



**Workers'
Compensation
Board**



CONFERENCE 2024

OCTOBER 18



**Workers'
Compensation
Board**



Depositions & Section 32 Waiver Agreement Updates

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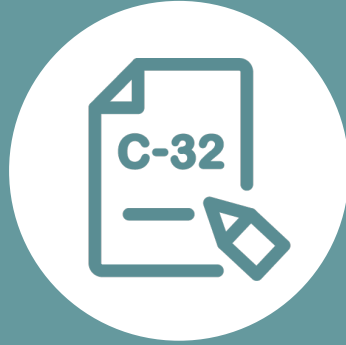
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CHANGES TO THE SECTION 32 WAIVER AGREEMENT GUIDANCE

CHANGES TO SECTION 32 WAIVER AGREEMENT

The Board recently revised its WCL Section 32 Guidance on the wcb.ny.gov website:

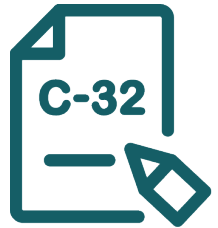
- Terms of the Agreement
- Resignation and No Re-apply Language
- Medicare Set-Aside/Medical Allocation



FORMS

Waiver Agreement - Section 32 WCL (Form C-32)

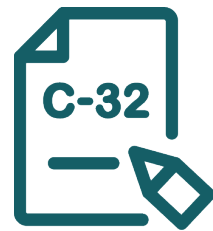
- Must be submitted with all Section 32 waiver agreements.
- Cover sheet with several checkboxes that provide a quick summary of the terms of the agreement.
- Checkbox allowing the parties to request that the agreement be reviewed and approved without a hearing.



FORMS (cont'd)

Settlement Agreement - Section 32 WCL Indemnity Only *Settlement Agreement (Form C-32-I)*

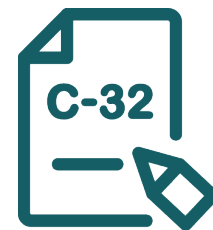
- Must be used when the agreement ends lost wage benefits but leaves open medical treatment.
- Contains all the terms of the agreement and the parties complete with information relevant to the claim.
- Parties may add additional terms to the agreement if they choose.
- A **C-32** must be submitted with a **C-32-I**.



FORMS (cont'd)

Section 32 Waiver Agreement: Claimant Release (Form C-32.1)

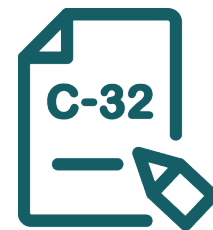
- Must be submitted with all Section 32 waiver agreements.
- Must be completed and signed by claimant and their representative and submitted with every Section 32 waiver agreement.
- Checkbox allowing the parties to request that the agreement be reviewed and approved without a hearing.
- Also contains an attestation that must be signed by claimant's representative indicating that they fully explained to the claimant the terms of the agreement and its ramifications.



FORMS (cont'd)

Carrier's/Self-Insured Employer's Affirmation (Form C-32-AF)

- Must be submitted with all Section 32 waiver agreements.
- Must be completed and signed by the person who signs the agreement on behalf of the insurer and submitted with every Section 32 waiver agreement.
- Affirms that the Section 32 waiver agreement submitted to the Board for approval contains all the terms and conditions agreed to by and between the injured worker and the insurer, and that no separate agreements or contracts have been entered into by the parties that are not reflected in the agreement submitted to the Board for approval.
- The **C-32.1** form asks claimant, “Have you made any promises, or have any promises been made to you, that are not reflected in this Section 32 Waiver Agreement?”



SIGNATURES



- The claimant and the payers in all claims covered by a Section 32 waiver agreement are the necessary signatories to the agreement.
- Claimant's attorney is not a party to the agreement and need not be a signatory (see *Matter of Abel v Wolff and Dungey Inc.*, 287 AD2d 914 [2001]). However, the Board will not reject or disapprove an agreement solely because claimant's counsel has signed the agreement.
- Even before the COVID-19 pandemic, the Board permitted payers to sign Section 32 waiver agreements electronically and required the person signing on behalf of the payer to submit a completed **Section 32 - Electronic Signature (Form C-32E)** affirming that the electronic signature on the agreement was theirs.

SIGNATURES (cont'd)



- At the beginning of the COVID-19 pandemic in early 2020, the Board waived the original signature requirement for a number of Board forms, thereby permitting represented claimants, attorneys, and payers to sign the **C-32**, **C-32.1**, and **C-32-AF** forms electronically if they submitted an attestation by the claimant's attorney or person signing on behalf of the payer, and that policy remains in effect (wcb.ny.gov/content/main/TheBoard/COVID-19-signature-requirements.jsp).
- Payers who sign a Section 32 waiver agreement electronically need only submit the required attestation and are not required to submit the **C-32E** form. However, **Form C-32E** is still on the Board's website and the payer can elect to submit a **C-32E** form instead of an attestation when they sign a 32 agreement electronically.



TERMS OF THE AGREEMENT

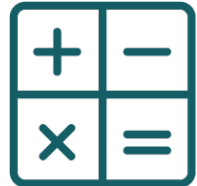
TERMS OF THE AGREEMENT

- This portion of the Section 32 Waiver Agreements Guidance page was revised to state that WCL Section 32(a) provides for “an agreement settling upon and determining the compensation and other benefits due to the claimant or his or her dependents.”
- Only those cases expressly identified in the terms of the waiver agreement may be settled.



TERMS OF THE AGREEMENT (cont'd)

- Further revised to warn that a claimant “may not include prospective actions.”
- Revised to provide that a Section 32 waiver agreement must delineate what part of the agreement is attributable to indemnity and what part is attributable to medical, by dollar amount or percentage.





JOB DISCRIMINATION

JOB DISCRIMINATION

- Section 32 waiver agreements that provide that the claimant will resign and not re-apply for employment with the employer, or its subsidiaries, will not be approved by the Board.
- Resignation agreement and agreement by the claimant not to re-apply.
- Whether the terms of a resignation agreement are unfair, unconscionable or improper as a matter of law (*WCL Section 32[b][1]*), or the result of an intentional misrepresentation of a material fact (*WCL Section 32[b][2]*), is within the discretion of the Workers' Compensation Law Judge (WCLJ).
- Agreements that provide that a claimant is never to re-apply for employment with the employer or its subsidiaries are strictly forbidden and should result in rejection of the waiver agreement pursuant to *WCL Section 32(b)(1)*.



JOB DISCRIMINATION (cont'd)

- A Section 32 waiver agreement may contain a provision that the claimant is to resign from employment.
- Approval of an agreement that contains a resignation agreement (only) remains within the discretion of the WCLJ.



ISSUE: NO RE-EMPLOYMENT

In Employer: *Costco Wholesale Corp, 2024 NY Wrk Comp G2359949*, the Board Panel addressed an appeal filed by the self-insured employer (SIE) who objected to the disallowance by a WCLJ of a global WCL Section 32 waiver agreement for over \$100,000. As part of the agreement, the claimant agreed to

- (a) resign from employment with the SIE, and
- (b) and not seek re-employment

in exchange for \$100 that would be paid to claimant separate and apart from the proceeds of the Section 32 agreement.



ISSUE: NO RE-EMPLOYMENT (cont'd)



The WCLJ decision

The WCLJ decision disallowed the agreement deeming the “no re-apply” language to be improper. The judge’s decision was memorialized in a decision filed on August 2, 2023.

ISSUE: NO RE-EMPLOYMENT (cont'd)



The appeal

The SIE argued on appeal that the agreement should be approved, as “no re-apply” agreement is permitted by a Bulletin/Gov Delivery issued by the Board on September 30, 2022, and the \$100 paid to the claimant was sufficient consideration for this provision.

ISSUE: NO RE-EMPLOYMENT (cont'd)



Board Panel MOD

- (a)** The Board may disallow any Section 32 agreement if it is unfair, unconscionable or improper as a matter of law, or is the result of an intentional misrepresentation of a material fact;
- (b)** There is a September 30, 2022, Board Gov Delivery indicating that the Section 32 agreement may be approved if it contains a resignation agreement with “no re-apply” language if the agreement delineates the consideration the claimant will receive for agreeing to it;

ISSUE: NO RE-EMPLOYMENT (cont'd)

Board Panel MOD (cont'd)

- (c) WCL Section 120 (which prohibits an employer from discriminating against an employee that has claimed or is attempting to claim workers' compensation benefits) and WCL Section 125 (which prohibits an employer from discriminating against a prospective employee based on their filing for, or receipt of, workers' compensation benefits) evidence a strong public policy against discrimination towards workers availing themselves of their rights under the WCL, a right which a claimant cannot waive;
- (d) A Section 32 agreement that only calls for a claimant to resign may be approved, but will be closely scrutinized; and
- (e) The September 30, 2022, Gov Delivery indicating that "no re-apply" agreements are permissible in Section 32 waiver agreements, and any decisions relying upon that announcement, are disavowed.

ISSUE: NO RE-EMPLOYMENT (cont'd)



September 30, 2022,
Gov Delivery Notation

“Language within this announcement regarding agreements to resign/not reapply has since been superseded by updated guidance. Please see Section 32 Waiver Agreement Guidance for the current guidance.”



MEDICARE SET-ASIDE AND MEDICAL ALLOCATION

MEDICARE SET-ASIDE/MEDICAL ALLOCATION

- Medical allocation – Term used by the Board to capture that portion of the settlement proceeds that are allotted for the claimant's future medical expenses.
- Medicare Set-Aside (MSA) – An agreement reviewed and approved by the Centers for Medicare & Medicaid Services (CMS) if the claimant meets certain thresholds and elects to submit the MSA to CMS for approval.
- A Section 32 waiver agreement that resolves the medical portion of a claim must indicate the portion of the settlement proceeds that are allocated for claimant's future medical expenses.
- There may be instances where no medical allocation is required.

MEDICARE SET-ASIDE/MEDICAL ALLOCATION (cont'd)

- This section of the Section 32 Waiver Agreements Guidance page was revised to reinforce that it is up to the parties to determine whether it is necessary to include an MSA that takes Medicare's interest into consideration in any Section 32 agreement.
- If the parties conclude that an MSA is required, the agreement ultimately contains an MSA, and there is an indication that the CMS has given prior approval of a specific set-aside amount, a copy of the letter from CMS approving the MSA must be forwarded to the Board along with the agreement.
- An attorney's fee awarded in a WCL Section 32 waiver agreement may not be based on that part of the settlement used to fund a medical allocation or MSA.



DESK EXPANSION

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Background

Until recently, all Section 32 waiver agreements were approved by the Board on-calendar at a hearing before a WCLJ or by desk review conducted by a senior attorney if the parties agreed to an off-calendar resolution of the claim.



DESK EXPANSION (cont'd)

Subject Number 046-778

- In the years since **Subject Number 046-778** was issued in 2016, many Section 32 waiver agreements settling only indemnity benefits continued to be considered at a hearing before a WCLJ, and not via the desk review process.

Subject Number 046-1683

- On July 1, 2024, the Board began utilizing the desk review process to review Section 32 waiver agreements.



DESK EXPANSION (cont'd)

Current process

- Effective July 1, 2024, most such agreements and those with gross settlement amounts of \$10,000 or less, will now be reviewed administratively, via desk review, without a hearing.
- This will significantly reduce the time it takes to approve Section 32 waiver agreements and will allow necessary hearings to be held sooner.





EVIDENCE

EVIDENCE IN WORKERS' COMPENSATION

- *WCL § 118*: Technical rules of evidence or procedure not required
 - The Board is not bound by common law or statutory rules of evidence except as provided in the Workers' Compensation Law but may make investigation or inquiry as to ascertain the substantial rights of the parties.

- *Universal Camera Corp. v NLRB*, 340 US 474 (1951)
 - Not binding on the Board but illustrates the history of relaxed evidence requirements in administrative proceedings.
 - Agencies are “presumably equipped or informed by experience to deal with a specialized field of knowledge, [and] findings within that field carry the authority of an expertness which courts do not possess and therefore must respect.” (at 488).

EVIDENCE: SIGNIFICANT CASES

- *Matter of Paiz v Coastal Pipeline Prod. Corp.*, 9 AD3d 717 (2004)
 - “Formal rules of evidence do not apply to proceedings before the Board and it may, in its discretion, consider evidence on any relevant issue, even if such evidence might not be admissible in other contexts.” (at 718).

- *Matter of Berkley v Irving Trust Co.*, 15 AD3d 750 (2005)
 - “ ‘It is within the Board's discretion to resolve issues of credibility, especially among conflicting medical experts,’ and its resolution will be afforded great deference.” (at 751. Internal citations omitted.).

EVIDENCE: SIGNIFICANT CASES (cont'd)

■ *Matter of Morrell v Onondaga County*, 238 AD2d 805 (1997) (*lv denied*)

- When there is conflicting medical evidence, it is “within the Board’s discretion to accept or reject such evidence.” (at 806).

■ *Matter of Marks v Count of Thompsons*, 274 AD2d 764 (2000)

- “While as a general rule the Board may not reject the unanimous opinion of experts and arrive at its own conclusion on the issue of causation, the Board is entitled to disregard an expert opinion when it is based upon an assumption that lacks evidentiary support in the record providing a rational basis.” (at 765. Internal citations omitted).

EVIDENCE: SIGNIFICANT CASES (cont'd)

- *Matter of Jaquin v Cmty. Covenant Church*, 69 AD3d 998 (2010)
 - “Though the Board may not fashion its own expert medical opinions, it may reject medical evidence as incredible or insufficient even where, as here, no opposing medical proof is presented.” (at 1000).

WORKERS' COMPENSATION EVIDENCE SUMMARY

- The Board has wide discretion in accepting, considering, and weighing evidence.
- The Board **cannot** fashion its own medical opinion.
- The Board **can** accept some parts of a medical opinion without accepting other parts found in the same document.
- The Board *can* use both internal material (such as *The Workers' Compensation Board's New York Medical Treatment Guidelines or Impairment Guidelines*) and outside material (such as medical studies) when determining what weight or credibility to assign to a medical opinion.





DEPOSITIONS

DEPOSITIONS: RIGHTS AND RESPONSIBILITIES

■ Insurers

▪ 12 NYCRR 300.10(c)

- Employer may request adjournment to produce an attending physician whose report is in the file. The WCLJ shall grant first adjournment.
- Second adjournment shall be granted only when the WCLJ finds sufficient excuse for the physician's nonappearance.
- Third adjournment granted only when there are extraordinary circumstances.
- Obligation to invoke court action for enforcement of subpoena is on the employer/carrier/special fund.
- "If such adjournment is granted and the physician does not appear, unless extraordinary circumstances are shown, the referee shall proceed to determine the claim upon the evidence in the record."

DEPOSITIONS: RIGHTS AND RESPONSIBILITIES (cont'd)

■ Claimants

▪ Due process

- Claimant's opportunity to cross-examine a insurer's consulting physician is not specifically provided in *12 NYCRR 300.10(c)* but is permitted under tenets of due process.
- The insurer's consultant's report is subject to scrutiny akin to the report of any expert, as it does not enjoy the presumption accorded to the reports introduced into evidence by claimants under *WCL § 21(5)*.



DEPOSITIONS: CURRENT PROCEDURES

■ Party requests WCLJ to direct deposition

- This can happen via *Request for Further Action (RFA)* or at a hearing.
- SN 046-1715: Mandate of electronic filing of *RFA-2* by insurer/employer.

■ WCLJ directs deposition and gives a deadline for filing transcript

■ Deposition is scheduled

- **Note:** A subpoena is not necessary. Under *12 NYCRR 301.1* and *301.3*, fees are payable to treating providers when the deposition is required. A WCLJ's direction to take deposition is sufficient for payment.
- **Note:** If a party does not take reasonable steps to secure deposition (meet and confer to schedule deposition, issue **and enforce** a subpoena if necessary), the Board is within its discretion to find that the party has waived their right to such deposition.

DEPOSITIONS: CURRENT PROCEDURES (cont'd)

■ If the deposition occurs:

- Medical witness fees are paid under *12 NYCRR 301.1* and *301.3*.
 - **Note:** There is no requirement for a WCLJ to direct a medical witness fee. Fees should be paid directly and promptly to the witness.
 - Guidance on deposition fees can be found here:
wcb.ny.gov/content/main/hcpp/request-assistance-unpaid-medical-bills.jsp
- The deposition transcript is filed.
- The WCLJ evaluates the entirety of the record, including the medical report(s) and deposition transcript(s).

DEPOSITIONS: CURRENT PROCEDURES (cont'd)

■ If the deposition does not occur:

- Insurer may request extension/adjournment under 12 NYCRR 300.10(c); claimant may request extension/adjournment under due process.
 - **Note:** All such requests should be filed *in accordance with the decision that directed the deposition*, typically prior to the deposition transcript deadline.

DEPOSITIONS: CURRENT PROCEDURES (cont'd)

■ If the deposition does not occur (cont'd):

- The WCLJ makes a determination on whether there is sufficient excuse for the witness's nonappearance or extraordinary circumstance.
- Based on that determination, the WCLJ grants extension/adjournment; finds that party did not take reasonable steps to secure deposition and waived right to cross-examine the witness; or finds that the witness did not have sufficient excuse for nonappearance and **may** preclude records.
- There is no requirement that the WCLJ preclude a treating provider's records. As the arbiter of facts, the WCLJ has discretion to include the records and weigh them accordingly.

DEPOSITIONS: SIGNIFICANT CASES



Bryan v Borg-Warner Automotive, **293 AD2d 856**

In the absence of viable differences between expert opinions in the medical reports, or when carrier IME refuses to give an opinion, “no prejudice accrue[s] as a result of the refusal to permit the carrier to cross-examine” on causal relationship.

2001

Pugliese v Remington Arms, Inc., 293 AD2d 897
Absence of IME report not fatal to insurer’s request to cross-examine attending provider in controverted case.

2002



Matter of Desamours **2017 NY Wrk Comp** **G1007356**

Where an insurer has failed to take reasonable steps to secure a deposition, Board may find that the carrier has waived the right.

2017

DeLucia v Greenbuild LLD, **182 AD3d 874**

It is within Board’s authority to preclude reports when provider does not appear for deposition, absent extraordinary circumstances.

2020



2023

Lazalee v Wegman’s Food Mkts., 40 NY3d 458
WCLJ shall provide adjournment for insurer to cross-examine attending physician.

MATTER OF LAZALEE v WEGMAN'S FOOD MARKETS, INC.

- The language in *12 NYCRR 300.10(c)* makes it mandatory for the referee to grant adjournment for an employer, its carrier, or the special fund to cross-examine an attending physician whose report is in the file.
- The decision notes that this does **not** require the Board to accept belated requests, and that requests for adjournment for cross-examination must be made before the referee issues a decision on the merits.
- The decision also notes that if the Board concludes that the WCLJ should have discretion on whether to adjourn for cross-examination, it is within the Board's power to amend its regulations accordingly.



REGULATORY AMENDMENTS

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- SAPA § 202
- Prior to the adoption of a rule, an agency submits a notice of proposed rule making for publication in the State Register.
- The agency must also make available regulatory impact statements and other supporting materials explaining the rationale for the rule change.
- The State Register is available at dos.ny.gov/state-register.
- Interested parties should sign up for Board updates at wcb.ny.gov/Notify.



REGULATORY AMENDMENTS (cont'd)

- There is a period of public comment and/or public hearing on the proposed rule.
 - **Note:** This period does not apply to consensus rules, which the agency determines are not likely to object to the adoption of the rule as written.
- There may be a notice of revised rule, assessing previously-received public comment and requesting additional comments.
- The agency files a notice of adoption, adopting the final regulation. With this notice, the agency also publishes and makes available an assessment of public comment.
- **Note:** There are also provisions for emergency adoption of a rule for the preservation of the public health, safety, or general welfare.

AMENDMENTS TO DEPOSITION REGULATIONS

- The Board is considering amendments to *12 NYCRR 300.10(c)* regarding the mandatory nature of adjourning hearings for cross-examination.
- With this process, the Board is evaluating the procedural flow of depositions and ways to make the deposition process smoother and more consistent overall.
- Feedback can be sent to OfficeOfGeneralCounsel@wcb.ny.gov
 - Include a clear subject line such as “Feedback on Deposition Processes.”
 - **Note:** While the Board responds to feedback during a period of public comment, the Board is not required to respond directly to feedback outside of this period but may collect it for reference.

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