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DELAWARE STATE SENATE
151st GENERAL ASSEMBLY

SENATE BILL NO. 315

AN ACT TO AMEND TITLE 19 OF THE DELAWARE CODE RELATING TO WORKERS' COMPENSATION.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend § 2347, Title 19 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 2347. Review by Board of agreements or awards; grounds; modification of award.

(a) On the application of any party in interest on the ground that the incapacity of the injured employee has subsequently terminated, increased, ~~diminished or recurred~~ diminished, or recurred, or that the status of the dependent has changed, the Board may at any time, but not oftener than once in ~~6 months~~, 26 weeks, review any agreement or award. Each 26-week period is to be calculated so that no 2 hearings to review an agreement or award may be held within 26 weeks of each other. This subsection does not restrict when a party in interest can file a petition to review but rather when the Board can convene to hear the petition to review.

(b) On ~~such review~~, the review under subsection (a) of this section, the Board may make an award ending, diminishing, ~~increasing~~ increasing, or renewing the compensation previously agreed ~~upon~~ on or awarded, and designating the persons entitled ~~thereto~~, to the award, subject to this chapter, and shall state its conclusions of facts and rulings of law. The Department shall immediately send to the parties a copy of the award by personal delivery, by secure ~~email~~ e-mail with electronic receipt, or by certified mail.

(c) This section ~~shall~~ does not apply to a commutation of payments under § 2358 of this title.

(d) Compensation payable to an employee, under this chapter, ~~shall~~ does not terminate until and unless the Board enters an award ending the payment of compensation after a hearing ~~upon~~ on review of an agreement or award, ~~provided that no award. However, a petition for~~ to review, hearing hearing, or an order by the Board ~~shall be~~ is not necessary to terminate compensation ~~where~~ if the parties to an award or an agreement consent to the termination. ~~No petition for review shall be accepted by the Department unless it is accompanied by proof that a copy of the petition for review has been served by certified mail upon the other party to the agreement or award. Within 5 days after the filing of a petition for review, the Department shall notify each party concerned of the time, date and place scheduled for the hearing upon the petition.~~

(e) The Department shall accept a petition to review when it is accompanied by proof of service of the petition as required under subsection (h) of this section and the petitioner has provided all of the following information on the petition's face:

(1) The name of the petitioner and respondent.

(2) The Board file number assigned to the agreement under review.

(3) The date of the industrial accident.

(4) Whether the petitioner is the employee, dependent, employer, or insurer.

(5) The insurance carrier's name and file number, if applicable.

(6) The social security number of the employee, if applicable.

(7) On filing of a petition to review based on "failure to sign an agreement or receipt", supporting documents, including the unsigned agreement or receipt at issue, and proof of service of the petition as required under subsection (h) of this section.

(8) Whether the petitioner seeks to review the agreement or award on the ground that employee's disability has terminated, increased, diminished, or recurred; that a dependent's status has changed; or other relief, except for additional medical benefits under § 2322(c) of this title or utilization review appeals under § 2322F(j) of this title for which the Board shall require petitions to determine additional compensation.

(9) For the following petitions under this section, a copy of the medical report must be attached if it is the basis for the petition and in existence at the time of filing:

a. Petitions seeking to terminate or diminish compensation benefits for disability that is total under § 2324 of this title or partial under § 2325 of this title on the ground that the employee is physically able to work, when the basis of the petition is a medical report in existence at the time of the filing of the petition.

b. Petitions seeking to determine whether an employee is entitled to compensation allowable for permanent injury under § 2326 of this title.

(f) Within 5 business days of the date a petition to review has been received, the Department shall notify the petitioner's attorney or, if the petitioner is pro se, the petitioner directly, of whether the petition has been accepted or rejected. If the petition is rejected, the notice must state each reason for the rejection with specificity. The Department shall issue the notice electronically if the petitioner is represented by an attorney. The Department shall serve notice on a pro se petitioner by certified mail, unless the petitioner has elected to receive electronic notice from the Department, in which case the Department shall issue the notice electronically.

(g) The Board may review an issue regarding the scheduling of a hearing under § 2348(c) of this title. The Board may dismiss a petition for insufficient documentation on motion by the opposing party.

(h) A petition to review may be served by any of the following means:

(1) On the other party to the agreement or award by one of the following:

a. Certified mail or other private mailing services with evidence of proof of receipt. Proof of receipt is satisfied by signature, rejection, or lack of claim of certified mail or private mail requiring signature by the recipient. Proof of the actual signature, rejection, or lack of claim is not required, only a statement from the mail carrier that the mail was delivered, rejected, or unclaimed, including proof of delivery with printout from the United States Postal Service's or equivalent private mail carrier's website.

b. Anyone authorized to serve a subpoena under § 2320(2)b. of this title. Proof of receipt is satisfied by an affidavit of service by anyone authorized to serve a subpoena under § 2320(2)b. of this title who served the petition.

(2) On the other party's attorney by electronic delivery with acknowledgment from the attorney on the face of the petition that the petition has been accepted.

(i) When both parties are represented by counsel, the Department shall schedule, within 5 days after acceptance of a petition to review, a pretrial conference with notice to each party to schedule the time, date, and place for the hearing on the petition to review.

(j) Whenever a respondent is pro se at the time of the filing of a petition to review, the Department shall schedule, within 5 days after acceptance of the petition, a pretrial conference with notice to each party to schedule the time, date, and place for the hearing on the petition to review. If the pro se respondent does not appear at the pretrial conference, the petition to review must be scheduled for a default hearing on the petition. The Department shall serve notice of the default hearing on all parties. If the pro se respondent does not appear at the default hearing, the Board may grant the petition to review. If the pro se respondent appears at the default hearing, the Board shall decide whether to grant the default judgement or schedule a merit hearing. If the Board determines a merit hearing is necessary, the Department shall schedule the hearing and provide notice of the hearing to all parties.

(k) Compensation shall be paid by the Department to the employee after the filing of the employer's petition to review from the Workers' Compensation Fund until the parties to an award or agreement consent to the termination or until the Board enters an order upon the employer's petition to review. After the parties to an award or agreement consent to the reinstatement of compensation or, after the employer withdraws its petition, or, if the Industrial Accident Board orders the employer's petition dismissed, the employer shall repay to the Workers' Compensation Fund the amount paid out by the

82 Department. A petition to review must be withdrawn whenever the parties to an agreement settle the claim without a
83 hearing before the Board or whenever an employee consents to a termination after a petition to review has been filed with
84 the Board. On an employer's petition to review an agreement for total or partial disability benefit entitlement on the ground
85 that the employee is physically able to return to work, compensation shall be paid from the Workers' Compensation Fund
86 by the Department to the employee on acceptance of the employer's petition to review as follows:

87 (1) The Department shall initiate compensation retroactive to the date the petition to review was accepted by
88 the Department. The Department shall issue compensation on receipt of a properly completed eligibility certification
89 form, which has been signed and dated by the employee.

90 (2) If there is an agreement approved by the Board on file, the Workers' Compensation Fund shall pay this
91 compensation to the employee at the compensation rate documented on the face of the agreement approved by the
92 Board that is under review. If an agreement is not on file, the Workers' Compensation Fund shall pay the compensation
93 at the rate the employer had been paying as of the date of the petition until the Board makes a determination that
94 reformation of the rate is appropriate or the Fund is notified by counsel for the employee or the employee of a
95 reduction in the amount owed due to the employee's return to work. If the compensation rate that employer had been
96 paying the employee as of the date of the filing of the petition does not comply with § 2302(b)(3) of this title, the
97 Workers' Compensation Fund shall pay employee wage compensation that complies with § 2302(b)(3) of this title. On
98 notification to the Fund by counsel for the employee or the employee of the employee's return to work, the Fund may
99 cease payment of total disability benefits as of the date of the employee's return. The Fund shall issue any payment for
100 partial disability when the Fund receives pay stubs or other evidence of wage payments from the employee. The
101 employee must continue to submit pay stubs or other evidence of wage payments for the Fund to continue to issue
102 partial disability payments. Unless the employee has returned to work under this section, the Workers' Compensation
103 Fund shall continue to pay the compensation by the terms of the agreement or award under review until the parties to
104 an award or agreement consent to the termination, the petitioner withdraws the petition, or the Board enters an order on
105 an employer's petition to review.

106 (3) After the parties to an award or agreement consent to the reinstatement of compensation or the employer
107 withdraws its petition, the employer shall repay to the Workers' Compensation Fund the amount paid out by the
108 Department on written request for payment issued by the Workers' Compensation Fund. If the Board orders the
109 employer's petition dismissed, the employer shall reimburse the Workers' Compensation Fund at the rate and during
110 the period ordered by the Board within 30 days of the later of when the award becomes final and conclusive between
111 the parties under § 2349 of this title or on written request for payment issued by the Workers' Compensation Fund.

Every petition to review must be withdrawn whenever the parties to an agreement settle the issues of the petition to review without a hearing before the Board or whenever an employee consents to a termination after a petition to review has been filed with the Board.

(4) If, during the pendency of a petition to review for which the employee is receiving compensation from the Workers' Compensation Fund, the parties agree that a new totally or partially incapacitating event, whether surgical or otherwise, is compensable, the employer shall, within 10 days, notify the Department of the date of the event, the date disability from the event resumed, whether that disability is total or partial in character, and, if applicable, the date disability subsequently terminated. The employer shall provide this notice in one of the following ways:

a. By filing one or more Employer's Supplemental Report(s) of Injury under § 2313(a) of this title to which all protections afforded by § 2313(d) of this title continue to apply.

b. In any other written manner that provides the Department with substantial notice of the date of the event, the date disability from the event resumed, whether that disability is total or partial in character, and, if applicable, the date disability subsequently terminated.

(5) On receipt of a notice under paragraph (k)(4) of this section, the Workers' Compensation Fund is entitled to reimbursement from the employer only for that period during which the notice states that the employer would have provided weekly compensation as a direct result of the incapacitating event without the employer being required to withdraw the petition or waiving any other rights, claims, or defenses of any sort should the parties proceed to hearing on the merits of the remainder of the petition. If, during the pendency of the petition, the notice or a subsequent notice states that the disability from the new incapacitating event terminated before the hearing date scheduled for the Board's review, the Workers' Compensation Fund's responsibility to pay weekly compensation resumes from the date the notice states that the disability terminated until the date that the Board's award, following its review, has become final and conclusive, after which reimbursement to the Workers' Compensation Fund, if any, be ordered by the Board following the hearing, is to be made under paragraph (k)(3) of this section.

~~(l) The first 2 sentences of the fifth paragraph of this section shall apply only to employers insured by insurance carriers. Nor shall they apply to self-insured employers who shall be responsible for payment of their own claims under this section. The provisions of subsection (k) of this section pertaining to payments by the Workers' Compensation Fund only applies to employers insured by insurance carriers and do not apply to self-insured employers. Self-insured employers are responsible for payment of their own claims under this section.~~

~~(m)(1) Upon any~~ On an order imposed by the Insurance Commissioner under § 2411(e) of Title 18 requiring payment of restitution following a finding of insurance fraud, and after all rights of appeal from said the order have been

142 waived or exhausted, the Board shall, ~~upon~~ on motion of the party to whom restitution was ordered and after hearing and
143 opportunity to be heard, allow a credit against benefits payable under §§ 2324, ~~2325 and/or 2325~~, or 2325, or 2326 of this title, for
144 any restitution ordered by the Insurance Commissioner remaining unpaid.

145 (2) The Board shall ~~also~~ review orders establishing ~~such credits upon~~ a credit under paragraph (m)(1) of this
146 section on motion based ~~upon~~ on any change in circumstances that may warrant modification or rescission of a prior order.

SYNOPSIS

This Act makes substantial changes to clarify and modernize § 2347 of the Workers' Compensation Act, Chapter 23 of Title 19 of the Delaware Code, as follows:

(1) Subsection (a) incorporates recent Industrial Accident Board rulings governing the frequency with which petitions to modify workers' compensation agreements may be raised.

(2) Subsection (e) clarifies pleading requirements for petitions to review, which helps the Department of Labor in docketing of Petitions and attorneys in preparing pleadings for filing.

(3) Subsection (h) expands methods of service of process of petitions to permit utilization of private mail services, traditional process servers, and electronic service to respondents who are attorney represented. This subsection also explicitly defines what must be submitted to the Department of Labor as proof of service.

(4) Subsection (j) codifies the process by which default or "read-in" hearings have proceeded before the Industrial Accident Board under § 2347 for over 30 years.

(5) Subsection (k) clarifies whether and to what extent Workers' Compensation Fund wage replacement benefits are available to injured workers during the pendency of petitions to review. The clarifications provided for both the Department of Labor and the claimant's bar will streamline the process so that injured workers will experience fewer interruptions or delays in the payment of benefits than under the current law. Also included are protections for the Workers' Compensation Fund to ensure that there are not overpayments.

This Act is the product of the work of the workers' compensation claimants bar, defense bar, and the Department of Labor, and the underlying intent of this Act is to streamline processes and limit unnecessary litigation that has occurred in recent years as a result of lack of clarity in § 2347. This Act furthers the public policy behind various changes to the Workers' Compensation Act in the last 15 years to mitigate insurance rates for Delaware businesses while simultaneously ensuring that the interests of the State's injured workers are protected.

Author: Senator Walsh