ensuring fairness
- Ensuring the highest medical quality
- Improving methods of combatting fraud
- Feasibility of new methods of assignment

To structure their consideration of information and discussion on the potential recommendations, at the kickoff meeting on February 6, 2019, the Committee agreed on key topics and set monthly meetings to consider possible resolutions and recommendations for the related issues.

MEETING TOPICS AND DATES

The table below shows the meeting date and the topic discussed at each meeting:

TOPIC	DATE
Kick-off and 2018 Utilization Study Presentation	Wednesday, February 6, 2019
IME Provider Access	Thursday, March 14, 2019
Scheduling & Timing	Tuesday, April 9, 2019
Injured Worker Experience	Wednesday, May 8, 2019
Cost of IMEs and IME Entity Role	Thursday, June 13, 2019
Quality of Reports	Tuesday, July 9, 2019
Process and IME Committee Survey	Wednesday, August 7, 2019
Fraud & Abuse	Tuesday, September 10, 2019
Discuss Revised Draft Report & Consensus Items	Thursday, October 10, 2019
Finalize Draft Report	Wednesday, November 13, 2019

INFORMATION AND DATA CONSIDERED

To develop their recommendations, the Committee was directed to review the **2018 IME Utilization Study** and to review and analyze leading studies, both in New York State and nationwide.

In addition to that data, the Committee considered the following information:

- IME Process Survey of all currently registered IME entities to inquire about the core and ancillary services they provide.
- Claims Administrator Survey that inquired into the existence of (and whether each² would share) a “Do Not Use” list of IME physicians, as well as their claims manual.
- IME entity recommendations prepared by the three IME entities who participated in the meeting on June 13, 2019.
- Comments received from stakeholders in the IMEComments@wcb.ny.gov mailbox, including the NYS Chiropractic Board and the Nurse Practitioner Association New York State.

KEY FOCAL POINTS & SURVEY

Based on the Committee’s meetings and discussions, the Board compiled 27 unique issues and developed a survey for Committee members to review and complete. The survey was intended to assist the Committee in arriving at possible consensus points and recommendations. Following are Committee recommendations that resulted from the survey and subsequent discussions.

² An Executive session was held during the August 7, 2019, meeting so that Committee members could view confidential injured worker survey comments and proprietary Do Not Use lists from claims administrators.

RECOMMENDATIONS BY TOPIC

The IME Advisory Committee (Committee) agreed that recommendations would only be put forward if there were no dissenting votes among Committee members who voted for any discussed topic. The recommendations are as follows:

4.1 Continuing Education and Training

- The Board should provide for continuing education and training on key topics within a specialty, and as related directly to workers' compensation.
- The mandated training/education must be accredited.
- The Board should provide these trainings to all providers at no cost to providers.
- All providers should be encouraged to take the training; Providers authorized to perform IMEs should be required to take these trainings every two years.

4.2 Flexible Scheduling

- 12 NYCRR 300.2 should be revised to allow for more flexibility in scheduling IMEs. Proposed revisions are as follows:
 - Delete 12 NYCRR 300.2(d)(9) – remove this section concerning regular hours.
 - Modify 12 NYCRR 300.2(d)(1) – Procedures for notice, conduct and reporting of independent medical examinations, as follows:

(1) Notice. The claimant shall receive notice of the scheduled independent medical examination at least seven business days prior to the date of such examination. The independent medical examination may be scheduled Monday through Friday, exclusive of state observed holidays, between the hours of 8 a.m. and 6 p.m. unless otherwise agreed to with the consent and for the convenience of the claimant. A claimant shall not be required to attend an independent medical examination when such examination is scheduled on a day of religious observance (any particular day or days or any portion thereof which the claimant observes as a sabbath or other holy day or days in accordance with the requirements of his or her religion).

Part 5 Key Topics

The following topics were the key focal areas identified during stakeholder outreach, in the *2018 IME Utilization Study*, or as a result of the IME Advisory Committee (Committee) proceedings. The Committee resolved to make recommendations only where there was unanimous consensus among the Committee members.

5.1 Volume, Distribution, Availability

5.1.1 Volume and Distribution of IME Providers

■ 1. Day Caps

IME utilization data revealed that 2.5% of IME providers submitted 72% of *IME Provider's Report Cover Sheet (IME-4)* forms during the three-year study period (see table below). For high volume providers, the daily maximum ranged from five to 56. Feedback from approximately 11%³ of injured workers who were surveyed indicates they believe that their IMEs were too brief. At the conclusion of discussions, the Committee did not reach consensus on this topic.

2014-2016 DISTRIBUTION OF TOTAL IMEs (a)				
IME Range (Total completed during 3-year study period)	Total Providers ^(b)		Total IMEs Performed during 3-year study period	
	#	%	#	%
1-5 IMEs	2,889	70.7%	5,130	1.3%
6-100 IMEs	860	21.0%	20,152	5.1%
101-500 IMEs	173	4.2%	39,688	10.0%
501-1000 IMEs	63	1.5%	44,087	11.1%
1001-5000 IMEs	94	2.3%	221,551	56.0%
5001-9000 IMEs	10	0.2%	65,105	16.5%
Total	4,089	100%	395,713	100%

a) Table 3: *2018 IME Utilization Study Report*

b) Total provider counts include the 2,089 authorized providers contained in the Board's HPA system as well as 2,000 other providers who submitted *IME-4* reports during 2014-2016. The 2,000 other providers performed less than 1% of total IMEs.

SOURCE: IME ENTITY DATA

³ 12 out of 106 responses to the injured worker survey had comments mentioning brevity or lack of full exams.

■ 2. Annual Minimums

IME utilization data revealed that 70% of providers who performed IMEs during the three-year study period completed a total of five or fewer IMEs (approximately 1% of all IMEs).⁴ These low-volume IME providers tended to have IME reports that: were more expensive than average; took longer to complete than average (both to schedule and to receive the IME report); and had a higher rate of addendums required.⁵ The Committee discussed implementing a requirement for IME providers to perform a minimum number of IMEs each year; however, no consensus was reached. Continuing education and training are addressed as a separate IME topic in this report. At the conclusion of discussions, the Committee did not reach consensus on this topic.

5.1.2 Availability of Provider Specialties

■ 1. Allow Telemedicine

The *2018 IME Utilization Study* identified that only a small subset of Board-authorized IME providers actually perform IMEs. IME provider participation varies widely by specialty group. For instance, only 13% of internists authorized to perform IMEs actually perform them. This is also true of chiropractors (21%), neurologists & psychiatrists (34%), psychologists (18%) and other specialties (23%).⁶ To ensure the availability of IME provider specialties in all regions of New York State (including underserved regions), the Committee discussed the possibility of allowing telemedicine to be used for certain types of IMEs. Some committee members commented that telemedicine could be beneficial in situations where a psychiatric or psychological evaluation was needed, but not when a physical examination was required. Even if video was required (as opposed to telephonic only) several Committee members opined that such IMEs are inferior to in-person exams and expressed concern that video IMEs would be afforded less evidentiary value and would, therefore, be of minimal value. At the conclusion of discussions, the Committee did not reach consensus on this topic.

5.1.3 Method of Selection and Assignment

In addition to the statute requiring the Committee to consider the feasibility of new methods of assigning IMEs, some stakeholders commented on the potential for the outcome of the exams to be impacted by the fact that IMEs are assigned by the party paying for the exam.

■ 1. Rotating Panels

The statute requires consideration of “rotating panels” as a method of assigning IME providers. The proposal considered by the Committee is that the Board establishes rotating panels of three IME providers, and both parties (or the Board if a claimant is not represented by counsel) either agree, or each party is entitled to de-select one name from the panel. In the event of any dispute, the Board or IME network will make the selection. Panels could be either Board or IME network administered. The Board also presented information on methods used in other states. At the conclusion of discussions, the Committee did not reach consensus on this topic.

⁴ March 14, 2019, presentation handout entitled, “Handout 1 — High Volume IME Providers 2014-2016”

⁵ Provider volume analysis for cost, quality and timing and scheduling

⁶ *2018 IME Utilization Study*, page 9

■ 2. Rotating Providers

The statute required the Committee to consider the feasibility of new methods of assigning IME providers, such as through rotating providers. Options to assign authorized IME providers to perform IMEs could be administered either by the Board or through a contracted network. The Board presented information on approaches used in other states to assign IME providers, including selection by requesting party, selection by a panel, selection from a list compiled by a panel, agreement of both parties or selection by the employer and approval by the regulator.⁷ At the conclusion of discussions, the Committee did not reach consensus on this topic.

5.1.4 IME Provider Types

■ 1. Partial Parity or Full Parity for NPs and LCSWs

In preparation for the *2018 IME Utilization Study*, stakeholders commented on the lack of availability of IME providers. While it is difficult to determine if an adequate number of providers exists to meet IME demands, the *2018 IME Utilization Study* revealed that only 2.5% of authorized IME providers performed 72% of all IMEs from 2014-2016.⁸ The Committee discussed an option that would allow Nurse Practitioners (NPs) and Licensed Clinical Social Workers (LCSWs) who apply to become Board-authorized providers effective January 2020, to perform IMEs in cases where the claimant has treated with an NP or LCSW, or allow a party to retain an NP or LCSW as an IME, even when the claimant did not treat with an NP or LCSW for the at-work injury. At the conclusion of discussions, the Committee did not reach consensus on this topic.

5.2 Provider Requirements

5.2.1 Active Treatment

■ 1. Actively Treat

The IME utilization data revealed that over 86% of IMEs performed during the three-year study period were completed by physicians who were actively treating one or more injured workers.⁹ At the conclusion of discussions, the Committee did not reach consensus on this topic.

■ 2. Continuing Education and Training

The Committee discussed the role of continuing education and training for IME providers and were supportive that the Board should provide directly, or through a vendor or entity, for continuing education and training on key topics within a specialty, and as related directly to workers' compensation. Committee members agreed that accredited training should be offered to all providers (those authorized to perform IMEs would be required to take the training every two years but it would be available to all) at no cost to acquaint providers with the IME system. This will be done in online format limited to two hours every three years and will provide CME credits free of charge to all physicians.

⁷ August 7, 2019, presentation handout entitled, "Selection of Provider — State by State Comparison"

⁸ *2018 IME Utilization Study*, page 11 — Table 3 "2014-2016 Distribution of Total IMEs"

⁹ March 14, 2019, Providers PowerPoint, slide 10, entitled "IME Providers-Performing IMEs and Actively Treating"

5.3 Examination and Reporting Requirements

5.3.1 Timing of Notice for Exam, Filing, and Service Requirements

■ 1. End ‘Same Day/Same Manner’

Currently, all IME Forms shall be sent on the same day and in the same manner as required by *WCL §137 (1)(a)*. The Committee members discussed the feasibility of allowing the IME practitioner or entity to upload the report to the Board electronically, and to serve parties in differing manners: by paper mail to the claimant, and via electronic means to others, if so desired. At the conclusion of discussions, the Committee did not reach consensus on this topic.

■ 2. Notice Waiver

12 NYCRR 300.2(d)(1) mentions that “The claimant shall receive notice [posted by United States mail] of the scheduled IME at least seven business days prior to the date of such examination.” The Committee discussed allowing claimants to waive the seven-day requirement, by written consent, if desired, in any case.¹⁰ At the conclusion of discussions, the Committee did not reach consensus on this topic.

■ 3. Filing Waiver

The Committee members discussed allowing claimants to waive the 10/20 day filing requirements for IME reports from providers.¹¹ *12 NYCRR 300.2(d)(14)* sets forth reporting requirements of 10 business days after the IME for in-state providers and 20 business days for out-of-state providers. At the conclusion of discussions, the Committee did not reach consensus on this topic.

■ 4. Modify 10/20 Regulatory Filing Requirements by Case Type

Several stakeholders stated that the timeframes for submitting the IME report were unrealistic. As set forth in *12 NYCRR 300.2(d)(14)*, IMEs that are performed in New York State must be received by the Board within 10 business days of the exam. Out-of-state IMEs must be received within 20 business days. The **2018 IME Utilization Study** revealed that 88% of NYS IMEs are received by the Board within the 10-business day requirement.¹² At the conclusion of discussions, the Committee did not reach consensus on this topic.

■ 5. Modify Request for Information Filing

The **2018 IME Utilization Study** revealed that 71% of IMEs performed have one or more **Request for Information/Response to Request for Information (Form IME-3)** associated with them.¹³ *WCL §137(1)(b)* requires an IME provider who has performed or will be performing an independent medical examination of a claimant to submit a copy of any request for information regarding the claimant to the Board within 10 days of receipt of the request. At the conclusion of discussions, the Committee did not reach consensus on this topic.

¹⁰ April 9, 2019, presentation handout entitled, “Handout 1 — Request Date to IME Schedule Date WCL Citation”

¹¹ April 9, 2019, presentation handout entitled, “Handout 1 — Request Date to IME Schedule Date WCL Citation”

¹² April 9, 2019, Scheduling & Timing PowerPoint, slide 7, entitled, “IME Date to Board Received Date”

¹³ 2018 IME Utilization Study, page 24 — Section 3.5.5 Appropriate Communication between IME Provider and IME Entity/Carrier

5.3.2 Volume of IME Forms Currently Required by the Board

■ 1. Change IME Form(s)

Some have complained that there are too many IME forms. The Board-mandated forms include: *Form IME-3*; *Form IME-4*; *IME Provider's Report Attachment for Schedule Loss of Use Permanency Evaluations (IME-4.3A)*; *IME Provider's Report Attachment for Partial or Total Permanency Classifications (IME-4.3B)*; and *Claimant's Notice to Appear for an IME (Form IME-5)*. The Committee discussed streamlining the IME forms as well as implementing an online upload. At the conclusion of discussions, the Committee did not reach consensus on this topic.

■ 2. Replace IME Forms with Modernized Online Electronic Filing Process

Several stakeholders and Committee members suggested that when technologically feasible, IME providers be granted access to the claimant's electronic case folder so that they may review all pertinent medical information available prior to rendering their opinion in the IME report, while others opposed it. At the conclusion of discussions, the Committee did not reach consensus on this topic.

5.3.3 Evidentiary Considerations: Preclusion

■ 1. Provide Greater Discretion on Precludable Issues

Stakeholders raised concerns about the rate of IME report preclusions, citing that the IME process is too rigorous, and the required timelines are unreasonable. As identified in the *2018 IME Utilization Study*, a Workers' Compensation Law Judge (WCLJ) may preclude an IME report for a host of reasons, including a finding that one of the reports was late or not properly served on the same day, and in the same manner.¹⁴ The Board estimates the average preclusion rate to be between 0.4% and 2% (~1%).¹⁵ At the conclusion of discussions, the Committee did not reach consensus on this topic.

5.3.4 Evidentiary Considerations: Records Review

■ 1. Attending Doctor's Request For Authorization And Insurer's Response (Form C-4 AUTH) Cases

The Committee discussed the possibility of using records reviews in lieu of in-person IMEs to resolve certain medical-only issues (for example, those involving potential opioid weaning, causally-related death, durable medical equipment requests or an authorization for medical treatment (*Form C-4 AUTH*)). At the conclusion of discussions, the Committee did not reach consensus on this topic.

5.3.5 Videotaping

■ 1. More Robust Notification

The Committee discussed a recommendation to require the claimant to advise the IME provider, or IME entity, or carrier, in advance of the exam that he/she intends to videotape or record the exam. At the conclusion of discussions, the Committee did not reach consensus on this topic.

■ 2. Require Videotaping

The Committee discussed a recommendation to require all IMEs to be videotaped, with a certification of non-alteration, and stored by the carrier or IME entity in the event the tape is requested by the claimant or the WCLJ. At the conclusion of discussions, the Committee did not reach consensus on this topic.

¹⁴ *2018 IME Utilization Study*, page 22

¹⁵ *2018 IME Utilization Study*, page 23

5.4 Fees

5.4.1 No Shows/Cancellations

■ 1. Fees

Stakeholders raised concerns over the number of cancelled or no-show appointments. The **2018 IME Utilization Study** found that, on average, 77% of IMEs were performed as scheduled from 2014-2016. Approximately 14% of IMEs were cancelled and 9.6% were no-shows. No significant regional differences were found.¹⁶ During stakeholder calls, some expressed concerns about whether the provider should be paid when an injured worker fails to show up for an IME. New York State does not have regulations that require a carrier to pay an IME provider for a no-show appointment. The IME entity data showed wide variability. Almost 51% of no-shows were not reimbursed by carriers. When a payment was made, the average payment for no-shows was approximately \$204.¹⁷ The option to impose a fee for the carrier to pay in the event of a no-show or a claimant cancellation was discussed by the Committee. The proposed fees could be either a standard fee or a fee structure based on various factors, including first or repeat no-show/cancellation by the claimant, geographical location of the IME, specialty area of the IME provider, and reschedule of exam. At the conclusion of discussions, the Committee did not reach consensus on this topic.

■ 2. Consequences

The IME utilization data revealed that 9.6% of scheduled IMEs result in a “no-show”¹⁸ wherein the injured worker failed to appear for the IME or call in advance to cancel or reschedule. Currently, there are no regulations covering the consequences of failure to show up for an IME; however, the WCLJs have discretion to review the circumstances surrounding the no-show to determine if the failure to attend the IME was reasonable. At the conclusion of discussions, the Committee did not reach consensus on this topic.

5.4.2 Payment/Fee Structure

■ 1. Set Fee Schedule

The IME utilization data shows that there is a wide variability in the fees billed for IME services, ranging from \$100 to over \$10,000.¹⁹ The Committee members discussed whether an IME fee schedule, based on exam type, and other factors such as uniqueness of sub-specialty, difficulty of obtaining an IME, or geographical region should be established. At the conclusion of discussions, the Committee did not reach consensus on this topic.

■ 2. Network-Based Fees

A recommendation for IME networks to administer the selection and rotation of IME providers, and to follow certain fee structures was discussed by the Committee. A number of the members indicated that IME fees should be market-based and equalize the influence of some IME networks. At the conclusion of discussions, the Committee did not reach consensus on this topic.

¹⁶ *2018 IME Utilization Study*, pages 15-16 as well as April 9, 2019, Scheduling & Timing PowerPoint slide 10, entitled "Distribution of IMEs by District"

¹⁷ June 13, 2019, Cost of IME PowerPoint, slide 6, entitled, "No-Show Payments (2014-2016)"

¹⁸ July 9, 2019, Quality of Reports & Technical Issues PowerPoint, slide 6, entitled, "Unmatched iME-5 and iME-4s"

¹⁹ June 13, 2019, Cost of IME PowerPoint, slide 5, entitled "Range of IME Payments by Specialty (2014-2016)"

5.5 IME Entities

5.5.1 Registration, Accreditation and Other Requirements

■ 1. Annual Reporting

Much of the utilization data for the IME study, as well as process descriptions presented to the Committee, were gathered by the Board by surveying registered IME entities. The Board does not currently have standardized annual reporting requirements, although the Chair always has the right to request information from an IME entity for purposes of ensuring compliance with the law [12 NYCRR 300.2(e)(3)]. The Committee discussed requiring annual standardized reporting, including the following subject areas: cost, scheduling, IME provider volume and quality, geographic breakdown and compliance with regulatory schema. At the conclusion of discussions, the Committee did not reach consensus on this topic.

■ 2. Utilization Review Accreditation Commission

During the August 7, 2019, Committee meeting on IME Process, the Committee discussed the potential for regulating IME entities. One option that was discussed was to require accreditation through an organization such as Utilization Review Accreditation Commission (URAC). Accredited IME entities account for just 17% of IME entities and perform just over one-third of all IMEs, based on those performed between 2014 and 2016. Non-accredited IME entities account for the majority of the IME entities performing IMEs and perform just under two-thirds of all IMEs, based on the same time period.²⁰ Additional information about URAC was provided to Committee members for review after the August 7th meeting.²¹ At the conclusion of discussions, the Committee did not reach consensus on this topic.

5.6 Fraud Prevention

The Committee discussed the possibility of recommending that the act of improperly influencing an IME or interfering with a physician conducting an IME be a crime. At the conclusion of discussions, the Committee did not reach consensus on this topic.

5.7 Injured Worker Experience

5.7.1 Reasonable Distances for IMEs

■ 1. All IMEs Should be within a Reasonable Distance of the Injured Worker

The Committee considered if there should be regulations regarding either the time or distance an injured worker must travel for their exam. Of the injured workers who were surveyed, 29.4% responded “No” to the question, “Was the medical office in a convenient and accessible location within a reasonable distance from your residence?”²² The Committee agreed that travel time, rather than distance, should be considered since there are geographical discrepancies across the state, e.g., traveling five miles downstate could take a significantly longer time than traveling five miles upstate. At the conclusion of discussions, the Committee did not reach consensus on this topic.

²⁰ August 7, 2019, presentation handout entitled, “IME Entity Accreditation”

²¹ August 9, 2019, handout distributed to Advisory Committee members entitled, “Independent Review Org standards”

²² May 8, 2019, presentation handout entitled, “Handout 1 — All Survey Responses”

■ 2. Regulate Wait Times for IMEs

The Committee considered if there should be regulations regarding an injured worker's wait time at an IME provider's office. Of the injured workers who were surveyed, 27.5% selected "Greater than 30 minutes" in response to the question, "Approximately how long did you wait at the office before you were seen by the IME provider."²³ At the conclusion of discussions, the Committee did not reach consensus on this topic.

²³ May 8, 2019, presentation handout entitled, "Handout 1 — All Survey Responses"

Appendix 1 — Relevant Statute, Key IME Definitions & Regulations

- See attached.

Appendix 2 — 2018 IME Utilization Study

- Visit: www.wcb.ny.gov/content/main/TheBoard/ime-utilization-study.pdf

Appendix 3 — 2019 IME Advisory Committee Meeting Materials

- To view videos, visit:
www.wcb.ny.gov/content/main/TheBoard/ime-advisory-committee.jsp

Appendix 1 — Relevant Statute, Key IME Definitions & Regulations

New York State Workers' Compensation Law (WCL) §137(12)

The chair shall conduct a thorough study of the utilization of independent medical examinations under this chapter, to occur within calendar year two thousand eighteen, and shall convene and present a preliminary report based on the study to an advisory committee set to commence on or about January first, two thousand nineteen. The advisory committee is to consist of representatives of organized labor, business, carriers, self-insured employers, medical providers, and other stakeholders and experts as the chair may deem fit to include. The advisory committee shall meet quarterly, or more frequently if directed by the chair. By December thirty-first, two thousand nineteen, the committee shall present detailed recommendations to the governor, speaker of the assembly, and majority leader of the senate, regarding administrative improvements, and regulatory and statutory proposals, that will ensure fairness, and highest medical quality, while improving methods of combatting fraud. The committee shall review and analyze leading studies, both in New York state and nationally. The compensation insurance rating board shall provide data, and cooperate with the chair and committee in identifying potential abuse and fraud. The report shall consider, among other items, the feasibility of new methods of assigning independent medical examinations, such as through rotating providers or panels, statewide networks, or other arrangements.

IME Definitions and Regulations

Definition of Independent Medical Examination

An IME is an examination performed by an authorized or qualified independent medical examiner, pursuant to section 13-a, 13-k, 13-l, 13-m or 137 of the Workers' Compensation Law, for purposes of evaluating or providing an opinion with respect to schedule loss, degree of disability, validation of treatment plan or diagnosis, causal relationship, diagnosis or treatment of disability, maximum medical improvement, ability to return to work, permanency, appropriateness of treatment, necessity of treatment, proper treatment, extent of disability, second opinion or any other purpose recognized or requested by the Board.

Role of Medical Director's Office in IME

In New York State, the Medical Director's Office (MDO) certifies medical providers to perform IMEs and report their opinions to the Board and other parties of interest. There are two types of authorizations for IME providers; they may be authorized to only perform IMEs or to both perform IMEs and treat injured workers. Currently there are more than 7,700 authorized IME providers. More than 7,100 of those providers are authorized to perform IMEs and treat injured workers, while the remaining 600 providers are authorized as IME only.

Definition of IME Provider

An IME provider can be an attending physician (provider) or other attending practitioner who has the primary responsibility of treating the claimant for the injury or illness for which such claimant is being examined. In addition, an authorized provider means a physician, podiatrist, chiropractor, or psychologist who possesses a current, valid, and unrestricted professional license granted by the New York State Board of Regents, that is without any limitation imposed by the New York State Department of Health, Board of Professional Medical Conduct or the New York State Department of Education, Office of Professional Discipline, is not subject to any restriction on or suspension or revocation of a professional license granted by any other state, and meets the requirements for authorization by the Chair of the Workers' Compensation Board to conduct IMEs and review of records (ROR).

Definition of IME Entity

An IME entity means an individual or entity that derives income from IMEs performed in accordance with Workers' Compensation Law §§ 13-a, 13-k, 13-l, or 13-m or review of records, whether by employing or contracting with independent medical examiners to conduct such IMEs or RORs, or by acting as a referral service or otherwise facilitating such examinations or review of records and is registered with the Chair in accordance with Workers' Compensation Law Section 13-n and section 300.2.

12 CRR-NY 300.2
NY-CRR

OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK
TITLE 12. DEPARTMENT OF LABOR
CHAPTER V. WORKERS' COMPENSATION
SUBCHAPTER A. GENERAL PROVISIONS
PART 300. PROCEDURE BEFORE THE BOARD

12 CRR-NY 300.2
12 CRR-NY 300.2

300.2 Independent medical examinations, examiners, entities, and reports made without physical examination.

(a) Purpose.

Pursuant to Workers' Compensation Law, sections 13-a, 13-b, 13-d, 13-k, 13-l, 13-m, 13-n and 137, and in accordance with these regulations, the chair of the Workers' Compensation Board shall:

- (1) authorize competent providers who meet eligibility requirements to conduct independent medical examinations of persons suffering injuries or illnesses which are the subject of claims under the Workers' Compensation Law, Volunteer Firefighters' Benefits Law and Volunteer Ambulance Workers' Benefit Law;
- (2) modify or revoke such authorization where there is a failure of continued compliance with such laws and regulations or other provisions governing the professional conduct or obligations of such providers;
- (3) require that such independent medical examinations are conducted in accordance with Workers' Compensation Law, sections 13-a, 13-b, 13-d, 13-k, 13-l, 13-m, 13-n and 137 and these regulations and that reports of such independent medical examinations are prepared and transmitted in accordance with Workers' Compensation Law, section 137 and these regulations; and
- (4) require the registration with the chair of entities that derive income from independent medical examinations.

(b) Independent medical examiners; definitions.

For purposes of this Part, the following terms have the following meanings:

- (1) *Attending physician or other attending practitioner* means those providers or practitioners who have primary responsibility for treating the claimant for the injury or illness for which such claimant is being examined.
- (2) *Authorized examiner* means a physician, podiatrist, chiropractor, or psychologist who possesses a current, valid, and unrestricted professional license granted by the New York State Board of Regents, that is without any limitation imposed by the New York State Department of Health, Board of Professional Medical Conduct or the New York State Department of Education, Office of Professional Discipline, is not subject to any restriction on or suspension or revocation of a professional license granted by any other state, and meets the following requirements for authorization by the Chair of the Workers' Compensation Board to conduct independent medical examinations and review of records:
 - (i) Requirements for all professions. Each applicant must complete the application process for independent medical examiners required for the applicant's licensed profession under Workers' Compensation Law section 13-b, 13-k, 13-l or 13-m and paragraph (c)(2) of this section. A physician, podiatrist, chiropractor, or psychologist who is currently authorized to provide treatment to persons in accordance with the Workers' Compensation Law, Volunteer Ambulance Workers' Benefits Law, and Volunteer Firefighters' Benefits Law must apply for and receive a separate or additional authorization in order to conduct independent medical examinations under such laws.
 - (ii) Requirements specific to professions.
 - (a) A physician must have a degree of doctor of medicine, M.D., or doctor of osteopathy, D.O., or an equivalent degree in accordance with the regulations of the Commissioner of Education, and must satisfactorily meet all other licensing requirements of the State Board of Medicine and Commissioner of Education, and must be board certified as defined in paragraph (3) of this subdivision.
 - (b) A podiatrist must have received a doctoral degree in podiatry in accordance with the regulations of the Commissioner of Education, and must satisfactorily meet all other licensing requirements of the State Board for Podiatry and the Commissioner of Education.
 - (c) A chiropractor must have completed two years of pre-professional college study and a four-year resident program in chiropractic in accordance with the regulations of the Commissioner of Education, and must satisfactorily meet all other licensing requirements of the State Board for Chiropractic and the Commissioner of Education.
 - (d) A psychologist must have received a doctoral degree in psychology from a program of psychology registered with the State Education Department or the substantial equivalent thereof in accordance with the regulations of the Commissioner of Education, and must satisfactorily meet all other licensing requirements of the State Board for Psychology and the Commissioner of Education.

Regulations (cont'd)

(e) An authorized examiner does not include the insurance carrier or special fund's medical professional as that term is defined in section 324.1(c) of this Title.

(3) *Board certified* means a physician or surgeon who is certified by a specialty board that is recognized by the American Board of Medical Specialties or the American Osteopathic Association.

(4) *Independent medical examination* means an examination performed by an authorized or qualified independent medical examiner, pursuant to section 13-a, 13-k, 13-l, 13-m or 137 of the Workers' Compensation Law, for purposes of evaluating or providing an opinion with respect to schedule loss, degree of disability, validation of treatment plan or diagnosis, causal relationship, diagnosis or treatment of disability, maximum medical improvement, ability to return to work, permanency, appropriateness of treatment, necessity of treatment, proper treatment, extent of disability, second opinion or any other purpose recognized or requested by the board. An examination that is conducted for any of the purposes described in this section, other than an examination conducted at a clinic that is a member of the occupational health clinics network established pursuant to subdivision (3) of section 151 of the Workers' Compensation Law, shall be deemed an independent medical examination and shall be subject to the requirements governing the conduct and reports of such examinations as set forth under sections 13-a, 13-b, 13-d, 13-k, 13-l, 13-m, 13-n and 137 of the Workers' Compensation Law and this Part. An examination conducted at the request of the chair or the board in accordance with section 13(e) or 19 of the Workers' Compensation Law shall not constitute an independent medical examination for purposes of this Part, or for purposes of sections 13-b, 13-k, 13-l, 13-m and 137 of the Workers' Compensation Law.

(5) *Independent medical examiner* means a physician, surgeon, podiatrist, chiropractor or psychologist who is authorized to conduct independent medical examinations as defined in paragraph (4) of this subdivision, in accordance with sections 13-b, 13-k, 13-l, 13-m and 137 of the Workers' Compensation Law and this Part, or is found to be qualified to perform such examinations by a Workers' Compensation Law judge as set forth in paragraph (9) of this subdivision.

(6) *IME entity* means an individual or entity that derives income from independent medical examinations performed in accordance with Workers' Compensation Law sections 13-a, 13-k, 13-l, or 13-m and this section or review of records, whether by employing or contracting with independent medical examiners to conduct such independent medical examinations or review of records, or by acting as a referral service or otherwise facilitating such examinations or review of records and is registered with the chair in accordance with Workers' Compensation Law section 13-n and this section.

(7) *Medical facility* means a professional office suitable for a medical, podiatric, chiropractic or psychological examination, where the primary use of the examination location is not residential, commercial, educational, or retail in nature. A professional office that is adjacent to a residence may serve as a medical facility for independent medical examinations if the residence provides a separate entrance for the professional office that is clearly marked as a professional office, provides adequate privacy to the injured worker, and is listed with the Workers' Compensation Board and the State Education Department as an office address for the provider conducting the examination. A medical facility shall have adequate access, heat, light, space and equipment to provide for the safety and integrity of the examination, and shall meet reasonable sanitary requirements. Medical facilities shall meet other requirements consistent with section 137 of the Workers' Compensation Law as may be required by the chair or Workers' Compensation Law judge, and shall meet all applicable standards for accessibility as required under State or Federal law.

(8) *Preferred provider organization or P.P.O.* means a plan licensed by the Commissioner of Health pursuant to section 353 of the Workers' Compensation Law that is owned, operated, or administered by an entity that provides for the delivery of services required under article 10-A of the Workers' Compensation Law.

(9) *Qualified* means, with respect to independent medical examiners, a physician, podiatrist, chiropractor or psychologist who holds a current, valid and unrestricted professional license in the state in which he or she performs the subject independent medical examination or record review, and is found to meet additional professional standards as may be required in the discretion of a Workers' Compensation Law judge or the chair or board based upon the particular facts of a case. A qualified examiner does not include the insurance carrier or special fund's medical professional as that term is defined in section 324.1(c) of this Title.

(10) *Representative*, for purposes of section 137(A)(1) of the Workers' Compensation Law, means a claimant's attorney or a representative who is licensed and authorized by the board to appear in matters or proceedings before the board in accordance with section 24-a of the Workers' Compensation Law, or a person who is licensed to represent the members of its bona fide charitable or welfare organization or labor or other organization pursuant to section 302-1.3(b) of this Title.

(11) *Request for information*, for purposes of Workers' Compensation Law section 137(1)(b), except as limited under Civil Practice Law and Rules section 4503, means any substantive communication with an independent medical examiner, or his or her office, regarding the claimant from any person or entity, including a claimant, an insurance carrier, or a third party administrator, that takes place or is initiated outside of the independent medical examination, including a request or referral for examination and any communication related thereto, questions or inquiries related to the claimant or the examination, and the provision of information to the examiner for review in connection with a request for the examiner's professional opinion with regard to the claimant or the examination. When any substantive communication consists of documents, records, reports, and items that are part of the official board file and available to all parties at the time they are provided to the independent medical examiner, or his or her office, the documents, records, reports, and items or copies thereof shall not be filed with the board.

(12) *Review of records, records review or report made without physical examination* means the evaluation of a claimant without physical examination, by a medical provider authorized by the chair to treat claimants or to conduct independent medical examinations or both, or a medical provider qualified within the meaning of paragraph (9) of this subdivision, based on the review of reports and records, including treatment notes, diagnostic test results, depositions or hearing testimony, exhibits, and other records or reports from medical providers or independent medical examiners or both in the electronic case file maintained by the Board. A review of records does not include reviews conducted by the insurance carrier or special fund's medical professional as that term is defined in section 324.1(c) of this Title.

(c) Independent medical examination provider eligibility requirements and application procedures.

(1) Eligibility requirements. A physician, surgeon, podiatrist, chiropractor or psychologist who seeks to become authorized to conduct independent medical examinations of persons suffering injuries or illness which are the subject of claims under the Workers' Compensation Law, Volunteer Firefighters' Benefits Law and Volunteer Ambulance Workers' Benefits Law must meet the requirements set forth for an authorized provider under paragraph (b)(2) of this section and section 13-b, 13-k, 13-l, or 13-m of the Workers' Compensation Law.

Regulations (cont'd)

(2) Application procedures. Application, review and authorization procedures for independent medical examiners shall be conducted in accordance with sections 13-b, 13-k, 13-l and 13-m of the Workers' Compensation Law. Each physician, surgeon, podiatrist, chiropractor or psychologist seeking authorization to conduct independent medical of persons suffering injuries or illness which are the subject of claims under the Workers' Compensation Law, Volunteer Firefighters's Benefits Law and Volunteer Ambulance Workers' Law shall complete Workers' Compensation Board form MR/IME-1, or such other form prescribed by the chair. A physician or surgeon shall submit the application for review to the county medical society in which his or her office is located, or to the New York State Osteopathic Medical Society, or to the panel or board designated by the chair for review as provided in section 13-b of the Workers' Compensation Law. A podiatrist, chiropractor or psychologist shall submit the application to the podiatry, chiropractic or psychology practice committee of the Workers' Compensation Board designated for review of such applications under section 13-k, 13-l or 13-m of the Workers' Compensation Law. The reviewing county medical society, State medical society, panel, board or practice committee shall make an advisory recommendation to the chair regarding each application as required under the Workers' Compensation Law. Upon such recommendation, the chair shall authorize a review of each application by the Workers' Compensation Board, and shall determine whether the applicant may become authorized to conduct independent medical examinations under the Workers' Compensation Law. Upon approval of an application by the chair, the applicant shall receive an authorization notice and a provider authorization number. An applicant who is denied authorization shall receive a notice of denial of authorization.

(3) Retaining authorization privileges.

(i) An authorized examiner may retain authorization privileges to conduct independent medical examinations and reviews of records only so long as such examiner continues to comply with the laws and regulations governing such authorization and the examiner's profession, and submits to such reports and investigation as may be required by the chair. The chair may remove an independent medical examiner's name from the list of authorized examiners, upon notice to the affected examiner, if:

(a) the independent medical examiner is not in compliance with any of the laws and regulations authorizing him or her to conduct independent medical examinations and reviews of records, including any failure by an examiner to possess a required board certification in accordance with paragraph (b)(3) of this section, or the presence of a restriction or restrictions placed by the regulating New York State agency or any agency in any other state charged with oversight of medical licensure compliance and professional conduct, on the examiner's license to practice medicine, podiatry, chiropractic, or psychology; or

(b) the independent medical examiner has engaged in professional or other misconduct or incompetence, or fails to comply with the laws and regulations governing his or her conduct.

(ii) When an independent medical examiner receives notice of the chair's intent to remove his or her name from the list of authorized examiners for one or more of the reasons in subparagraph (i) of this paragraph, the examiner may be heard, on his or her own behalf or through legal counsel, by offering written proof that he or she is in compliance with the laws and regulations governing authorization to conduct independent medical examinations as a defense to the chair's intended actions.

(iii) When an independent medical examiner receives notice of the chair's intent to remove his or her name from the list of authorized examiners for one or more of the reasons in subparagraph (i) of this paragraph, his or her name may be removed from the chair's list of authorized examiners in accordance with Workers' Compensation Law section 13-d, 13-k, 13-l, or 13-m. Professional and other misconduct shall have the same meaning as set forth in Education Law sections 6509, 6509-a, 6530, and 6531 and include any violation of the Workers' Compensation Law or Chapter V of this Title or both, and any violation of the laws or regulations under the jurisdiction of the Centers for Medicare and Medicaid Services.

(iv) The chair shall have the authority to designate a representative to represent him or her in the determinations pursuant to subparagraphs (ii) and (iii) of this paragraph.

(d) Procedures for notice, conduct and reporting of independent medical examinations.

(1) Notice. The claimant shall receive notice of the scheduled independent medical examination at least seven business days prior to the date of such examination. The notice shall be printed on the form prescribed by the chair for such purpose, which shall include all information required thereon, as set forth under Workers' Compensation Law, section 137. A copy of such notice shall be sent to the board on the same day it is sent to the claimant. Where the claimant asserts that notice of the examination was not received at least seven business days prior to the date of the examination and upon request by the board, the party scheduling such examination shall provide proof in the form of an affidavit, or a business record that meets requirements for admissibility under Civil Practice Law and Rules Rule 4518 that the notice was posted by United States mail at least 12 business days prior to the date of the examination or deposited into the custody of an overnight delivery service for overnight delivery, prior to the latest time designated by the overnight delivery service for overnight delivery at least eight business days prior to the date of the examination. In the event that an independent medical examination is required for the purpose of determining authorization for special services for specialist consultations, surgery, physical or occupational therapy, imaging studies or special diagnostic or laboratory tests in accordance with Workers' Compensation Law section 13-a(5), and a delay in authorization for such special services would result in a worsening of the claimant's condition or irreparable harm, and the examination can be scheduled less than 12 business days from the date of the request for the examination, the claimant may, by written consent waive the requirement of seven business days' notice of the examination. However, in case of such a waiver by the claimant of seven business days' notice of the examination, for purposes of scheduling an examination for authorization of such special services, a notice of the examination must be sent to the claimant as soon as possible after the scheduling of the examination in the same manner as otherwise required for notices of examinations under Workers' Compensation Law section 137 and this Part. In no event may the right to such notice be waived pursuant to an employment agreement or a collective bargaining agreement. If a claimant requests that an examination be rescheduled, and the examination is rescheduled less than seven business days after the request, the notice required under section 137 need not be received seven business days prior to the examination, but must be sent to the claimant as soon as possible in the same manner as required for the original notice under said section and this section. A copy of such notice shall be sent to the board on the same day it is sent to the claimant. Upon request by the Board, the party scheduling such examination shall provide proof in the form of an affidavit, or a business record that meets the requirements for admissibility under Civil Practice Law and Rules Rule 4518 that the notice was mailed as soon as possible.

(2) Examination requested by claimant. A party requesting an independent medical examination from a provider, other than the attending provider, in accordance with subdivision 4(B) of section 13-a, subdivision 3(B) of section 13-k, subdivision 3(B) of section 13-l, or subdivision 4(B) of section 13-m of the Workers' Compensation Law, for a purpose described under paragraph (b)(4) of this section, shall be liable for all reasonable fees and costs associated with such examination. However, where a claimant can demonstrate to the satisfaction of the board that

Regulations (cont'd)

he or she made a good faith effort to obtain an opinion from his or her attending provider prior to seeking an independent medical examination for any of the purposes described under paragraph (b)(4) of this section, and that the attending provider was unable by reason of death or absence from the State, or unreasonably failed or refused to provide such opinion, the carrier shall be liable for all reasonable fees and costs associated with such examination. Where a claimant seeks an independent medical examination in accordance with subdivision 4(B) of section 13-a, subdivision 3(B) of section 13-k, subdivision 3(B) of section 13-l, or subdivision 4(B) of section 13-m of the Workers' Compensation Law, for a purpose described under paragraph (b)(4) of this section, the independent medical examiner shall inform the claimant in writing on the form prescribed by the chair for notice of such examination that the claimant may be responsible for payment of the cost of such examination, and shall state the actual fee or fee range for such examination.

(3) Provision of information. An independent medical examiner may be provided with information, such as documents, reports, records, and/or test results, for review in connection with an independent medical examination or a review of records. Information provided to an independent medical examiner in connection with an independent medical examination or review of records shall be part of the official board file at the time it is provided to the independent medical examiner or his or her office so it is available to all parties. If the party requesting the examination wants to provide information to the independent medical examiner that is not part of the official board file, it shall submit the information to the board for inclusion in the official file on the same day the information is first sent to the independent medical examiner or IME entity. The party requesting the examination or review of records may provide the information to an IME entity and such entity may then provide the information to the independent medical examiner who conducts the independent medical examination or review of records.

(4) Reports.

(i) The independent medical examiner shall prepare a complete and accurate report following an independent medical examination or review of records that at least shall contain:

(a) a description of the examination, if conducted;

(b) a list of all of the information, such as documents, reports, records, and/or test results, received and reviewed in preparation for the independent medical examination the report of such exam or the review of records;

(c) any test films or results, or other medical information provided by the claimant at the time of the independent medical examination that is related to the condition that is the subject of the independent medical examination;

(d) the independent medical examiner's professional opinion; and

(e) a signed statement certifying:

(1) that the report is a full and truthful representation of the independent medical examiner's professional opinion with respect to the claimant's condition in accordance with Workers' Compensation Law section 13-a (4)(e)(i), 13-k (3)(e)(i), 13-l(3)(e)(i) or 13-m (4)(e)(i), as appropriate;

(2) that no person or entity has caused, directed or encouraged the independent medical examiner to submit a report that differs substantially from the professional opinion of the independent medical examiner; and

(3) that the independent medical examiner has reviewed the report and attests to its accuracy.

(ii) A report that does not bear the signed certification required in subparagraph (ii) of this paragraph shall not be sufficient to meet the requirements of Workers' Compensation Law section 137 or this section, and shall not be admissible as evidence in a workers' compensation proceeding. The signed certification shall contain an original signature of the independent medical examiner made by such examiner after reviewing the report and shall not be a stamp or other method of reproducing a signature. An electronic signature, as that term is defined in State Technology Law section 302(3) and that is affixed remotely by the independent medical examiner, may be used if its use complies with State Technology Law section 304 and section 540.4 of Title 9.

(iii) The independent medical examiner shall provide copies of the report of an independent medical examination as required under Workers' Compensation Law section 137(1)(a) together with any questionnaires or intake sheets completed by the claimant at the request of the independent medical examiner by filing such report and questionnaire with the form prescribed by the chair for such purpose with the board and providing copies of such form to the insurance carrier, the claimant's attending physician(s) or other primary attending practitioner(s), the claimant's attorney or licensed representative, and the claimant. Only the form specifically prescribed by the chair for the reports of independent medical examinations shall be filed. The form prescribed by the chair pursuant to paragraph (5) of this subdivision to submit a request for information or a response to such a request shall not be used for the reports of independent medical examinations. When a claimant treats with more than one attending physician or practitioner, the independent medical examiner shall provide a copy of the report of the independent medical examination to any attending physician or practitioner who has treated the claimant in the past six months for the condition that is the subject of the independent medical examination. If no provider has treated the claimant in the last six months, the report should be sent to the provider who last treated the claimant. A provider who has examined the claimant solely for the purpose of consultation or diagnostic examination or test is not an attending physician or other attending practitioner within the meaning of this section and section 137 of the Workers' Compensation Law. All such reports shall be sent on the same day and in the same manner as required by Workers' Compensation Law section 137(1)(a).

(iv) Copies of written reports of medical experts, made on behalf of any party without physical examination of the claimant (a review of records), to be used for reference at a hearing, must be filed with the board and submitted to all other parties or their representatives, if any, three business days prior to the hearing.

(5) Request for information and response. Requests for information and responses to such requests shall be provided as required under Workers' Compensation Law section 137(1)(b) and (c) and paragraph (b)(11) of this section. Such requests and responses to such requests should be provided on or attached to the form prescribed by the chair for such purpose. The failure to provide such requests or responses to such requests by the independent medical examiner in accordance with Workers' Compensation Law section 137 and this section shall be considered in determining whether the report of any related independent medical examination substantially complies with Workers' Compensation Law section 137 and this section.

Regulations (cont'd)

(6) Reports filed by an IME entity. An independent medical examiner may retain the administrative services of an IME entity. Such IME entity may provide administrative support to the independent medical examiner, including but not limited to those responsibilities described in subdivisions (1) and (7) of Workers' Compensation Law section 137, under the following circumstances:

(i) the IME entity retained shall be duly registered and in full compliance with Workers' Compensation Law section 13-n and this section;

(ii) the IME entity retained, in addition to the examiner, shall be responsible for the work of any subcontractors performing ancillary services for the examiner and the IME entity. These services may include, but are not limited to, translation and transcription services. The examiner or IME entity may not retain the services of an organization that is not licensed as an IME entity to perform functions central to the examination such as identifying and retaining the services of an examiner, scheduling of the examination, mailing of the report of independent medical examination and any related notices or board forms, and negotiation of payment for the examination;

(iii) the independent medical examiner is solely responsible for the content and certification of the written report and for ensuring that the written report is distributed in compliance with Workers' Compensation Law section 137 and these regulations;

(iv) the signed certification on the written report shall be an original signature of the independent medical examiner made by the examiner after reviewing the report and shall not be a stamp or other method of reproducing a signature, except that it may be an electronic signature as provided in paragraph (4) of this subdivision;

(v) the content of the written report may not be derived by the independent medical examiner completing a checklist or circling or checking or otherwise marking provisions on a form, letter or any other writing or document prepared by another individual or entity;

(vi) such IME entity, or any officer, servant, or employee of such IME entity, may not cause, direct or encourage the independent medical examiner to submit a report that differs substantially from the professional opinion of the independent medical examiner;

(vii) the IME entity and independent medical examiner do not engage in the splitting of fees in violation of Workers' Compensation Law section 13-d(2)(g), 13-k(10)(g), 13-l(10)(g), or 13-m(11)(g) and Education Law section 6530(18) and (19);

(viii) the IME entity shall act on behalf of and at the convenience of the independent medical examiner and may not require that an independent medical examiner use any or all of its services nor may an insurance carrier or third party administrator require that an independent medical examiner use a particular IME entity; and

(ix) the IME entity shall disclose in writing to the board if it is owned by, shares common ownership with, owns or is affiliated with the insurance carrier, as defined in section 300.1(a)(7) of this Part, or third party administrator, as defined in section 300.1(a)(10) of this Part, that requested the independent medical examination or review of records. The notice required by subparagraph (ix) of this paragraph shall include the name of the IME entity, the name of claimant who underwent the independent medical examination or review of records, the name of the insurance carrier or third party administrator and whether the IME entity is owned by, shares common ownership with, owns or is affiliated with the insurance carrier or third party administrator.

(7) Conduct at examination. The claimant or the examiner may videotape or otherwise record the examination. An independent medical examiner may not refuse to conduct an independent medical examination because the claimant intends to videotape or otherwise record such examination when the claimant has appeared for such examination as scheduled. The claimant and the independent medical examiner and their agents shall not alter or misrepresent the content of the recording and shall not distribute publicly the recording beyond its use in a hearing of the board. The claimant may be accompanied to the examination by an individual or individuals of his or her own choosing. However, neither the examiner nor the claimant may disrupt or interfere with the examination by such recording or as a result of the presence to such companion or companions. The claimant may be accompanied to the examination by an individual or individuals of his or her own choosing. However, neither the examiner nor the claimant may disrupt or interfere with the examination by such recording or as a result of the presence of such companion or companions.

(8) Relationship between examiner and claimant. The independent medical examiner shall not provide treatment to the claimant, shall not be a partner, member, or employee of the claimant's attending physician's or practitioner's practice, and only a limited patient-physician or patient-provider relationship is established by conducting an independent medical examination in accordance with Workers' Compensation Law section 13-a, 13-k, 13-l, or 13-m or this section. The limited patient-physician or patient-provider relationship established requires the physician or provider to administer an objective medical evaluation but not to monitor claimants' work related injury or illness over time, treat claimants, or fulfill the other duties traditionally held by attending physicians or providers. However, all laws and regulations governing the confidentiality of medical records and workers' compensation records shall apply to records of an independent medical examination or review of records. Notwithstanding the limitations set forth under Workers' Compensation Law section 137(9), an independent medical examiner who has evaluated a claimant at the request of the employer, carrier or claimant may conduct a subsequent independent medical examination of the claimant for the same injury or illness.

(9) Regular business hours. Independent medical examinations shall be conducted between the hours of 8:00 a.m. and 6:00 p.m., Monday through Friday except that they shall not be conducted on official and officially recognized religious holidays. An examination may be scheduled outside of regular business hours only with the consent and for the convenience of the claimant.

(10) Unreasonable burden. Where an insurance carrier, third party administrator or claimant finds that it would place an unreasonable burden to arrange for an independent medical examination or review of records, or to attend an independent medical examination by an authorized examiner, the employer, carrier or claimant shall arrange for such examination or review of records to be performed by a qualified provider. Upon request by the board, the person or entity requesting such examination or review of records by a qualified provider must demonstrate the existence of the unreasonable burden to the satisfaction of the board. Where a person or entity is unable to demonstrate to the satisfaction of the board that an unreasonable burden existed which required the examination or review of records to be conducted by a qualified provider rather than an authorized examiner, the report based upon such examination or review of records by a qualified provider shall not be admissible as evidence in a workers' compensation proceeding.

(11) Ability of claimant to appear. The physical capability of a claimant to present himself or herself for examination, and the observations of the examiner in relation to the claimant's ability to present for such examination shall not constitute dispositive evidence in determining a claimant's disability, degree of disability or eligibility for compensation or benefits under the Workers' Compensation Law. However, refusal by the claimant to submit to an independent medical examination requested by an employer or carrier in accordance with subdivision 4(B) of section 13-a, subdivision 3(B) of section 13-k, subdivision 3(B) of section 13-l, or subdivision 4(B) of section 13-m of the Workers'

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Compensation Law, for a purpose described under paragraph (b)(4) of this section, shall bar the claimant from recovering compensation for any period during which he or she has refused to submit to such examination.

(12) No waiver of claimant's rights. Except as otherwise provided, a claimant may not waive any of the rights provided under Workers' Compensation Law section 137 in relation to independent medical examinations. A report of an examination that does not substantially comply with the requirements of Workers' Compensation Law section 137 and this section, shall not be admissible as evidence for any of the purposes described in paragraph (b)(4) of this section in a workers' compensation proceeding, unless the party raising an objection to the admissibility of the report does not raise such objection in a timely manner. Except for a waiver that is expressly authorized by the Workers' Compensation Law or this section or by a Workers' Compensation Law judge, and is knowingly executed by the claimant, no agreement between an employee and employer, or employee and carrier shall be binding upon the board; nor shall any such agreement in any way excuse compliance with said section 137 or this section. In no event shall a collective bargaining agreement be binding upon the board or excuse compliance with respect to said section 137 or this section; nor shall a claimant be required or permitted to waive any of the requirements of section 137 or this section pursuant to such agreement.

(13) Selection of examiners in a P.P.O. Notwithstanding any provision to the contrary:

(i) an employer retains its right as permitted under section 354 of the Workers' Compensation Law and 10 NYCRR 732-2.2(k)(2) to require a second opinion from a provider within a P.P.O. in the event that an employee seeks medical treatment outside the P.P.O.; and

(ii) a claimant retains his or her right as permitted under 10 NYCRR 732-2.2(g) to access a second opinion from a provider within a P.P.O. where the claimant has previously been evaluated or treated by another provider within the P.P.O.

(14) A written report of an independent medical examination, duly sworn to, shall be filed with the board, and copies thereof furnished to all parties as may be required under the Workers' Compensation Law, within 10 business days after the independent medical examination, or sooner if directed, except that in cases of persons examined outside the State, such reports shall be filed and furnished within 20 business days after the independent medical examination. A written report is filed with the board when it has been received by the board pursuant to the requirements of the Workers' Compensation Law.

(15) Copies of written reports of medical experts, made on behalf of any party without physician examination of the claimant, to be used for reference at a hearing, must be furnished to the referee and to all other parties or their representatives, if any, prior to that hearing.

(e) Registration of entities.

(1) Mandatory registration.

(i) Any entity that derives income from independent medical examinations performed in accordance with Workers' Compensation Law sections 13-a, 13-k, 13-l or 13-m and 137 or review of records, whether by employing or contracting with independent medical examiners or by contracting with insurance carriers, third party administrators, the Uninsured Employers' Fund or Reopened Case Fund or by acting as a referral service by arranging or otherwise facilitating or providing administrative services for such examinations or review of records, shall register with the chair by filing the following requested documents. Such entity shall meet the definition of IME entity.

(ii) The IME entity shall provide the following information:

(a) the name or names under which it is registered with the Department of State and a copy of the organizational documents for the entity, such as articles of incorporation or articles of organization;

(b) the name or names under which it conducts business;

(c) the address or addresses of its administrative office and each of the offices where it conducts any business;

(d) the telephone numbers of each business location;

(e) the entity's tax identification number;

(f) the name, title and telephone number of the contact person for the entity;

(g) the names, addresses and telephone numbers of each of the entity organization's officers, owners, or partners, identify if any of the officers, owners, or partners have been convicted of any criminal offenses and if so, detailed information about such conviction, and certify under penalties of perjury that all such officers, owners, or partners are of good moral character;

(h) the name or names and address or addresses of all organizations that are affiliated with, share common ownership with, own or are owned by the IME entity, including but not limited to other entities required to register pursuant to Workers' Compensation Law section 13-n, insurance carriers as defined in section 300.1(a)(7) of this Part, or third party administrators as defined in section 300.1(a)(10) of this Part;

(i) a statement as to whether the IME entity subcontracts or contracts with an organization that is not a registered IME entity to perform any ancillary services related to independent medical examinations or review of records, and if the IME entity does so subcontract or contract, the IME entity shall provide a statement that such ancillary services performed by a subcontractor do not require registration as an IME entity as they are not functions central to the examination or review of records such as identifying and retaining the services of an examiner, scheduling of the examination, mailing of the report of independent medical examination or review of records and any related notices or board forms, and negotiation of payment for the examination or review of records;

(j) description of the services provided by the IME entity and its employees or independent contractors;

(k) a description of the relationship between the IME entity and its owners, officers or partners and the independent medical examiners it employs or with whom it contacts to conduct independent medical examinations and reviews of records;

(l) the affirmation as set forth in paragraph (2) of this section; and

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(m) such other information as the chair finds to be necessary and relevant.

(iii) The chair may audit any contract between a carrier and an IME entity or examiner, or any contract between an IME entity and an examiner or subcontractor, to ensure compliance with this section and sections 13-n and 137 of the Workers' Compensation Law.

(iv) If there are any material changes to the information supplied in clause (a), (b), (c), (d), (e) or (f) of subparagraph (i) of this paragraph, the IME entity shall notify the chair in writing within 30 business days that the information has changed and provide the updated information. The IME entity shall notify the chair in writing by March 31st of each year of any material changes to the information supplied in subclause (g), (h), (i), (j), (k) (l) (m), (n) or (o) of subparagraph (i) of this paragraph.

(v) Entities must register every three years by submitting the form required in subparagraph (1) of this paragraph and paying the registration fee set forth in paragraph (5) of this subdivision.

(2) Compliance with laws. An officer of each such entity registering with the chair shall affirm under penalty of perjury upon registration that the entity is organized under the laws of New York State or in the state in which it was incorporated in a corporate form that is recognized by the laws of the State of New York, is duly registered with the Department of State, and is in full compliance with the laws of the State of New York, its state of incorporation if outside New York, and the United States, including but not limited to any laws or regulations under the Public Health Law, the Education Law and the Workers' Compensation Law governing the practice of medicine, podiatry, chiropractic and psychology, treatment of injured or ill workers, solicitation and fee-splitting, and any laws or regulations under the jurisdiction of the State Insurance Department, the Federal Centers for Medicare and Medicaid Services, the State Department of Taxation and Finance or the Federal Internal Revenue Service. The officer shall further affirm that he or she has read or is familiar with the fee-splitting and anti-solicitation provisions of the Workers' Compensation Law under sections 13-d, 13-i, 13-k, 13-l and 13-m, and that the entity is not in violation of any such section.

(3) Additional information. The chair or his or her designee reserves the right to request any and all information or documentation necessary from any IME entity for the purpose of administering and ensuring compliance with Workers' Compensation Law sections 13-a, 13-b, 13-d, 13-i, 13-k, 13-l, 13-m, 13-n, 137 and other related provisions of such law and this section. All IME entities must cooperate in any investigation and produce for review by the chair or his or her designee any relevant documents, reports or notes.

(4) Acceptance of registration not a defense. The acceptance of a registration statement by the chair in accordance with Workers' Compensation Law section 13-n and these regulations shall not be construed as authorization, approval or endorsement of the registering entity, or its services, corporate organization or business practices by the chair or board, and the acceptance of a registration statement by the chair shall not be a defense to any investigation, action or proceeding by any government agency or official enforcing the laws of this State or the United States.

(5) Registration fee. The registering entity shall pay a registration fee of \$250 to the chair for the purpose of administering the registration and ensuring compliance of such entities in accordance with Workers' Compensation Law section 13-n.

(6) Removal from list of registered IME entities. The chair or his or her designee may remove an IME entity from its list of such registered IME entities for failure to comply with Workers' Compensation Law section 13-n or 137 or this section. The following procedure shall apply to such removal:

(i) Written notice.

(a) The registered IME entity shall be given written notice of the proposed rescission of registration containing the following information:

(1) a concise statement of the grounds or the nature of the misconduct upon which the proposed rescission of registration is based; and

(2) a recitation of the statute(s), regulation(s), or order(s) allegedly violated by the registered IME entity.

(b) The written notice of proposed rescission of registration may be sent in any manner that provides proof of delivery to the registered IME entity or to the registered IME entity's legal counsel, if known.

(c) The written notice shall inform the registered IME entity of the opportunity to have the chair or his or her designee administratively review the proposed rescission of registration.

(ii) Responses to the written notice.

(a) Answer. A registered IME entity that wishes to dispute the allegations contained in the notice of proposed rescission of registration, must serve an answer to the notice of proposed rescission.

(1) The registered IME entity must serve any answer to the notice of proposed rescission on the board within twenty days of receipt of the notice.

(2) Any answer must set forth responses to the grounds or nature of the misconduct alleged, the statutes, regulations or orders allegedly violated, and any defenses.

(3) Failure to provide an answer. Failure to provide an answer within twenty days will result in the allegations in the notice being deemed admitted and the registered IME entity will be prohibited from raising any defenses or any argument in opposition to the allegations set forth in the notice. If the registered IME entity does not submit an answer and request a timely administrative review, then the registered IME entity will be deemed to have waived all rights, all allegations set forth in the notice will be deemed admitted, the registered IME entity will be prohibited from raising any affirmative defenses or any arguments in opposition to the allegations set forth in the notice or from submitting any evidence in its defense, an administrative review will not be held, and the IME entity's registration will be automatically rescinded. A determination of this nature shall be deemed administratively final.

(b) Voluntary resignation. At the chair's or his or her designee's discretion, a written statement may be executed at the option of the registered IME entity which affords it the opportunity to voluntarily resign as a registered IME entity without admitting or denying the

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allegations contained in the notice. If the registered IME entity voluntarily resigns after requesting an administrative review of the allegations, such administrative review shall not be held and will not be rescheduled.

(iii) Administrative review. If the registered IME entity submits an answer and requests an administrative review of the allegations:

(a) Administrative review of the registered IME entity's authorization shall be scheduled not less than thirty days from the date of receipt of the notice. The administrative review shall be held at the executive offices of the board in Albany, New York.

(1) The registered IME entity shall appear with counsel at the administrative review, provide testimony, and cross-examine witnesses. The registered IME entity may also submit documents or other materials for review by the chair or his or her designee either prior to or at the administrative review itself.

(2) The chair or his or her designee shall not be bound by common law or statutory rules of evidence in conducting the administrative review and may conduct such investigation or inquiry in a manner which, in his or her discretion, is appropriate, including the preparation of a record of the proceedings or the admission of non-documentary evidence.

(3) The registered IME entity shall receive a written decision containing findings of fact and conclusions of law within thirty days of the conclusion of the administrative review.

(iv) Notification of decision to rescind registration. After providing written notification to the registered IME entity of the registration rescission, the chair or his or her designee shall notify or direct the registered IME entity to notify any and all appropriate public or private agencies, entities or organizations that the registered IME entity's registration has been rescinded. A decision to rescind an IME entity's registration shall be administratively final.

(7) Penalties for materially altering or causing a report to be materially altered. If the chair or his or her designee finds that an IME entity that derives income from independent medical examinations has materially altered an independent medical examination report, or caused such a report to be materially altered, then in addition to revoking or rescinding the registration of such IME entity through the process set forth in paragraph (6) of this subdivision, the chair or his or her designee shall:

(i) refer the matter to the attorney general for prosecution; and

(ii) impose a penalty not to exceed \$10,000 payable to the chair. In determining the amount of the penalty, the chair or his or her designee shall consider:

(a) the extent of the alteration to the report;

(b) the nature of the alteration;

(c) how the IME entity caused the report to be altered; and

(d) the impact of the altered report on the decision of the board.

CROSS REFERENCES:

Physical examination, Workers' Compensation Law § 19.

RESEARCH REFERENCES AND PRACTICE AIDS:

5 NY Jur 2d, Arbitration and Award § 8.

15 NY Jur 2d, Business Relationships § 923.

52 NY Jur 2d, Employment Relations § 218.

110 NY Jur 2d, Workers' Compensation §§ 527, 531, 532, 537, 538, 540---542, 552, 596---598, 662.

23 C-W2d, Arbitration § 141:260.

2 C-W2d, Limitation of Actions §§ 13:75, 13:109.

82 Am Jur 2d, Workers' Compensation §§ 385, 386, 391---395, 435---437.

10 Am Jur Trials 589, Workmen's Compensation: Back Injuries.

12 CRR-NY 300.2

Current through June 15, 2019

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