

PROPOSED RULEMAKING

DEPARTMENT OF LABOR AND INDUSTRY

[34 PA. CODE CH. 111]

Special Rules of Administrative Practice and Procedure Before the Workers' Compensation Appeal Board

The Workers' Compensation Appeal Board (Board) proposes to amend 34 Pa. Code Chapter 111, Subchapter B (relating to appeals) to streamline the disposition of appeals to the Board, as set forth in Annex A.

Statutory Authority

The Board proposes these amendments under the authority contained in section 435(c) of the Workers' Compensation Act (act) (77 P.S. § 991(c)), which directs the Board to establish rules of procedure "...which are reasonably calculated to expedite the hearing and determination of appeals to the board and to insure full payment of compensation when due." Furthermore, section 506 of the Administrative Code of 1929 (71 P.S. § 186) provides authority for the promulgation of rules and regulations for departmental administrative boards stating: "[T]he several departmental administrative boards and commissions, are hereby empowered to prescribe rules and regulations, not inconsistent with law, for the government of their respective departments, boards, or commissions. . . [and] the distribution and performance of their business. . . ."

Background

The Board is a departmental administrative board under section 401 of the act (77 P.S. § 701). It is established under sections 202, 207.1, 503 and 2208 of the Administrative Code of 1929 (71 P.S. §§ 62, 67.1, 183 and 568). The Board voted to adopt the proposed amendments in Annex A on October 27, 2020.

The Board's regulations currently require oral argument in all appeals and cross appeals unless the parties agree to submission on briefs. See §§ 111.13(b) and 111.17(a) (relating to processing of appeals and cross appeals; and oral argument). Moreover, these regulations currently require the petitioner's brief to be filed at or before the date of the oral argument, while the respondent's brief is due 30 days after oral argument. See § 111.16(a) and (b) (relating to briefs: content and form and time for filing). The petitioner generally is the party seeking to review a ruling or decision by a workers' compensation judge, while the respondent is the party or parties in whose favor the matter was decided by the judge. See § 111.3(a) (relating to definitions) regarding the definitions of petitioner and respondent.

The current briefing and oral argument requirements significantly delay the consideration and disposition of appeals. Oral arguments are scheduled more frequently in major population areas and less frequently in other areas. As a result, there is greater delay in processing appeals from petitioners in less-populated areas where oral arguments are only held two or three times a year. Consequently, the appeal is not placed in line for decision until after the oral argument and the receipt of briefs. Under current practice, the Board's rules further permit oral request for extensions of the petitioner's brief at oral argument, § 111.16(c), thereby facilitating additional de-

lay in case processing. Any decrease in time to process an appeal will benefit all parties within the workers' compensation system. The average time for the Board to issue a decision was approximately 11.36 months in 2018, 12.28 months in 2019, and 11.32 months through the first 9 months of 2020. Although timeliness has improved from 2015, when the average time to decision as closer to 15 months, the processing times remain unreasonably long. The Board's delay in issuing decisions can exact financial hardship on claimants and is at odds with the timeliness dictates of the act.

The present requirement for in-person oral argument in every case increases the Board's travel, lodging and meal expenses, as well as the parties' expenses to the extent that they or their attorneys must attend the arguments. Prior to the novel coronavirus (COVID-19) pandemic, the Board conducted seven argument sessions a year in Philadelphia; six in Pittsburgh, Harrisburg and Scranton; and three in Erie. Most of these sessions are for multiple days. The Board's travel costs for fiscal year 2018-2019 totaled nearly \$60,000. The developments in communication and computer technology, and the experience using that technology during the pandemic, have reduced the need for the Board members to meet in-person to hear arguments, discuss pending cases, or circulate decisions for signature.

Compliance with Executive Order 1996-1

The Board engaged in extensive public and stakeholder outreach during the drafting process. In 2017, the Department of Labor and Industry (Department) sought stakeholder input as to a proposal to amend the regulations to (1) require both parties' briefs to be submitted before making a decision to schedule oral argument and use the briefs, not oral argument, to start the internal appellate review process; and (2) make oral arguments discretionary with the Board where necessary to address novel or complex legal issues, as is the practice in other Commonwealth appellate courts. Stakeholder input was solicited through the Workers' Compensation Committee of the Pennsylvania Bar Association and more widely from insurance carriers, attorneys, third-party administrators and self-insured employers through the Workers' Compensation Automation and Integration System (WCAIS), which is the enterprise vehicle by which all workers' compensation claims are filed, adjudicated, appealed and managed. Every workers' compensation employer, insurer (or self-insurer) and legal practitioner has access to and routinely uses WCAIS. In addition, the Department posted a general notice of the proposed regulations and the rationale for them on its web site, for which interested persons and organizations could submit comments, and also posted notice on the WCAIS home page for all WCAIS users. More than 50 comments were received, the vast majority of them in favor of these changes. The Workers' Compensation Rules Committee (established in 1978 by the Secretary of the Department of Labor and Industry for the purpose of obtaining comment on procedural rules governing the practice of workers' compensation) convened to provide input to the proposed oral argument procedures and approved the proposed regulation. This proposed rulemaking was presented to and discussed with the Pennsylvania Workers' Compensation Advisory Council established under section 447 of the act (77 P.S. § 1000.3).

In 2019, following additional coordination with key stakeholders, the Board determined that the humanitar-

ian purposes of the act were better served by continuing to offer oral argument in every appeal, unless waived by the parties. In addition, the Board wishes to make better use of telecommunications to further streamline the appeal process. Accordingly, these proposed regulations provide for oral argument, unless waived, at the earliest possible date following the close of the briefing schedule and authorize oral argument or by telephonic or electronic means. This proposed rulemaking was also presented to members of the Pennsylvania Workers' Compensation Advisory Council for review and comment on March 23, 2020. The Deputy Secretary for Compensation and Insurance coordinated the regulatory amendments outlined in Annex A with members of the Workers' Compensation Rules Committee on April 24, 2020. The Board voted to adopt this proposed rulemaking in Annex A on October 27, 2020.

Purpose

This proposed rulemaking ensures that oral argument will be conducted after briefs are submitted, rendering argument more meaningful for the parties, as the Board will have a better understanding of the issues at the time of argument. This proposed rulemaking also permits arguments to be conducted by telephone or other electronic means, giving the Board the flexibility to timely schedule arguments regardless of the location of the parties. These proposed changes will streamline the processing and disposition of appeals, reduce the time for decision in some cases, and achieve cost savings to both the Board and the parties.

Affected Persons

The persons affected by this proposed rulemaking include the Board's members and staff, attorneys practicing before the Board, and parties to appeals filed with the Board. The parties in workers' compensation cases include injured employees, possibly their dependents in the case of a fatal injury, self-insured employers, employers typically represented by workers' compensation insurance companies and the Department's Bureau of Workers' Compensation representing special funds created under the act.

Fiscal Impact

This proposed rulemaking is designed to reduce costs, through reduced travel costs and litigation expenses, and will not result in increased costs to the public or private sectors. Because the workers' compensation system is funded through assessments on workers' compensation insurance carriers and self-insured employers, any savings realized in the administration of the system may result in savings to the regulated community through lowered assessments. See section 446 of the act (77 P.S. § 1000.2) regarding creating the Workers' Compensation Administration Fund and providing for maintenance of the fund through an annual assessment.

Summary of Proposed Rulemaking

§ 111.13. Processing of appeals and cross appeals.

The proposed minor amendment to this section clarifies that the Board will issue a briefing schedule upon receipt of an appeal or cross appeal.

§ 111.16. Briefs: content and form and time of filing.

The proposed amendments to this section address the time for filing briefs. This section is proposed to be amended to require that the petitioner's brief be filed within 30 days of the acknowledgement of receipt of appeal by the Board, unless subsequent or cross appeals

are filed. In the case of subsequent or cross appeals, the Board will issue a revised briefing schedule. The respondent's brief will be due 30 days after service of the petitioner's brief, or the due date of petitioner's brief, unless there are subsequent or cross appeals. A request for an extension of time to file a brief must indicate the other parties' position as to the request. This section is also amended to permit the Board to direct the filing of a supplemental brief.

The proposed amendments require that briefs filed with the Board include a summary of the argument, not to exceed one page.

§ 111.17. Oral argument.

The proposed amendments to this section authorize oral argument to be conducted by telephone or other electronic means. This section is proposed to be amended to provide that argument will be scheduled following the close of the briefing schedule.

§ 111.18. Decisions of the Board.

This section is proposed to be amended to delete current subsection (b), which consists of an obsolete reference to section 441 of the Administrative Code of 1929 (71 P.S. § 151). Section 441 regarding the Workmen's Compensation Appeal Board was repealed under the act of November 9, 2006 (P.L. 1362, No. 147) and replaced by section 401.2 of the act (77 P.S. § 710.1) regarding the Workers' Compensation Appeal Board.

Reporting, Recordkeeping and Paperwork Requirements

This proposed rulemaking does not require any new forms, and thus does not impose any additional reporting, recording or paperwork requirements on either the Commonwealth or the regulated community. The existing forms used by the Board to acknowledge appeals, notify parties of briefing requirements, and oral argument may require minor modification since briefs are due before any oral argument and oral argument may be conducted by teleconference or other electronic means.

Sunset Date

A sunset date is not appropriate for this proposed rulemaking. The Board will periodically monitor this proposed rulemaking and submit amendments as needed.

Effective Date

This proposed rulemaking will be effective on publication of the final-form regulation in the *Pennsylvania Bulletin*.

Contact Person

Interested persons are invited to submit written comments, suggestions or objections regarding this proposed rulemaking to Kelly K. Smith, Executive Deputy Chief Counsel, 651 Boas Street, Harrisburg, PA 17121, fax (717) 787-1303, kellysmith@pa.gov within 30 days after publication of this proposed rulemaking in the *Pennsylvania Bulletin*.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on February 16, 2021, the Department submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Labor and Industry Committees. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Department, the General Assembly and the Governor of comments, recommendations or objections raised.

ALFONSO FRIONI, Jr., Esq.,
Chairperson
Workers' Compensation Appeal Board

Fiscal Note: 12-105. (1) Worker's compensation Administration Fund; (2) Implementing Year 2020-21 is \$700,000; (3) 1st Succeeding Year 2021-22 through 5th succeeding Year 2025-26 are \$0; (4) 2019-20 Program—\$2,954,095; 2018-19 Program—\$2,925,834; 2017-18 Program—\$2,868,708; (8) recommends adoption. Funds have been included in the budget to cover this increase.

Annex A

TITLE 34. LABOR AND INDUSTRY

PART VII. WORKERS' COMPENSATION APPEAL BOARD

CHAPTER 111. SPECIAL RULES OF ADMINISTRATIVE PRACTICE AND PROCEDURE BEFORE THE WORKERS' COMPENSATION APPEAL BOARD

Subchapter B. APPEALS

§ 111.13. Processing of appeals and cross appeals.

(a) Upon receipt of an appeal or a cross appeal, the Board will acknowledge receipt to all parties.

(b) The Board will, in addition to acknowledging receipt of the appeal or the cross appeal, establish [**the**] a briefing schedule and indicate that the appeal and the cross appeal will be scheduled for oral argument unless all parties agree to submission of the case on only briefs or record.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 33.31 (relating to service by the agency).

§ 111.16. Briefs: content and form and time for filing.

(a) A brief on behalf of a petitioner shall be filed with the Board [**at or before the date of oral argument. If oral argument is waived, petitioner shall file a brief**] within 30 days of the date of the Board's acknowledgment of receipt of the appeal as set forth in § 111.13 (relating to processing of appeals and cross appeals). **In the event subsequent appeals or cross appeals are filed, the Board will issue revised briefing schedules.**

(b) A brief on behalf of a respondent shall be filed with the Board **within 30 days after [oral argument. Otherwise, the respondent shall file a brief with the Board within 60 days of the date of the Board's acknowledgment of receipt of the appeal as set forth in § 111.13] service of the petitioner's brief, or where petitioner fails to timely file a brief, within 30 days of the date the petitioner's brief was to be filed. In the event subsequent appeals or cross appeals are filed, the Board will issue a revised briefing schedule.**

(b.1) The Board may direct the filing of a supplemental brief.

(c) Upon written request of a party directed to the [**Secretary of the**] Board [**or upon oral request at the time of oral argument**], and with notice to all parties, the Board may extend [**or shorten**] the time for filing of the party's brief only for good cause shown. A party shall [**present**] **file** a request to extend [**or shorten**] the time [**at or**] **for filing a brief** before the date set for filing that party's brief. **The request shall indicate the position of the other parties with respect to the request.**

(d) Briefs not filed with the Board in accordance with the schedule in this section or as modified by the Board under subsection (c) will not be considered and will result in disposition of the appeal without further notice or consideration of the brief of the party failing to comply with these deadlines or schedule.

(e) Briefs, except as otherwise allowed, shall consist of the following items, separately and distinctly set forth:

- (1) A short statement of the questions involved.
- (2) A statement of the facts by the petitioner, or counterstatement of the facts by the respondent.

(2.1) A summary of the argument, not to exceed one page.

- (3) The argument.
- (4) A short conclusion setting forth the precise relief sought.
- (5) A proof of service as specified in § 111.12(e) (relating to filing, service and proof of service) insofar as applicable.

(f) [**An original brief shall be filed**] (**Reserved**).

(g) Briefs shall be served on all parties.

(h) Subsections (a)—(g) supersede 1 Pa. Code §§ 31.15, 33.37, 35.212 and 35.221 and also supersede 1 Pa. Code Chapter 35, Subchapter F (relating to briefs).

§ 111.17. Oral argument.

(a) The Board will schedule oral argument in every appeal or cross appeal unless all parties to the appeal or the cross appeal, upon receiving the acknowledgment of appeal or cross appeal, indicate that no oral argument is requested, or that it is waived.

(b) The Board will hear oral argument on appeals and cross appeals according to a schedule prepared in advance for each calendar year. Oral argument [**will**] **may** be conducted in Harrisburg, Philadelphia and Pittsburgh [**and in**] **or** other locations [**throughout**] **in** this Commonwealth, **or by telephonic or electronic means**, as the Board may [**schedule, or, as is appropriate in the Board's judgment**] **determine**.

(c) Oral argument will be scheduled at the earliest possible date [**pursuant to the schedule as established by the Secretary of the Board**] **following the close of the briefing schedule**.

(d) [**Parties shall be advised**] **The Board will notify parties of the scheduling of oral argument** as far in advance as possible of the [**date of oral**] argument [**by the acknowledgment of appeal or cross appeal as specified in § 111.13(b) (relating to processing of appeals and cross appeals)**] **date**.

(e) Oral argument shall consist of a presentation, including rebuttal, if necessary, by the petitioner and respondent.

(f) A petitioner or respondent represented by counsel need not be present at oral argument.

(g) Oral argument may be conducted before one or more members of the Board.

(h) Subsections (a)—(g) supersede 1 Pa. Code §§ 33.51, 35.204, 35.214 and 35.221.

§ 111.18. Decisions of the Board.

(a) The decision of the Board on an appeal and a cross appeal shall be issued as promptly as possible following

oral argument or the receipt of briefs, whichever occurs later.

(b) [**Decisions of the Board on an appeal shall be issued under section 441 of The Administrative Code of 1929 (71 P.S. § 151)] (Reserved).**

(c) Decisions of the Board will be served on all parties and the judge from whose decision the appeal was taken.

(d) Subsections (a)—(c) supersede 1 Pa. Code §§ 31.13, 31.14, 35.201—35.207 and 35.226.

[Pa.B. Doc. No. 21-280. Filed for public inspection February 26, 2021, 9:00 a.m.]
