

Assessment of Public Comment

The 45-day public comment period with respect to Proposed Rule I.D. No. WCB171300002 commenced on April 24, 2013, and expired on June 8, 2013. The Chair and the Workers' Compensation Board (Board) received and accepted formal written comments on the proposed rule through June 15, 2013.

The Chair and Board received formal written comments from one entity, the State Insurance Fund (SIF). This Assessment will address each comment made and summarize the minimal clarifying changes to the proposed regulation.

SIF commented that the Board could not limit the statutory grant of discretion permitting the Board to excuse a carrier's late filing of a notice of controversy granted by Workers' Compensation Law (WCL) §25(2)(b), by prohibiting a carrier's filing of a notice of controversy as a first report of injury when more than 18 days from the date of injury and 10 days from the employer's knowledge have elapsed in proposed 12 NYCRR §300.22(b)(ii). The Board has not made any changes to the regulation based on this comment because the Board's discretion to excuse a late filed notice of controversy is granted by WCL §25(2)(b) and is preserved in proposed 12 NYCRR §300.22 (d). Proposed 12 NYCRR §300.22(b) and (c) addressed notices of controversy filed pursuant to WCL §25(2)(a).

SIF also notes that the sentence in 12 NYCRR §300.22(b)(ii), "A notice of controversy may not be filed as a first report of injury when it is filed more than 18 days after the disability event or more than 10 days after the employer has knowledge of the disability event," fails to state that it should be the greater of 18 days and 10 days. The sentence has been changed to read "Unless it is filed on or before the greater of 18 days after the disability event or within 10 days after the employer has knowledge of the disability event as required by subdivision (1) herein, a notice of controversy may not be filed as a first report of injury."

SIF states that a carrier should always be permitted to submit a notice of controversy as a first report of injury because the carrier may not have sufficient information to complete a subsequent report of injury. The

circumstances for filing a notice of controversy as a first report of injury and subsequent report of injury are set by the protocols of the International Association of Industrial Accident Boards Commission, a national organization, and are being used successfully by carriers in 39 states. Based upon the successful use of these protocols by all national insurance carriers and many regional carriers, the Board believes that SIF's concerns are unwarranted and no change is necessary.

SIF also commented that the requirement in subdivision (f) (2) of section 300.22 that requires a carrier to file a subsequent report of injury within 18 days of the resumption of disability should be changed as a carrier may not necessarily know when a disability has resumed, particularly if the claimant has returned to work with a new employer. Based on this comment, the board has clarified that the subsequent report of injury is due within 18 days of the resumption of "payments for" a disability.

Finally, SIF commented that the provisions in section 300.23 that in some instances require the carrier to electronically file a report on a change in payment and simultaneously send documents in support of the change in payment to the Board could result in the supporting documentation being filed prior to the electronically filed report. This is an unlikely scenario for two reasons: 1) the carrier will know almost immediately if a transaction is rejected; and 2) the mailing of supporting documents will take several days and then the scanning of those documents into the Board's electronic case folder also takes a couple of days.

CHANGES TO THE REGULATION:

The Regulation that is being adopted contains the following insubstantial changes from the proposed rule published in the April 24, 2013 State Register:

- In section 300.22 (a)(3), the following sentence has been added to clarify that an electronic filing will not be untimely when it is received by the Board on time, but is not processed by the Board until after the expiration of the filing date. The new sentence reads: "For the purpose of determining whether an electronic submission has been timely submitted, any electronic transmission that is submitted to and

accepted by the Board within the time required by subdivisions (b), (c), (d) and (f) herein shall be considered timely submitted when such electronic transmission is later acknowledged by the Board even though the acknowledgement by the Board may have occurred after the time required by subdivisions (b), (c), (d) and (f).”

- In section 300.22(b)(1)(ii), the sentence “A notice of controversy may not be filed as a first report of injury when it is filed more than 18 days after the disability event or more than 10 days after the employer has knowledge of the disability event” has been changed, for the purpose of clarification, to “Unless it is filed on or before the greater of 18 days after the disability event or within 10 days after the employer has knowledge of the disability event as required by subdivision (1) herein, a notice of controversy may not be filed as a first report of injury.”
- In section 300.22 (f)(2), in the first sentence, “payments for” has been added and “due to the resumption of disability” removed. The sentence now reads “Within 18 days of a resumption of payments for a disability, the carrier, Special Fund, or TPA shall file electronically with the Board a subsequent report of injury indicating payments made to the claimant.”
- In section 300.22 (g), the effective date has been changed from April 20, 2014 to April 23, 2014 to ensure enough time for implementation by all carriers, self-insured employers and third-party administrators.
- In section 300.23 (b)(1) and (c)(1), “A copy of the notice shall be transmitted to the claimant and his or her attorney or licensed representative, if any, within one business day of the date it is filed electronically with the chair and,” has been changed to “A copy of the notice and supporting evidence shall be transmitted to the claimant and his or her attorney or licensed representative, if any, on the same day it is submitted to the Board or if submitted electronically within one business day of the date it is filed electronically with the Board and,” as service on the next business day is only permitted when a

notice is submitted to the Board electronically in order to give the carrier sufficient time to receive an acknowledgement from the Board that the notice was electronically filed.