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# ALERT

## MASSACHUSETTS WORKERS' COMPENSATION SIGNIFICANT REGULATION CHANGES EFFECTIVE 3/21/08

**For your immediate attention. Effective 3/21/08, Massachusetts has changed the Regulations that effect our Workers' Compensation statute in several significant ways. Some of these changes, as detailed in the following memorandum, will require a change in how claims are handled immediately.**

**We suggest an immediate compliance review of the attached memorandum and Regulations. Further, with such a profound change to the Regulations (for example, there is now a Department approved interest formula and calculator that varies from the commonly used interest software of "Comptools"), we suggest and offer our legal services for specific and individual training on compliance at no cost. The significance of the interest calculator alone can't be understated where last month the Reviewing Board found an Insurance Company strictly liable for a $43.00 underpayment and assessed a $10,000 penalty! Any payment error will be strictly construed.**

**Please contact Attorney David Shay our Wakefield Office directly for individual follow up and training at your earliest convenience.**

To: All Clients of Moriarty & Associates
From: James E. Ramsey, Esq.
Date: 4/11/08
Re: Massachusetts Regulatory Changes effective 3/21/08 (452 C.M.R.)

Massachusetts Department of Industrial Accidents has updated its Regulations that govern the applications of Chapter 152. Please refer to the new full text of 452 C.M.R. available as attached or on line with the DIA.

The following material will highlight the Regulation changes that are relevant to insurers. Many of the approximate 26 changes apply to employees, attorneys or appeals. All of the changes are summarized in the following pages, but only the relevant ones are bolded below as they pertain to adjusters or claims handlers or their attorneys. Please pay particular attention to those listed immediately below.

**In summary, adjusters should take note of all of the changes below but specifically to the changes as enumerated below in sections:**

**1. The definition of All Payments Due and Employee (Section 46A lien repayments)**
**3. Interest calculator**
**4. 11A unilateral suspension addition to 1.06**
**6. Interpreter guidelines**
**8. Section 1(7A) document and written requirements**
**9. Subpoena and discovery changes**
**10. Striking IPE reports**
**14. Denial of Section 14 claim is "prevailing" triggering attorney fee.**

**1. All Payments Due an Employee:**

All Payments Due an Employee as used in M.G.L. c. 152, Section 8(1), shall mean, in regard to past due or retroactive benefits only, the sum certain payable to the employee after the determination of the amount due a lien holder in satisfaction of any lien filed pursuant to M.G.L. c. 152, Section 46A. Unless otherwise agreed, the parties shall make reasonable efforts to expedite the determination of the amount due the Section 46A lien holder, but in no event shall payment be delayed beyond sixty days of the insurer's receipt of the order, decision, arbitrator's decision, approved lump sum or other agreement indicating that such payments are required to be made. All other payments due an employee shall be made by the insurer within the timeframe set forth in M.G.L. c. 152, Section 8(1).

*This change allows the insurer an additional 46 days, at the most, to determine, identify and pay a lien properly filed under Section 46A. The most common lien is STD, DOR, or unemployment liens where the amount (specific dollar amount) is unverifiable by the insurer within the previously mandatory 14 days. Now there is an obligation of the parties to cooperate to ascertain the amounts and payment details. Estimate payments are still not sufficient but better if there is no choice then no payment at all.*

*Note, if the payment amount is still undetermined by the 59th day the insurer has an obligation to make payment or suffer a possible penalty under Section 8(1). It is recommended if this remains an issue that counsel seeks a status conference and amended conference order or order compelling disclosure of the information by the employee or non-cooperating party as soon as necessary.*

**2. Disputes Over Medical Issues:**

Disputes Over Medical Issues as used in M.G.L. c. 152, Section 11A(2), shall not include any case in which:

a) Inserted "the parties" to start the sentence
b) Inserted "the parties" to start the sentence
c) Inserted "the parties" to start the sentence
d) based upon the information submitted at a Conference pursuant to Section 10A, the administrative judge determines that there is no dispute over medical issues. The judge's determination, and reasons therefore, shall be stated in the Section 10A Conference order.

*These changes simply clarifies that "the parties" have the ability to invoke subsections a, b, and c. Subsection d is new and it allows specifically for a judge to declare that no impartial examination is necessary on his/her own regardless of the will of the parties. However, the judge is to state this opinion in writing if the parties do not agree with the decision.*

**3. Interest**:

Interest as used in as used in M.G.L. c. 152, §50, shall be calculated using the Department provided formula available on its website. The parties may utilize other formulas but when a discrepancy exists the amount of interest in the Department formula will prevail for all purposes.

*This Regulation definition sets an interest formula for the first time and at the same time allows for a free software calculator on the DIA website. It also immunizes the insurer if it uses the DIA calculator and pays interest based on it. The parties can utilize any method they desire but if a discrepancy exists the DIA interest calculator will prevail for possible penalties if raised.*

*This simple change should avoid future strict application of Section 8(1) penalties for minor calculation underpayments.*

**4. 1.06: Modification Or Discontinuance Of Compensation:**

(1) Whenever the insurer or insured deems the employee to have refused to submit to, or in some way to have obstructed, a medical examination scheduled pursuant to MGL c. 152, §§ 45 or 11A, it shall be entitled to suspend weekly benefits without an agreement, order, or decision. Such a suspension of weekly compensation shall take effect only after the Department is notified on a form prescribed by the Department and when the insurer sends a written notice of the suspension to the employee and the employee's legal counsel, if any, by certified mail with a copy of the notice also sent to the department. Suspension cannot be commenced until the date the notice is mailed. Such notice shall state the grounds for the suspension and, except as to suspensions pursuant to M.G.L. c. 152 § 11A, shall contain notification of the re-examination date. The re-examination shall be scheduled to occur not less than seven days nor more than 21 days from the date of notice of the suspension. Such notice shall also instruct the employee that attendance at, and cooperation with, the re-examination shall result in reinstatement of weekly benefits and payment of benefits withheld during the period of such suspension. Should the claimant fail to appear at the re-examination, or in any way obstruct, or fail to cooperate at such re-examination, the suspension shall continue until an administrative judge makes a determination whether benefits should be forfeited.

*The 1.06 unilateral suspensions of weekly benefits now expressly apply to missed 11A impartial examinations.*

**5. 1.07: Claims And Complaints:**

Inserted two new subsections m, and n in subparagraph (2).

(2) (m) All claims and complaints alleging §§ 8 and/or 14 must specify the individual subsections under §§ 8(1), 8(5), 14(1), or 14(2) or the claim or complaint shall be administratively withdrawn.

(2) (n) All claims for penalties under §8(5) shall be accompanied by an affidavit stating the penalty being claimed and the basis for the alleged claim.

*These two insertions mandate that the employee be specific when alleging a penalty. This will allow for the insurer to be aware of the nature of the penalty being claimed and assist in determining if the claim is to be denied, paid or negotiated. If the claim is not properly filed it shall be withdrawn.*

*Practice note: In many of the penalty claims the penalty has already accrued by the time the claim is filed so getting the claim withdrawn my allow for adjustment without payment of an attorney fee but might not stop the value of the penalty from increasing if it has not already reached the maximum.*

**6. 1.09 Interpreter:**

1.09(4) The responsibility for providing and paying for an interpreter when needed at the M.G.L. c. § 10A conference rests with the party that files the claim or complaint. Thereafter, responsibility for providing and paying for an interpreter, whenever one is needed, rests with the party appealing from the conference order. If both parties appeal from the M.G.L. c. 152, § 10A conference order, the responsibility of providing and paying for such interpreter rests with the party the filed the claim or complaint.

*This Regulation clarifies the obligation to pay for the interpreter. The initial moving party initiates the first interpreter. Then the appealing party. If both parties appeal, then the initial moving party will continue to bear the full cost of the interpreter. No sharing of the fee as in the IPE appeals.*

*Practice note: If the insurer is the moving party (first or subsequent) be sure to have an interpreter at the § 10A Conference, IPE and §* 11 *Hearing. As well as any IMEs or vocational mandatory meetings. Failure to do so can result in the employee seeking the proceeding to be rescheduled or delayed or if it is an IPE, possibly stricken as improper.*

**7. 1.10 Disputes over medical issues:**

(6) In disputes regarding extent of incapacity where the parties agree upon both the partial nature of the impairment as well as the causal relationship between the impairment and the employment, subject to the provisions of MGL c. 152, § 11A(2) and 452 CMR

1.02, the parties may agree in writing at the time of conference that an impartial physician is not required.

*This Regulation clarifies the changes made to the definitions under 1.02. It provides for an elective opt out of the IPE exam if both parties agree on the partial nature of impairment and causal relationship <u>but not</u> the earning capacity (extent of incapacity).*

(9) No impartial physician shall be required where an administrative judge has determined, based upon the information submitted at the M.G.L. c. 152 § 10A conference, that there is no dispute over medical issues and has so stated in the M.G.L. c. 152 § 10A conference order.

*This Regulation clarifies the changes made to the definitions under 1.02. It provides an administrative judge the absolute right to declare no IPE is necessary but s/he must put it in writing if the parties disagree.*

**8. <u>1.11 Hearings and Section 1(7A):</u>**

1 (f) In any hearing in which the insurer raises the applicability of the fourth sentence provisions of M.G.L. c. 152 , § 1(7A), governing combination injuries, the insurer must state the grounds for raising such defense on the record or in writing, with an appropriate offer of proof.

*This is a completely new subparagraph. It requires the insurer's counsel to state the grounds "on which it intends to rely" in raising the defense, with citation to the medical records which it intends to present to the impartial physician for their opinion on the predicate requirements of the statute or a judge need not consider it in the hearing decision. This will force the adjuster and insurer's counsel to coordinate information prior to the hearing sufficient to meet this requirement.*

*Practice note: The insurer must <u>not only</u> raise a combination injury, it must have sufficient information and medical evidence to shift the burden to the employee to disprove it or meet the heightened standard of "a major cause" …No longer will insurer's counsel be able to point to a remote reference in a medical history, it must affirmatively pull the combination evidence together. This has generally been the practice, but judges varied widely on the methods and decision writing.*

**9. <u>1.12: Discovery And Depositions:</u>**

(3) extended response to RPD to 20 days

(4) (a) On written motion of an appropriate party, the administrative judge to whom the case has been assigned may require, by the issuance of any order, that any request for discovery, including any request submitted under 452 C.M.R. 1.12(1) or (2), be complied with. Failure to comply with said order without good cause may result in assessment of costs or penalties pursuant to M.G.L. c. 152 § 14.

(4) (b) Any motion relating to discovery must be served upon counsel for the opposing party and the administrative judge. The party receiving the motion shall, within ten (10) days of receipt of the motion, comply with the discovery sought by motion or provide a written response opposing the motion with specificity to the other party and the administrative judge. A hearing on the motion may be required at the discretion of the administrative judge. The administrative judge may rule upon the motion without hearing. All other motions not relating to discovery are exempt from 452 C.M.R. 1.12(4)(b).

(7) An attorney for any party may serve a subpoena, issued by a Notary Public, or by a Justice of the Peace, stating the title of the action, name of the administrative judge, or the senior judge if an administrative judge has not been assigned, and shall command each person to whom it is directed to attend and give testimony or produce documents at a time and place therein specified. The Notary Public or Justice of the Peace shall issue a subpoena or a subpoena for the production of documentary evidence, signed but otherwise in blank, to a party requesting it, who shall fill it in before service. A subpoena may also command the person to whom it is directed to produce books, papers, documents or tangible things designated therein, but the administrative judge, upon motion at or before the time specified in the subpoena for compliance therein, may:

> (a) Quash or modify the subpoena it if is unreasonably oppressive; or beyond the scope of discovery or seeks documents protected by privilege; or
>
> (b) Condition denial of the motion upon the advancement of the person in whose behalf the subpoena is issued of the reasonable cost for producing the books, papers, documents or tangible things.

Notice of the subpoena must be given to counsel for each party to the action at least two business days prior to service. At the option of the party, a subpoena commanding the production of documents or other tangible things may include a provision stating that for the convenience of the witness and in *lieu* of appearance at the proceeding, the requested documents may be provided at a date, time and place specified in the subpoena. Any party receiving documents or other tangible things in response to a Subpoena shall provide a complete copy of the response to all parties to the action prior to commencement of the proceeding. Any documents obtained by subpoena not in compliance with this regulation shall not be admissible in any proceeding except by agreement of the parties. Failure to comply with 452 C.M.R. 1.12(7) may subject the attorney to the provisions of M.G.L. c. 152, §14.

*These subparagraphs provide the process by which counsel can issue subpoenas, subpoenas for the production of documents and the notice and compliance requirements. Note that Section 14 is a possible penalty for failure to comply in good faith. Judge's can now enforce discovery motions or non-compliance to a degree.*

*Counsel will be required to serve all motions as well on all parties. Counsel must provide a written response to any motion or RPD served on it within 10 days. (However, straight RPD requests need not be served on the judge and there is now 20 days to respond instead of the previous 5 days). Counsel will have to serve on opposing counsel any subpoenas at least 2 days prior to service to allow for any opposition to be raised and brought to the attention of a judge to modify, quash or allow service.*

**10. 1.12: Discovery And Depositions:**

5 (c) **[Note a significant change here.]** If the IPE makes himself unavailable for deposition, the report upon motion for a ruling of unavailability can be stricken from the record in the case.

**11. 1.14 Impartial Physicians:**

(2) All hypothetical questions are now required to be submitted within 14 days of an appealed conference order.

**12. 1.15 Reviewing Board Briefs:**

(4) This sets out the appropriate format and content of the Reviewing Board Briefs. Not reproduced here.

**13. 1.18 Practice Before the Department:**

(4) Whenever an attorney appears at a proceeding, who:

a.) is not the attorney of record, or

b.) is not an attorney who, pursuant to his or her registration with the Board of Bar Overseers, shares the same business/professional address as the present attorney of record, the attorney must file a written notice of appearance on a form prescribed by the Department prior to addressing the board in the proceeding. Where more than one attorney has filed an appearance for a party, all notices will be sent to the attorney who most recently appeared. In all cases, any attorney or qualified representative so appearing is representing to the Department that she or he possesses full authority to handle any and all aspects of the matter presently pending at the Department.

*This Regulation limits the ability of independent contract attorneys to simply appear on a case. This will allow for the identity of one attorney to serve documents on (i.e., the last attorney on file with the Department) at the time of service.*

**14. 1.19 Payment of Attorney's Fees:**

For purposes of M.G.L. c. 152, § 13A(5), the employee shall be deemed to have prevailed when an insurer's M.G.L. c. 152 § 14 fraud complaint is denied and dismissed.

*This Regulations brings c. 152 in line with the holding of the Appeals Court. It also will cost the insurer a full hearing fee whenever a weak Section 14 claim is raised or (more likely) at times when a judge is of the opinion that to deny an attorney fee to employee's counsel would not be equitable. In these cases, the judge can always raise or lower the ordered hearing fee.*

*As with any statute, Regulation, case law or legal question in Massachusetts, it is advisable to involve legal counsel to discuss current applications and interpretations. This is the first significant revision of our Regulations in more then 15 years and I suspect that there will remain issues in application and interpretation; Especially the more controversial Regulations.*

***As always, please feel free to contact us directly to discuss in greater detail.***

Thank you,

James Ramsey,
Moriarty & Associates, P.C.