

## Revised Summary of Regulatory Impact Statement

### 1. Statutory authority:

The Workers' Compensation Board (hereinafter referred to as Board) and the Chair of the Board are authorized to adopt this rule pursuant to Workers' Compensation Law (WCL) § 117(1), § 141, §142, §25, §24, §13-a, §13-b, §13-d, §13-k, §13-l, §13-m and Chapter 6 of the Laws of 2007.

### 2. Legislative objectives:

On March 13, 2007, Governor Spitzer signed into law sweeping reforms of the workers' compensation system which amended the WCL to increase benefits to claimants while decreasing costs to employers. Section 40 of Chapter 6 amended WCL Section 25(2-a) to reduce the period in which a pre-hearing conference (PHC) is held from 60 days to 45 days and to require a medical report before scheduling a pre-hearing conference. These regulations build upon these legislative changes so that controverted claims can be resolved as quickly as possible.

### 3. Needs and benefits:

In a letter dated March 13, 2007, Governor Spitzer directed the Superintendent of Insurance, with the assistance of the Chair of the Board and the Commissioner of Labor, to development recommended regulations to adjudicate a controverted claim within ninety days. To assist the Superintendent, the Governor directed the formation of an Advisory Committee comprised of representatives of the AFL-CIO, Business Council of New York State, New York State Senate and Assembly. On June 1, 2007, the Superintendent issued his report and recommended regulations.

The Board received comments regarding the recommended regulations from attorneys, associations representing attorneys, one union, an occupational health and safety committee and the New York State Insurance Fund. In addition, the Chair and other representatives of the Board met with interested parties to discuss their concerns regarding the recommended regulations. Based upon the comments and concerns

expressed, as well as logistical challenges identified by the Board, the recommended regulations have been revised to retain the goal of resolving controverted claims within 90 days and the core philosophy that more information early in the claim enables the insurance carrier or self-insured employer to make informed decisions about whether or not to controvert a claim.

The proposed rule eliminates the requirement that a determination of prima facie medical evidence be made within five days of receipt of the notice of controversy, the mediation conference and removes the requirement that the first expedited hearing occur immediately after the PHC. The proposed regulations are based on a 30-60-90 timeframe. The PHC will be held within 30 days of the filing of the notice of controversy and a medical report referencing an injury. The initial expedited hearing, at which all lay testimony will be taken, will be held 30 days after the pre-hearing conference or 60 days after the receipt of the requirement documents. If a second expedited hearing is necessary for medical testimony it will be held no more than 60 days after the pre-hearing conference. The 30-60-90 timeframe fits easily within the statutory requirements.

Chapter 6 of the Laws of 2007 amended WCL § 25(2-a) to reduce the maximum time period in which a PHC must be held in a controverted case from 60 to 45 days and added the requirement that “a medical report referencing an injury” must also be received by the Board before the 45 day time limit begins to run. These changes clearly indicate the need for faster resolutions of controverted claims and that the evidence necessary to proceed to a PHC is a medical report referencing an injury.

The reduction in time from receipt of a notice of controversy to the convening of a PHC has obvious benefits for an injured worker. In the past PHCs were held only to find that there are no medical reports in the Board’s file for the Workers’ Compensation Law Judge (WCLJ) to review for the purpose of determining whether “prima-facie medical evidence” (PFME) exists. These types of “no medical evidence” hearings were of limited value. The statutory amendment and the proposed regulations ensure that “no medical evidence” PHCs will no longer be held. In addition, the amendment makes clear that all that is needed in order to proceed to a pre-

hearing conference at which discovery will close and a hearing scheduled is a medical report referencing an injury. Therefore, prima facie medical evidence is now a medical report referencing an injury. The proposed regulation sets forth this definition.

The new case file creation, claim indexing, notice of indexing and notice of controversy regulations are designed to generate more claim information earlier in the process so that an employer/carrier can make an informed decision whether to accept or controvert a claim. If the decision is to controvert, the proposed regulations require the employer/carrier to specifically state the basis (es) of the controversy.

The proposed regulations require the filing of a PHC statement at least 10 days prior to the PHC. This statement must contain certain required information. It is intended to narrow the issues in dispute, provide witness names, and otherwise facilitate the prompt and efficient resolution of disputed issues relating to the basic, initial compensability of the claim.

The new regulations are designed to expedite the adjudication of controverted claims by requiring carriers to file Independent Medical Exam (IME) reports, if the carrier wishes to produce such a report in support of its controversy, on or before the initial expedited hearing date.

The proposed regulations modified the recommended regulations to schedule the initial expedited hearing 30 days after the pre-hearing conference to ensure the most efficient use of resources. Under the recommended regulations, if a controversy was resolved at the PHC then the time blocked for the initial expedite hearing would not be used. In addition, parties would be required to prepare witnesses and prepare to examine witnesses before a WCLJ had ruled whether the witness could testify at the PHC. The proposed regulations require the taking of all medical testimony at a hearing to be held within 30 days after the initial expedite hearing or no more than 55 days after the PHC.

Like the recommended regulations, the proposed regulations regulate and limit the circumstances under which adjournments in controverted cases can be granted. Adjournments usually prolong the time it takes to

reach a decision in a controverted case. Additionally, the proposed regulations limit appeals of decisions that contain orders and directions that do not establish or disallow the claim. This provision is in accordance with existing regulations at 12 NYCRR §300.34.

Unlike the recommended regulations, the proposed regulations revise 12 NYCRR §300.33 and §300.34. These sections currently govern PHCs and the expedited hearing process. Changes were made to conform to the provisions in section 300.38 for controverted claims.

#### 4. Costs:

Some of the provisions in the regulations already exist, such as the filing of IME reports and PHC statements. The proposed regulations eliminate the requirement in the recommended regulations that a mediation conference occur before the PHC. Carriers, self-insured employers and attorneys would have incurred costs in attending these conferences. There should be fewer controverted claims because carriers and self-insured employers will be able to make an informed decision due to the increased information they will receive and the requirement that the Board receive a medical report before indexing a claim. The regulations require parties to use required forms. Employers, carriers, attorneys and medical providers may experience some increase in costs from fully complying with the WCL and regulations.

There are some minimal costs that will be incurred regardless of whether the claim is controverted, such as distributing the Claimant Information Packet (Packet) to employees injured or who become ill on the job. Legal Representatives of claimants will incur small costs in complying with the requirement to submit a written certification and a list of documents if the representative is retained at the time the Form C-3, Employee's Claim for Compensation, is filed with the Board.

#### 5. Local government mandates:

All local governments, especially the approximately 2,511 political subdivisions who currently participate in self-insured programs for workers' compensation coverage in New York State, will have to comply with these

regulations. Local governments will be affected by the proposed rule in the same manner as all other employers. Since the purpose behind the regulations is to speed the resolution of controverted claims so claimants receive the benefits they are entitled to as quickly as possible, there is no justification or reason why an employee of a local government has any less right to a swift resolution when a local government decides to controvert a claim.

6. Paperwork:

The proposed rule imposes some paperwork requirements. First, the rule requires that all forms be completed fully which the Board has not historically required. The proposed rule creates consequences for failing to fully complete forms. Second, existing forms must be modified. The proposed regulations require revised Forms C-2, C-3, C-4, C-7 and PH-16.2. Third, new forms and documents are required such as, a claimant must complete a limited medical release in order for a claim to be indexed in certain cases, claimant's legal representative must file a written certification that the allegations and facts in the employee claim form have evidentiary support or will have such support after an opportunity for investigation, and claimant's legal representative must file a list of all documents that may be used to support the claim. The employer upon receiving notice of a work place injury must provide the employee with a Claimant Information Packet. The Board is required to send this packet to an individual who has not retained a legal representative and has a case number but a claim has not been indexed. The limited release required by the regulations is only for relevant medical records for the same condition or injury site as that at issue in the workers' compensation claim. To obtain a broader release, an insurance carrier must make an application to the Board supported by an affidavit showing relevance. Requests for adjournments under the proposed rule must be made by affidavit rather than merely submitting a letter or telephoning the Board.

The proposed rules will limit some paperwork because it limits the filing of appeals until a final decision is reached. The proposed rule will also limit the number of summations, memoranda of law and/or briefs that are submitted.

The proposed rule requires the parties to file all medical reports obtained by them through the use of medical releases with the Board.

7. Duplication:

These amendments will not duplicate any existing Federal or State requirements.

8. Alternatives:

One alternative would be to take no action. However, given the statutory amendment of WCL § 25(2-a) and gubernatorial directive to design a streamlined docket system to process workers' compensation claims, this is not a viable alternative.

Another alternative would be to propose and adopt the recommended regulations as submitted to the Chair and Board. However, the recommended regulations contain provisions which are inconsistent with statute, do not account for all types of claims that are filed with the Board, and contain provisions which are logistically difficult for the Board and the parties. The proposed regulation has addressed these issues.

The Board received suggested changes to the recommended regulations from participants in the system and from within the Board.

9. Federal standards:

There are no federal standards applicable to this proposed rule.

10. Compliance schedule:

It is expected that the affected parties will be able to comply with the new definitions in §300.1 and the indexing requirements in §300.37 immediately and be able to comply with the changes to §300.33 and §300.34 and new controverted claims process in §300.38 by November 3, 2008. However, the statutory amendment to WCL § 25(2-a) requiring the PHC to be held within 45 days from the filing of the notice of controversy and a medical report referencing an injury became effective for claims filed on and after March 13, 2007, and has been implemented. Therefore, parties are already complying with these requirements.