

Summary of Assessment of Public Comment

In June 2007 the Superintendent of Insurance submitted recommended streamlined adjudication regulations for controverted claims to the Board based upon the work of an advisory committee comprised of representatives of the AFL-CIO, Business Council of New York State, Assembly and Senate, Labor Department, Board and Insurance Department. Based upon all input, including comments from stakeholder groups, Board staff, and workers' compensation law judges (WCLJs), the Board modified the regulations without changing the underlying goal: resolution of controverted claims within 90 days and increased information at the onset of a claim to enable speedier resolution.

Thirty-three comments were received from: twelve attorneys, five individuals, one third party administrator, one Board employee; the Injured Workers' Bar Association, Workers' Compensation Alliance, Workers' Injury Law & Advocacy Group, Business Council of NYS, Erie County Bar Association, New York Self Insurers Association, American Insurance Association, New York State Insurance Fund, Kennedy Valve, New York State Trial Lawyers Association, and Medical Society of the State of New York. Three practice groups of physicians provided comments on revisions to the Board's Attending Doctor's Report and Carrier/Employer Billing Form (C-4) form.

Comments were submitted regarding modifications to the C-2, C-3, and C-4 forms. These form changes are not part of the proposed regulation but underwent a separate process. As the modifications to these forms are not part of this rule making, comments pertaining to them are not discussed.

The Board received a number of comments that only expressed a general objection to the proposed regulations without any discussion. Most of the remaining comments focused on the same issues and made the same or contradictory arguments.

Many of the comments raised issues with the indexing rules for claims. Among the issues raised are that the rules are too complex, contrary to statute, create a new defense, and will delay the indexing and adjudication of claims. The Workers' Compensation Law (WCL) does not require that a case be indexed before a pre-hearing conference (PHC) can be held. The proposed regulations specifically provide that if the carrier files a notice of controversy (C-7) form before a claim is indexed, indexing is not required and the Board may take appropriate action to address any issues. Therefore, if a C-7 form is received for a case that is not indexed and a medical report referencing an injury is in the file, a PHC will be scheduled.

The WCL does not require a C-3 form or medical release be filed in order for a case to be indexed as it does not define any requirements for it to occur. Rather, WCL §141 empowers the chair to make administrative regulations and orders providing for the indexing of claims.

The release of information about prior medical records, called the limited release, while part of the C-3 form, will also be a separate form so it can be filed without the C-3 form. The regulations only require a limited release when the claimant has filed a C-3 form and indicated on the form that he/she has a prior injury to the same body part or similar illness to the one(s) listed on the form. A limited medical release is to speed the exchange of information so that parties can make better informed decisions and to foster prompt resolution or settlement. This requirement does not create any new defenses and does not violate the statute.

The Board maintains that the regulation does not increase the focus on a claimant's prior medical history or allow the carrier to change its focus. Carriers routinely send general medical releases to claimants. Most of the releases are signed, but when claimants fail to sign them, the WCLJ will direct the claimant to sign the release.

Contrary to the comments submitted, a claim does not require a C-3 and limited release form in every case to be indexed. A claim may be indexed upon receipt of a C-2 and a C-4. WCL §110(2) mandates that employers file with the Board and its carrier a report of any accident causing injury which results in two or

more medical treatments or lost time beyond the day of the accident within ten days of the accident. WCL §13-b (4) (a) requires physicians to file a medical report on a form prescribed by the chair within 48 hours of the initial treatment. If the Board receives these two forms at the same time or a C-3 and C-4 it will index the case if a limited release is not necessary.

Some who commented suggested that a C-3 form and medical release be required to index a claim. Requiring a C-3 form to index a claim was not in the recommended regulations though it was discussed in depth by the committee that advised the Superintendent. The Board considered this suggestion before proposing the regulations and decided that requiring the C-3 form to index would be too restrictive and possibly negatively impact claimants. Recognizing that the filing of a C-3 form helps to speed resolution, the proposed regulations require the Board to send a claimant information packet when it creates a case, the Board has not received a C-3 form, and the claimant is unrepresented. The claimant information packet contains a C-3 form and instructions on how to complete it. A C-3 form can be submitted by mail, completed over the telephone or the internet.

Section 300.37(d) (4) requires providers, except in certain circumstances, to complete the C-4 form or lose payment for that treatment. Providers who are authorized to treat injured workers are required to submit medical reports on forms prescribed by the chair pursuant to WCL §13-a (4) (a) and 12 NYCRR §325-1.3(a) and (d). Similar provisions exist for psychologists, podiatrists and chiropractors. A completed C-4 is necessary to ensure all information required is received without delay.

The purpose of the limited release is to enable carriers to investigate a claim promptly. It does not create a new defense or change the statute or case law regarding pre-existing conditions. Only claimants with prior injuries to the same body part as injured in the work related accident or similar illness to the one claimed are required to complete a limited release.

The Board disagrees that the indexing rules are detrimental to claimants and believes it will be no harder for a claimant to bring a claim. The Board will be sending a claimant information packet with a copy of the C-3 form to claimants upon receiving any document and creating a case file. This packet will contain information about the need for a medical report, and the Board will assist the claimant in obtaining such report. A medical report is necessary for any workers' compensation claim but is imperative for a controverted claim as a pre-hearing conference may not be scheduled until one is received.

Some raised issues about the new definition of prima facie medical evidence (PFME) and the prohibition on appeals until a decision deciding the controverted issues is issued. The new definition of PFME is based upon the change to WCL §25(2-a) and therefore is not contrary to case law or beyond the Board's authority.

Another issue is that the time limits provided in the rule are unrealistic. The Board disagrees with this assessment. Since June 2007, the Board has expedited all controverted claims as authorized and worked to resolve them within 90 days. Board statistics show that 88% of controverted claims are being resolved in 90 days. The regulation simply codifies the changes the Board implemented, and provides additional tools to speed this process.

Another contention raised is that prohibiting the direct testimony of a medical witness unless authorized by the WCLJ will not be helpful, will complicate the process and interfere with the ability to present a claim. The medical reports of the treating provider and the independent medical examination (IME) report are the direct testimony of the medical witnesses. Currently, medical witnesses are only called if the opposing side wants to cross-examine him/her. There is no reason in most cases to take the direct testimony; however, the proposal provides that WCLJ's may grant requests to take direct testimony.

Many commented on the written certification requirements for claimants' and carriers' attorneys. These provisions require participants to properly investigate the claim and prepare themselves before appearing for a

PHC or hearing. Many commented that this provision is burdensome and may prevent or discourage attorneys from representing parties. The Board disagrees with the objections to these requirements as the certification is upon information and belief, and attorneys are currently required by disciplinary rules to represent a client within the bounds of the law. This includes only advancing a claim that is warranted and not knowingly making a false statement of law or fact. WCL §114-a (3) prohibits a legal representative from instituting or continuing a claim without reasonable grounds. If the attorney is in compliance with this provision, there must be reasonable grounds to support the claim, and therefore he/she can make the certification.

A number of comments were received that the PHC statement requirement is burdensome. WCL §25(2-a) requires the filing of a PHC statement by represented parties at least 10 days before PHC which includes the information listed in §25(2-a)(b). Contrary to the comments submitted, WCL §28 only provides for the waiver of the defense of failing to timely file if it is not raised at the first hearing at which all parties are present. If a carrier receives a notice of indexing or notice of case assembly within 6 months or a year of the date of accident, it makes little sense to raise this defense.

WCL §25(2) (b) provides that if the carrier fails to file the C-7 form within 25 days of the notice of indexing, it is barred from pleading that the claimant was not an employee, or the employee did not sustain an accidental injury, or that the injury did not arise in and out of the course of employment. However, the Board in the interest of justice and upon showing of good cause may permit the filing of an amended C-7 form raising defenses not previously raised. As stated above, parties must investigate the claim, and the carrier must raise only credible defenses.

The rule does not change any evidentiary rules; it merely requires the party to identify the medical witnesses it intends to cross-examine. It does not require a party to cross-examine anyone. In addition, at the first

hearing, after the carrier has served its IME report, the claimant's legal representative will be asked if he or she still wants to cross-examine the carrier's examiner.

Many commented that the proposed regulations are burdensome and costly. As stated elsewhere, the Board has implemented programs to make it easier for claimants to file a C-3 form and to create an appropriate flow of information so that claims can be resolved more expeditiously. Many of the requirements are already part of the WCL, and the addition of new requirements for the parties are minimal since the statute already provides that discovery closes at the end of the PHC. Finally, commentators caution that the regulations will increase costs for all parties. Noted particularly is the longer C-4 form. Currently, the average number of pages of each medical report is approximately three to four pages, so there should be little additional cost. Further, the C-4 could be submitted on the internet at no cost to the Board and reduced cost to the provider.

Mention is also made of an increase cost to the Board from scanning the PHC statement. The PHC statement is required by statute and existing regulations. Further, the Board will be making this form available for electronic filing. Other documents required to be submitted are those that would be submitted at the PHC or the initial expedited hearing. Documents submitted at such time are currently scanned into the electronic case folder. Thus, the regulation only changes when the documents are scanned and does not increase the number of scanned documents.