



## WEST VIRGINIA INSURANCE BULLETIN

### No. 21 – 03

*Insurance Bulletins are issued when the Commissioner renders formal opinions, guidance or expectations on matters or issues, explains how new statutes or rules will be implemented or applied, or advises of interpretation or application of existing statutes or rules.*

#### ► Physical Examinations of Workers Compensation Claimants ◀

W.Va. Code §23-4-8(a) provides generally that a private carrier, self-insured employer or, in the case of a claim made to a state administered workers' compensation fund, the Insurance Commissioner may, after due notice and whenever in its opinion it is necessary, order a claimant other than a claimant for occupational pneumoconiosis to appear for a physical examination before a medical examiner of its own choosing. W.Va. Code §23-4-8 further provides that a claimant and/or an employer may also select a physician of their own choosing to, at their own expense, participate in the examination. The claimant and employer shall be furnished with a copy of the report of examination made by the medical examiner retained by the private carrier, self-insured employer or the Commissioner, if applicable.<sup>1</sup> A physician selected by a claimant or an employer has the right to submit a separate report.

It has long been a common practice to refer to physical examinations ordered pursuant to W.Va. Code §23-4-8 as "independent medical examinations" or "IMEs" despite the fact that W.Va. Code §23-4-8 does not actually use the term.<sup>2</sup> Further, the West Virginia Supreme Court of Appeals, as well as the Board of Review and Office of Judges, often refer to examinations of claimants undertaken pursuant to W.Va. Code §23-4-8 as "independent medical examinations". However, it has come to the Commissioner's attention that there are oftentimes questions regarding the objectivity of the examination and that the use of the term "independent medical examination" may lead to confusion or misunderstanding by claimants, especially *pro se* claimants.

The term "independent medical examination" generally refers to an examination that is performed by a medical examiner who has not previously been involved with the claimant's care. In that regard, an independent medical examination is an examination that is *independent* of the traditional doctor/patient relationship. However, it does not mean that the examination is independent in the traditional or colloquial sense, as it is oftentimes requested and paid for by the party investigating the claim or even opposing the requested benefits. Of course, medical examiners have their own professional code of ethics to which they must adhere, and examinations should always be objective and unbiased. Importantly, medical examiners

<sup>1</sup> A limited exception exists regarding disclosure of certain psychiatric or psychological reports. See W.Va. Code §23-1-13(f).

<sup>2</sup> While W.Va. Code §23-4-8 does not use the term "independent medical examination," W.Va. Code §23-4-7a and W.Va. Code of State Rules §85-20-1, *et seq.*, do use the term. The term is used extensively in Rule 20, as promulgated by the former Workers' Compensation Commission, including on Exhibits A, B, and C to Rule 20, which are report guidelines and outlines for examinations. However, the Commissioner is considering the possibility of proposing amendments to Rule 20 to resolve any lingering confusion. Furthermore, while the term is used in both W.Va. Code §23-4-7a and W.Va. Code of State Rules §85-20-1, *et seq.*, it is clear that a private carrier, self-insured employer, or the Commissioner, if applicable, may refer a claimant to a medical examiner of its own choosing and is not required to refer a claimant to a medical examiner chosen by the regulator or any other entity. Moreover, if a claimant refuses, without good cause, to undergo an examination or needed treatment provided for under W.Va. Code §23-4-7a, his or her benefits may be suspended until the claimant complies.

must follow all statutory guidelines, guidelines set forth in W.Va. Code of State Rules §85-20-1, *et seq.*, and any other applicable guidelines, but that certainly does not mean that a party who disagrees with a report of any examination is in any way prevented from obtaining their own physical or medical examination and submitting a separate examination report to contest findings or opinions.

In the past, generally prior to the privatization of workers' compensation in West Virginia, independent medical examiners were permitted to apply to be recognized by the former Workers' Compensation Commission as providers who were permitted to recommend impairment ratings of injured workers. The former Workers' Compensation Commission, and thereafter the Insurance Commissioner, maintained a list of providers who applied and were recognized as qualified, independent medical examiners. However, because the law clearly provides that private carriers, self-insured employers, and/or the Commissioner, if applicable, are, in their sole discretion, permitted to direct claimants to medical examiners of their choosing, and because upon termination of the former Workers' Compensation Commission, registration of independent medical examiners was no longer required, the Commissioner ceased maintaining a list of independent medical examiners.<sup>3</sup>

Private carriers, self-insured employers and their claims administrators should use caution to ensure that use of the term "independent medical examination" or "IME" is not misleading or confusing to a claimant. In that regard, the Commissioner strongly discourages use of the term and urges private carriers, self-insured employers, claims administrators, employers and claimants to use more accurate or precise terminology, such as, for example, "insurer's physical examination of claimant", "private carrier's physical examination of claimant", "claimant's physical examination", or "employer's physical examination of claimant", as opposed to the more generic and potentially confusing term, "independent medical examination" or "IME". As noted, pursuant to W.Va. Code §23-4-8, both claimants and employers are entitled to a physician of their own choosing, at their own expense, to participate in any examination ordered by a private carrier, self-insured employer or the Commissioner, if applicable, and a physician selected by a claimant or an employer has the right to submit a separate report, if desired. Most importantly, claimants should not be misled to believe that the examination report of the private carrier's or self-insured employer's medical examiner is the only report admissible in litigation or that such report would necessarily be afforded more weight than the examination report of another qualified medical examiner, or even a treating physician in certain circumstances, in litigation so long as the medical examiner and the resulting report follow all statutory guidelines, guidelines set forth in W.Va. Code of State Rules §85-20-1, *et seq.*, and any other applicable guidelines. All reports made by medical examiners, including any separate reports, must and will be considered in the "passing upon", or adjudication, of a claim. *See* W.Va. Code §§23-4-8(a) and 23-4-1g.

Please e-mail any questions concerning this Insurance Bulletin to [OICBulletins@wv.gov](mailto:OICBulletins@wv.gov). Consumers needing assistance may contact our Consumer Services Division at 1-888-TRY-WVIC or [OICConsumerServices@wv.gov](mailto:OICConsumerServices@wv.gov).

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<sup>3</sup> Even though registration of independent medical examiners no longer being required, examiners are required to verify and provide proof of their American Board of Medical Specialties ("ABMS") or American Osteopathic Association ("AOA") certification to whomever services are provided. *See* W.Va. Code of State Rules §85-20-5.9.a.