

## Assessment of Public Comment – SLU impairment guidelines

The Chair and Board received approximately 400 formal written comments from Survey Monkey, emailed comments, and regular mail. Additionally, the Chair and Board received approximately 1,993 form letters from individuals using a website form, approximately 398 form letters from individuals, a petition with approximately 7,875 signatures, approximately 17,000 postcards.

After the public comment period closed, the Board received an additional 1,100 postcards from associations objecting to the proposed changes, as well as approximately 37 additional form letters, a hard copy of a form letter with approximately 780 signatures from a labor organization, and approximately five comments from individuals.

The comments covered many aspects of the proposed regulations, but most of the comments received focused on the legislative directive to take into account advancements in modern medicine only.

In response to the comments received, the Board is replacing the proposed guidelines and providing a new proposal.

The Board received a comment from a claimant's attorney objecting to the changes to section 300.2, opining that the proposed changes are not within the statutory mandate and therefore should not be made.

The Board received a comment from a claimant representative opining that the guidelines are complicated and will reduce the number of medical providers willing to participate in the system. The comment specifically cited claimants being required to obtain permission from the Board before seeking an IME to be onerous.

The Board received a comment from an insurance association agreeing with the proposed addition of section 300.2(b)(4), opining that this will prevent doctor-shopping.

The Board received a comment from an individual claimant requesting that the proposed regulations include a way for claimants to have a list of IME doctors to choose from, and objecting to the decrease in SLU awards.

The Board received several comments from individual claimants and associations objecting to the requirement that a claimant is required to get evaluated by a Board-approved health care provider.

The Board received many comments from various individuals and associations, as well as legislators, objecting to the ability of injured workers to be questioned without counsel and the use of a questionnaire.

One carrier submitted a comment to the Board disagreeing with the proposed regulation only permitting the insurer to challenge the SLU-1 in limited circumstances.

The Board received a comment from an insurance carrier suggesting the deletion of the SLU-1 entirely.

The Board received two comments from insurance carriers suggesting a change to the proposed regulations with inconsistencies in the use of the terms “minimum,” “maximum,” and “base” in the proposed regulations, including the lack of definition of the term base.

The Board received several comments objecting to the use of language allowing claimants to be labeled “uncooperative” and for judges to take this into account, citing the claimant’s due process rights and that the proposed regulations are a violation.

One comment from a carrier attorney asked for clarification if subpart (c) was missing a sentence and suggested a change to say “A schedule loss of use will only be considered in such a claim following a determination of maximum medical improvement and a finding that there is no residual impairment for non-schedulable sites.”

Another comment from a carrier pointed out a typographical error where the proposed regulations should read “The SLU-1” and not “he SLU-1.”

The Board received several comments from various associations, law associations, and insurance carriers objecting to the prohibition against cross examination of the claimant unless granted by a WCL judge.

The Board received a comment from a health care provider requesting that the proposed regulations require the carrier to respond to them within 10 days.

### **Section 1.2**

The Board received several comments from insurance carriers suggesting amending section 1.2 to deter the pursuit of SLU awards where the claimant does not lose any time from work or undergo restorative treatment.

### **Section 1.3**

The Board received a comment from an insurance carrier supporting the proposed Subsection D for addressing the need for non-schedulable injuries to reach maximum medical improvement before being resolved.

The Board received a comment from an insurance carrier suggesting a distinction be made in subsection E listing conditions that would preclude a finding of an SLU award are causally related to the injury.

### **Section 1.5**

The Board received approximately six comments from a claimant attorneys and claimants expressing confusion about what the “points” referred to in the proposed regulations means.

The Board received several comments from claimant attorneys, associations, and health care providers disagreeing with the system of categories.

Most detailed comments, from claimant representatives and associations as well as business owners, carriers, health care providers, and in some instances individual claimants, objected to the use of pain as a factor in SLU awards, because it’s too subjective.

The Board received a comment from an employer organization opining that the proposed guidelines are too subjective and should remove the new rating criteria, as well as citing confusion and uncertainty with how the new criteria will be applied.

One comment from an insurance carrier supported the proposed regulations instruction to providers to refrain from inferences not drawn from physical examination or rests.

### **Section 1.6**

The Board received several comments from various individuals and associations requesting the SLU-1 Form draft for inspection.

### **Section 1.7**

The Board received comments from two organizations representing NYS small businesses agreeing with the proposed regulations for the most part, but disagreed with the change to SLU awards and decreased predictability, because of the use of loss of earning power.

Nearly all comments from claimant organizations, TPAs and law firms, as well as several comments from legislators, objected to the use of loss of earning power as a factor in determining SLU awards.

One claimant attorney submitted a comment opining that permanency should be decided and awarded in the manner most beneficial to the claimant.

The Board received a comment from a business owner to eliminate the ability for a judge to make an SLU award after the IME has made a determination.

### **Section 1.9**

The Board received a comment from a claimant attorney objection to a cap in section 15(3)(v), recommending no cap.

The Board received a comment from an insurance carrier suggesting that the Board define how “special considerations” will be treated.

### **Section 2.13**

The Board received a comment from a business owner disagreeing with the proposed 5% SLU for a digit, especially when pain is a factor.

### **Section 3.7**

The Board received a comment from a claimant attorney objecting to the elimination of special considerations.

The Board received a comment from a business pointing out confusion in the draft guidelines, citing whether the 7.5 to 20% permanent impairment for hand and wrist apply to tears or strains.

### **Section 4.2**

The Board received a comment from a business objecting to the categorization of categories in elbow determinations, citing inadequate scientifically-based medical evidence.

### **Section 5.6**

The Board received a comment from a claimant attorney urging the Board to preserve special considerations at least in part.

### **Section 6.3**

One comment from a claimant attorney objected to the broad nature of the categorization of hip injuries as well as other sections.

### **Section 6.6**

The Board received a comment from a health care provider noting no mention of replacements in the draft guidelines for hip and knee replacements with special impairment and objected to the lack of concrete examples.

### **Section 7.2**

The Board received a comment from a claimant objecting to the listing of several knee conditions, including meniscal tears and ACL tears, and opined that these injuries should never receive a 0% finding.

### **Section 8.6**

The Board received a comment from a business objecting to the assignment of permanent impairment for tarsal tunnel syndrome and Morton's Neuroma without citing medical evidence for this assignment.

### **Section 10.7**

The Board received a comment from a carrier supporting the inclusion of the sentence making clear that no other impairment points are added unless otherwise noted, citing the current guidelines that cause litigation.

The Board received a comment from an insurance carrier objecting to the special condition impairment allowing an automatic 10-20% SLU award for the hand without regard to loss of motion, strength, or pain.

### **Section 11.3**

The Board received a comment from a claimant attorney objecting to the Board not updating awards for facial disfigurement and recommending an increase in the cap.

#### **1. General Comments**

The Board received many comments from associations, individuals, legislators, and attorneys objecting to the proposed changes because the proposed regulations go beyond the legislative mandate and do not take into account only advancements in modern medicine. Nearly all sections of the proposed changes had comments objecting to the changes, citing a lack of medical advancement to support the change.

The Board received approximately 1,993 form letters using a website form objecting to the regulations as a whole, and several more after the public comment period closed. The comments objected to the use of a new SLU-1 form, as well as the reductions in awards for injured workers generally.

The Board received approximately 398 form letters from individuals objecting to cutting awards for injured workers, as well as opining that the Board did not propose guidelines based on advances in modern medicine.

The Board also received approximately 232 comments from individuals, including many correction officers, objecting to both the proposed regulations and any changes at all to the impairment guidelines, especially for reduced awards. Because there is a legislative requirement to change the impairment guidelines, no change has been made in response to these comments.

The Board received approximately 17,000 postcards and a petition with approximately 7,785 signatures objecting to the proposed regulations as a whole. It also received approximately an additional 1,200 postcards from other associations objecting to the regulations in their entirety after the public comment period closed.

The Board received a comment from an association of insurers supporting the draft guidelines generally, and more specifically requiring out of state medical providers to follow the WC guidelines.

The Board received a comment from a law firm recommending that the Board grandfather in cases with medical opinions prior to January 1, 2018.

The Board received a comment from a law firm opining that the Board does not have the authority to to direct payment of the claimant’s IME, and suggested the addition of definitions for “recovery” and “improvement” if pain is to continue being a factor.

The Board received a comment from a law firm with many detailed suggestions on fine-tuning the language in many of the sections of the draft guidelines. Because the draft guidelines are being replaced, we did not reproduce those suggestions here.

One comment disagreed with incorporating the Guidelines into the regulations to give them the force of law.

The Board received approximately four comments from associations representing workers objecting to the proposals because they opined the changes would be harmful to low wage workers.

The Board received a comment from an individual requesting that the proposals require more transparency from insurance companies.

The Board received a comment from a claimant suggesting the addition of standardized questionnaires to the guidelines to ensure everyone uses the same forms.

One individual comment suggested a change to the entire approach and remove IME and insurance carrier involvement from the process entirely and have all cases heard in civil or criminal court.

Approximately six comments from individual claimants objected to the proposed changes, citing how difficult they are to understand.

The Board received a comment from a judge suggesting the addition of diagrams and illustrations, which would help claimants and laypersons understand the motions being discussed. A comment from a health care provider echoed this sentiment.

The Board received a comment from a judge suggesting the addition of a section dealing with transition to avoid duplication of SLU reporting and unnecessary costs.

The Board received a comment from a claimant attorney objecting to the proposed changes because the reduction in awards may mean a reduction in business.

The Board received a detailed comment from a law firm with many medical recommendations for the draft impairment guidelines.

The Board received a comment from members of the legislature objecting to the broad nature of the proposed regulations and the reduction in awards for injured workers.

One carrier submitted comments supporting the proposed regulations, but suggested amending the use of pain as a factor for determining SLU awards.

The Board received one comment from a business owner supporting the proposed regulations and changes to the impairment guidelines as a whole.

The Board received a comment from a conference of legislators requesting the withdrawal of the proposals because

The Board received a comment from a health care provider objecting to the changes from the NYSSOS recommendations in the final version of the proposed regulations, including changes to the categories of Range of Motion, Strength and Pain.

The Board received several comments from various labor and employee organizations objecting to the proposed regulations as a whole and citing a lack of transparency in the creation of the guidelines, including not contacting enough stakeholders.

The Board received a comment from an insurance carrier supporting the changes to the IME process, particularly the cooperation language.

The Board received many comments from labor organizations and associations objecting to the reduction in awards, especially upon finding lack of cooperation of the claimant. These labor organizations also objected to the requirement that injured workers be examined by an independent medical examiner and not a health care provider of the employee's choice.

The Board received a comment from a business organization and another comment from a carrier association challenging the use of the category system for the impairment guidelines, as well as opining that the draft guidelines do not take into account advancement in modern medicine and objecting to the use of the VAS pain scale.

The Board received one comment from an individual objecting to the proposed changes because they will invite fraudulent claims and workers claiming injury and getting awards even when not injured.

**Changes Made:**

- The proposed amendments to 12 NYCRR 300.2 are deleted.
- The proposed new section 12 NYCRR 300.39 is deleted.
- The proposed new section 12 NYCRR 325-1.6 has been changed to delete all previously proposed text and simply incorporate the Impairment Guidelines by reference and provide readers with where the guidelines can be inspected.
- The Board has updated the dates to reflect a republished date of 11/22/17.