

# Workers' Compensation

Practice Group Update

October 23, 2015

## Inside the New York Workers' Compensation Board's New Payor Compliance Procedures

The New York Workers' Compensation Board has implemented a new procedure that changes the way carriers manage claims per Section 25(2)(a), which will affect both carriers and employers. The new procedure requires carriers to accept or controvert a claim "within 18 days after a disability or within 10 days after the employer has knowledge of the alleged accident, whichever is greater."

This new protocol relating to the 18/10 timeframe contrasts starkly to the common previous practice of many carriers. In addition to the timeframe difference, changes also impact how to deal with cases without the receipt of medical evidence. Failure to comply with the new procedures could result in fines.

Here we examine the history behind this development, the impact of this protocol change, and situational examples to help carriers and employers comply with these complex rules.

We have also included a flowchart of these procedures on the pages following this alert.

### **The Histories of Rule 21, Section 25, and Amended Sections 25(2)(a) and (b)**

Historically, the Workers' Compensation Board promulgated Rule 21, which mandated that a carrier must file a C-7 notice of controversy on or before the 18th day of disability or within 10 days of the employer's first knowledge of the alleged accident. Failure to file a notice of controversy resulted in the carrier waiving certain defenses, including employer/employee relationship, accident arising of the course of employment, and notice. Rule 21 allowed only one narrow exception — the carrier could seek *nunc pro tunc* permission from a law judge excusing the late filing of a C-7 in circumstances where filing a timely C-7 was not reasonably possible.

In contrast with Rule 21, the legislature also adopted Workers' Compensation Law Section 25. Section 25 mandated the procedures for timely filing of a notice of controversy and awarding initial payments of compensation. Generally, Section 25 required carriers to make payments of compensation before the 18th day of disability or within 10 days of the employer's first knowledge of the alleged accident. If the carrier decided to controvert the claim, the carrier was required

to file a notice of controversy within the 18/10 periods or be subject to a penalty. In *Matter of Meit v. PS&M Catering Corporation*, 285 A.D. 506, 138 N.Y.S.2d 378 (3d Dept. 1955), the Third Department addressed the inherent contradictions between Rule 21 and Section 25. The court held that Rule 21 contravened Section 25 as the Legislature had already imposed penalties for failing to file a timely notice of controversy. The court held that Rule 21 did not comport with the intent of the Workers' Compensation Law, which states that "no case shall be closed without notice to all parties interested and without giving to all such parties an opportunity to be heard." The court found that Rule 21 was invalid, and in the creation of Rule 21, the board had exceeded the scope of its authority by assuming legislative authority.

In 1956, WCL Section 25 was amended to include Section 25(2)(a) and Section 25(2)(b). Those statutes read as follows:

Procedure when compensation controverted; penalties: late filing; controversy without just cause.

(a) In case the employer decides to controvert the right to compensation, it shall, either on or before the eighteenth day after disability or within

ten days after it has knowledge of the alleged accident, whichever period is the greater, file a notice with the chair, on a form prescribed by the chair, that compensation is not being paid, giving the name of the claimant, name of the employer, date of the alleged accident and the reason why compensation is not being paid. If the insurance carrier shall fail either to file notice of controversy or begin payment of compensation within the prescribed period or within ten days after receipt of a copy of the notice required in section one hundred ten of this chapter, whichever period is the greater, the board may, after a hearing, impose a penalty in the amount of three hundred dollars, which shall be in addition to all other penalties provided for in this chapter and shall be paid to the claimant. Such penalty shall be collected in like manner as an award of compensation.

(b) In the event the board shall notify an employer or his insurance carrier that a workers' compensation case has been indexed against such employer, and the employer or insurance carrier decides to controvert the right to compensation, a notice of controversy shall be filed with the chair within twenty-five days from the date of mailing of a notice that the case has been indexed. Failure to file the notice of controversy within the prescribed twenty-five day time limit shall bar the employer and its insurance carrier from pleading that the injured person was not at the time of the accident an employee of the employer, or that the employee did not sustain an accidental injury, or that the injury did not arise out of and in the course of the employment. However, the board, in the interest of justice, shall, upon the showing of good cause therefor, permit the filing or the amendment

of a notice of controversy to raise an issue not theretofore raised because of mistake, inadvertence, omission, irregularity, defect or surprise, or based upon newly discovered evidence.

The codification of Section 25(2)(a) and 25(2)(b) resulted in the creation of a timing paradox for carriers. Under Section 25(2)(a), if the carrier wishes to controvert the claim, it must do so within 18 days of the "disability" or 10 days of knowledge of the disability. Failure to do so results in a penalty of \$300, payable to the claimant. The legislature intended Section 25(2)(a) to promote fast and efficient response to a claim.

In contrast, Section 25(2)(b) grants a carrier additional time to controvert a claim. Section 25(2)(b) requires a carrier to determine whether to accept or to controvert the claim within 25 days of a notice of indexing.

Interestingly, the carrier's failure to file a notice of controversy timely under Section 25(2)(b) can be excused under the statute, but there is no similar phrasing under Section 25(2)(a).

Of additional note, Section 25(2)(c) permits the board to issue a penalty against a carrier for controverting a claim without just cause.

## 12 NYCRR 300.22 Requires Reporting Within 18/10 of "Disability Event," Not a "Disability"

The Workers' Compensation Board also issued similar rules under New York Rules and Regulations Section 300.22, which sets out the specific procedure for a carrier to follow in circumstances in both accepted and non-controverted claims. Unfortunately, 12 NYCRR 300.22 only increases further confusion as to

how carriers are to properly calculate the 18/10 time periods.

12 NYCRR 300.22(b)(1) states when the carrier must file the First Report of Injury, which is on or before the 18th day after the "disability event" or within 10 days after the employer has knowledge of the disability event, whichever is greater. Failure to do so results in a penalty of \$300, payable to the claimant. 12 NYCRR 300.22 (c) states that a Mandatory Subsequent Report of Injury must be filed within 18 days of the "disability event" or 10 days from when the employer has knowledge of the disability event. Specifically, Section 300.22 (c)(1) notes that initial notices of controversy, unless submitted on a First Report of Injury, must be filed within the 18/10 rule as well, citing Section 25(2)(a).<sup>1</sup>

However, the Section 25(2)(a) statute and the 12 NYCRR 300.22 diverge on where the 18 days are counted from. Section 25(2)(a) states that the notice of controversy must be filed within 18 days of a "disability" — defined as when the claimant began to lose time from work and not the date of accident. See *Seneca Gaming Corp.*, 2008 N.Y. Wrk. Comp. LEXIS 9994, 2008 N.Y. Wrk. Comp. 80804870 (October 7, 2008).

In contrast, 12 NYCRR 300.22 states that the notice of controversy must be filed within 18 days of the "disability event." 12 NYCRR 300.22 (a)(1) defines a "disability event" as "any accident ... occurring in the course of employment ... that results in personal injury which has caused or will cause a loss of time from regular duties ... or will require medical treatment

<sup>1</sup> Although carriers may decide to file a Notice of Controversy for every file that reports a "disability event," carriers must remember as noted above that Section 25(2)(c) also permits the board to issue a penalty against a carrier for controverting a claim without justification.

beyond ordinary first aid or more than two treatments by a person rendering first aid.”

Under 12 NYCRR 300.22, the carrier is required to file a First Report of Injury (FROI) and/or Initial Report of Controversy (FROI-04/SROI-04) within 18/10 of the “disability event.” Failure to file these forms timely could, under the statute, result in a penalty to the carrier of \$300 payable to the claimant if the notice of controversy is filed outside of these guidelines.

If the carrier chooses to controvert the file after 18/10 time period, the carrier does not waive right to any defenses unless and until the 25-day time period to respond to the notice of indexing has lapsed under Section 25(2)(b).

Clearly, the Section 25(2)(a) statute may allow for greater leniency for the reporting and responding to claims; however, the Workers' Compensation Board has yet to determine the precise definition of a “disability event.” It is potentially within the Worker's Compensation Board's administrative authority to curtail and to limit the ability of a carrier to respond by adopting a strict interpretation of 12 NYCRR 300.22.

## The Payor Compliance Project and Board's Imposition of the Section 25(2)(a) Penalties

The Workers' Compensation Board recently started its Payor Compliance Project, which will measure carriers' timeliness in filing certain reports, including the filing of the FROI, initial payment of compensation (SROI-IP), and notices of controversy (FROI-04 or SROI-04). It will also measure the percentage of claims controverted by each carrier.

The board has also announced its intention to impose penalties for failure to comply with Section 25(2)(a). The statute notes that the board may impose this

penalty, making it discretionary instead of mandatory. The statute also requires a hearing to be scheduled if the board is contemplating issuing a penalty for failure to file a timely notice of controversy. This penalty cannot be done by administrative decision without the hearing being held to address that issue.

The board panel recently issued a decision on the matter on May 13, 2015, where it outlined the requirements under Section 25(2)(a) and affirmed the imposition of a \$300 penalty on the carrier. See *Gypsum Wholesalers Inc.* 2015 NY Wrk. Comp. LEXIS 3939, 2015 NY Wrk. Comp. LEXIS 3939 (May 13, 2015). In summary, the board panel noted in that claim that a \$300 penalty was appropriate due to untimely filing of a notice of controversy.

It should also be noted with respect to medical-only claims, the Third Department previously found in *Zalsky v. Inter-County Farmers Cooperative Association*, 27 A.D.2d 682, 27 A.D.2d 682 (3d Dept. 1967) that even when it is a medical-only claim, the board may still impose a penalty for the carrier's failure to file a notice of controversy within the timeline in Section 25(2)(a).

## The Requirement to Start Indemnity Payments If the Claim Is Not Controverted, Even Without Medical Evidence

The Workers' Compensation Board has also recently indicated that carriers must begin immediate indemnity payments to the claimant in accepted cases.

Section 25(1)(c) states that if the employer or insurance carrier does not controvert the injured worker's right to compensation, such employer or insurance carrier shall begin paying compensation, either on or before the 18th day of “disability” or within 10 days after the employer first has

knowledge of the alleged accident, whichever period is greater. Please note that this section remains void of any requirement for the claimant to produce medical evidence of a disability. The statute requires the carrier to have notice of an injury.

The board allows a carrier to discontinue payments if no medical evidence is received after a 30-day time period. This applies only when there is no notice of controversy. If the claim is controverted, the carrier is not subject to a penalty for failing to begin payments to the claimant. Again, however, the carrier must be mindful of controverting every claim. This is especially true now that the board has announced its intention to track the number of controverted cases from each carrier and its ability to impose a penalty under Section 25(2)(c) for filing a controversy without justification.

The board has indicated that a carrier may not be required to pay without prejudice on any occupational disease claim.

The Workers' Compensation Board recommends the carrier take the following actions in situations where the claimant is out of work, but no medical evidence has been produced:

1. Pay at the mild rate tentatively until there is medical evidence provided;
2. File a SROI-IP and make payments without prejudice under Section 21-a;
3. When no medical evidence is produced within 48 hours of treatment, the carrier can send the claimant to an authorized treating provider in order to obtain an opinion as to degree of disability and pay benefits at that rate;
4. The carrier may stop payments within 30 days from the date the employer had knowledge of the disability or if there is a C-11 indicating claimant has returned to work. Additionally, the board also stat-

ed that the carrier can stop payments when there is no medical provided within 30 days from when the employer had knowledge of injury noting that “the inference of disability contained in the employer’s initial report lasts only a reasonable time.”

5. The carrier can choose a PPO in accordance with Article 10-A and send claimant to a PPO provider for the first 30 days; and

6. Send the claimant for an IME.

The board indicates that the carrier may make payments to a claimant without prejudice even if the case is controverted; however, there is no mechanism to recoup payments if the claim is later disallowed. The carrier must seek a judgment against the claimant in Supreme Court to recoup any money paid to the claimant.

If the claim is not controverted, yet no medical evidence is ever received, the carrier is directed to pick up payments to the claimant but may stop after 30 days as noted above. Any money paid would be considered an overpayment and can be recouped if and when additional indemnity awards are entered.

If the claim is not controverted and the claimant is losing time from work, a SROI report to the board must be filed within 18 days of disability or 10 days of after the employer has knowledge of the disability, whichever is greater. Failure to do so can result in an additional penalty to the carrier of \$50 under Section 25(3)(e). If awards have not been issued within the prescribed time period, the board can also impose a penalty under Section 25(2)(a) for failure to pick up payments timely.

## Comparing the Old and New Ways: Impact of the Project on Carriers and Employers

Putting together all of the above information, one can see a significant difference in the old and new ways proceeding under the 18/10 day timelines.

**The Old Way:** To date, the requirement to respond to a claim within 18/10 days under Section 25(2)(a) has largely been ignored by the board. The common practice of carriers today is to delay determination as to whether to accept or to deny a case after an investigation, receipt of medical evidence, or the filing of the notice of indexing. Carriers also commonly refuse to pay the claimant without the receipt of medical evidence of an ongoing degree of disability and wait to file a notice of controversy until within 25 days after a Notice of Indexing is issued.

**The New Way:** Beginning in the third quarter (September 2015), the board now requires carriers to determine whether to accept or controvert a claim per Section 25(2)(a) “within 18 days after a disability or within 10 days after the employer has knowledge of the alleged accident, whichever is greater.” Please note that the 18/10 timeframe runs from the time when the employer has knowledge of the accident, not the carrier. As discussed above, this 18/10 rule under Section 25(2)(a) has never been enforced.

Additionally, in cases that are accepted (or accepted without prejudice), the board also states that the carrier should pay the claimant without prejudice for 30 days even if no medical evidence exists. If no medical report is received after 30 days, the board then permits the carrier to suspend.

Unfortunately, a failure to comply with the 18/10 day rule in WCL Section 25(2)(a) could result in penalties. Under WCL

Section 25(2)(a), the board may impose a \$300 penalty payable to the claimant for failure to file the notice of controversy or begin payment for lost time within 18 days of the disability or within 10 days of the employer’s knowledge of the disability, which can only be imposed at a hearing. Under Section 25(3)(e), if the carrier or employer fails to file a notice or report requested by the board within 10 days, the board may impose a \$50 penalty that can be imposed administratively. The board has indicated that no penalty will be imposed under WCL 25(3)(e) unless the carrier falls below performance standards for each category, including timely report of injury, timeliness of SROI for initial payment, and timely filing of notice of controversy.

Of note, carriers still have the right to change a case accepted without prejudice into a controverted case per WCL Section 21-a. Carriers should be aware that Section 21-a still imposes a one-year time limit to change an acceptance without prejudice into a denial.

Additionally, under Section 25(2)(b), a carrier still has 25 days from the Notice of Indexing to file a notice of controversy. Although the Section 25(2)(a) penalty can be assessed for untimely filing, a carrier’s right to controvert the file cannot be waived until the time to respond to the notice of indexing has passed.

## Examples of How to Apply the Workers' Compensation Board's New Payor Compliance Procedures

**Situation #1:** You have little to no information regarding a claim. The claimant alleges being out of work, but has no medical evidence. You have 18/10 days to accept or to controvert the case. The board wants carriers to accept without prejudice and pay the claimant at his proper rate for at least 30 days.

We recommend you file a notice of controversy (FROI-04) raising issues of no prima facie medical evidence and no causal relationship, among any other potential defenses following discussion with your insured. If appropriate medical evidence is received, your denial can be withdrawn.

Please note that the board indicates that any denial filed without justification could be subject to a \$300 penalty payable to the claimant. However, we take the position that any denial filed raising issues of no prima facie medical evidence and no causal relationship due to lack of medical is justified and not subject to a penalty under WCL Section 25(2)(c).

**Situation #2:** You choose to accept a claim without prejudice pending further investigation and begin payments without prejudice (either with or without medical evidence). You would need to file a FROI-00 and a SROI-IP.

We recommend you pay only the minimum statutory rate of \$150 to the claimant to avoid any potential overpayment.

**Situation #3:** You cannot tell whether the claimant is making a claim for an accident or occupational disease.

We recommend that you choose to report an occupational disease because the board has indicated that occupational disease claims will be excluded from the measurement of timely first report of injury, timely initial payment, timely SROI, and timely controversy.

**Situation #4:** You accept a claim without prejudice, but later decide to deny after an investigation. In this situation, you accept the claim without prejudice by filing a FROI-00 and if also making payments, you file a SROI-IP as well. Later, if you choose to deny following your investigation, you file a FROI-02 then a SROI-04.

We recommend that you immediately contact defense counsel to discuss the appropriate denial codes to be raised and then file a SROI-04 to deny the claim. Defense counsel will perfect your denial by filing a PH-16.2 pre-hearing conference statement and OC-400.5 certification. Please remember that you can still controvert a claim within 25 days of the Notice of Indexing.

## For More Information

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For further information on how this new procedure could impact your business, please contact:

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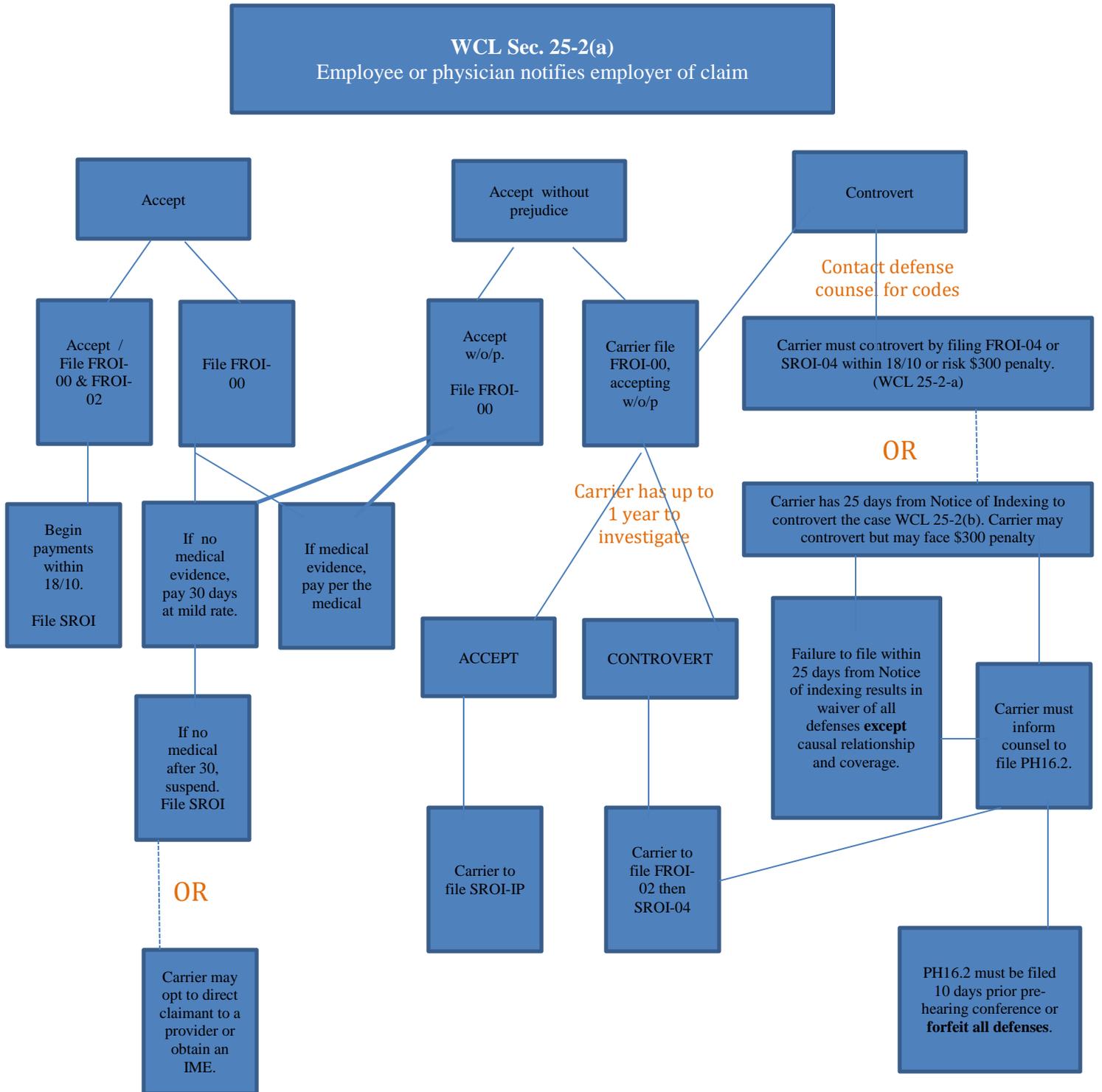
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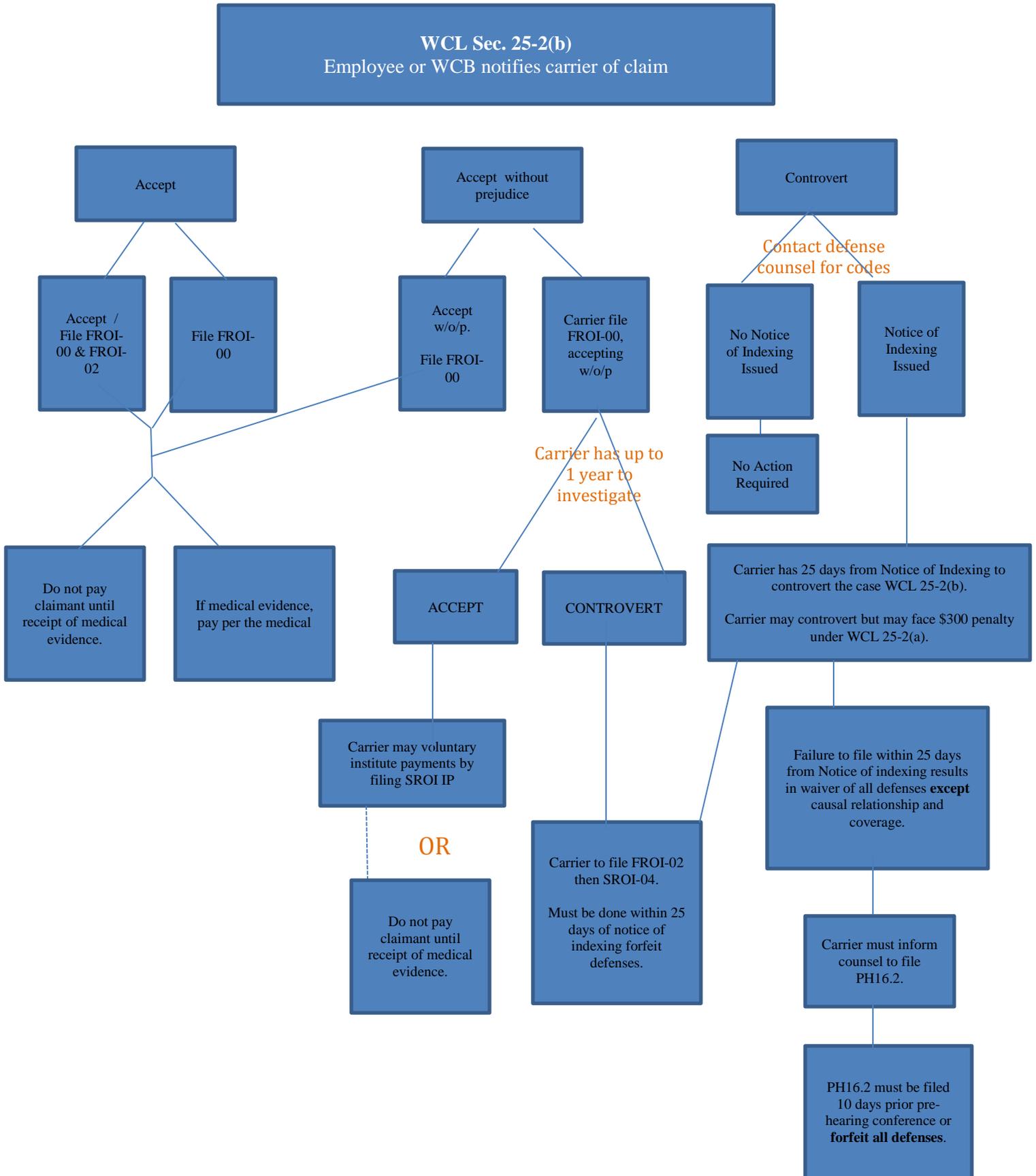
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## WCL Sec. 25-2(a) & 25-2(b) Claim Response Procedures



## WCL Sec. 25-2(a) & 25-2(b) Claim Response Procedures





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