

Recommended Workers' Compensation Streamlined Docket Regulations

Subsection (a) of Section 300.1 of Title 12 of the New York Code Rules and Regulations is amended to read as follows:

300.1 Definitions

(a) As Used in this Part:

(1) "Board" means the Workers' Compensation Board, except as pursuant to the Workers' Compensation Law, the decision of the Board in particular cases may be by a member or panel of the Board or by a workers' compensation law judge.

(2) "Chair" means the Chairman, Chairwoman or Chair of the Workers' Compensation Board. The term Chairman appearing in this Part shall be deemed to mean Chair.

(3) "Claim" includes any matter over which the Board has jurisdiction.

(4) "Insurance Carrier" means the state fund, stock corporations, mutual corporations or reciprocal insurers with which employers have insured, and employers permitted to pay compensation directly under the provisions of Workers' Compensation Law §50 (3), (3-a) or (4). Insurance Carrier also means, as applicable, an employer which has failed to obtain the required workers' compensation coverage pursuant to Workers' Compensation Law § 50.

(5) "Legal Representative" means an attorney-at-law or a representative licensed by the Board pursuant to Workers' Compensation Law §§24, 50(3-b) and (3-d).

(6) "Prima Facie Medical Evidence" means a medical report by an attending medical provider that gives a history of the accident or occupational disease, a diagnosis, and a statement as to whether the injury is causally related to the accident or occupational disease.

(7) "Workers' compensation law judge" means any person appointed as a referee, pursuant to the Workers' Compensation Law, to hear and decide controversies in accordance with the provisions of the Workers' Compensation Law and to conduct such investigations and further hearings in connection therewith as may be required by the Board. Senior workers' compensation law judge means the senior referee; supervising workers' compensation law judge means the supervising referee. This subdivision shall not apply to acting referees.

A new section 300.37 is added to read as follows:

300.37. Case File Creation and Indexing of Claims that May Be Controverted

(a) Case File: Upon receiving any document regarding a claim or potential claim for workers' compensation benefits for which a case number has not been assigned and a case file has not been created, the Board shall assign a unique case number and create a case file. The assignment of a case number and creation of a case file is not the indexing of a claim for purposes of any time periods set forth in the Workers' Compensation Law. The Board shall assign the case number and create the case file within five business days of receipt of said document for which a case file does not exist.

(b) Indexing:

- (1) The Board will index a claim for compensation only upon the receipt of these forms:
 - (i) a completed form prescribed by the Chair for an employee to make a claim for compensation (hereinafter referred to as Employee Claim form) or a completed form prescribed by the Chair for an employer to report an injury or illness of an employee as required by Workers' Compensation Law §110 (hereinafter referred to as Employer's Report);
 - (ii) a completed form as prescribed by the Chair for a medical provider treating an injured employee to report on medical treatment (hereinafter referred to as Medical Report); and
 - (iii) a completed and executed limited authorization to obtain relevant medical records that is compliant with the Health Insurance Portability and Accessibility Act and to access relevant prior workers' compensation claims (hereinafter referred to as Limited Release). The Limited Release shall be part of the Employee Claim form and Employer's Report that can be easily detached from said forms.
- (2) If the claimant has retained a Legal Representative at the time the Employee Claim form is filed with the Board, the Legal Representative shall file with the Employee Claim form:
 - (i) a written certification, signed by the Legal Representative, that to the best of the Legal Representative's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the allegations and other factual matters asserted on the Employee Claim form have evidentiary support or if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
 - (ii) a list of all documents in the possession, custody or control of the claimant that may be used to support the claim.
- (3) If the claimant has not retained a Legal Representative, the Board shall do the following with respect to a claim that has a case number but either has not been indexed or does not have an Employee Claim form in the case file:

(i) make readily available, to the employee, assistance in complying with the indexing requirements, including a telephone hotline exclusively dedicated to that purpose and the Office of the Advocate for Injured Workers. Such assistance shall include a Board employee electronically completing the Employee Claim form based on information provided by the claimant over the telephone and sending the completed form to the claimant for signature;

(ii) provide to the claimant by mail or other effective means the following information and documents (hereinafter referred to as the Claimant Information Packet):

A) an Employee Claim form;

B) instructions for completing said form that shall include notice of the availability of assistance in completing the form by calling a toll free telephone number;

C) the necessity of a Medical Report;

D) the requirement that the employee complete and execute a Limited Release;

E) notice that the employee has the right to a Legal Representative in proceedings before the Board, accompanied by a list of licensed representatives and information about access to an attorney; and

F) the documents and information shall be available in both English and Spanish.

(iii) inform the claimant of all available resources in a meaningful fashion, using plain language. All forms, instructions and notices shall be available in English and Spanish;

(iv) contact the claimant in the most effective manner to assist the claimant in satisfying the indexing requirements, including obtaining a completed Medical Report and completing the Employee Claim form as set forth in subparagraph (i) above; and

(v) notify the claimant semi-annually in writing for two years after the filing of any document with the Board of the claimant's right to file a claim, the statute of limitations for doing so, and the assistance available for indexing a claim. The notice shall be accompanied by the Claimant Information Packet.

(4) The Employer's Report shall require the employer to certify that the employer has delivered to the injured or ill employee the Claimant Information Packet. The contents of the Claimant Information Packet will be available to employers on the Board's website.

(5) A Medical Report shall set forth facts and opinions responsive to the questions on the form. A separate narrative or office notes of the medical provider shall not be sufficient to serve as a Medical Report, although they may be used to supplement information in the Medical Report.

(i) no medical professional authorized to practice before the Board shall be paid for examining the claimant and filing a Medical Report unless the Medical Report is completed in accordance with the foregoing.

(ii) the Medical Report shall be filed electronically unless the medical professional does not have the technology to do so.

(6) Upon receipt of the Employer's Report or a Medical Report, the Board, if it has not received a completed Employee Claim form, shall promptly send an employee the Claimant Information Packet.

(7) A claimant who has not satisfied the indexing requirements may amend the required documents and resubmit them.

(8) No forms or documents other than those described in this subsection shall be the basis for indexing a claim or case.

(9) Within five days of receiving the documents set forth in paragraph (1) of this subsection, the Board shall index the claim and electronically make available to the Insurance Carrier and, if applicable, the Uninsured Employer's Fund, all documents which the Board has received to date.

(c) Notice of Indexing:

(1) The Board shall send the claimant, the claimant's Legal Representative, if any, the employer, the Insurance Carrier and if applicable, the Uninsured Employer's Fund, the notice of indexing on the form prescribed by the Chair. The Board shall also make available to the Insurance Carrier and, if applicable, the Uninsured Employer's Fund, the completed Limited Release executed by the claimant.

(2) The notice of indexing shall include notification that:

(i) any independent medical examination report as provided in §300.2(d)(3) of this Part (hereinafter referred to as IME Report) shall be filed with the Board and served as required by Workers' Compensation Law §137(a)(1) at or before the pre-hearing conference; and

(ii) the failure to so file and serve an IME Report shall be a waiver, as provided in Subsection (e) of §300.38, of the Insurance Carrier's right to examine the claimant and to have filed on its behalf or otherwise have considered an IME Report on the issue of causal relationship.

A new section 300.38 is added to read as follows:

300.38 Controverted Claims

(a) Notice of Controversy:

(1) An Insurance Carrier who controverts a claim shall file with the Board and serve upon all other parties a notice of controversy on the form prescribed by the Chair within 25 days from the date the notice of indexing is mailed. The notice of controversy shall comply with the following:

- (i) it must be complete and provide a factual basis for the Insurance Carrier's controverting the claim and for any asserted defenses;
- (ii) it must contain a written certification signed by the Insurance Carrier, or if represented, by its Legal Representative, that to the best of his or her knowledge, information and belief, formed after an inquiry reasonable under the circumstances that the allegations and other factual matters asserted in controverting the claim or the defenses asserted have evidentiary support, or if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. If the initial certification is not signed by a Legal Representative, then before a Legal Representative may appear on behalf of the Insurance Carrier, the Legal Representative shall file and serve the required certification;
- (iii) it must provide the name and, if known, the address and telephone number of each individual likely to have information that the Insurance Carrier may use to support its factual basis for controverting the claim or for supporting a defense, and briefly describe the information; and
- (iv) it must provide a list of all documents in the possession, custody or control of the Insurance Carrier that it may use to support the factual basis for controverting the claim or for supporting a defense.

(2) At the time of the filing of the notice of controversy is filed, the Insurance Carrier may make an application to the Board, supported by an affidavit by the Insurance Carrier, or if represented, by the Insurance Carrier's Legal Representative, for a broader release than that set forth in §300.37(b) (1) (iii) that may be granted only upon a showing of relevance.

(b) Determination of Prima Facie Medical Evidence: If the notice of controversy raises the issue that claimant's Medical Report does not constitute prima facie medical evidence, the Board shall determine the issue within five days of receipt of the notice of controversy.

(1) A finding that the Medical Report constitutes prima facie medical evidence is interlocutory and shall not be subject to an application for review under Workers' Compensation Law §23 until all issues relating to the compensability of the claim have been determined.

(2) Upon a finding that the claimant's Medical Report does not constitute prima facie medical evidence, claimant may thereafter submit additional information on an amended or other Medical Report. Within three days of receipt of such additional information, the Board shall determine the issue based on the additional information. If the Board finds that prima facie medical evidence has still not been submitted, the Board shall take no further action on the claim until further medical evidence is submitted and shall proceed in accordance with Workers' Compensation Law §123.

(c) Notice of Pre-Hearing Conference and Other Matters: Within ten days of receipt of the notice of controversy, the Board shall send notice to the parties that shall include the following:

(1) The date of the pre-hearing conference, which shall not be later than forty-five days from receipt of a notice of controversy;

(2) An order directing the parties, except a claimant that has not retained a Legal Representative, to serve and file a pre-hearing conference statement no later than fourteen days before the date of the pre-hearing conference;

(3) An order directing that any IME Report, on behalf of the Insurance Carrier, shall be filed with the Board and served on all other parties at or before the pre-hearing conference and that failure to do so shall be a waiver, as provided in Subsection (e) of this Section, of the Insurance Carrier's right to examine the claimant and to have filed on its behalf or otherwise have considered an IME Report on the issue of causal relationship; and

(4) In the event the claimant has retained a Legal Representative by the date of the pre-hearing conference, an order directing that a hearing shall be held on the same date as and immediately after the above pre-hearing conference and that the testimony of claimant and all other lay witnesses shall be taken at such hearing.

(d) Medical Records:

(1) In accordance with the Limited Release, the parties may seek production of relevant medical records from medical professionals and hospitals that have treated the claimant for the injury or disease at issue and any relevant pre-existing conditions;

(2) Medical professionals authorized to practice before the Board shall deliver a copy of duly requested records within 21 days of the request and within 10 business days if the requesting party offers to increase payment to \$1.50 per page copied (an Expedited Request).

(3) In addition to any other penalties, a medical professional authorized to practice before the Board who fails to produce requested documents within 21 days, or within 10 business days of an Expedited Request, shall be subject to censure, suspension or revocation of the right to practice before the Board. The Board shall notify all authorized medical professionals of their professional responsibility to comply timely with requests for medical records and the possible penalties for failure to do so.

(4) All medical records obtained by the parties shall be filed with the Board so that all parties have access to them.

(e) Independent Medical Examination: All IME Reports shall be served and filed pursuant to §300.2(d)(11) and Workers' Compensation Law §137(1)(a) no later than at or before the pre-hearing conference. Failure to timely serve and file an IME Report in a controverted claim shall be a waiver of the Insurance Carrier's right to examine the claimant and to have filed on its behalf or otherwise have considered an IME Report on the issue of causal relationship, unless the Insurance Carrier makes a showing of good cause, and that it acted in good faith and with due

diligence, that it should be granted additional time. The showing must be made by an affidavit by the Insurance Carrier, or if represented, by its Legal Representative.

(f) Subsequent Retention of Legal Representative. If a claimant retains a Legal Representative after a claim is indexed, the Legal Representative shall, within five days thereof, file with the Board and serve on all other parties a notice of retainer on the form prescribed by the Chair together with:

- (1) An Employee Claim form if not previously filed or the Legal Representative's certification of a previously filed Employee Claim form or, if the previously filed form is incomplete, incorrect or in need of supplementation, an amended Employee Claim form and certification thereof;
- (2) The list of documents required to accompany the Employee Claim form of a claimant who has retained a Legal Representative as required in §300.37(b)(2)(ii); and if the claimant has retained a Legal Representative prior to the pre-hearing conference, a pre-hearing conference statement pursuant to subsection (h) of this section. Certification shall have the same meaning as in §300.37 (b)(2)(i).

(g) Mediation Meeting for Controverted Claims:

- (1) The Board shall schedule a mediation meeting for the purposes of settlement and shall notify all parties thereof. The meeting shall occur after the filing of the notice of controversy or the finding of prima facie medical evidence (if that issue is raised by the Insurance Carrier), whichever is later, and at least twenty-five days before the pre-hearing conference.
- (2) The claimant and all Legal Representatives of the parties shall attend the mediation meeting and engage in a good faith effort to settle or otherwise resolve the case.
- (3) A Legal Representative appearing on behalf of an Insurance Carrier at a mediation meeting must be authorized to enter into a settlement or a person authorized to do so shall be available during the session.
- (4) A settlement shall be reduced to writing in the form of a stipulation and signed by the parties before the mediator.

(h) Pre-Hearing Conference Statement:

- (1) Fourteen days before the pre-hearing conference, each represented party shall file electronically with the Board and serve on all other parties a pre-hearing conference statement. The pre-hearing conference statement shall contain information to facilitate the just, speedy and efficient disposition of the claimant's right to workers' compensation benefits, including settlement.

- (2) The pre-hearing conference statement shall include:
- (i) a brief summary of the claim;
 - (ii) the theory of the case with statutory and if appropriate, case citations;
 - (iii) with respect to the Insurance Carrier's statement, an offer of proof for each defense raised;
 - (iv) a list of lay witnesses, including claimant, the party will call to testify at the initial hearing, including the names, addresses, employers if known, and a summary of, and the estimated time needed for, the testimony;
 - (v) a list of medical witnesses that the party intends to cross-examine and whether the party wishes such cross-examination to be by deposition or, if the workers' compensation law judge permits, at a hearing;
 - (vi) the names of any additional necessary parties;
 - (vii) a statement that all discovery has been completed or will be completed prior to the pre-hearing conference; and
 - (viii) a certification that the party has conferred in a good faith effort to settle or otherwise resolve the case.
- (3) Each party shall attach to the pre-hearing conference statement any and all reports, forms and documents that the party intends to use at the hearing(s) insofar as they are not already a part of the electronic case file maintained by the Board, including hospital records and forms detailing the employer's statement of wages and the claimant's work status.
- (4) Failure by the Insurance Carrier to timely serve upon all other parties and file with the Board the pre-hearing conference statement, or the filing by the Insurance Carrier of a materially incomplete statement shall result in a waiver of defenses to the claim; failure to list a witness on, or to include a copy of any document not in the electronic case file with the pre-hearing conference statement, shall constitute a waiver of the right to call such witness or introduce such document in the case. There shall be no waiver if the workers' compensation law judge finds, based on the affidavit of the Insurance Carrier's Legal Representative (or if the Insurance Carrier does not have a Legal Representative, then by the Insurance Carrier), that the conduct at issue was due to good cause and the Insurance Carrier exercised good faith and due diligence.
- (5) The legal fee of claimant's Legal Representative shall be subject to a mandatory, substantial reduction for:
- (i) failure to timely serve on all parties and file with the Board the claimant's pre-hearing conference statement;
 - (ii) filing a materially incomplete pre-hearing conference statement for claimant;
 - (iii) failure to list a witness, who subsequently testifies, on claimant's pre-hearing conference statement; or
 - (iv) failure to include with claimant's pre-hearing conference statement a copy of any document not in the electronic case file, if such document is used by claimant's Legal Representative in seeking to establish the claim.

At the time of the fee award, the workers' compensation law judge shall state what the fee would have been but for the mandatory reduction, the amount of the reduction, and the resulting actual fee. If the workers' compensation law judge finds, based upon the Legal Representative's affidavit, that the conduct at issue was due to good cause and the Legal Representative exercised good faith and due diligence, the fee shall not be reduced.

(i) The Pre-Hearing Conference for Represented Claimants:

(1) The pre-hearing conference for a claimant with a Legal Representative shall be held within forty-five days of the filing of a notice of controversy, and shall proceed as described herein.

(2) At the pre-hearing conference, the workers' compensation law judge or conciliator may take appropriate action with respect to the following:

- (i) confirmation that all appropriate forms, including medical reports have been filed with the Board and served upon all other parties and a verification from the parties that all information thereon is accurate;
- (ii) addition of any other necessary parties;
- (iii) simplification and limitation of factual and legal issues;
- (iv) stipulations by the parties; and
- (v) settlement or other disposition of the case.

(3) The workers' compensation law judge or conciliator shall find a waiver of any defense for which the offer of proof at the pre-hearing conference is insufficient.

(4) The parties shall identify the evidence they intend to present at the initial hearing, including lay witnesses and documents.

(5) The parties shall identify any medical witnesses they wish to cross-examine and indicate whether they wish the medical witnesses to appear at a hearing or by deposition. The Legal Representatives shall advise the workers' compensation law judge or conciliator at the pre-hearing conference as to the availability of their respective medical witnesses for cross-examination. The workers' compensation law judge or conciliator shall decide whether medical witnesses shall appear for cross-examination at a hearing or by deposition.

(6) For those medical witnesses to be cross-examined at a hearing, the workers' compensation law judge or conciliator will set a hearing date no more than forty days from the pre-hearing conference.

- (i) the workers' compensation law judge or conciliator may permit the medical witnesses to appear at the hearing by telephone;
- (ii) the Insurance Carrier shall subpoena the medical witnesses it wishes to cross-examine at the hearing; and
- (iii) the Board shall send notice to the medical witnesses referenced in subparagraph (ii) of this paragraph, notifying them of the date(s) for cross-

examination, and that payment for prior medical services depends upon their appearance at the hearing.

(7) For medical witnesses to be cross-examined by deposition:

(i) the workers' compensation law judge or conciliator shall schedule the depositions for dates that shall be no more than twenty-five days from the pre-hearing conference;

(ii) the workers' compensation law judge or conciliator may permit depositions to be taken by telephone;

(iii) the transcript(s) of the testimony shall be filed with the Board within ten days from the date of the deposition; and

(iv) the Board shall send a notice to the medical witnesses to be cross-examined by the Insurance Carrier, notifying them that cross-examination will be by deposition, the date of cross-examination and that payment for prior medical services depends upon their appearance at the deposition.

(8) A Legal Representative appearing on behalf of a party must be authorized to enter into stipulations and a settlement or a person authorized to do so shall be available during the pre-hearing conference.

(9) If the claim is not settled or otherwise resolved at the pre-hearing conference, the workers' compensation law judge or conciliator shall find that the case is suitable for expedited hearings, unless the workers' compensation law judge or conciliator finds that there are complex factual or medical issues, the resolution of which are not suitable for an expedited docket. The workers' compensation law judge or conciliator must set forth on the record the reasons for such finding.

(10) The workers' compensation law judge or conciliator shall issue an order stating all determinations made at the pre-hearing conference.

(11) The pre-hearing conference shall be recorded.

(12) If the claimant fails to appear or is otherwise not prepared to proceed, the case shall be closed. The case shall be reopened and scheduled for another pre-hearing conference upon the claimant's application advising that he or she is prepared to proceed.

(13) If the Insurance Carrier or its Legal Representative fails to appear, a workers' compensation law judge will render a decision based upon the evidence contained in the Board file. The Insurance Carrier will be deemed to have waived its right to have an IME Report considered on the issue of causal relationship and to cross-examine the medical providers who have treated the claimant. The foregoing is subject to the Insurance Carrier making the required showing for an adjournment pursuant to subsection (k) of this section.

(j) Expedited Hearing Process in Controverted Cases:

(1) The Initial Hearing: Immediately following a pre-hearing conference at which the claimant is represented, the workers' compensation law judge shall hold an initial hearing at which testimony of the claimant and all other lay witnesses shall be taken and recorded.

- (i) if an Insurance Carrier's witness does not appear, then the Insurance Carrier shall have waived the right to have the witness testify in-person or by deposition, unless the Insurance Carrier makes a showing that the witness did not appear because of extraordinary circumstances. The showing must be made by an affidavit of the Legal Representative of the Insurance Carrier or, if the Insurance Carrier does not have a Legal Representative, then by the Insurance Carrier;
- (ii) if a claimant's witness, other than claimant, does not appear, then his or her testimony shall be taken by deposition at the earliest date practicable but no later than twenty-five days after the pre-hearing conference and the transcript shall be filed with the Board within ten days from the date of the deposition.

(2) Hearing for Medical Witnesses When the Claimant is Represented:

- (i) the Hearing for cross-examination of medical witnesses, pursuant to Subsection (i) (5) of this Section, shall be held on a date that shall be no more than forty days from the date of the pre-hearing conference.
- (ii) at such hearing, the Medical Report(s) and the IME Report(s) previously filed with the Board and served on the parties shall constitute the direct testimony of the medical witnesses and there shall be no direct in-person examination at the hearing; redirect examination may be permitted that is strictly limited to points raised by the cross-examination.
- (iii) if the medical witness to be cross-examined by claimant's Legal Representative fails to appear as scheduled, then the Insurance Carrier's right to introduce the IME Report from the witness or have the medical witness testify at a hearing or by deposition shall be waived, unless the Insurance Carrier makes a showing that the witness did not appear because of extraordinary circumstances. The showing must be made by an affidavit of the Legal Representative of the Insurance Carrier or, if the Insurance Carrier does not have a Legal Representative, then by the Insurance Carrier.
- (iv) if the medical witness to be cross-examined by the Insurance Carrier does not appear for cross-examination as scheduled, then his or her testimony shall be taken by deposition at the earliest date practicable. Such deposition may be taken by telephone. With respect to any such medical witness authorized by the Board to practice before it, the Board shall promptly direct the witness to appear at such deposition. If the witness does not appear, the Board shall take such action as it deems appropriate with respect to the witness' authorization to practice before the Board.

(3) Summations, Memoranda of Law and Briefs: At the conclusion of the presentation of the evidence, post-hearing summations of the evidence, memoranda of law, and/or briefs are not permitted, unless the workers' compensation law judge finds, on the record, that

the claim presents extensive and complicated factual determinations or novel and important questions of law. If the workers' compensation law judge orders such post-hearing submissions, they must be filed with the Board and served on all other parties within ten days from such order.

(4) Decisions:

(i) at the hearing at which medical testimony is given and after the close of the evidence respecting a controverted claim, the workers' compensation law judge shall orally issue, upon the record, a decision, including reasons and evidence supporting the decision, unless:

(A) the workers' compensation law judge determines on the record that there are extensive and complicated factual determinations or novel and important questions of law, in which case the written decision shall be issued within 15 days of the hearing, or if post-hearing submissions have been ordered, within 25 days of the hearing.

(ii) if the close of evidence does not occur at such hearing, then the worker's compensation law judge shall issue such a decision within ten business days from the close of the evidence.

(k) Adjournments in Controverted Cases:

(1) Adjournments for a deposition to a period of time beyond that specified in this Section, a pre-hearing conference, or a hearing in a controverted claim shall only be granted in extraordinary circumstances.

(2) The grounds for adjournment must be established by an affidavit of the Legal Representative of the requesting party (or if the requesting party is not represented, by the party), that shall be served on all other parties and filed with the Board by the party promptly upon learning the circumstances that are the basis for the adjournment requested. In the event that extraordinary circumstances occur on the day of the pre-hearing conference or hearing, the Legal Representative may make an oral application for an adjournment which the workers' compensation law judge may grant, conditioned upon the requesting party promptly filing with Board a confirming affidavit, as described in this Subsection.

(3) An adjournment, if granted, shall be as short as practicable and generally shall not exceed 20 days.

(4) "Adjournment" includes a rescheduling or continuance.

(5) "Extraordinary circumstances" are serious events that occur which prevent the timely completion of some action ordered or directed by the Board or regulation. Extraordinary circumstances include death in the immediate family, serious illness, significant and unavoidable prior professional or business commitment, and inclement weather that prevents all reasonable travel. It does not include any event that can be prevented or mitigated by the timely taking of reasonable action.

(l) This Section shall not apply to controverted claims where an employer has failed to secure coverage, as referenced in Workers' Compensation Law §50.