

Revised Regulatory Impact Statement for the amendment of Section 300.23 and addition of Section 300.35 of Title 12 NYCRR

1. Statutory Authority:

The Workers' Compensation Board (Board) is authorized to amend 12 NYCRR §300.23, and add 12 NYCRR §300.35. Workers' Compensation Law (WCL) §117(1) authorizes the Board to adopt reasonable rules and regulations consistent with and supplemental to, the provisions of the WCL and Labor Law. WCL §10(4) provides that any person incarcerated upon conviction of a felony shall be deemed ineligible for all benefits provided under this chapter. All those whose benefits have ceased by operation of this section may apply to the Board for benefits upon their release from custody pursuant to regulation of the Board. WCL §15(3)(w) provides a limit to the number of weeks permanent partial disability benefits are payable based upon the claimant's degree of impairment where the date of accident or disability is on or after March 13, 2007.

2. Legislative Objective:

Chapter 6, §37 of the Laws of 2007, added a new subdivision 4 to section 10 of the WCL to deem ineligible for all benefits under the WCL those persons incarcerated upon conviction of a felony. The law further provides that upon release from custody, these individuals may apply to the Board for reinstatement of their benefits pursuant to regulation of the Board. The provision codified existing case law, except that it allows carriers and self-insured employers to suspend causally related medical treatment in addition to wage replacement benefits. Section 4 of Chapter 6 amended WCL §15(3)(w) to create a schedule of maximum number of weeks that a claimant classified with a permanent partial disability, with a date of accident or date of disability on or after March 13, 2007, may receive indemnity benefits. The maximum number of weeks range from 225 weeks where the loss of wage-earning capacity is 15 percent or less, to 525 weeks where the loss of wage-earning capacity is greater than 95 percent.

3. Needs and Benefits:

Section 300.23 governs the requirements to suspend or reduce compensation benefits. The proposal amends several portions of §300.23. There are five categories of changes: 1) amendments necessary to achieve compliance with the statutory changes made by the 2007 workers' compensation reform legislation; 2) amendments so the regulation reflects current Board practice; 3) structural amendments; 4) amendments that change the wording of a provision for clarity; and 5) amendments that make the rule gender neutral.

#### Reform Changes:

The 2007 reform legislation codified case law that claimants who are incarcerated after conviction for a felony are no longer entitled to indemnity benefits. In addition, the reform legislation eliminated the entitlement to medical benefits. The 2007 reform legislation also amended the WCL to cap the number of weeks that claimants classified with permanent partial disabilities may receive indemnity benefits. After the completion of the number of weeks set in WCL §15(3)(w), the claimant is no longer entitled to indemnity benefits. Section 300.23 has been amended in several places to reflect the ability of the carrier to suspend or reduce compensation benefits where there is proof of incarceration upon conviction of a crime. Subsection (c) of section 300.23 has been amended by adding a new subparagraph (ii) to allow carriers to suspend payments for permanent partial disability when payments have reached the maximum number of benefit weeks under WCL §15(3)(w). These amendments provide uniform procedures on how insurance carriers must proceed to stop paying benefits pursuant to the new provisions.

#### Practice Changes:

The Board no longer refers to compensation cases as being open or closed. Cases are pending or they are marked no further action. 12 NYCRR §300.23 is being amended in several places to delete the words open, closed and reopen. Section 300.23(b) is being amended to delete the word open and to make clear that the subsection applies to any case where temporary disability awards have been made. Section 300.23(c) is

amended to delete the word closed and to clarify that the subsection applies to awards for permanent disability. These changes align the regulation with current practices.

The Board decides issues in compensation cases in several other ways besides holding hearings. Issues related to settlement agreements under WCL §32 are handled at meetings, and conferences are held in an attempt to settle issues prior to scheduling a hearing. Section 300.23(b) (2) is being amended to reflect that the Board conducts business via the use of meetings and conferences in addition to hearings. Again, these changes align the regulation with actual practice.

Issues in compensation claims in certain circumstances are decided by conciliators as well as referees. The phrase “Workers’ Compensation Law judge” in §300.23(b) (2) is being replaced with the word Board so as not to limit the type of employee involved in resolving compensation claims. This change allows the Board to make full use of the statutorily provided tools to resolve cases.

#### Structural Changes:

Section 300.23 is a lengthy rule that addresses a variety of situations pertaining to suspending or reducing benefits. Several changes have been proposed to help make the rule easier to navigate. The first un-numbered paragraph in §300.23(b) has been numbered as paragraph (3), and lists the situations where temporary disability payments may be suspended by a carrier without a hearing. A paragraph has been added to §300.23(c) to delineate the situations where a carrier can suspend permanent disability payments without a hearing. These changes will improve the readability of the regulation.

#### Clarity:

Some of the wording in §300.23 is cumbersome. Words have been changed or rearranged to make the rule easier to read and understand. These changes can be found at §300.23(b), §300.23(b) (1) and (2), and §300.23(c). These changes will also improve the readability of the regulation so it is easily understood.

#### Gender Neutral Changes:

Section 300.23 has been amended in several places to replace chairman with chair and to replace his with his/her.

Section 300.35 is added by this proposal to 12 NYCRR to provide direction to a claimant recently released from custody on how to reapply for benefits. The issuance of such regulation is required by the recently enacted WCL §10(4). The addition of 12 NYCRR §300.35 will benefit claimants released from custody by providing a process for reapplying for benefits.

This regulation provides needed direction to parties and practitioners regarding the action they may or must take when suspending or reducing benefits or seeking the resumption of benefits. By following this regulation, parties and practitioners will respond properly when a claimant is incarcerated for a felony or he/she reaches the maximum number of weeks to receive benefits.

#### 4. Costs:

The Board estimates there will be little or no additional costs as a result of the amendments of §300.23 and the addition of §300.35. While the Board will have to scan the notice of release from custody and the accompanying information into the electronic case folder, the number of documents will be small as only a small number of claimants have their benefits suspended due to incarceration for a felony.

Costs may be reduced for carriers and self-insured employers because there will be clear direction on the actions carriers must take when a claimant is incarcerated after conviction. Further it is now clear that carriers and self-insured employers are no longer responsible for causally related medical expenses while claimants are incarcerated upon conviction of a felony.

New §300.35 instructs claimants on how to reapply for benefits following their release from custody. The addition will not result in any added or reduced costs for the parties. The carriers' and self insured employers' resumption of benefits is not an added cost but a payment of causally related benefits under the WCL.

#### 5. Local government mandates:

There are approximately 2300 local governments that are self-insured for workers' compensation purposes. The proposed amendments to §300.23 and proposed addition of §300.35 do not impose any additional responsibilities or duties on local governments. Section 300.23 relieves local governments from having to pay for causally related medical treatment while the claimant is incarcerated upon conviction of a felony. Section 300.35 provides a process for claimants released from custody to reapply for benefits. The resumption of benefits after release from custody provided adequate proof is supplied, is not an additional responsibility for local governments but rather is already required under the WCL.

#### 6. Paperwork:

The amendments to §300.23 will require the carrier or self-insured employer to file an application or a C-8/8.6 to suspend benefits together with proof of the claimant's incarceration upon conviction of a felony. The carrier or self-insured employer will also have to file a C-8/8.6 to suspend payments based when the cap on permanent partial disability benefits is reached. This provision reiterates the requirement in WCL §25(1) (d) that carriers and self-insured employers must provide notice to the Board that the payment of compensation has ceased upon a form prescribed by the Chair.

In order to resume benefits, §300.35 will require a claimant released from custody to file a form prescribed by the Board together with proof of release from custody, and up to date medical evidence where the claimant has not, as of the date of conviction, been classified with a permanently partially disability. However this is the current practice so this provision merely codifies existing law and practice.

#### 7. Duplication:

This rule does not duplicate any existing state or federal rules. This merely sets forth the process to implement amendments to WCL §10(4) and §15(3) (w).

#### 8. Alternatives:

The alternative to amending §300.23 and creating §300.35 would be to do nothing and rely on the newly enacted WCL §10(4), and the newly amended WCL §15(3) (w). This course of action is unsatisfactory because the statutes do not outline a procedure as to how a carrier or self-insured employer should suspend benefits, and §10(4) specifically requires the Board to issue regulations on the process for reinstatement of benefits following incarceration. The requirements relative to suspension of compensation benefits are contained in 12 NYCRR §300.23, which is the proper place to include the procedure for how a carrier or self-insured employer can suspend benefits for a claimant incarcerated upon conviction of a felony or for a claimant who has received the permanent partial disability payments for the maximum number of weeks. WCL §10(4) provides that claimants whose benefits have ceased by operation of that provision may apply to the Board for benefits pursuant to a regulation of the Board, thereby clearly contemplates rulemaking by the Board and making the addition of §300.35 mandatory. The Board seeks to implement the simplest process for the resumption of benefits for those whose benefits ceased pursuant to §10(4).

9. Federal Standards:

There are no federal standards applicable.

10. Compliance Schedule:

Affected parties will be able to achieve compliance with the rule upon adoption.