

Assessment of Public Comment

The 30-day public comment period with respect to revised Proposed Rule I.D. No. WCB121300004 commenced on January 8, 2014, and expired on February 7, 2014. The Chair and the Workers' Compensation Board (Board) accepted formal written public comments on the proposed rule through February 10, 2014.

The Chair and Board received written comments from the State Insurance Fund (SIF) and from Workplace Health Solutions, an IME entity (Workplace Health). Each comment is addressed below.

SIF commented that the Board should require that health care professionals who conduct records reviews to be authorized by the Board to conduct IMEs. The Board has not made any change to the regulation as the definition of records review requires that a health care professional conducting a records review be authorized as an IME examiner, authorized as a treating provider or "qualified" within the meaning of 12 NYCRR 300.2(b)(9).

SIF commented that the word "surgeon" should be removed from paragraph (9) of section 300.2 (b) since the word "physician" is also used and the word physician includes surgeons. This change is consistent with changes to paragraph (2) of section 300.2 (b). The Board has made this change.

SIF commented that to provide greater clarity, the language of paragraph (11) of section 300.2 (b) concerning requests for information should be amended to include "third party administrators." Third party administrators are defined under section 300.1 (10) as separate from insurance carriers. The Board has made this change.

SIF commented that paragraph (4) (i) of subdivision (d) which pertains to providing reports based on a review of records without an examination of the claimant should be changed to provide that such reports be "completed, filed and served" at least 3 business days prior to a scheduled hearing date, rather than simply "sent" at least 3 days prior to a hearing. Because a records review is not an IME, the Board has not accepted the suggestion to impose the same requirements as an IME report. The Board has, however, changed the language

to provide that the records review should be “filed with the Board and submitted to all other parties or their representatives” at least three business days prior to the scheduled hearing.

SIF also suggested that the Board make a form change in conjunction with its amendment specifically stating that an IME provider may not refuse to conduct an IME because a claimant intends to videotape the examination. This suggestion will be forwarded to Board’s the Business Process Reengineering project for consideration.

SIF also suggested changing the word "provider" to "physician" in paragraph (8) of subdivision (d) to make it consistent with paragraph (1) of subdivision (b). The Board has made this change.

Workplace Health commented that the IME provider would not be able to sign the IME-3 form if the medical reports are sent to the Board at the same time they are sent to the provider. Any medical records provided to the IME provider at the time the IME is scheduled and that were supplied to the Board at that time in accordance with paragraph (3) of subdivision (d) are not a request for information or a response to a request for information. Accordingly, no IME-3 is required for submission of these records to the Board. Accordingly, the Board has made no change in response to this comment.

Workplace Health commented that when a claimant treats with more than one attending physician or practitioner, the requirement that a copy of the IME report be provided to all that have treated the claimant within the last six (6) months has the potential to be unduly burdensome on the IME entity based upon the potential volume of attending physicians or practitioners. Workplace Health suggests that the Board accept copies of reports being sent to all attending physician or practitioner that are listed in the Board file as “Interested Parties.” The regulation requires that the IME report be submitted to all physicians or practitioners that have treated the claimant for the condition that is the subject of the IME. This list should be readily available to the insurance carrier, employer or third-party administrator requesting the IME based on a review of the medical records in the file, and supplied to the IME entity or the IME provider. The list of medical

providers that are parties of interest in the Board file would not be appropriate as they are added due to a disputed medical bill and not because of the nature of the treatment. The Board has not made any changes in response to this comment.

Workplace Health commented that the regulation does not advise who is responsible for the distribution of a records review. As the regulation does not prescribe who should submit the records review, the arrangements for submission of the records review may be arranged by the parties seeking the records review or conducting the records review. The Board has not made any change in response to this comment.

Workplace Health commented that the regulation does not describe the notice required from the claimant when he or she intends to videotape the IME or the time frame for such notice. The Board has not made any change in response to this comment. Workers' Compensation Law section 137 permits the claimant to videotape the IME and requires that the IME provider give notice of his or her intent to videotape. The claimant is not required to give notice in advance.

Workplace Health commented that the changes to paragraph (12) of subdivision (d) are unclear as to whether the claimant may waive his or her entitlement to ten days notice of the scheduling of an IME. This paragraph, formerly paragraph (9) of subdivision (d), does not impact the claimant's ability to waive the time frame for notice. It has been amended solely to permit denial of an objection to an IME report when such objection is not raised in a timely manner. The Board has not made any change in response to this comment.

CHANGES TO THE REGULATION:

The Regulation that is being adopted contains the following changes from the revised proposed rule published in the January 8, 2014 State Register:

- In subdivision (b)(9), the word "surgeon" has been removed from the first sentence.

- In subdivision (b)(11), the first sentence has been changed. Specifically, “or insurance carrier” has been changed to “, an insurance carrier or third-party administrator.”
- In subdivision (d)(4)(iv), the requirement that records reviews be “sent” to the Board and all parties has been changed to require that records reviews be “filed” with the Board and “submitted” to all parties three business days before a hearing.
- In subdivision (d)(8), attending “provider” has been changed to “physician.”