

Assessment of Public Comment

The 45-day public comment period with respect to Proposed Rule I.D. No. WCB-39-11-00011-P commenced on September 28, 2011, and expired on November 14, 2011. The Chair and the Workers' Compensation Board (Board) received and accepted formal written public comments on the proposed rule through November 18, 2011.

The Chair and Board received 67 formal written comments. 66 of the comments expressed concern regarding the adoption of the regulatory amendments. The Board received letters or emails from: ten attorneys or attorney groups; fifteen Board employees; 24 court reporters; eight New York State legislators; one manufacturer of digital audio recording equipment; and, three unions. The remaining six commenters did not identify themselves with any group.

All of the comments received were reviewed and assessed. The commenters shared similar concerns about the proposed regulatory amendments. In fact a number of the letters used identical language. The concerns expressed mirrored the concerns expressed by the Senate Labor Committee and addressed by the Chair of the Board at a hearing on October 6, 2009. At that hearing the Chair of the Workers' Compensation Board testified to address those concerns. This assessment will summarize and respond to the comments received.

Comments concerning Workers' Compensation Law section 122

A number of commenters expressed concern that the proposed regulatory amendments are in violation of the language contained in Workers' Compensation Law (WCL), section 122. Section 122 of the WCL provides that:

A copy of the testimony, evidence and procedure of any investigation, or a particular part thereof, transcribed by a stenographer in the employ of the board and certified by such stenographer to be true and correct may be received in evidence with the same effect as if such stenographer were present and testifying to the facts so certified.

As set forth in the Regulatory Impact Statement, section 122 of the WCL does not require that records of hearing testimony be taken by Board employees, nor does it require that testimony be recorded by a stenographer. Rather, this section provides that if such testimony, evidence or procedure of an investigation is taken by a Board stenographer (now known as verbatim reporters) it does not require the stenographer's presence to be entered into evidence. Therefore, this section focuses on the evidence which can be admitted in a Board proceeding. This section does not address the record to be kept of hearings, and only discusses who transcribes any minutes of an investigation taken. Further, this section relates to investigations, and an investigation is not a hearing.

The amendments to 12 NYCRR §§ 300.7(c), 300.9, 300.13(d), 300.18(f), 325-4.6(c), 326-1.5(b), 326-2.7, 330.4(b), 340.4(b) and 345.4(b) are in accordance with the Board's duty to conduct accurate and fair hearings, to ensure that all parties are afforded due process and to preserve the integrity of the hearing process.

Alternative and additional means of recording hearings, such as electronic recording devices, will ensure that all parties receive accurate, impartial, timely and fair hearings. In addition, alternative means of recording will assist the Board in ensuring that the hearings are conducted in the utmost professional and ethical manner. This will assist the Board in maintaining the integrity of the hearing process.

Comments concerning the "replacement" of verbatim reporters with electronic recording devices

The regulatory amendments will not have an adverse impact on existing verbatim reporters' jobs. Rather than requiring that hearings be recorded by a stenographer in §§ 300.7(c), 300.9, 300.13(d), 300.18(f), 325-4.(c), 326-1.5(b), 326-2.7, 330.4(b), 340.4(b), and 345.4(b), the rule allows the Board to maintain the verbatim record in a readable, viewable, or audible format. This change will provide the Board flexibility to use other means of recording hearings, such as audio digital recordings, *in addition* to using verbatim reporters. The proposed regulation should have little to no effect on the verbatim reporters currently employed by the Board. The Board expects to continue to use their services to record and transcribe hearings. It is not clear what effect this rule

will have on the employment of new verbatim reporters. The implementation of additional means of recording hearings may reduce the need to fill all of the unfilled verbatim reporter positions. As was fully developed at a hearing before the New York State Senate Standing Committee on Labor on October 6, 2009, the Board has had longstanding and intractable difficulties attracting verbatim reporters and retaining verbatim reporters. An important reason why the Board has so many unfilled positions is that verbatim reporters, especially downstate, leave the Board after a few years, four to five, for employment in higher-paying positions with the Office of Court Administration.

Comments regarding accuracy of electronic recordings

A number of commenters voiced opposition to the proposed regulatory amendments based on a belief that electronic recording of hearings will not result in an accurate record. The commenters concerns appear to be based on prior experience with or anecdotal information regarding older, less technologically advanced equipment than that selected by the Board. The concerns by the commenters are that the electronic equipment will not clearly record the variety of speakers and languages at a workers' compensation hearing. It is noted that the amended regulations require that the Board maintain a record of a proceeding in a "readable, viewable or audible format." Thus the Board retains its obligation to create a usable record of every hearing and proceeding.

Furthermore, it is believed that the commenters concerns are based on misconceptions about the equipment used by the Board and the process the Board employs when digital-audio recording is employed. The digital audio-recording equipment that the Board has been using, records each speaker at a workers compensation hearing using an individual microphone. The Board has extensively tested this equipment during the pilot phase to ensure that the equipment generates an accurate, understandable and complete record.

Comments that verbatim reporters job function reaches beyond recording of hearings

Several commenters stated that a verbatim reporter does not merely record the hearing or proceedings, but in fact facilitates the smooth functioning of the hearing by assisting and directing the parties as well as reading

back testimony or requesting clarification when an accented speaker testifies. It is undisputed that verbatim reporters perform these functions at hearings and will continue to function in this capacity on behalf of the Board. However, the gradual and smooth transition to use of digital audio-recording at hearings will permit all participants to adapt to any changes in process. Furthermore, verbatim reporters will still participate in many trials with multiple participants.

Comments regarding availability of transcript

Several commenters were concerned that transcripts of hearings would not be available for reference in appeals by page number and that listening to a recorded hearing takes much longer than reviewing a typed transcript. This is a misconception about the process. Transcripts will still be made of Board hearings when requested. Use of alternate methods of recording the hearing, such as digital audio recording, will permit verbatim reporters to use their time in a more valuable manner. Currently seventy-three percent (73%) of all Board cases require a hearing which in turn requires a verbatim reporter to be present. Of the seventy-three percent (73%) only three and one-half percent (3.5%) require stenographic transcription of the hearing minutes. In other words, nearly seventy percent (70%) of the verbatim reporters' work at hearings is never transcribed. This is an inefficient and expensive way to record hearings. Verbatim reporters spend approximately seventy percent (70%) of their work time recording hearings that will never be transcribed and only (30%) of their work time transcribing the hearing minutes and performing other job-related duties. Transcripts will continue to be made of hearings as requested by the parties regardless of the method used in recording the actual hearing.

Comment that hearing reporters are available and that use of digital audio recording equipment is too expensive

Some commenters expressed skepticism at the Board's contention that it has difficulty attracting and retaining verbatim reporters and that the unavailability of hearing reporters has resulted in unnecessary adjournments of hearings. As stated in the Regulatory Impact Statement, the shortage of verbatim reporters was so severe that the Department of Civil Service granted the Board the ability to conduct the exam on a

decentralized basis. In 2002, verbatim reporters were upgraded and received an increase in salary. Additionally, verbatim reporters are permitted to supplement their state wages by charging parties a per page fee for transcriptions of Board hearings and working for parties on their own time taking depositions of medical witnesses in Board related cases. In spite of all this, verbatim reporters elect to leave the Board for positions at the Office of Court Administration when they have gained the required experience. Due to shortages, the Board has been forced in certain locations to schedule calendars of hearings which are not trials. The purpose of no-trial hearing calendar is that if there is no verbatim reporter available, the Board can more easily cancel the calendar if necessary. Currently, conducting a hearing without a means to record it stenographically violates the regulations. Alternative and additional means of recording hearings, such as electronic audio and video devices, would supplement the existing verbatim reporter staff and provide the Board with much needed flexibility in scheduling and conducting hearings. If the Board had the ability to conduct hearings without verbatim reporters being present, there would be no need to cancel hearings which necessarily would prevent delays and difficulties in ensuring timely resolution of claims. Further, when cases are cancelled it not only delays the resolution of a case, but it also creates backlogs of cases to be heard. With additional means of recording proceedings, the Board can examine whether proceedings, such as conciliation meetings, should be recorded.

As stated in the Regulatory Impact Statement, it is estimated that the cost of installing electronic recording devices will be \$5,000.00 per unit for each hearing part. At the present time, the Board has not determined the number of electronic recording devices which may be installed or a time frame that the installation will be performed. It is the Board's plan to install alternative means of recording on an as needed basis over time. The cost of adding an electronic recording device will not be passed to any of the participants in the workers' compensation system.

Comments that electronic recording of hearings will stifle off-the-record discussions

Several commenters were concerned that the use of electronic recording devices will stifle off-the-record and settlement discussions between the parties. The use of electronic recording devices should not affect the conduct of hearings in any manner. The parties will still be able to conduct off-the-record and settlement discussions and those discussions will not be transcribed for use in appeals.