



The Streamlined Docket Regulations “Rocket Docket”



It wasn't broken, but someone fixed it, so now we have to learn to deal with it!



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Exactly what are we talking about?

- New York Codes, Rules and Regulations
- Title 12 Department of Labor
- Chapter V. Workers Compensation
- Subchapter A: General Provisions
- Part 300 Procedure Before the Board

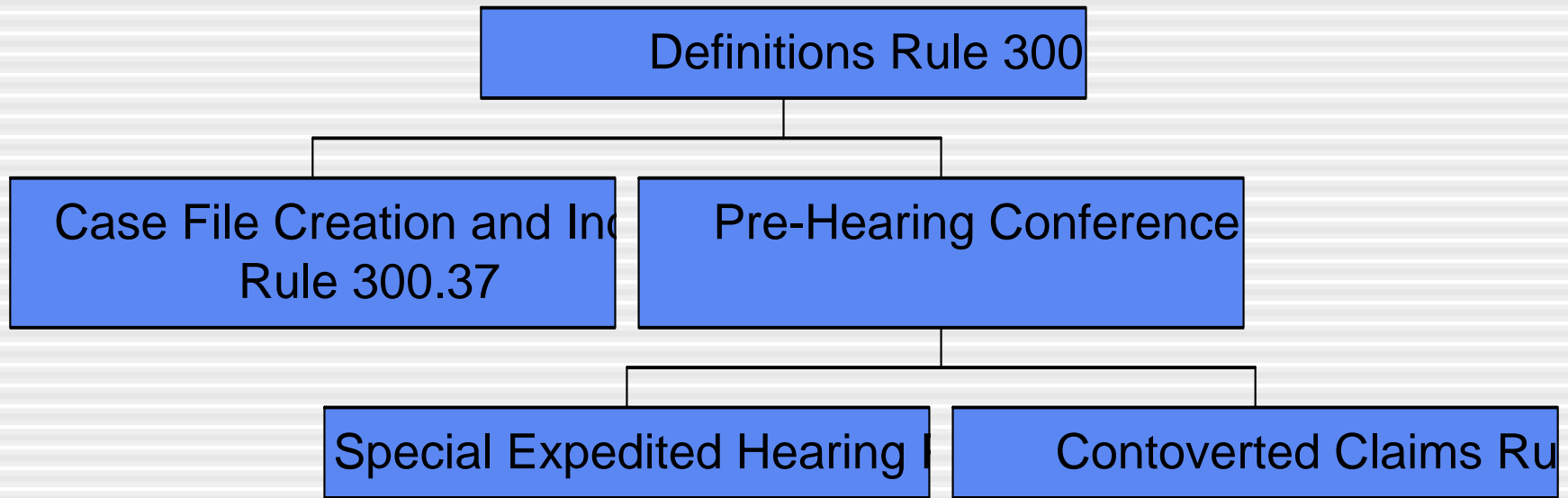
What has changed?

- Modifications to:
 - Rule 300.1
 - Rule 300.33
 - Rule 300.34
- Newly Added Sections:
 - Rule 300.37
 - Rule 300.38
- New Forms (C2, C3, C4s, C7)

Why should we care?

- Many practitioners will rightly ask this question, and though the answers seem obvious, its good to consider some of the answers:
 - New indexing rules could lessen hearings even further and delay injured workers receiving proper benefits;
 - Complicated new filing requirements;
 - Complicated new rules for doctors;
 - More work, less fees;
 - Extensive technicalities in a system originally designed to be injured worker friendly and easier than the “legal system”
 - Many others...

Overview of New Regulations



(Note: Rule 300.37 affects how the other sections operate and when they do so)

The Definitions Rule 300.1

The new regulations add the following definitions:

- Affidavit
- Affirmation
- Insurance Carrier
- Initial Expedited Hearing
- Who a Legal Representative is
- Prima Facie Medical
- Who a Law Judge is

What does it all mean?

The significance of the definitions only come into play while looking at the pre-hearing and expedited hearing process regulations, however some highlights...

- **Prima Facie Medical** “a medical report referencing an injury, which includes traumas and illnesses”
- **Initial Expedited Hearing** “the first hearing scheduled after a pre-hearing conference which is designed to provide an opportunity for the claimant and any lay witnesses to testify

Rule 300.33 Pre-Hearing Conferences

300.33(a) Statement of Purpose

- To address the conduct and processing of pre-hearing conferences (PHC), to provide a mechanism for identification of issues and relevant evidence and to permit **parties** an opportunity to assess their case and to resolve outstanding issues **prior to scheduling a hearing** regarding those issues.

Rule 300.33(b)

This rule actually defines three “kinds” of pre-hearing conferences and their rules...

Kind I Pre-Hearing Conference - Controverted Claims

If WCB

Receives:

C-7; and
Medical Report referencing an injury

Then: “shall”

Pre-Hearing Conference within 30 calendar days

Rule 300.33(b)

Kind II Pre-Hearing Conference: Outstanding Issues Only

If:

Cases with outstanding issues,
which cannot be processed through conciliation
or administrative determination

Then: "shall be
referred when necessary"

Pre-Hearing Conference to complete
Discovery!

Rule 300.33(f)

Kind III Pre-hearing Conference: The Unrepresented Claimant

It is important to read this section because it closely tracks the requirements of the represented claimant, and does affect the claimant who gets representation after the pre-hearing conference held under this Rule.

Rule 300.33(f) Details

300.33(f)(1) details what the Law Judge or Conciliator shall consider:

- All forms completed, medical reports submitted, verification of forms, addition of necessary parties, simplifying issues, witness lists, production of depositions, schedule case for hearing, enter into stipulation

(this is just an overview, you should read the section in detail)

Rule 300.33(f)(2-13)

- The balance of this rule discusses where Pre-hearing conferences are held, **recorded**, insurance carrier requirements including PHC statements, claimant requirement to file C-3, IME requirements, written order, No Further Action if claimant doesn't appear, consequence if carrier fails to appear, interlocutory decisions, **shall schedule hearing within 60 days**, and fees for doctors testimony

Rule 300.33 other provisions

Rule 300.33 also spells out additional requirements:

- 300.33(c) Notice of Pre-hearing Conference: The How to and What to do (see 300.38(b))
- 300.33(d) Filing of the Pre-hearing Conference Statement: All represented parties must file pursuant to 300.38(f)
- 300.33(e) Conduct of Pre-hearing Conference is governed by 300.38(g) if claimant retained legal counsel on or before the Pre-hearing Conference date

Special Expedited Hearing Process Rule 300.34

- This Rule has been modified to allegedly speed up the process in conjunction with the new rules...
- 300.34(a) The purpose has changed to address unresolved issues within one (1) year, and to direct controverted cases to the Rules under 300.38

Special Expedited Hearing Process Rule 300.34

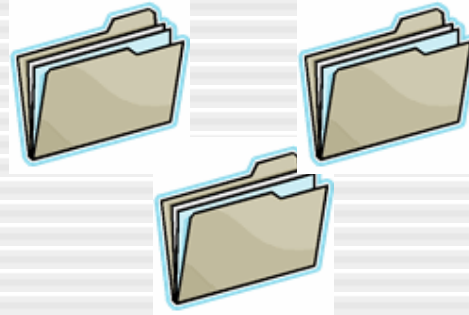
- 300.34(b) Tells us when a case can be transferred to the Special Expedited Hearing Process...one year and by motion or party of interest or the Chair's own motion
- 300.34(c) Each party must file within 20 (twenty) days of the transfer a PHC statement pursuant to 300.33(c) if not already done (**controverted cases have their own filing rules**)
- 300.34(d) Hearing Conduct - only by a Law Judge, enough time to resolve all issues, within 30 days of the order transferring case to the Process

Special Expedited Hearing Process Rule 300.34

- 300.34(e) The know your case and have permission to do something about it rule
- 300.34(f) Adjournments SHALL ONLY be granted in accordance with section 300.38
- 300.34(g) Non-Emergency Frivolous adjournment penalties: Claimant's Counsel pays \$500 and Carrier's Counsel pays \$1000.
- 300.34(h) Judges decisions are interlocutory unless they deal with Accident, Occupational Disease, Notice, Causal Relationship or a monetary award.
- 300.34(i) takes effect immediately (i.e. 9/15/2008)

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

The case within the case!



At first glance, and maybe second glance the kindest thing to be said about this new Rule is that everyone from claimants, carriers, and Workers' Compensation Board employees will be equally confused. Unfortunately, the built in features designed to help injured workers are out-weighted by the built in bureaucratic chaos...

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

300.37(a) Case File:

Upon receipt of any document regarding a claim, the WCB shall assign a **unique case number and create a case file**...this number and file **IS NOT INDEXING** for purposes of Sec. 25(2)(b) and filing a C-7...

All of this activity creates a WCB Case File, but
□ **DOES NOT** toll the Statute of Limitations!

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

300.37(b) Indexing:

300.37(b)(1): The Board will only INDEX (thus tolling the SOL and starting the other statutory timelines) upon receipt of the following forms:

- i) C3 (see new form) or C2 (see new form); AND
- ii) Medical Report (see new C-4) unless the medical provider is out of state, it was an Emergency Room visit or the claimant is deceased; AND
- iii) Properly executed Limited Release if the claimant “remembers” a prior injury to the same body part or similar illness as listed in the C-3.

Case File Creation and Indexing of Claims that May Be Controverted

Rule 300.37

300.37(b)(2) - a limited rule that notes if the WCB learns a worker was killed, and the employer doesn't file a C-2 and the beneficiary or estate hasn't file a claim, then the WCB can index a case.

300.37(b)(3) - the WCB has five (5) days to index the case and make it available electronically to the Carrier or Uninsured Employers Fund if it gets all the documents noted in 300.37(b)(1)

300.37(b)(4) - NOTICE OF INDEXING - the WCB must send it to all parties it knows about, and it must include information telling the Insurance Carrier of its rights to have an IME performed if the Carrier controverts the case (has to have it done within three days of the Initial Expedited Hearing and if fails to waives right to have IME on threshold issue of Causal Relationship - see also 300.38(g)(8)

Case File Creation and Indexing of Claims that May Be Controverted

Rule 300.37

300.37(c) When Claim is NOT Indexed

This rule tries to clarify what is to be done when a case has a case file, but is not or cannot be indexed - it is very confusing:

300.37(c)(1)

If the Board receives a prescribed form from the Carrier before any other forms required for indexing the Board does not have to index a claim. [it is not clear if the indexing rules in this section are only for C-7 cases, or apply to C-669 cases as well. The language in 300.37(a) seems to talk about controversies, but 300.37(b) does not]

Case File Creation and Indexing of Claims that May Be Controverted

Rule 300.37

300.37(c)(1) When Claim is NOT Indexed

The rule continues by stating the Board can “take appropriate action without indexing a claim to address any issues or disputes raised by one of the parties if the Board has received a form that

- 1) accepts the case
- 2) carrier agrees to make payments under Sec. 21-A
- 3) controverts the claim

Also - this rule states that even if the Board does not index the claim, the date the Board received one of the above forms is to be considered the date of indexing for Sec. 25(2-b) and Sec. 32

Case File Creation and Indexing of Claims that May Be Controverted

Rule 300.37

300.37(c)(2) When Claim is NOT Indexed

This part of the rule address what the Board is to do if the Carrier controverts the case (by filing a proper form), but the case is not indexed under **300.37(b)(1)**.

The WCB must attempt to contact the claimant, claimant's legal representative or medical provider in writing, by phone of the need for and how to file a Medical Report;

or if unrepresented by sending out the Claimant Information Packet (described later in this rule!)

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

300.37(d) Provisions Applicable to all claims that have been or may be controverted

This part of the rule address the obligations of various parties when a case may be or has been controverted (read this as every case, because who knows if a carrier will controvert the case!)

Case File Creation and Indexing of Claims that May Be Controverted

Rule 300.37

300.37(d) Provisions Applicable to all claims that have been or may be controverted

1) The Legal Representative: if you are retained at the time the C-3 is filed then you (the Legal Representative) **MUST**

i) **certify in writing 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 in the C3 have evidentiary support or if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery

ii) **provide a list of all documents in the possession, custody or control of the claimant that may be used to support the claim**

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

300.37(d) Provisions Applicable to all claims that have been or may be controverted

2) Unrepresented claimant, the Board SHALL DO THE FOLLOWING if there is a case number but not indexed, or the carrier has not accepted the case, or there is no C3 or Medical Report :

make assistance readily available to get all the parts done
provide the claimant with the Claimant Information Packet (C3,
instructions for the C3, information about need for Medical
Report, Limited Release, Right to Legal Representation, rights
regarding medical treatment including pharmacy information

Case File Creation and Indexing of Claims that May Be Controverted

Rule 300.37

300.37(d) Provisions Applicable to all claims that have been or may be controverted

3) Employer Obligations: C2 shall require the Employer/Designee to certify that they have given the injured worker the Claimant Information Packet. (The Rule also extensively discusses pharmacies and diagnostic testing)

4) Medical Report - basically says that the provider must fill out the C-4, that notes and narratives can only supplement (except if ER, out of state or deceased employee) and goes on to advise providers that if they do not do it, they do not have to be paid.

5) if the claimant doesn't satisfy the indexing requirements s/he may amend the documents and resubmit them.

Rule 300.38 Controverted Cases

- This new rule, designed to expedite the resolution of Controverted cases is rather lengthy. In fact, the Rule Modifications and Rule 300.37 take up fifteen printed pages. Rule 300.38 alone takes up sixteen printed pages!
- This rule was promulgated and passed, even though the Board itself acknowledged that it had resolved 88% of Controverted cases within its 90 day deadline since the beginning of 2008!

Rule 300.38

- 300.38(a) Notice of Controversy
 - A carrier who controverts a case must file a C-7 form and shall:
 - Complete and provide a factual basis for the controversy and any asserted defenses
 - Written certification signed by carrier or representative (similar to Claimant Legal Representative certification)
 - Witness information
 - Documents in its possession, custody, control

Rule 300.38

- 300.38(b) Notice of Pre-hearing Conference and other matters
 - Upon receipt of C-7 and Medical Report, Board to send notice to parties that:
 - Gives date of Pre-hearing Conference (within 30 days)
 - Tells parties to file PHC Statement no later than 10 days before the PHC
 - Notice about IME rules for Carriers

Rule 300.38

- 300.38(c) Medical Records

- 1) Parties may seek relevant prior medicals from medical professionals and hospitals if a limited release was part of the C3
- 2) Medical Professional has twenty-one (21) days to deliver a copy, or ten (10) business days if the requesting party pays \$1.50 per page.
- 3) If not produced in time, the provider shall be subject to administrative warning or suspension or revocation of code letters.
- 4) all records will be available to all parties

Rule 300.38

- 300.38(d) Subsequent Retention of Legal Rep.

If you are hired after indexing, or if C-7 but not indexed, then you **SHALL file a retainer within five (5) days** and:

- File a C-3, if not previously filed, or certify previously filed C-3 or supplement the previously filed C-3 and certify it; and
- Provide list of all documents per 300.37(d)(1); or Pre-hearing Conference statement per 300.38(f)

Rule 300.38

- 300.38(e) Retention of Legal Rep. within 10 days of the Pre-hearing Conference

If you are hired within ten days of the pre-hearing conference, this may constitute good cause for the insurance carrier to obtain an adjournment based on information you provide - note: it is not good cause for the attorney to adjourn the conference!

Rule 300.38

- 300.38(f) Pre-hearing Conference Statement

This Rule has very detailed directions for what needs to be done:

- the time frame to do so 300.38(f)(1);
- what should be included 300.38(f)(2)(i-x);
- what records to attach to statement (300.38(f)(3));
- consequences of carrier failing to timely serve or providing incomplete PHC statement (300.38(f)(4));
- consequence of legal representative to file PHC statement or provide incomplete information (300.38(f)(5)) ** This section specifically details a MANDATORY SUBSTANTIAL FEE REDUCTION **

Rule 300.38

- 300.38(g) The Pre-hearing Conference for represented claimants:

This Rule Details Everything You Ever Wanted to Know about the Pre-hearing Conference:

There are eighteen (18) subsections: They cover items from the PHC to be held in 30 days, to what is Prima Facie Medical, effects of rulings by Judge or Conciliator, defense waivers, lists of witnesses, forms filled out properly (C3), list of evidence for the Initial Expedited Hearing, IME rules and results, identification of medical doctors for cross-examination (within 60 days), decisions, recording of PHC, and so forth

Rule 300.38

- 300.38(h) Expedited hearing process in controverted cases when the claimant is represented:

1) The Initial Expedited Hearing: This occurs within 30 days of the PHC and is for the testimony of claimant and all lay witnesses. But if no request for claimant or lay, then no Initial Expedited Hearing

Witness no-show without good cause (by affidavit) then witness is waived (precluded)

IME - reports shall be filed no later than three days before the Initial Expedited Hearing and Claimant must state if cross-examination is still requested

Rule 300.38

- 300.38(h) Expedited hearing process in controverted cases when the claimant is represented:

2) Hearing for Medical Witness when the claimant is represented

This rule seems to say that if testimony is directed it must be done within 30 days from the hearing unless good cause.

This rule definitely says that Medical Reports and IME Reports previously filed **shall constitute direct testimony** of medical witnesses and that there is no direct examination unless exceptional circumstances, and redirect is limited to the scope of cross-examination!

Failure to Appear - without good cause, if it is medical witness being cross-examined by claimant - then waived. If it is a medical witness to be cross-examined by the carrier, then another 30 days for a deposition (but not waived?)

Rule 300.38

- 300.38(h) Expedited hearing process in controverted cases when the claimant is represented:

3) Summations, memoranda of law and briefs

Oral summations at last hearing or deposition, **NO** written post-hearing summations etc, unless Law Judge directs due to extensive and complicated factual determinations or novel and important questions of law. (And those within five (5) days of the order or conclusion of evidence)

Rule 300.38

- 300.38(h) Expedited hearing process in controverted cases when the claimant is represented:

4) Decisions

When close of evidence occurs at hearing, then on the record decision unless the complicated decision needs to be done in five days!

When close of evidence is not at a hearing, then no later than the sixty (60) days from the PHC, and within five days of the close of the evidence.

Rule 300.38

- 300.38(h) Expedited hearing process in controverted cases when the claimant is represented:

5) Applicability of Section 300.34

Not really sure what this means or if it really matters

Rule 300.38

- 300.38(i) Decisions in Expedited Hearing Process

Basically says that orders and directions made by a Law Judge regarding a PHC or Expedited Hearing are not reviewable, until there is a finding establishing or disallowing the case.

Rule 300.38

- 300.38(j) Adjournments of Controverted Cases

 Adjournment of a deposition beyond the time frame, only in an emergency.

Need to file an affidavit

Cannot be more than twenty days

“Adjournment” includes a rescheduling or continuance

“Emergency” is a serious event that occurs preventing the timely completion of some action ordered ..it includes death in the family, serious illness, significant prior professional or business commitment and inclement weather that prevents travel...frivolous adjournment can lead to penalties

Rule 300.38

- 300.38(k) Non-applicability to Uninsured Employers

___ Oddly enough, the most delayed hearings occur when the Uninsured Employers Fund is involved, and presto - the expedited hearing for controverted cases doesn't apply...so much for speeding up cases for the most needy!