

Section 300.10 of Title 12 NYCRR is hereby amended to remove subdivision (c) and renumber subdivision (d) as (c).

Section 300.38 of Title 12 NYCRR is hereby amended to read as follows:

§ 300.38 Controverted claims

(f) Pre-Hearing conference statement:

(2) The pre-hearing conference statement shall include:

(v) [a list of medical witnesses] the name(s) and address(es) of the medical witness(es), if known, that the party [intends] wishes to cross-examine, the date(s) of the report(s) which forms the basis for the cross-examination, and the basis for requesting cross-examination, including any specific fact(s) reasonably likely to be elicited on cross-examination that would undermine the witness(es)'s medical opinion relative to the report(s), and whether the party wishes such cross-examination to be by deposition or, if the Workers' Compensation Law Judge or Conciliator permits, at a hearing;

(g) The pre-hearing conference for represented claimants:

(9) The parties shall identify the name(s) and address(es) of any medical witness(es) they wish to cross-examine, the date(s) of the report(s) which forms the basis for the cross-examination, and the basis for requesting cross-examination, including any specific fact(s) reasonably likely to be elicited on cross-examination that would undermine the witness(es)'s medical opinion relative to the report(s), and indicate whether they wish the medical witness(es) to appear at a hearing or by deposition. The Workers' Compensation Law Judge or Conciliator shall determine whether the requested cross-examination is reasonably necessary for the full presentation of the case. If a party identifies specific evidence that, if credited by the Worker's Compensation Law Judge or Conciliator, would likely result in rejection of the witness(es)'s medical opinion, cross-examination shall be granted. If a party fails to timely request cross-examination or to identify specific

evidence that would likely result in rejection of the witness(es)'s medical opinion, cross-examination shall be denied. Where the party has produced a medical opinion that contains a viable difference from or is contrary to the witness(es)'s medical opinion with respect to the particular issue(s) to be determined, the party shall presumptively be entitled to 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.

A new section 300.39 is added to read as follows:

§ 300.39 Cross examination of medical witnesses in accepted or established claims

(a) All requests for cross-examination of a treating medical provider, independent medical examiner, or a physician designated by the Board to examine a claimant pursuant to section 13(e) of the Workers' Compensation Law, shall be made in writing using the form prescribed by the Chair to request further action or on the record at a hearing no later than forty-five days from the date the Board received the medical report(s) which is the subject of the cross-examination. All requests shall specify (1) the name and address of the medical witness the party requests to cross-examine; (2) the date of the report(s) which forms the basis for the cross-examination, and (3) the basis for requesting cross-examination, including any specific facts reasonably likely to be elicited on cross-examination that would undermine the witness's medical opinion relative to the report(s).

(b) Except as provided in Workers' Compensation Law Section 13 (e), the Workers' Compensation Law Judge shall determine whether the requested cross-examination is reasonably necessary for the full presentation of the case or issue. If a party identifies specific evidence that, if credited by the Worker's Compensation Law Judge, would likely result in rejection of the witness's medical opinion, cross-examination shall be granted. If a party fails to timely request cross-examination or to identify specific evidence that would likely result in rejection of the witness's medical opinion, cross-examination shall be denied. Where the party has produced a

medical opinion that contains a viable difference from or is contrary to the witness's medical opinion with respect to the particular issue to be determined, the party shall presumptively be entitled to cross-examination.

(c) Cross-examination shall be taken at a hearing or by deposition within forty-five days of the order granting the cross-examination; provided however that if the claimant is not represented by legal counsel, the cross-examination shall be taken at a hearing.

(d) If the medical witness for the insurance carrier fails to appear for cross-examination as scheduled, the insurance carrier's right to introduce its independent medical report from the witness or to have the witness testify at a hearing or by deposition shall be deemed waived, unless the insurance carrier shows by affidavit good cause why the witness failed to appear, and that it acted in good faith and with due diligence.

(e) If the medical witness for the claimant does not appear for cross-examination as scheduled, then an extension of time to take testimony shall be granted only where the Worker's Compensation Law Judge finds that the witness could not have appeared within that period because of good cause, and that the party seeking the extension acted in good faith and with due diligence. If the extension is granted, the testimony shall be taken by deposition at the earliest date practicable but not more than thirty days after the date the witness was originally scheduled to testify. Such deposition may be taken by telephone. The insurance carrier is solely responsible for enforcing a subpoena to compel the appearance of the witness at the deposition. In the event that the insurance carrier fails to enforce a subpoena to compel appearance of the witness at the deposition, the report of the witness shall remain in evidence. For any such medical witness authorized by the Chair to treat or conduct independent medical examination of injured workers or both, the Board shall promptly direct the witness to appear at such deposition. If the medical witness does not appear at such deposition, the testimony of the witness shall not be rescheduled and the Chair shall take such action as deemed appropriate with respect to the witness's authorization to treat or conduct independent medical examinations of injured workers or both.

(f) Any order granting or denying cross-examination under this section shall be interlocutory and shall not be reviewable by the Board under Workers' Compensation Law Section 23 until a final decision on the substantive disputed issue(s) has been made by the Workers' Compensation Law Judge.

(g) Requests for cross-examination under this section that have been instituted or continued without reasonable ground are subject to assessments under Workers' Compensation Law Section 114-a (3) in addition to any other penalty permitted under the Workers' Compensation Law.

(h) For purposes of this section, "insurance carrier" shall include those entities under Workers' Compensation Law Section 2 (12), the Uninsured Employers' Fund under Workers' Compensation Law Section 26-a (2), and the Fund for Reopened Cases under Workers' Compensation Law Section 25-a (3).

Subdivision (j) of Section 312.5 of Title 12 NYCRR is amended to read as follows:

(j) The penalties and assessments contained in paragraph (f) of subdivision 3 of section 25 of the Workers' Compensation Law, for late payment of awards, shall [not] be applicable to conciliation cases.