

Supplement: 300.13 Items: decisional examples

- **Item 11 of Form RB-89 (and Item 13 of Form 89.2)**

Specific Examples:

Stating “See attached”

- Carrier’s application for Board review was not filled out completely, as the carrier merely indicated “please see attached” in response to Item 11, making the carrier’s application defective (Matter of JAD Transportation Inc., 2017 NY Wrk Comp G1299752).
- Application for Board review filed by the uninsured employer was denied as it was not filled out completely as Item 11 states only “See attached.” (Matter of Frederick Elghanayan & Diana Elghanayan, 2018 NY Wrk Comp G1109385).
- Application for Board review will not be considered as Item 11 stated only “See Attached.” The Board Panel found that Item 11 was not filled out completely as it referred to attached documentation (“see attached”) without further explanation (Matter of Progressive Home Health, 2017 NY Wrk Comp G1228870).
- In the dicta of the decision, the Board Panel indicates that responding to Item 11 of the RB-89 and Item 13 of the RB-89.2 by stating “see attached” is not sufficient and the form will be deemed not filled out under Board Rule 300.13(b)(1) (Matter of 7-Eleven Inc., 2018 NY Wrk Comp G1666297 and Matter of Jemco Fuel Corp., 2018 NY Work Comp G1396209).

Left Blank-

- The carrier’s application will not be considered as Item 11, requiring the appellant to specify the issue for review, was left completely blank (Matter of Breakaway Courier Systems, 2018 NY Wrk Comp G1912222).

Wrong Issue-

- Carrier’s application for Board review was not considered as the only issue specified on Item 11 on the RB-89 was WCL § 28. The legal brief and its arguments did not correspond to what was specified on the RB-89 (Matter of W NY Hotel, 2018 NY Wrk Comp G1526988).
- Carrier’s response to Item 11 was not related to the decision in which it sought review and its application was not considered as it failed to comply with Board Rule 300.13(b)(1) requiring that an application for review or rebuttal be filled out completely (Matter of 401 Hotel LP, 2018 NY Wrk Comp 1595125).

Incomplete-

- Claimant’s application for Board Review was not filled out completely as the claimant indicated under Item 11 that “the 6/16/17 decision must be rescinded and modified as it is not supported by substantial evidence or applicable law,” as opposed to specifying the issue or issues for review (Matter of Loretto Management Corp., 2018 NY Wrk Comp 60506916).

- The claimant failed to specify sufficient issues or grounds for review as required by Board Rule 300.13(b)(2)(i), by raising an argument that the WCLJ held had not been properly preserved and had already been litigated and resolved in the prior decision. The Board Panel declined to entertain the application for review (Matter of Verizon, 2017 NY Wrk Comp G0195690).
- **Item 12 of Form RB-89 (and Item 14 of Form 89.2)**

Specific Examples:

Failure to Respond-

- The claimant's Application for Board Review was not filled out completely, as the SIE failed to respond to Item 12 on the RB-89 (Matter of Dept. of Homeless Services, 2017 NY Wrk Comp G1654348).
- Application for Board review will not be considered as Item 12 was “completely left blank.” (Matter of Breakaway Courier Systems, 2018 NY Wrk Comp G1912222).

Insufficient Response-

- Item 12 of the carrier’s RB-89 was completed with the following phrase: “It is respectfully submitted that the Law Judge's actions were improper and in error under the law as demonstrated in the attached letter of appeal.” The response to Item 12 of the RB-89 is insufficient because it does not provide the grounds upon which the appeal is based and does not include the specific findings of fact which are challenged and/or the errors of law which are alleged (Matter of Kohl’s Department Stores, Inc., 2018 NY Work Comp G1145562).

See Attached Insufficient-

- The Board Panel did not consider the carrier’s application for Board review, as the carrier responded to Item 12, requiring the appellant to set forth the basis of the appeal, by writing, “[a]ttached is the brief regarding the issues raised in question 11.” (Matter of Blanding Plumbing, 2018 NY Wrk Comp G1067624).
- Application for Board review was not considered as it failed to comply with Board Rule 300.13(b)(1). In this case, the claimant's Application for Board Review was not filled out completely, as it responded to Item 12 by stating only “See attached.” (Matter of ADP Total Tool Source-Weigner, Inc., 2017 NY Wrk Comp G1027142; *see also* Matter of Citigroup Inc., 2018 NY Wrk Comp G1726576 (claimant’s counsel noted “See attached appeal”).
- The claimant’s application for Board review was not considered as it failed to comply with Board Rule 300.13(b)(1). In this case, the application was not filled out completely as Item 12 stated only: “Please see attached document, supporting claimant's assertion as stated above.” (Matter of Yeshiva Bnos Ahavas Israel, 2018 NY Wrk Comp G1655367).
- In response to Item 12, the carrier stated its basis of appeal to the WCLJ's finding of labor market attachment is incorrect, “for the reasons set forth in the attached letter of appeal.”

This is insufficient, as the carrier has not provided the grounds upon which the appeal is based (Matter of Dignity Home Care, 2018 NY Wrk Comp G1108745).

“Not Applicable” is Insufficient-

- The Board Panel would not consider the carrier’s incomplete appeal, in part, due to the failure to properly respond to Item 12, merely indicating “N/A.” (Matter of Mount Sinai at Elmhurst Medical, 2017 NY Wrk Comp G0440385; *see also* Matter of Progressive Home Health, 2017 NY Wrk Comp G1228870).

Item 12 Insufficient-

- The claimant's Application for Board Review was not filled out completely, as the claimant did not provide any substantive information in response to Item 12 (“Claimant relies upon the memorandum of law and attachments thereto dated 8/3/17 which contains his factual references to the record and legal arguments”) (Matter of All Seasons Services Inc., 2018 NY Wrk Comp 69312557).
- The response to Item 12 (“It is respectfully submitted that the Law Judge's refusal to place the claimant on an opioid weaning program was in error as will be demonstrated in the attached letter of appeal”) of the RB-89 is insufficient because it does not provide the grounds upon which the appeal is based and does not include the specific findings of fact that are challenged and/or the errors of law that are alleged (Matter of Best Yet Market Inc., 2018 NY Wrk Comp 40701048).
- The response to Item 12 of the RB-89 (“It is respectfully submitted that the Law Judge abused his administrative authority in declining the carrier's request that the matter be closed with a finding of no permanency for the reasons that will be set forth in the attached letter of appeal”) is insufficient because it does not provide the grounds upon which the appeal is based and does not include the specific findings of fact which are challenged and/or the errors of law which are alleged (Matter of County of Nassau Civil Service, 2018 NY Wrk Comp G1534045).
- In response to Item 12, the claimant stated only: “[r]espectfully, the claim should not have been disallowed as explained in the attached letter brief.” This response did not articulate the basis of appeal as required (Matter of New York Black Car Fund, 2018 NY Wrk Comp G1917582).
- The claimant's attorneys' Application for Board Review was not filled out completely as Item 12 states only “Mistakes of Fact and Law.” This is not sufficient as it does not provide the grounds upon which the appeal is based, which is supposed to include specific findings of fact which are challenged and/or the errors of law which are alleged (Matter of Department of Parks & Recreation, 2018 NY Wrk Comp G1624790).
- The response to Item 12 of the RB-89 (“It is respectfully submitted that the Law Judge erred in rescinding the aforementioned schedule as will be set forth in the attached letter of appeal”) is insufficient because it does not provide the grounds upon which the appeal is based and does not include the specific findings of fact which are challenged and/or the errors of law which are alleged (Matter of The John T. Mather Hospital, 2018 NY Wrk Comp G1149096).

Format Issues-

- A Board Panel concluded that the carrier's legal brief is eight-and-a-half pages long, and the carrier did not explain why its legal argument could not be made in eight pages or make a request to submit a brief in excess of eight pages. Therefore, the Board Panel found that the carrier's application for review violates Board Rule 300.13(b)(1)(i), given the length of the attached legal brief to its form RB-89, and that it will not be reviewed (Matter of 53 Veteran's Highway Inc., 2018 NY Wrk Comp G1533417).
- The carrier's application for Board review contains a brief that is nine pages in length, exclusive of the attachments to the application. The carrier did not make a request to deviate from the eight-page limit, as specified under Board Rule 300.13(b)(1)(i), and offered no explanation as to why the argument in the application could not be made within that constraint. The Board Panel found that the carrier's application for Board review will not be considered as it failed to comply with Board Rule 300.13(b)(1)(i) (Matter of Renzi Bros, Inc., 2017 NY Wrk Comp G1635461 and Matter of Arctic Glacier Group Holdings, 2017 NY Wrk Comp G1613039).
- Self-insured employer's application for Board review contained a brief that was 12 pages long, exclusive of the attachments to the application. The self-insured employer's attorney did not make a request to deviate from the eight-page limit and offered no explanation as to why the arguments in the application could not be made within that constraint. The Board Panel found that the self-insured employer's application would not be considered as it failed to comply with Board Rule 300.13(b)(1)(i) (Matter of RTS, 2018 NY Wrk Comp G0939480).
- The self-insured employer's application for review exceeded the 8-page limit, but in the first paragraph of the first page of its brief, the self-insured employer explained that "given the multiple outstanding issues being addressed, the nature of the outstanding issues, the testimony from multiple lay and medical witnesses, and the substantial number of documents in the record relevant to the issues at hand, we believe that more than 8 pages are necessary to adequately address all of the outstanding issues." The Board Panel determined that such a cursory referral to the "number" and "nature" of issues being addressed was an insufficient basis to excuse the failure to comply with the page length limitation of Board Rule 300.13(b)(1)(i) (*see* Matter of City of Rochester, 2018 NY Wrk Comp G0159968 and Matter of RTS, 2018 NY Wrk Comp G0939480). The Full Board has strictly applied this rule to deny review of an application for Mandatory Full Board Review because the attached legal brief exceeded the page limit set forth in the regulation (Matter of Frito Lay, 2017 NY Wrk Comp G0278049).
- SIE submitted a RB-89 with a three-page brief, two affidavits (one two-pages long and the other one page long) and a copy of the New York City Transit Authority Rules and Regulations, which is approximately 329 pages long, as additional information to be considered as part of the appeal. As such, the SIE's RB-89, with its three-page brief, complies with the eight-page brief requirement pursuant to Board Rule 300.13(b)(1)(i) (Matter of NYS Transit Authority, 2018 NY Wrk Comp G1819210).
- The carrier's Application for Board Review, which was filed by its attorney, contains a legal brief that does not conform to the formatting requirements prescribed by the Board as it uses less than 12-point font. Under these circumstances, the carrier's application was not considered because it failed to comply with Board Rule 300.13(b)(1)(i) (Matter of Hohl Industrial Services Inc., 2018 NY Wrk Comp G1610334).

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

Specific Examples:

Item Not Completed-

- The claimant's Application for Board Review was not filled out completely, as the RB-89 filed on March 23, 2018 left Item 13 blank. The additional RB-89, filed March 30, 2018, responded to Item 13 only by listing the subject hearing date, and excluding reference to relevant medical reports, prior testimony, and prior decisions on the (WCL § 114-a) issue at hand (Matter of Skanska USA Civil NE, 2018 NY Wrk Comp G0777216; *see also* Matter of Premiere Home Health Care Services, 2018 NY Wrk Comp G0790121).
- The claimant's representative's Application for Board Review was not filled out completely as Item 13 was left blank. As such, the application was not considered as it failed to comply with Board Rule 300.13(b)(1) (Matter of Jemco Fuel Corp., 2018 NY Wrk Comp G1396209).
- The claimant's Application for Board Review was not filled out completely, as the claimant failed to respond to Item 13 on the RB-89. As the claimant failed to indicate the documents upon which she was relying, the application will not be considered as it fails to comply with Board Rule 300.13(b)(1) (Matter of Human Resources Administration, 2018 NY Wrk Comp G1597639).

“All” Response-

- The carrier's Application for Board Review was not filled out completely as Item 13 states “All.” Item 13 requires the appellant to identify the hearing dates where the issues were raised before the WCLJ and the documents in the file that are relevant. Simply stating “All” does not meet this requirement. Therefore, the application will not be considered as it fails to comply with Board Rule 300.13(b)(1) (Matter of Centennial Elevator Industries, 2018 NY Wrk Comp G1519359).
- The SIE's Application for Board Review is not filled out completely as Item 13 states: “All.” Simply stating “All” does not meet the regulatory requirement. Therefore, the application will not be considered as it fails to comply with Board Rule 300.13(b)(1) (Matter of MTA Bus Company, 2017 NY Wrk Comp G1336495).
- The claimant's attorney's Application for Board Review was not filled out completely as Item 13 states “[a]ll hearings in the Workers' Compensation Board file. All transcripts in the Workers' Compensation Board file. All documents in the Workers' Compensation Board file.” Simply referencing the entire Board file does not meet this requirement. Therefore, the application was not considered as it failed to comply with Board Rule 300.13(b)(1) (Matter of Sanitary District No. 6, 2017 NY Wrk Comp G1717327).
- Claimant's Application for Board Review was not filled out completely as Item 13 identified “all medical reports and the hearing transcript.” The Board Panel found that unless an entire medical file is indeed referred to in a brief, referencing the entire medical file does not meet this requirement (*see* Matter of Sanitary District No. 6, 2017 NY Wrk Comp G1717327). The Board Panel noted that the file included multiple duplicate medical reports and the recitation of “all medical reports,” served only to impede an efficient review process. Therefore, the application was not considered, as it failed to

comply with Board Rule 300.13(b)(1) (Matter of Triborough Bridge and Tunnel Authority, 2018 NY Wrk Comp G1718181).

- The claimant's attorney indicated the following in response to Item 13, “[a]ll hearings in the Workers' Compensation Board file, all documents in the Workers' Compensation Board file, and all transcripts in the Workers' Compensation Board file.” The claimant's attorney failed to cite the transcript, nor any specific document, exhibit, any relevant prior decisions, and/or relevant evidence in response to Item 13 of the RB-89 form. The claimant's attorney failed to reference any relevant parts of the record. The Board Panel therefore denied review of the application (Matter of Planet Hollywood International, 2018 NY Wrk Comp G1805610).
- The claimant's Application for Board Review was not filled out completely, as it responded to Item 13 by referring to the “record as it exists,” and listing only a single memorandum of law as the basis for its appeal on permanency, without referral to key documents. This response was deficient and, as such, the application was not filled out completely. Therefore, the application was not considered as it failed to comply with Board Rule 300.13(b)(1) (Matter of Buffalo Board of Education, 2018 NY Wrk Comp G1053813).
- The claimant's Application for Board Review was not filled out completely as Item 13 identifies “All (documents) in *eCase*.” Simply referencing the entire Board file does not meet this requirement (*see* Matter of Sanitary District No. 6, 2017 NY Wrk Comp G1717327; Matter of Briggs & Stratton Power, 2018 NY Wrk Comp G0831405; Matter of Winco Corp, 2018 NY Wrk Comp G1879086 and Matter of CDTS #1/CDTA, 2018 NY Wrk Comp 50300683).

Incomplete Responses-

- In response to Item 13, the claimant's counsel indicates that the sole document relied upon is “2/26/18.” However, the claimant's RB-89 also refers to multiple documents, including a C-4.3 and the claimant's current medical records, which are not identified in response to Item 13. The Board Panel found that the claimant's RB-89 form to be incomplete (Matter of Children's Village Inc., 2018 NY Wrk Comp G0891460; *see also* Matter of Brooklyn Development Center, 2018 NY Wrk Comp G0386768 and Matter of Advance Auto Parts, 2018 NY Wrk Comp G1066638).
- The claimant responded to Item 13 by listing only one hearing transcript. This is insufficient on its face given the fact that the basis of the claimant's appeal implicates a prior schedule loss of use decision and a prior Board Panel decision (Matter of Bank of America, 2018 NY Wrk Comp 80510326; *see also* Matter of Hersha Hospitality MGMT LP, 2018 NY Wrk Comp G1544977).
- The carrier's attorney's application for review was not filled out completely, as a party cannot respond to Item 13 by merely listing the hearing date at which the findings being appealed from were made, and omitting reference to the evidence being relied upon within the appeal itself (Matter of DC Steel Inc., 2018 NY Wrk Comp 90801203).
- The claimant's Application for Board Review was not filled out completely as it responded to Item 13 by listing the subject decision alone without listing the hearing date, or the relevant documentary evidence in the record. Therefore, the application was not

considered as it failed to comply with Board Rule 300.13(b)(1) (Matter of Dixon Building Company LLC, 2018 NY Wrk Comp G1456740).

ECF Not Functioning-

- The SIE's RB-89 set forth in response to Item 13, that the SIE is relying on the November 9, 2017 hearing minutes, “[s]ee carrier's prior appeal of 1/10/17,” and set forth that “[n]ote should be taken that this application is being prepared at a time when the ECF is not functioning. ACCORDINGLY, please forgive this writer for any errors made in the submission of this appeal.” The Board Panel found that setting forth that the ECF is “not functioning” does not relieve the SIE from submitting a complete RB-89, and notes that relying on a prior appeal that was previously decided by the Board is also insufficient to be considered responsive to Item 13 (Matter of Valley Stream CHSD, 2018 NY Wrk Comp G1279144).
- **Item 14 of Form RB-89**

Specific Examples:

- The claimant failed to respond to Item 14 of the RB-89 in any fashion, leaving it blank. While the claimant may not be relying upon any new or additional evidence, a response of “not applicable” or “N/A” would be appropriate in that situation (Matter of Rexel Holdings USA Corp., 2018 NY Work Comp G1615417; *see also* Matter of L Martone & Sons, 2017 NY Wrk Comp G1079316).
- The SIE submitted documentation that was not submitted before the WCLJ. The documents were not before the WCLJ at the time of the underlying hearing, and the record does not contain a sworn affidavit from the appellant setting forth the evidence, and explaining why it could not have been presented before the WCLJ. The Board Panel refused to consider the new evidence per 300.13(b)(1)(iii), but considered the remainder of the SIE’s application (Matter of General Motors LLC, 2017 NY Wrk Comp G1755307).
- A Board Panel declined to exercise its discretion to consider the claimant's “new and additional” documentary evidence, and finds that consideration of the evidence is not in the interests of justice as the claimant's affidavit provided no sufficient reason for the late submission (Matter of Burns Bros. Contracting, 2017 NY Wrk Comp G0861711).
- The Board Panel found that SIF's affidavit failed to explain why the at-issue evidence could not have been presented before the Workers' Compensation Law Judge and determined it would not be considered by the Board Panel per Board Rule 300.13(b)(1)(iii) (Matter of DOCCS Coxsackie Correctional Facility, 2017 NY Wrk Comp G1269861).
- A WCLJ's refusal to consider the evidence was the crux of claimant's appeal. Counsel attempted to present the information to the WCLJ at the hearing, but the WCLJ rejected its consideration. The Board Panel found, under these circumstances, that Board Rule 300.13(b)(1)(iii) did not apply, as the at issue documentation was not considered to be new evidence (Matter of GT Forge Inc., 2018 NY Wrk Comp G1910997).

- If an affidavit itself is new evidence, not an explanation for the belated production of evidence, as required by Board Rule 300.13(b)(1)(iii), the new evidence will not be considered (Matter of NYC DOT, 2018 NY Wrk Comp G1651536).
- SIF submitted a sworn affidavit with a credible reason for its filing of the evidence. As a result, the Board Panel considered this new evidence as part of its appeal under Board Rule 300.13(b)(1)(iii) (Matter of The Elite Contracting of NY, 2018 NY Wrk Comp G1401818).
- The carrier did not provide responses to Items 14 through 16 on the RB-89.1 form, simply stating “See attached.” However, the Board exercised its discretion to consider the appeal (Matter of The NY Methodist Hospital, 2017 NY Wrk Comp G1028965; *see also* Matter of Whole Food Market Group Inc., 2017 NY Wrk Comp G1008236 and Matter of Newburgh Windustrial Co., 2017 NY Wrk Comp G1213532).

- **Item 15 of Form RB-89**

Specific Examples:

Item Incomplete-

- Item 15 did not indicate what specific objection was made at the hearing and when it was made. Also, review of the hearing transcript reveals that the attorney did not object to the finding that was subsequently appealed from. Board review application was not considered (Matter of Harbor Child Care, 2017 NY Wrk Comp G1278326).
- Carrier’s failure to specify in Item 15 the date of the hearing at issue constitutes a violation of Board rule 300.13(b)(2)(ii) (Matter of Crucible Industries LLC, 2018 NY Wrk Comp G1852921).
- SIF did not complete Item 15. Since SIF’s appeal was of a Reserved Decision, SIF was not required to note an exception and this Item is not applicable per Board Rule 300.13(b)(4)(v)(c) (Matter of NYS Police, 2017 NY Wrk Comp G1699814).

Failure to Note Exception or Object at Hearing-

- Failure to note an exception or objection at the hearing on the record resulted in denial of appeal (Matter of Town of Tonawanda, 2018 NY Wrk Comp G1058619).
- Failure to note an exception or objection at a hearing cannot be overcome by indicating in Item 15 that application is being made in the interests of justice as claimant’s hearing representative was not aware of the issues at the time of the last hearing (Matter of Vikrant Construction, 2018 NY Wrk Comp G1917983).
- Fact that exception or objection was not interposed at hearing due to a mistake did not avoid a finding of a violation of the rule for failure to note a specific objection or exception (Matter of TGI Fridays, 2018 NY Wrk Comp G0997536).
- No objection at hearing and only discussion in Item 15 about general discussion at the hearing in question is not sufficient under Board Rule 300.13(b)(2)(ii) (Matter of Tops Markets LLC, 2018 NY Wrk Comp G1752491).
- No objection made at hearing and Item 15 was not completed. Appeal denied (Matter of Eger Health Care, 2017 NY Wrk Comp 00511587, Matter of Maine Drilling and Blasting

Inc., 2018 NY Wrk Comp G1365845 and Matter of Con Edison, 2018 NY Wrk Comp G0381657).

- A generic exception noted at the hearing (“Note the carrier’s exception”) is not specific enough under Board Rule 300.13(b)(2)(ii) (Matter of Verizon, 2018 NY Wrk Comp G1775604).
- Hearing transcript indicates that the carrier’s representative “summarized their position on the record,” but did not specifically object to the ruling by the WCLJ after hearing the parties’ summations. Appeal was denied (Matter of Pinnacle Environmental Corp., 2018 NY Wrk Comp G1916679).
- Failure to appear resulted in carrier’s failure to interpose an exception or objection, resulting in denial of appeal (Matter of H&G Home and Garden Services, 2017 NY Wrk Comp G1539569 and Matter of Oswego County, 2017 NY Wrk Comp G0639224).
- The hearing transcript does not reveal that carrier noted an objection or took exception to any of the WCLJ’s findings, but the WCLJ’s scratch sheet and decision indicate the carrier took exception to the finding under appeal. The Board Panel noted that the exception must have been made in an off-the-record discussion. The appeal was considered by the Board Panel (Matter of Bernard Fineson DDSO, 2017 NY Wrk Comp G1716663).
- A generalized objection made by a claimant’s representative to a WCLJ’s ruling (“note my exception please”) was sufficient as there was only one issue being ruled upon by the WCLJ (Matter of NYC Transit Authority, 2017 NY Wrk Comp G1681607).

Combined Item 15 and Exception/Objection Issues-

- Item 15 indicates that exceptions were noted with respect to awards “upon information and belief.” Hearing transcript reveals no exception or objection noted on the record. Appeal was denied (Matter of PAL Environmental Safety, 2017 NY Wrk Comp 00744868).
- Item 15 indicates that an objection was interposed at the hearing, but review of the hearing transcript indicates that no exception or objection was interposed to any of the findings made by the WCLJ. Appeal was not considered (Matter of All City Remodeling Inc., 2018 NY Wrk Comp G1915879).
- No objection at hearing and Item 15 indicates “Noted at hearing.” Appeal denied (Matter of Lawrence Public Schools, 2018 NY Wrk Comp G0464430).
- Item 15 notes that it was believed that SIF’s attorney had noted an exception or objection at the hearing; review of transcript revealed the contrary. Appeal denied (Matter of 1000 Islands Moving & Storage, 2017 NY Wrk Comp G0926302).
- At hearing no exception or objection was interposed by Special Funds. In Item 15, Special Funds stated “[t]his appeal serves as the objection.” Appeal was denied (Matter of Western NY DDSO, 2018 NY Wrk Comp 80110795).