



NEW
YORK
STATE

Workers'
Compensation
Board



CONFERENCE 2024

OCTOBER 18



**Workers'
Compensation
Board**



Payer Compliance & Regulatory Updates

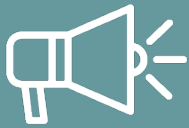
MICHAEL PAPA, DEPUTY COUNSEL
COURTNEY VALLEE, ASSOCIATE ATTORNEY

AGENDA

- 1 Introduction to Payer Compliance
- 2 Metrics Monitored/Measured & Legal Underpinnings
- 3 Payer Performance
- 4 Board Panel Decisions
- 5 Areas for Expansion
- 6 Regulatory Overview

INTRODUCTION TO PAYER COMPLIANCE

Responsibilities of the Payer Compliance Unit



Outreach



Education



**Compliance
with WCL**



METRICS MONITORED/MEASURED & THEIR LEGAL UNDERPINNINGS

METRICS MONITORED/MEASURED & THEIR LEGAL UNDERPINNINGS

Legal overview

- **Workers' Compensation Law (WCL) § 25** and **12 NYCRR §§ 300.22, 300.23, and 300.38**, set forth the timeframes for payer action and the corresponding penalties enforced by the Board.
- Further, Appellate Division cases have emphasized the common obligation of insurers to pay compensation at once in the absence of a controversy and that it is appropriate to issue a penalty under *WCL §25(2)(a)* when the timely filing requirements are not met.



METRICS MONITORED/MEASURED & THEIR LEGAL UNDERPINNINGS (cont'd)

The Board monitors/measures the following filings:

- Timeliness of the First Report of Injury (FROI)
- Subsequent Report of Injury (SROI) – Showing Initial Payment
- Timely Initial Payment, Timely Installment Payment
- SROI
 - Timely Notice Controverting the Claim
 - Showing Suspension of Indemnity Payment(s)



FIRST REPORT OF INJURY (FROI)

- Timeliness of the FROI filing is measured pursuant to *12 NYCRR § 300.22(b)* and *WCL § 25(3)(e)*.
- 12 NYCRR §300.22(b) provides:
 - “Mandatory first reports of injury. On or before the 18th day after the disability event or within 10 days after the employer has knowledge of the disability event, whichever period is the greater, the carrier [including self-insured employers], special fund, or TPA shall file electronically a first report of injury [FROI] with the board.”



FROI: DISABILITY EVENT

What is the meaning of disability event?

- Defined in *12 NYCRR § 300.22(a)(1)* as, “any accident, including death resulting therefrom, occurring in the course of employment or any alleged accident, including death resulting therefrom, that results in personal injury which has caused or will cause a loss of time from regular duties of one day beyond the working day or shift on which the accident or alleged accident occurred, or which has required or will require medical treatment beyond ordinary first aid or more than two treatments by a person rendering first aid; or any disease or alleged disease, including death resulting therefrom, claimed to have been caused by the nature of the employment and contracted therein.”

FROI: PENALTY

- The Board may impose a penalty of **\$50 per occurrence** for failing to timely file the FROI pursuant to *WCL § 25(3)(e)*.
- *WCL § 25(3)(e)* provides:
 - “If the employer or its insurance carrier fails to file a notice or report requested or required by the Board or Chair or otherwise required within the specified time period or within ten days if no time period is specified, the Board may impose a penalty in the amount of fifty dollars unless the employer or carrier produces evidence sufficient to excuse its conduct to the satisfaction of the Board. Such penalty shall be in addition to all other penalties provided for in this chapter and shall be paid into the state treasury.”

SUBSEQUENT REPORT OF INJURY (SROI)

- Timeliness of the SROI – Showing Initial Payment filing is measured pursuant to *WCL §§ 25(1)(c) and 25(3)(e)*
- Timely Initial Payment under *WCL §§ 25(1)(c) and 25(2)(a)*
- Timely Installment Payment under *WCL § 25(1)(e)*
- Timely Notice of Controversy under *WCL §§ 25(2)(a) and 25(3)(e)*
- Timely Notice of Suspension under *WCL §§ 25(1)(d) and 25(3)(e)*



SROI: SHOWING INITIAL PAYMENT

- *WCL* § 25(1)(c) provides:
 - “If the employer or insurance carrier does not controvert the injured worker’s right to compensation such employer or insurance carrier shall, either on or before the eighteenth day after disability, or within ten days after the employer first has knowledge of the alleged accident, **whichever period is the greater**, begin paying compensation and shall immediately notify the chair in accordance with a form to be prescribed by him, that the payment of compensation has begun, accompanied by the further statement that the employer or insurance carrier, as the case may be, will notify the chair when the payment of compensation has been stopped.” (Emphasis added).
- A penalty of **\$50 per occurrence** is permitted under *WCL* § 25(3)(e) for failing to timely file the SROI.

SROI: TIMELY INITIAL PAYMENT

- The initial payment of compensation must be made in accordance with the provisions of *WCL § 25(1)(c)*.
- If the carrier fails to begin payment within eighteen days from the initial/current date disability began, ten days from the date employer had knowledge of the alleged accident, or within ten days from when the claims administrator had knowledge of the injury, whichever is greater, the Board may impose a **\$300 penalty** under *WCL §25(2)(a)*.



SROI: TIMELY INSTALLMENT PAYMENT

- *WCL § 25(1)(e)* provides:
 - “If the employer or insurance carrier shall fail to pay any installments of compensation within twenty-five days after the same became due, there shall be paid by the employer or, if insured, its insurance carrier, an additional amount of twenty percent of the compensation then due which shall accrue for the benefit of the injured worker or his or her dependents and shall be paid to him or her or them with the compensation, unless such delay or default is excused by the Board upon the application of the employer or insurance carrier upon the ground that owing to conditions over which the employer or insurance carrier had no control, such payment could not be made. The employer in each such instance shall also be assessed the sum of **three hundred dollars** which shall be paid to the claimant.”

SROI: TIMELY NOTICE OF CONTROVERSY

- *12 NYCRR §300.22 (c)(1)* provides that unless submitted as a first report of injury, the carrier [including self-insured employers], special fund, or TPA, shall electronically file the initial notice of controversy [**FROI-04/SROI-04**] with the Board, either on or before the 18th day after the disability event or within 10 days after the employer has knowledge of the disability event, whichever period is the greater.
- As stated previously, a penalty of \$50 per occurrence is permitted under *WCL §25(3)(e)* for failure to timely file the **Notice of Controversy**.
- If the carrier fails to file a **Notice of Controversy** or begin payment within the prescribed period or within ten days of claims administrator knowledge of injury (whichever period is greater), the Board may impose a **\$300 penalty** payable to the claimant under *WCL §25(2)(a)*.

SROI: SHOWING SUSPENSION OF INDEMNITY PAYMENT(S)

■ WCL § 25(1)(d) provides:

- “Whenever for any reason compensation payments cease, the employer or its insurance carrier shall within sixteen days thereafter, send to the Chair a notice on a form prescribed by the Chair that such payment has been stopped, which notice shall contain the name of the injured employee or his or her principle dependent, the date of accident, the date to which compensation has been paid and the whole amount of compensation paid. In case the employer or its insurance carrier fails so to notify the Chair of the cessation of payments within sixteen days after the date on which compensation has been paid, the Board may impose a penalty upon such employer or its insurance carrier in the amount of **three hundred dollars**, which shall be paid to the claimant. Such penalty shall be collected in like manner as an award of compensation.”



PAYER PERFORMANCE

IMPROVED PAYER PERFORMANCE

Performance Metrics	Baseline (1st Q 2015)	4th Q 2015	1st Q 2017	3rd Q 2017	3rd Q 2021	1st Q 2024
FROI - § 25.3(e)	65.10%	71.80%	77.60%	82.50%	79.74%	82.08%
SROI - § 25.3(e)	29.00%		55.12%	67.20%	71.19%	68.50%
Initial Payment - § 25.2(a)	38.00%		82.80%	89.30%	91.69%	89.61%
Installment Payment - § 25.1(e)	60.00%		91.90%	94.60%	95.72%	94.40%
Controversy - § 25.3(e)				54.96%	60.74%	61.19%
Controversy - § 25.2(a)				70.00%	74.60%	76.70%
Suspension - § 25.3(e)					71.55%	84.00%
Suspension - § 25.1(d)					79.50%	87.82%



BOARD PANEL DECISIONS

BOARD PANEL DECISIONS: OFM ENTERPRISES

***Matter of OFM Enterprises Inc, 2019 WL 1224010
(N.Y. Work. Comp. Bd.) G1630677***

The issues presented for administrative review:

Whether the carrier is liable for a penalty under Workers' Compensation Law (WCL) § 25(2)(a), WCL § 25(1)(e), and WCL § 25(3)(e).

BOARD PANEL DECISIONS: OFM ENTERPRISES (cont'd)

The Board held:

- *WCL § 25(2)(a)* clearly requires that payment must be made within the later of 18 days after disability or within 10 days after the carrier has knowledge of the alleged accident or receives the employer's report of injury. The statute does not provide for a payment date that runs from the date the carrier had knowledge of disability. Thus, the Board panel finds that there is no legal basis to withdraw the **\$300 penalty**.
- *WCL § 25(1)(e)*: Here, the due date by which the first payment in this case should have been made was August 15, 2016, and 25 days after same would make the initial installment due by September 12, 2016. As the carrier did not issue the first payment in this case until May 12, 2017, it was late. In this case, the first payment and the first installment payment were the same and both are subject to possible penalties for violations of the respective sections of law.
- *WCL § 25(3)(e)*: Here, a SROI indicating first payment of compensation should have been filed 10 days from the employer's knowledge of accident (i.e., August 1, 2016), or 18 days after disability (i.e., August 15, 2016), whichever is greater. Thus, the SROI filed on May 16, 2017, was not timely filed.

BOARD PANEL DECISIONS: DINING ASSOCIATES

Matter of Dining Associates Inc, 2018 WL 1749000 N.Y. Work. Comp. Bd. G1585735

The issues presented for administrative review:

- Whether the carrier is liable for a penalty under *WCL § 25(2)(a)* and;
- Whether notice of claimant's lost time triggers the 18-day period under *WCL § 25(2)(a)*.

BOARD PANEL DECISIONS: DINNING ASSOC (cont'd)

The Board held:

- *WCL § 25(2)(a)* clearly requires that payment be made within the later of 18 days after disability or within 10 days after the carrier has knowledge of the alleged accident or receives the employer's report of injury. The statute does not provide for a payment date that runs from the date the carrier had knowledge of disability. Thus, there is no legal basis to withdraw the penalty.
- While the Board panel agrees that imposition of the penalty is discretionary, public policy considerations support facilitating prompt payment to claimants who are out of work due to injuries sustained in a work-related accident. In *Matter of Smith v City of Rochester, 285 A.D. 46 (1946)*, the Appellate Division emphasized the common obligation of employers/insurers to pay compensation at once in the absence of a controversy.

BOARD PANEL DECISIONS: FAIRWAY GROUP

***Matter of Fairway Group Holdings Corp., 2018
WL 1748779 N.Y. Work. Comp. Bd. G1713299***

The issues presented for administrative review:

- Whether payment was due within 10 days of carrier knowledge of compensable lost time or 18 days of the first day of disability; and
- Whether imposition of the *WCL 25(2)(a)* penalty in this instance is an unreasonable exercise of discretion by the Board.

BOARD PANEL DECISIONS: FAIRWAY GROUP (cont'd)

The Board held:

- *WCL* § 25(2)(a) clearly requires that payment be made within the later of 18 days after disability or within 10 days after the carrier has knowledge of the alleged accident or receives the employer's report of injury. The statute does not provide for a payment date that runs from the date the carrier had knowledge of disability. Thus, there is no legal basis to withdraw the penalty.

BOARD PANEL DECISIONS: FAIRWAY GROUP (cont'd)

The Board held:

- While the Board panel agrees that imposition of the penalty is discretionary, public policy considerations support facilitating prompt payment to claimants who are out of work due to injuries sustained in a work-related accident. In the *Matter of Smith v City of Rochester, 285 A.D. 46 (1946)*, the Appellate Division emphasized the common obligation of employers/insurers to pay compensation at once in the absence of a controversy.
- Where, as here, the delay in payment to the claimant was due to a lack of communication between the carrier and its insured, the waiver of the penalty for late payment would result in the carrier profiting from its own poor business process and without consideration of the consequences of the late payment to the claimant. It is well settled that the failure of an employer to act responsibly or legally will not relieve the carrier of its obligations to pay benefits to an injured worker (see *Matter of Urbano v Bletsas Plumbing & Heating Corp., 124 A.D.3d Dept. 1025 [2015]*).



AREAS FOR EXPANSION

POTENTIAL AREAS OF EXPANSION

Medical Payer Compliance

- *WCL § 13-a(6)(b)(i)* provides:

- “The Chair shall apply the performance standard based on multiple factors, including but not limited to, findings of improper interference submitted as complaints to the board’s monitoring unit, unreasonable objections to medical care, unwarranted objections to variances, medical billing disputes, case delays brought about by employers, insurers, and third-party administrators, and the unreasonable denial of medical care.”

- A penalty of **\$50 per violation** of performance standard is permitted under *WCL § 13-a(6)(b)(ii)*.





REGULATORY OVERVIEW

PURPOSE OF REGULATIONS



Emergency

Support of Board initiatives

Required by statute

Resolve inconsistencies created by court decision

Conform to national standard

Correct mistakes

REGULATORY PROCESS

Regulations implement the statute and follow this process to adoption:

- Draft text of regulation and impact statements.
- Send proposals to the Regulatory Review Unit (RRU) for executive approval before filing.
- File Notice of Proposal for publication in the State Register.
 - Published every Wednesday (deadlines for filing on Tuesdays for publication two weeks later)
- Begin public comment period.
- Draft Assessment of Public Comment.
- File Notice of Adoption.



REGULATORY PROCESS (cont'd)

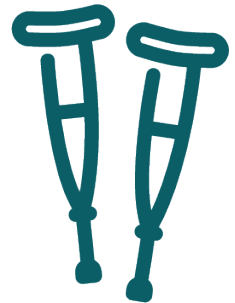
Other regulation types:

- Incorporation by reference
 - E.g.: *New York Workers' Compensation Medical Fee Schedules*, *New York Workers' Compensation Drug Formulary (Drug Formulary)*, *New York Medical Treatment Guidelines (MTGs)*
- Emergency adoptions
- Emergency adoption and proposal
- Consensus regulations



DURABLE MEDICAL EQUIPMENT (DME) FEE SCHEDULE

- The *New York Workers' Compensation Durable Medical Equipment Fee Schedule* was replaced in May 2022.
- New schedule is much more robust and identifies when a prior authorization request (PAR) is required.
- Only one comment received during public comment period.
- The fourth edition was adopted in June 2024.



MEDICAL TREATMENT GUIDELINES (MTGs)

There are now 16 effective *MTGs*, including several updated and several brand new *MTGs*:

1. Asthma	9. Mid and Low Back Injury
2. Complex Regional Pain Syndrome	10. Neck Injury
3. Elbow	11. Non-Acute Pain
4. Eye Disorders	12. Occupational Interstitial Lung Disease
5. Foot/Ankle	13. Post-Traumatic Stress Disorder and Acute Stress Disorder
6. Hand, Wrist & Forearm (prior to 5/2/22, it was Carpal Tunnel Syndrome)	14. Shoulder Injury
7. Hip/Groin	15. Traumatic Brain Injury
8. Knee Injury	16. Work-Related Depression and Depressive Disorders

INDEPENDENT LIVELY DRIVERS

- Filed as an emergency adoption and proposal in December 2021. Regulation took effect immediately upon adoption, but also had a public comment period before permanent adoption (although no comments were received).
- This regulation implemented the *Cisnero* case (195 A.D.3d Dept. 1344), which expanded the definition of independent livery driver.

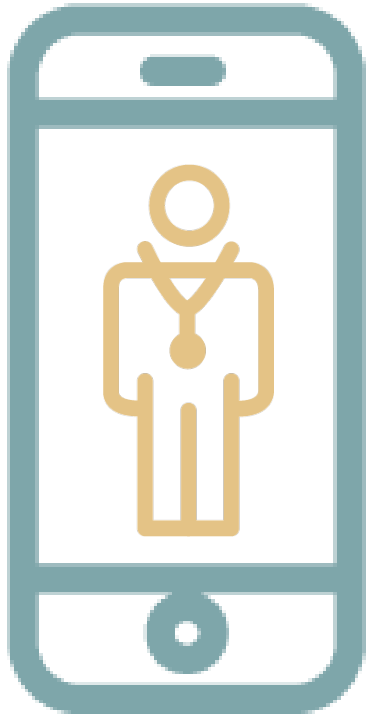


COVID-19 TESTING

- CPT Code is 87365
- RVU is 39.18
- Total fee is:
 - Regions I and II: 41.52
 - Region III: 47.41
 - Region IV: 51.33
- Billing permissions

Incident	Qualifier	Billable
Workplace Exposure Without WCB Claim	Asymptomatic or no injury	NO
Workplace Exposure With WCB Claim	Each exposure that accompanies one or more claims	YES
Repeat Testing After Exposure	With clinical documentation supporting a change or recurrence of symptoms	YES
Repeat Testing After Exposure	Without clinical documentation supporting a change or recurrence of symptoms	NO
Pre-Op Testing	DOH protocol requires testing	YES
Routine Screening	Without known exposure	NO
Antibody Testing	Ever	NO

TELEHEALTH REGULATIONS



- First emergency adoption was filed March 16, 2020.
- The Board drafted and proposed permanent telehealth proposals, and the final version was adopted in 2023 (effective 7/11/23).
- From March 2020, until the permanent proposal was adopted and became effective, there were 14 COVID-19 emergency adoptions filed.

PERMANENT TELEHEALTH REGULATIONS

- First proposed in July 2021.
- After assessing comments received, the Board decided to revise the proposal to address some of the concerns in the comments.
- Many of the comments focused on mental health services and the benefits of telehealth in that arena.
- Permanent telehealth proposal adopted in June 2023, effective upon the expiration of the final emergency adoption in July.
 - Permanent proposal allows treatment via telehealth by Board-authorized physicians, podiatrists, nurse practitioners, physician assistants, and licensed clinical social workers (LCSWs).
 - **NO** telehealth for chiropractors, acupuncturists, PTs, and OTs.
 - More telehealth flexibility for behavioral health (psychologists and LCSWs).

DISABILITY REGULATIONS UPDATES

- In October 2022, the Board proposed updates to several sections of the disability regulations.
- Changes include:
 - Explicit language about disability during/after pregnancy.
 - Changes to prescribe format of application form and denials.
 - Make certain New York's Paid Family Leave (PFL) regulations also applicable to disability.
- Six public comments received. These include:
 - Corrections of some typographical errors.
 - Clarifying changes.



UPCOMING: NETWORK PHARMACY REGULATIONS

- The Board plans to propose regulations that will make it easier for a claimant to go out of network for medications.
- Specifically, the regulations will address issues claimants have getting medications when a body part or condition has not yet been established or there is another legal objection.
- Goal is to reduce friction and ensure that there are no delays getting medically necessary medication.



UPCOMING: DEPOSITION REGULATIONS

The Board is analyzing current regulations surrounding depositions, in light of *Lazalee v Wegman's Food Mkts.*, 40 NY3d 458 (2023), regarding the Board's discretion over granting adjournments for deposition. In this process, the Board is also evaluating general procedures around depositions to make the process more consistent across cases, and the Board plans to propose regulations as well as draft forms to accompany them soon.

More detail in Patrick Cremo's and Lisa-Michelle Houck's CLE presentation, ***Depositions and Section 32 Waiver Agreement Updates***.

UPCOMING: DENTAL FEE SCHEDULE



- The *New York Workers' Compensation Dental Fee Schedule* has not been updated since it was created in 2009.
- Working with Medical Director's Office (MDO) to update the regulations and the *Dental Fee Schedule* itself, which is incorporated by reference.

UPCOMING: PAR REGULATIONS



- Working closely with staff including from MDO, Conciliation, and Adjudication to ensure that the PAR regulations conform to the functionality in OnBoard, the Board's modernization project
- Meetings are ongoing.

UPCOMING REGULATIONS

- Every January the Board publishes a regulatory agenda on its website (and in the State Register) as required under section 202-d of State Administrative Procedures Act (SAPA).
- Regulatory agenda lists regulations the Board is thinking about proposing to give the public notice:
 - Updates as needed to materials incorporated by reference
 - Proposal to implement performance standard in *WCL 13-a*
 - Addition of new section *329-1.4* regarding when Intra-operative Neurophysiological Monitoring (IOM) is appropriate
 - Proposals in support of OnBoard



FOLLOW THE BOARD

 [@NYSWorkersComp](#)

 [@NYSWCB](#)

 [@NYSWorkersCompBoard](#)

 youtube.com/@nyswcb

 linkedin.com/company/new-york-state-workers-compensation-board

 wcb.ny.gov (“Get WCB Notifications”)



NEW
YORK
STATE

Workers'
Compensation
Board

THANK YOU