

Office of General Counsel

Guidance Document on the Proper Application of Board Rule 300.13

On October 3, 2016, new regulations for Administrative Review, Full Board Review and Applications for Reconsideration went into effect. Subject Number 046-878, dated September 29, 2016, announced the repeal of 12 NYCRR 300.13, 300.15 and 300.16, and the adoption of a new 300.13. Board Rule 300.13 sets forth the prescribed formatting, completion, service and submission requirements for applications for review and rebuttals filed on or after October 3, 2016. The Board issued Subject Number 046-878, and then subsequently issued Subject Number 046-940, dated April 27, 2017, which reiterated the regulatory provisions. That Subject Number 046-940 contained a specific warning, in bold, all-capital letters, that “[a]s of **May 26, 2017** any application for review by a party other than an unrepresented claimant that is not filled out completely will be denied and any rebuttal filed by a party other than an unrepresented claimant that is incomplete will not be considered.”

The concept of completeness set forth in 12 NYCRR 300.13, as announced in 2016 and 2017, supports the Board and opposing parties in focusing on the exact issues, grounds and evidence in support of an application or rebuttal, to ensure that they properly address issues raised in an appeal. The RB-89 is the application for review itself, and is not merely a coversheet, and the RB-89.2 is the application for full Board review, and not merely a coversheet. In an application, the “completeness doctrine” assists the responding party in identifying the exact issues, grounds and evidence used in support of the application in determining the issues and crafting a timely and effective rebuttal. Having a complete application or rebuttal also assists the Board in providing timely and effective review of the application or rebuttal as it eliminates confusion over which evidence is involved in the application and which issues are preserved for appeal.

Board Rule 300.13 creates clear standards for the preservation of a party’s right to administrative review, and provides the Board with clearly stated standards for determining whether an application for review has been properly completed. The completion of administrative review applications and rebuttals is not complex, and is within the inherent competency of attorneys and licensed representative that practice before the Board. The instructions provided with each form also provide necessary clarity.

Despite the issuance of various Subject Numbers and Board Panel decisions on this topic, there continues to be some confusion. Therefore, the Board has developed this guidance document to systematically state the existing rules, with the aim of providing additional support to all parties concerning the proper application of Board Rule 300.13, and the correct completion of Requests for Administrative Review and Requests for Full Board Review, and Items 11 through 15 on the form RB-89 (and Items 13 through 15 on the RB-89.2). A companion document (labeled ‘Supplemental Guidance Document’) provides examples, item by item, as to how these rules are applied.

Below is a detailed treatment of each Item (11-15 of the RB-89), with citations to the relevant statute, as well as the “rules” for completing each Item. There is also a discussion regarding the proper completion of the Proof of Service on RB-89 (and RB-89.2).

Item 11 of RB-89 (and Item 13 of RB-89.2):

Item 11: *Specify the issue(s) for review.*

Relevant Regulation:

12 NYCRR 300.13(b)(2)(i) - “The application for administrative review shall specify the issues and grounds for the appeal.”

Guidance:

1. Provide a simple reference to the disputed issue(s) in response to Item 11, for example ANCR (Accident, Notice and Causal Relationship), AWW (Average Weekly Wage), LMA (Labor Market Attachment), or LWEC (Loss of Wage-Earning Capacity).
2. Issues specified in Item 11 must relate to the underlying decision and appeal of said decision.
3. An appellant cannot leave Item 11 blank.
4. An appellant cannot simply indicate “see attached” (or similar entries) in response to Item 11.
5. Indicating in Item 11 that the underlying decision must be rescinded as it is not supported by substantial evidence is insufficient.

Item 12 of RB-89 (and Item 14 of RB-89.2):

Item 12: *Basis of Appeal. This application for review is based on the following grounds (If you attach a legal brief it may be no more than 8 pages, see instructions for details).*

Relevant Regulations:

12 NYCRR 300.13(b)(2)(i) - “The application for administrative review shall specify the issues and grounds for the appeal.”

12 NYCRR 300.13(b)(1)(i) - “Unless otherwise specified by the Chair, the appellant may attach a legal brief of up to eight pages in length, in 12-point font, with one-inch margins, on 8.5 inch by 11 paper. A brief longer than eight pages will not be considered, unless the appellant specifies, in writing, why the legal argument could not have been made within eight pages. In no event shall a brief longer than fifteen pages be considered.”

Guidance:

1. Appellant must set forth a cogent summary of the basis for the request for review.
2. The grounds upon which the appeal is based must be provided and specific findings of fact that are challenged and/or the errors of law which are alleged.
3. Appellant must articulate the basis of the appeal.
4. Cannot respond to Item 12 by referring to the attached brief, or merely stating “see attached.”
5. Cannot respond to Item 12 by stating “see above” referring to Items 1-11.
6. Stating only “Mistakes of Fact and Law” is insufficient.
7. Cannot leave Item 12 blank.
8. Responding “N/A” to Item 12 is not appropriate.

9. With respect to formatting: The Board will not accept an attached brief that exceeds 8 pages, contains font that is less than 12-point, on paper that is not 8.5 by 11 inches, with margins other than one inch.

Item 13 of RB-89 (and Item 15 of RB-89.2):

Item 13: Hearing dates, Transcripts, Documents, Exhibits, and other Evidence (see instructions for details):

Relevant Regulations:

300.13(b)(1): "...an application... shall be in the format as prescribed by the chair. The application ... must be filled out completely..."

300.13(b)(3)(iii): "the chair ... may set the requirements to include various data fields..."

In this context, the data required in Item 13 informs the issues and grounds, as also required in 300.13(b)(2)(i).

Guidance:

1. Appellant must list the primary documents upon which the application is based.
2. The hearing dates where the issues were raised before the WCLJ and the documents in the file that are relevant must be identified.
3. Failing to reference in Item 13 the hearing dates, transcripts, documents, exhibits or other evidence that are specifically referenced in the attached appeal is fatal.
4. Stating "All" does not meet requirements of Item 13.
5. Item 13 cannot be left blank.
6. Referring to the date of a hearing only is insufficient.
7. Reference to "all medical reports" is insufficient unless an entire medical file is indeed referred to in the attached brief.
8. If an appeal implicates multiple hearings, it must reference all hearings in Item 13.
9. If an appeal relies on prior decisions, it must reference the prior decisions in Item 13.
10. Reference only to the subject decision, without listing the hearing date, or the relevant documentary evidence in the record, is insufficient.
11. It is acceptable to start to list of documents on the form, and if there is insufficient space to complete on the application, write 'see attached list' or 'see section in brief for additional list' for the additional documents, transcripts, etc.
12. Referring to "All documents in *eCase*" or referencing the entire Board case file does not meet the requirements of Item 13.
13. Setting forth that the ECF is "not functioning" does not relieve a party from submitting a complete RB-89.

Item 14 of RB-89:

Item 14: New and Additional Evidence under 12 NYCRR 300.13(b)(1)(iii) (see instructions for details).

Relevant Regulation:

12 NYCRR 300.13(b)(1)(iii) - “If the appellant seeks to introduce additional documentary evidence in the administrative appeal that was not presented before the Workers' Compensation Law Judge, the appellant must submit a sworn affidavit, setting forth the evidence, and explaining why it could not have been presented before the Workers' Compensation Law Judge. The Board has discretion to accept or deny such newly filed evidence. Newly filed evidence submitted without the affidavit will not be considered by the Board panel.”

Guidance:

1. Item 14 need only be completed if the appellant references new or additional evidence within the attached brief.
2. To submit new evidence for consideration, a sworn affidavit from the appellant, setting forth the evidence, and explaining why it could not have been presented before the WCLJ is required.
3. If the application for review includes new evidence, responding to Item 14 by stating “see attached” is not sufficient.
4. If new evidence is being submitted, the appellant must state whether the evidence is attached to the Application or is in the Board’s file, specifying the applicable ID number.
5. If the party is not relying on any new or additional evidence, a response of “not applicable” or “N/A” is required in Item 14.
6. If the Board Panel refuses to consider new evidence per 300.13(b)(1)(iii) due to Item 14 not being properly completed, it may consider the remainder of the application.
7. If an affidavit itself is new evidence, not an explanation for the belated production of evidence, it will not be considered.

Item 15 of RB-89:

Item 15: Objection or Exception. Specify the objection or exception interposed to the ruling and when it was interposed as required by 12 NYCRR 300.13(b)(2)(ii).

Relevant Regulation:

300.13(b)(2)(ii) - “The application for administrative review shall specify the objection or exception that was interposed to the ruling, and when the objection or exception was interposed.”

300.13(b)(4)(v) specifies the three contexts in which to interpose an exception of objection (at hearing, off-calendar, or where ruling made in reserve decision) (for purposes of this list, the word ‘hearing’ is meant to include, if applicable, the off-calendar development or reserve decision per 300.13[b][4][v]).

Guidance:

1. Must specify the objection or exception made and the date of the hearing or off-calendar proceeding when it was interposed, or the date of the Reserve decision if no prior hearing or off-calendar proceeding provided an opportunity to raise the objection. In all Guidance listed below, the word ‘hearing’ is meant to include off-calendar proceedings or a Reserve decision, if apt.

2. Must specify the date of the hearing at issue in Item 15. If there is only one hearing in the case, then specification of the date of the hearing is not required.
3. Stating in Item 15 that “[t]his appeal serves as the objection,” absent a specific objection or exception being noted at the underlying hearing, is insufficient.
4. If appeal is from a reserved decision, or in response to the submission of a written stipulation, so there was no hearing, the appealing party cannot note an exception, and completion of Item 15 is not required per Board Rule 300.13(b)(4)(v)(c) (can indicate “N/A” in Item 15 if this is the case).
5. An exception or objection must be noted at the underlying hearing.
6. A specific protective objection or exception satisfies the requirement under Item 15.
7. That an exception or objection was not interposed at a hearing due to a mistake, or lack of awareness of issues by a representative, is of no moment.
8. An objection or exception in an off-the-record discussion noted in a WCLJ’s scratch sheet, and thereafter in WCLJ’s decision, but not in transcript of the hearing, is sufficient for purposes of Item 15.
9. Appellant must specifically object to the ruling by the WCLJ; it is not sufficient to summarize their position on the record.
10. Objecting to one or more findings:
 - a. If there is one finding made at the hearing, and the appellant notes an objection at the hearing and writes “objection noted at hearing held on (date)” in Item 15, this is sufficient.
 - b. If there are multiple findings made at the hearing, the appellant notes an objection at the hearing to “all findings” or notes objections to each individual finding, and writes “objection to all findings at the hearing on (date)” in Item 15, this is sufficient.
 - c. If there are multiple findings at a hearing, and the appellant only appeals some, but not all, noting “Objection at hearing on (date)” in Item 15, this is not sufficient. The appellant must object to each individual ruling at the hearing and specify each issue being appealed in Item 15.
11. If appealing party did not appear at the underlying hearing, and could not note an exception or objection on the record as a result, and could not complete Item 15, appeal will not be considered.

Completing the Proof of Service:

12 NYCRR 300.13(b)(2)(iv) applies to applications for administrative review and applications for Full Board Review, and requires “proof of service upon all necessary parties of interest, in the format prescribed by the Chair.”

12 NYCRR 300.13(a)(4) defines necessary parties of interest to include “claimants, self-insured employers, private insurance carriers, the state insurance fund, special funds, no-fault carriers per section one hundred forty-two of the workers' compensation law (but only to the extent they are granted standing by being allowed to full participate in the proceedings), or any surety, including but not limited to the uninsured employer's fund, and the liquidation bureau.” The regulation further states that “[a] claimant's attorney or licensed hearing representative, properly designated by the claimant as his or her representative, shall receive a copy of any applications or rebuttals filed under this section” (*id.*).

12 NYCRR 300.13(b)(2)(iv) provides that “[f]ailure to properly serve a necessary party shall be deemed defective service and the application may be rejected by the Board.” Failure to serve a party who is not adverse to the interest of the appellant may not render the appeal defective as such party is not considered a necessary party of interest under 12 NYCRR 300.13(a)(4).

12 NYCRR 300.13(b)(4)(iv) also provides that an application for review may be denied “[b]y decision of the Board panel, when the appellant does not provide proper proof of timely service upon a necessary party in interest other than a party who is not adverse to the appellant. When the appellant fails to supply proper proof of timely service upon a necessary party.”

An application for review is defective if it fails to include proper proof of service to the parties of interest, or contains an unsigned, incomplete, or improperly completed affidavit or affirmation of service. In that event, the Board may exercise its discretion to deny review of the application (*Matter of Greenough v Niagara Mohawk Power Corp.*, 45 AD3d 1116 [2007]).

Pursuant to 12 NYCRR 300.13(b)(2)(iv)(a), proper proof of service “shall specify the papers served, the person who was served, the date, and method of service including the actual address, email address or fax number where service was transmitted. An affidavit, affirmation, or other satisfactory proof of service as prescribed by the Chair, shall be submitted with the Application for Administrative Review to the Board. The affidavit, affirmation, or other proof of service must certify that all service was completed within thirty days from the filing of the decision that is the subject of the Application for Administrative Review.”

If service is by electronic means (fax or email), parties are required to certify that the party served provided explicit permission to receive service by fax, email or other electronic means as required by Board Rule 300.13(b)(2)(iv)(c).

The proper completion of the Affirmation/Affidavit of Service requires completion of those items reflecting who was served, when and how (*see* Board Rule 300.13[b][2][iv][a]). Parties should be filling in each of these boxes and continuing onto another sheet if there are more than four parties/representatives being served. Parties should not write in “see attached” in Part B of the Affirmation or Affidavit.

When a rebuttal is submitted to the Board, the necessary party shall raise the issue of defective service in its rebuttal. Failure to do so shall constitute a waiver of the issue (*see* Board Rule 300.13[b][4][iv][a]). When no rebuttal is filed, the Board may consider whether the application was defectively served, and if so, the Board may deny review without decision (*see* Board Rule 300.13[b][4][iv][b]).

Conclusion:

The foregoing provides specific guidance with respect to the proper application of Board Rule 300.13. All workers’ compensation practitioners should be fully versed with the requirements of this regulation, the text of which is available on the Board’s webpage at: http://www.wcb.ny.gov/content/main/wclaws/RecentlyAdopted/Part300_13_text.jsp

Any question concerning the application of Board Rule 300.13, that are not addressed herein, should be directed to the Board’s Office of General Counsel, at (518) 486-9564, or officeofgeneralcounsel@wcb.ny.gov.