

Revised Summary of Text for amendment of §§300.1, 300.33 and 300.34 and addition of §§300.37 and 300.38 of Title 12 NYCRR.

The proposed changes amend 12 NYCRR §300.1(a), §300.33 and §300.34, and add new §300.37 and §300.38 to govern indexing of all claims, pre-hearing conference, the expedited hearing process and the resolution of controverted claims.

Section 300.1(a) provides definitions of terms used in Part 300. The proposed rule making adds definitions for the terms “affidavit”, “affirmation”, “initial expedited hearing” and “insurance carrier.” The existing definition of “representative” is clarified that it refers to “legal representative” and that it includes representatives licensed by the Board pursuant to Workers’ Compensation Law (WCL) §§ 24 and 50(3-b) and (3-d). The proposed rule making also adds a definition of “prima facie medical evidence” that comports with the amendment to WCL §25(2-a) (a) by Chapter 6 of the Laws of 2007.

Section 300.33 regarding pre-hearing conferences (PHC) is amended by this rule. First, §300.33 is amended to require PHC in cases in which a notice of controversy and a medical report referencing an injury (a medical report) are received must be scheduled within 30 days and to eliminate the requirement that notices of PHC must be sent 21 days before the PHC. Other cases with outstanding issues shall be referred to a PHC when necessary to complete discovery. New subdivisions (c), (d) and (e) of §300.33 are added to provide that the notice of PHC, the PHC statement filed by a represented party, and how the PHC is conducted if the claimant is represented are governed by new §300.38. Subdivision (f) sets forth how a pre-hearing conference will be conducted if a claimant is not represented with only minor changes to existing §300.33.

Section 300.34 regarding the expedited hearing process is amended to reflect the statutory changes to WCL §25(3) (d) by Chapter 6 of the Laws of 2007 and that the expedited hearing process for controverted claims when the claimant is represented at the pre-hearing conference is governed by new §300.38. Chapter 6 amended WCL §25(3)(d) to authorize the Chair to transfer claims with an issue outstanding before the Board

for one year rather than two years to be transferred to the expedited process. It also specifically authorizes the Chair to transfer controverted claims to the expedited process. Section 300.34 is renumbered and new subdivision (c) requires a PHC statement in accordance with §300.33(d) be filed in any case transferred to the expedited hearing process. Subdivision (f) of §300.34 requires adjournments in cases transferred to the expedited hearing process be granted only in accordance with §300.38. Throughout §300.34 references to carrier and representative are corrected to refer to “insurance carrier” and “legal representative”. Subdivision (h) clarifies that decisions solely containing determinations, directions and orders made by a Workers’ Compensation Law Judge (WCLJ) in the special expedited hearing process are interlocutory and not reviewable under WCL §23 until the conclusion of the trial and the resolution of all outstanding issues.

A new §300.37 is added to govern case file creation and indexing of claims. Subdivision (a) requires the Board to assemble a case upon receiving a document regarding a claim or potential claim for workers’ compensation and assign it a unique case number within five days. Assembling a case is not the indexing of a claim for purposes of WCL §25(2) (b) and does not change existing law with respect to the filing a claim for purposes of WCL §28.

Subdivision (b) provides that a claim may only be indexed if the Board receives an employee claim form or employer report of injury for any type of claim, a report by a medical provider on the form prescribed by the Chair unless the treating provider is based out of state, the claimant was treated in an emergency room or the claimant is deceased, and a limited release if the claimant files an employee claim form that indicates he or she had a prior injury to the same body part or similar illness to the one listed on the form. However, the rule authorizes the Chair to direct the indexing of a claim if a worker is killed and the employer refuses or fails to file an Employer’s Report and no one files a claim on behalf of the beneficiaries. Once all of the required forms are received the Board must send a notice of indexing to the parties and make the limited release available to the insurance carrier. The notice of indexing must indicate that if the claim is controverted the insurance carrier

must file an independent medical examination (IME) report with the Board at least 3 days prior to the initial expedited hearing or waive the right to have such a report considered.

Subdivision (c) provides that if the insurance carrier files a form to accept or controvert a claim or to notify the Board that it has begun to make temporary payment of compensation before all of the forms required to index a claim are received, the Board is not required to index a claim and can take any necessary action to resolve any issues in the claim.

Subdivision (d) includes provisions applicable to all claims, regardless of whether they are indexed or not. Specifically, it requires the legal representative of a claimant to provide a written certification and list of documents if retained when the employee claim form is filed; requires the Board to send a claimant information packet (packet) to unrepresented claimants who have not filed an employee claim form or had their claim accepted, details the contents of the packet and requires the Board to provide assistance to the claimant; requires the employer or the third-party it designated to file the employer's report to certify that the employer gave the packet to the claimant; and requires a medical report to be on the prescribed form and fully completed except in certain circumstances in order for the provider to be paid.

A new §300.38 is added to govern the resolution of controverted claims. Subdivision (a) requires the filing of the notice of controversy and details the contents of such notice, including that it contain a written certification by the insurance carrier, a list of witnesses and list of documents. Subdivision (b) requires a notice of PHC be sent to the parties upon receipt of the notice of controversy and a medical report. The notice shall include the date of the PHC which shall be no more than 30 days after the receipt of the notice of controversy and a medical report and notification that an IME report must be filed at least 3 days prior to the initial expedited hearing.

Subdivision (c) authorizes the parties to seek production of relevant medical records using the limited release and requires medical professionals authorized by the Chair to produce such records within 21 days or 10

business days if the requesting party offers to pay \$1.50 per page. A medical professional who fails to produce the records timely, if authorized by the Chair to treat or conduct IMEs of claimants, shall be subject to administrative warning or suspension or revocation of his or her authorization. All medical records obtained by the parties must be filed with the Board.

Subdivision (d) requires a legal representative of a claimant retained after a claim is indexed or the carrier files a form as provided in §300.37(c) to file a notice of retainer within five days, ensure an employee claim form is filed and certified by the legal representative, and provide a list of documents that support the claim. Subdivision (e) provides that the claimant's retention of a legal representative 10 days or less before the PHC may constitute good cause for an adjournment.

Subdivision (f) prescribes the content and date for filing the PHC statement. An unrepresented claimant is not required to file such statement. Each party must attach all documents not already part of the claim file to the PHC statement. Failure by the insurance carrier to timely serve and file the PHC statement or to file an incomplete statement will result in a waiver of defenses; failure to list witnesses or attach documents not in the electronic case folder will result in a waiver of the right to call the witness or introduce such document. There will be no waiver if a WCLJ finds the failure was due to good cause. If the legal representative of a claimant fails to timely file or files an incomplete PHC statement, his or her legal fee will be reduced.

Subdivision (g) governs the PHC for a represented claimant. It requires the PHC to be held within 30 days of the filing of the notice of controversy and medical report and prescribes what will occur at the PHC. For example, at the PHC the WCLJ will confirm all forms are filed, add any necessary parties, simplify and limit factual and legal issues, determine whether the medical report constitutes PFME, determine if the offer of proof for a defense was sufficient, obtain the names and addresses of medical providers for prior injuries or illnesses if relevant, determine if the insurance carrier is entitled to a broader medical release, direct the claimant to file an employee claim form if one has not already been filed, set the date by which the IME report must be filed,

identification of medical witnesses to be cross-examined, how and when such cross-examination shall occur and sets the date for the Initial Expedited Hearing.

Subdivision (h) governs the expedited hearing process for controverted claims when the claimant is represented. It requires the initial expedited hearing to occur within 30 days after the PHC where the claimant was represented. All lay witness testimony will be taken at that hearing. If no lay witness testimony is requested, nor the testimony of the claimant, the initial expedited hearing will not occur and the testimony of the medical witnesses will occur as set forth at the PHC. All IME reports must be filed and served at least three days before the date of the initial expedited hearing. If the testimony of the medical witnesses is to occur at a hearing it shall be scheduled no more than 30 days after the initial expedited hearing. This subdivision sets for the process if witnesses fail to appear. Paragraph (3) of subdivision (h) authorizes parties to make oral summations but limits written post-hearing summations, memoranda of law and/or briefs to certain situations. Finally, paragraph (4) details the timing of decisions deciding the controverted claim.

Subdivision (i) provides that decisions containing only orders or directions made by a WCLJ in connection with a PHC or expedited hearing process pursuant to §300.38 are not reviewable by the Board until a decision is made by a WCLJ establishing or disallowing a claim.

Subdivision (j) governs adjournments. An adjournment will only be granted in an emergency, and shall not exceed 20 days, and the grounds for an adjournment must be established by an affidavit of a legal representative. If a request for an adjournment is not an emergency and is frivolous the penalties in WCL §25(3) (d) and §300.34(f) and (g) apply.

Subdivision (k) provides that the §300.38 shall not apply to controverted claims where the employer was uninsured and the provisions relating to pre-hearing conferences and expedited hearings shall not apply if the claimant is unrepresented at the time of the PHC at which hearings are scheduled.