

Regulatory Impact Statement for changes to 12 NYCRR 300.10, 301.1, and 301.3

1. Statutory Authority: Workers' Compensation Law (WCL) §117(1) and 142 authorizes the Chair of the Workers' Compensation Board (Board) to adopt reasonable rules consistent with, and supplemental to, the provisions of the WCL.

2. Legislative Objectives: Under WCL § 118, the Board may make such investigation or inquiry or conduct a hearing to ascertain the substantial rights of the parties. The Chair and the Board are not bound by common law or statutory rules of evidence. WCL § 121 directs that the Chair or Board may cause depositions of witnesses to be taken in the manner prescribed for like depositions in civil actions in the supreme court. WCL § 13-f directs the Board to fix the fees for attendance at a hearing.

3. Needs and Benefits:

The proposal seeks to resolve discrepancies within the WCL and to establish consistent procedures for depositions of medical witnesses. This proposal also seeks to reduce delays in resolving contested matters before the Board and provide an increase in deposition fees to account for rising medical costs.

The intent of the regulatory change to 12 NYCRR 300.10(c) is to allow for a Workers' Compensation Law Judge's (WCLJ's) discretion regarding cross-examination of the attending provider. This change would allow a WCLJ to deny cross-examination when a denial is nonprejudicial and cross-examination would be duplicative, superfluous, or dilatory. The Board encourages intentional, sensible use of medical witness depositions; the Board also recognizes its obligation to resolve contested matters in a timely fashion to ensure that injured workers are able to receive the compensation to which they are entitled and allow employers certainty about whether a particular injury is compensable. This change will allow WCLJs to, when there is sufficient evidence in the file to do so, resolve matters without adjournment and delay.

Previously, the Appellate Division has held that when there is no "viable difference in the expert opinions expressed in the medical records, no prejudice accrues as a result of the denial of the right to cross-examine a medical expert" (*Matter of Bryan v Borg-Warner Automotive*, 293 AD2d 856 [2002]) and

that the carrier is not prejudiced by denial of its request to cross-examine the treating provider when their medical expert is unwilling or unable to comment on the medical issue in dispute (*Id.*) or where the particular issue at question is not controverted (*Matter of Robideau v Van Rensselaer Manor*, 56 AD3d 866 [2008]). More recently, the Court of Appeals held that the WCLJ has no such discretion and must grant adjournment for any employer's desire to produce an attending physician for cross-examination as a matter of course in accordance with the language of 12 NYCRR 300.10(c) (*Matter of Lazalee v Wegman's Food Markets, Inc.*, 40 NY3d 458 [2023]).

In matters before some other agencies, there is no such requirement. For instance, in *Monaghan v. Schroeder*, 223 AD3d 972 (2024), an appeal of a determination by the New York State Department of Motor Vehicles, the Appellate Division noted that there is a limited right to cross-examine witnesses and that fact-finders in administrative proceedings have broad discretion in matters of evidence. Indeed, there is a longstanding tradition that agencies are "presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess." (*Universal Camera Corp. v NLRB*, 340 US 474 [1951]).

The addition of 12 NYCRR 300.10(e) and (f) provide clear procedural requirements for scheduling depositions, requesting adjournments, and requesting extensions. Currently, as this information is not contained in a regulation, instructions are contained in each decision directing a deposition. This leads to inconsistency. These subdivisions will provide consistency across different claims and decisions. Currently, when parties request an extension to file a deposition transcript, the requests are typically submitted in writing, so the addition of (f) is formalizing an existing procedure. No particular format is currently required. The Board will create a form to be used when parties request an extension to submit a deposition transcript, which is anticipated to speed processing of these requests by making processing consistent.

The Board has noted numerous instances of parties not paying deposition fees in a timely manner. When an employer or carrier requests a deposition, they should be prepared to pay fees timely. Adding the payment requirement to the regulations, rather than in each decision, provides consistency across claims. The deadline for sending the fee to the witness has been increased to 45 days to make it consistent with other medical payment requirements. As payers will now have increased amount of time to remit payment, to encourage timely payment, and to compensate medical providers

who face excessive wait times for payment, the fee increases after 45 days and becomes subject to interest accrual.

In looking at the overall deposition fees, the Board analyzed similar fees nationwide and concluded that a small increase in fees was appropriate.

4. Costs: The proposed amendment is anticipated to have modest impact on costs; the employer or carrier who requests a deposition of an attending provider is already responsible for the witness fee. The increases in deposition fees are aligned with increases in medical costs and with similar fees in other states, and are necessary for attracting and retaining medical providers for workers' compensation claims. Several other states include increased fees for depositions that go over a certain time limit; adopting these provisions helps to keep depositions to a reasonable time and compensate medical providers if a deposition goes longer than one hour. As many medical providers have reported delays in receiving fees for depositions, providing a higher fee when paid after 45 days incentivizes timely payment and compensates providers who receive late payment. Increased fees after 45 days may increase costs for parties who do not pay witnesses in a timely manner. Parties can avoid this increase in costs by paying such fees within the time prescribed in the regulation. Notably, the 45-day deadline is consistent with other medical bills. The current regulations and guidance do not require submission of a bill by the medical provider; this is unchanged.

5. Local government mandates: The proposed amendments do not impose any additional program, service, duty, or responsibility upon any county, city, town, village, school district, fire district, or other special district.

6. Paperwork:

The request for extension to file a deposition transcript will be a new form, which will allow parties to streamline processing of such requests without a full formal letter. The existing decisions typically required a party to file a written request for extension; the planned form will provide a simple and consistent format for this process.

For all new forms that must be submitted to the Board, the Board may require electronic filing and allow parties to attach supplementary documentation. All parties who are expected to file these forms already participate in electronic filing so this will not provide a technological burden.

7. Duplication: The proposal does not duplicate or conflict with any State or federal requirements.

8. Alternatives: An alternative would be to not amend the regulation or amend the regulation to include only discretionary adjournment for the taking of depositions; extension request requirements; and/or deposition fees; but not all three. In analyzing the depositions process as a whole, the Board has concluded that any of these changes alone, or any two in combination, would be insufficient to provide a clear, consistent procedure for depositions. The Board has received ample feedback from stakeholders including parties who are dissatisfied with having to wait to schedule a deposition or resolution of an issue, as well as medical providers who are dissatisfied with delays in receiving their fees for depositions. By making these changes together, the Board can address multiple problems.

9. Federal standards. There are no applicable Federal Standards.

10. Compliance schedule: The regulation is expected to become effective 90 days after the publication of the Notice of Adoption in the State Register to allow parties time to incorporate new forms and procedures.