

## Assessment of Public Comment

During the public comment period, the Board received approximately 26 comments, including 10 comments of a similar substance from the same law firm.

Some comments, including from the law firm, from individuals, and from industry associations, disagreed with allowing discretion on the part of the Workers' Compensation Law Judge (WCLJ) in directing depositions and expressed concerns about uncertainty, inconsistency, due process violations, an increase in appeals, an inability to challenge unclear or biased medical opinions, a WCLJ's lack of having read the entire medical record to determine whether a deposition is warranted, and WCLJ's denying cross-examination due to the lack of an independent medical examination (IME). Some of these comments recommended that the regulation should specify certain types of depositions that should be denied, such as when the issue litigated is not a medical issue or when there is a request to depose multiple providers at the same practice. A WCLJ's discretion will be constrained by the dictates of due process and relevant decisional law. There is case law precedent already addressing these concerns. The proposed changes do not overturn *Matter of Bryan v Borg-Warner Automotive*, 293 AD2d 856 (2002), which holds that there is no prejudice as the result of a denial for cross-examination when there is no viable difference in the expert opinions or when the independent medical expert is unable or unwilling to comment on the medical issue in dispute; *Matter of Robideau v Van Rensselaer Manor*, 56 AD3d 866 (2008), which holds that there is no prejudice in denying cross-examination when the issue at question is not controverted; or *Matter of Pugliese v Remington Arms*, 293 AD2d 897 (2002), which holds that a carrier still has the right to cross-examine a treating provider even in the absence of an IME when the carrier disputes the treating provider's medical opinion. WCLJ's exercise discretion in myriad situations every day and there is no reason to believe they will not do so fairly and reasonably when determining whether medical testimony is appropriate. Therefore, no change has been made in response to these comments.

One comment suggested that, rather than the WCLJ providing the basis of any denial or adjournment, the party requesting to cross-examine should be required to make a sufficient showing of the need for cross-examination. Having the reason for a deposition, and any objections to such reason, is beneficial to the WCLJ in determining whether to grant or deny the request. This also protects the payer by establishing, in the record, the reason for such cross-examination. Therefore, the Board has made a change to the regulations to require payers to make an offer of proof and show the need for cross-examination.

One comment expressed concern that subpoenas would be required to obtain an extension for a deposition. This is not a requirement in the regulation, so no change has been made in response to this comment.

One comment recommended that requests for extension should be required to include documentation of attempts to schedule the deposition within the deadline. The proposed changes do not change the requirements for second or third adjournments, which require showing of sufficient excuse or, for a third adjournment, an extraordinary circumstance. It is best practice for any party requesting an extension to include such documentation to support a showing of

sufficient excuse, which may include scheduling efforts or extraordinary circumstance. Therefore, no change has been made in response to this comment.

Some comments requested clarification on the process required for the party scheduling a deposition, inclusion of a good faith effort requirement, and an explicit requirement to coordinate with opposing counsel and the medical witness. As with documentation of attempts to schedule the deposition, a WCLJ may find that a the employer, carrier or Special Fund has waived their right to cross-examine a treating provider if attempts are not made in good faith or may preclude an IME report if the employer, carrier, or Special Fund has not made diligent efforts to arrange for cross-examination, so no change has been made in response to these comments.

Some comments recommended not having the employer, carrier, or Special Fund take full responsibility for coordinating, conducting, and paying for deposition. These comments expressed concerns about cost accountability and increasing financial risk for the employer, carrier, or Special Fund; concerns about strategically motivated depositions; no mechanism to deter abuse or excessive deposition demands; an increase in premiums; and discourage early settlement of claims. One comment expressed a specific concern that employers, carriers, and Special Fund should not be responsible for depositions requested by opposing parties without a finding that the deposition is necessary and proportionate. The consultant who prepares the IME report is under the control and direction of the employer, carrier, or Special Fund, and it is appropriate for that entity to arrange for depositions. The employer, carrier, or Special Fund is in the best position to work with their consultants regarding requirements for depositions. Injured workers do not have the same or comparable control or direction over their treating providers, and so it is appropriate for the payer to arrange for and potentially issue subpoenas for depositions. At present, the practice of many if not most payers is to schedule and pay the cost of a deposition of their IME when cross-examination is requested by claimant's counsel. This proposed amendment would make that practice uniform and shift the economic burden away from the injured worker in all instances. Burdening injured workers with the cost of deposing the payer's IME is likely to discourage them from exercising their due process rights and to elect to forego deposing the payer's medial expert. The additional cost to payers will be relatively small and will not result in increased insurance premiums. Finally, the Board has the discretion to deny a claimant's request to cross-examine a payer's IME when the circumstances warrant. Therefore, no change has been made in response to these comments.

Some comments expressed a specific concern about fees incurred for depositions that are canceled by the injured worker's attorney, where a stenographer has been retained and must still be paid, and recommended a cost-recovery mechanism when a cancellation or delay is caused by the injured worker's counsel. Proposed subdivision (e) of section 300.10 of Title 12 NYCRR states that the payer shall bear all costs related to taking the deposition "[u]nless otherwise directed by the board". Thus, the Board retains the discretion to shift the costs related to taking the deposition to the party who causes the delay or cancellation, when the circumstances warrant. Therefore, no change has been made in response to these comments.

Some comments recommended not increasing deposition fees and not increasing the fee for payments made after 45 days. One comment expressed a specific concern about how a fee dispute would be handled, and whether the increase and any interest would be held in abeyance

during the pendency of the dispute. At present, the payment of deposition fees to providers results in very few controversies and it is anticipated that these proposed amendments will result in even fewer disputes. If a legitimate controversy concerning the payment of a deposition fee does occur, it will be resolved pursuant to the adjudication process, at a hearing before a WCLJ if necessary, and interest will not accrue until the dispute is resolved. Again, such disputes should be rare, and the Board will assess all relevant penalties against any payer who raises a frivolous dispute.

Some comments recommended including language that direct examination is waived unless authorized or directed by the Workers' Compensation Law Judge, or that direct examination is denied in all depositions. The Board notes that under precedent of *Matter of Ferguson v Fruehauf Corp.*, 156 AD2d 880 (1989), there is no right to cross-examine one's own witness. Direct examination is not addressed in these regulations, and the Board does not intend to include direct examination in these changes so has made no change in response to these comments.

Some comments recommended changing the provision for higher fees after one hour of deposition to higher fees after 30 minutes of deposition, and reported that the majority of depositions last less than 30 minutes. One comment recommended that prior Board approval be required for a deposition to last more than one hour in order to avoid inflated fees from extended depositions. The Board assessed fees in relation to general increases in healthcare costs and other states' deposition fees, and has found that the proposed fees are appropriate. No change has been made in response to these comments.

One comment noted that physician assistants are not mentioned in the changes to 301.3. The Board has added physician assistants to this change to clarify that they can receive a fee under this section if they are deposed.

One comment recommended that, instead of this change, some type of change be implemented to address medical opinions themselves and perhaps allow some discretion for reasonable inferences from the medical record. Because the presumptions under WCL § 21 are statutory and cannot be changed by regulation, no change has been made in response to this comment.

The Board also received several comments supporting the change, noting that the changes will streamline the deposition process; cut down on correspondence; ensure that healthcare providers are paid for their testimony in a timely manner and without a need for additional action by providers; no violation of due process rights as a party with a legitimate reason for requesting cross-examination should have no difficulty providing that basis for the record, and an unreasonable denial can be appealed; and put into regulation the current practice of having the employer or carrier bear responsibility for bearing the costs related to taking the deposition.

#### Changes made:

- Subdivision (c) of section 300.10 of Title 12 NYCRR has changed the text reading "The referee shall provide the basis of any denial of an adjournment" to "The employer, carrier, or special fund must provide an offer of proof that shows the reason for cross-examination. If the request is

denied, the referee shall address such offer and provide the basis of any denial of an adjournment.”

- Adding physician assistants to the regulation to clarify that they may receive a fee when they are deposed