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NO JUSTICE: THE CASE AGAINST THE CALLOUS CAMPAIGN TO CUT COMPENSATION BENEFITS FOR INJURED WORKERS

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This week, the Workers' Compensation Board is expected to release a proposal responding to the Business Council's callous campaign to cut workers' compensation benefits for injured workers who have forever lost some or all of the use of their limbs. Many of them are workers who have had parts of their body amputated, who have had their knees or hips replaced with artificial joints, who have lost full use of their hands or arms, or whose ability to stand or walk has been compromised.

The Business Council's campaign rests on two premises, both of which are completely false. One is that employer's workers' compensation costs are "skyrocketing," and that slashing compensation awards is necessary to cut employer costs. The other is that the existing guidelines that are used to determine awards are outdated and must be revised

to take into account advances in medical science that improve outcomes and reduce loss of function.

It is true that after remaining flat for fifteen years from 1992 until 2007 the particular type of award targeted by the Business Council – known as “schedule loss” awards – increased for about two-thirds of injured workers with permanent limb injuries between 2007 and 2010. However, that increase was bargained-for by the Business Council, which in exchange obtained a billion dollars in savings by capping payments to permanently disabled workers. Moreover, since 2010, two-thirds of workers have not seen further increases in schedule loss awards, while increases for the remaining one-third have been minimal, incremental, and benefit a diminishing number of workers. In addition, schedule loss awards represent only a small portion of all employer costs, which are lower today than they were in 1996 – and were just reduced by nearly a half billion dollars. In short, the Business Council’s claim that the guidelines must be revised to save employers from spiraling costs is demonstrably false.

The Business Council’s claim that the guidelines must be revised to account for advances in medical science that improve outcomes and reduce functional loss is equally false. The existing guidelines take into account three primary considerations: what body part is affected by the injury; the nature of the injury and/or the type of surgery that was involved; and the resulting range of motion or function. The fact that the existing guidelines are based largely on range of motion and function necessarily builds in the result of advances in medical science. If advances in surgery or therapy result in improved range of motion and function, then the resulting schedule loss evaluation is correspondingly lower than it would have been at an earlier time when the surgery was performed differently and left the worker with poorer range of motion or function. Thus, there is no basis for the

Business Council's claim that new guidelines must be written to account for new medical procedures.

In the absence of any justification based on cost or medicine, it is clear that the Business Council's campaign is nothing more than a cynical attempt to enrich its members in the insurance industry at the expense of injured and defenseless workers, many of whom are immigrants or work for low wages in hazardous physical employment. Meanwhile, a recent survey of these workers showed that large majorities believe that the awards made under the existing guidelines are unfair and inadequate. This was especially true of low-wage workers, who already receive the lowest payments. While a downward revision of the guidelines would slash benefits for all workers, it would result in low-wage workers receiving a lower award today than they received for the same injury twenty-five years ago in 1992.

It is clear that there is no justice in the Business Council's callous campaign to cut compensation benefits for injured workers.

I. EMPLOYER COSTS ARE FALLING, NOT RISING.

The Business Council's claims about high employer costs are based purely on small samples of information that are taken entirely out of context. For instance, with regard to schedule loss awards, the Business Council focuses solely on the increase in awards for high-wage workers since 2007, while selectively ignoring the facts that (1) schedule loss awards did not increase for any worker, regardless of wage group, for fifteen years from 1992 to 2007; (2) schedule loss awards have continued to remain flat for low-wage

workers¹ up until the present time; (3) while costs did increase for medium- and high-wage workers² from 2007 to 2010, those bargained-for increases were dwarfed by employer savings from caps on permanent partial disability awards; and (4) cost increases for the past seven years have been trivial and have involved a small and diminishing number of high-wage workers. Similarly, with regard to overall employer costs, the Business Council points selectively to a few years in which there were significant cost-increases, but ignores many other years in which employer costs were flat or declined significantly – including this year, in which employer costs were cut nearly a half billion dollars.

A. Trends in Schedule Loss Costs.

At the outset, it is important to note that only about 13.5% of workers' compensation claims involve awards for schedule loss of use.³ These awards are based primarily on three factors: the injured worker's wage; the maximum benefit rate in effect on the date of accident; and the extent of the loss of use of the affected body part.

From 1992 until 2007, both the maximum benefit rate and the guidelines used to evaluate injuries remained unchanged. As a result, there were no increases in schedule loss awards for fifteen years.

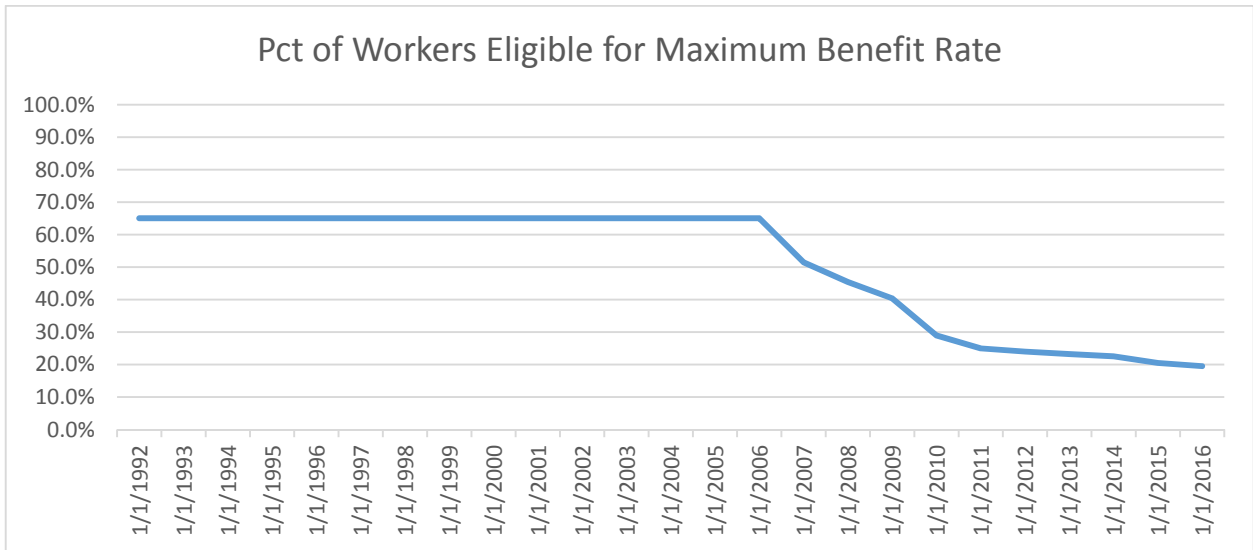
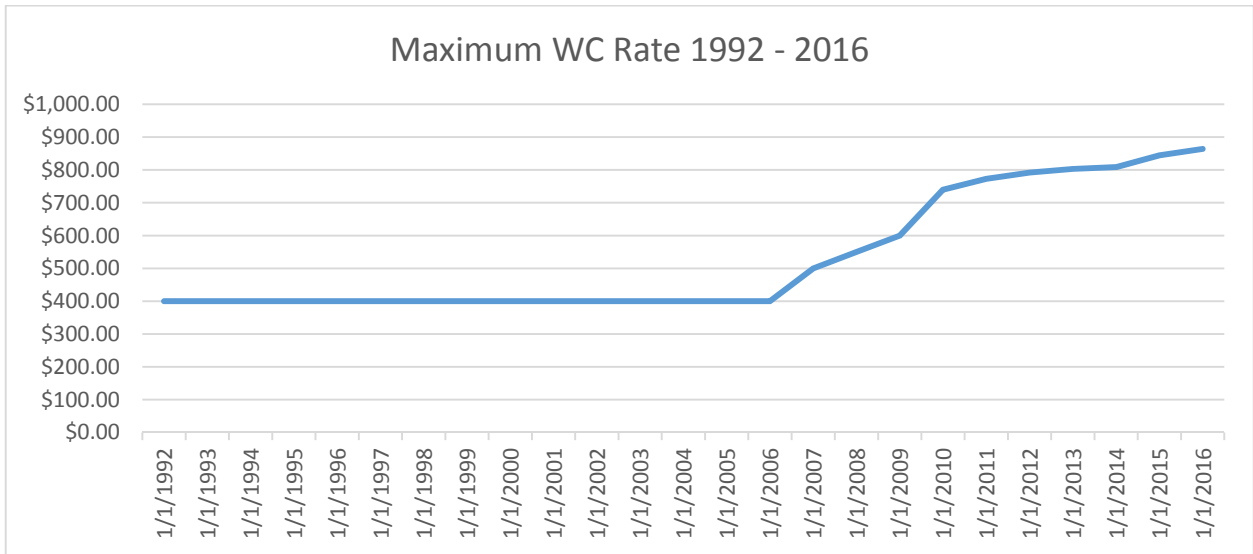
As a result of the 2007 workers' compensation reform legislation, the maximum benefit rate was increased in stages from 2007 through 2009, and was tied to the state average weekly wage in 2010. As a result, temporary disability and schedule loss benefits

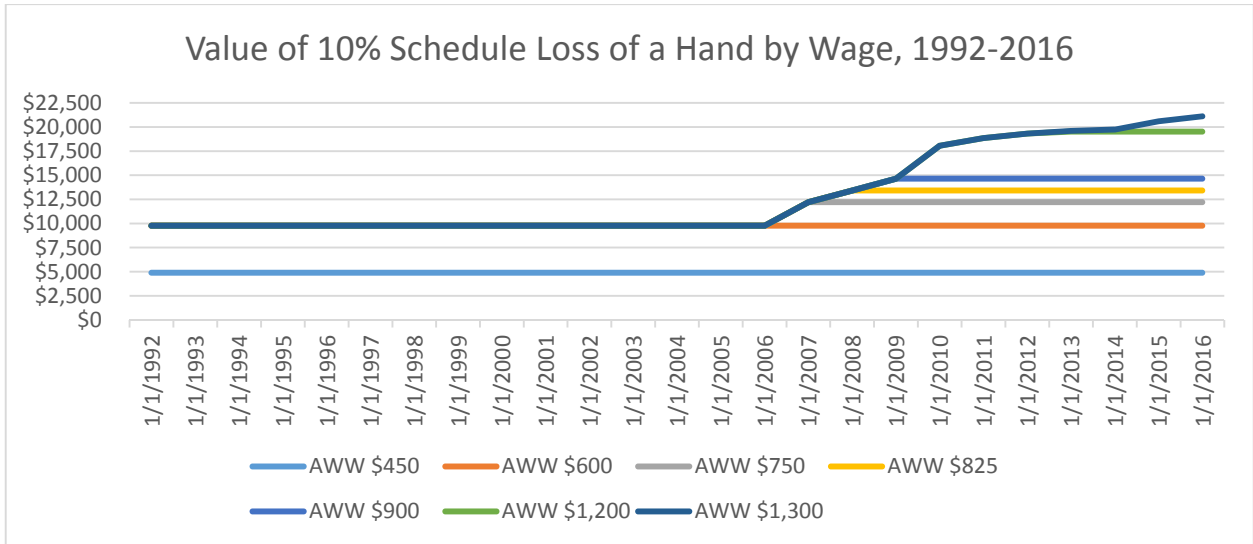
¹ For purposes of this paper, low-wage workers are those who earn less than \$600 per week, or \$31,200 per year.

² For purposes of this paper, defined respectively as those who earn between \$600 and \$1,100 per week (\$31,200 to \$57,200 per year) and those who earn more than \$1,100 per week (or \$57,200 per year).

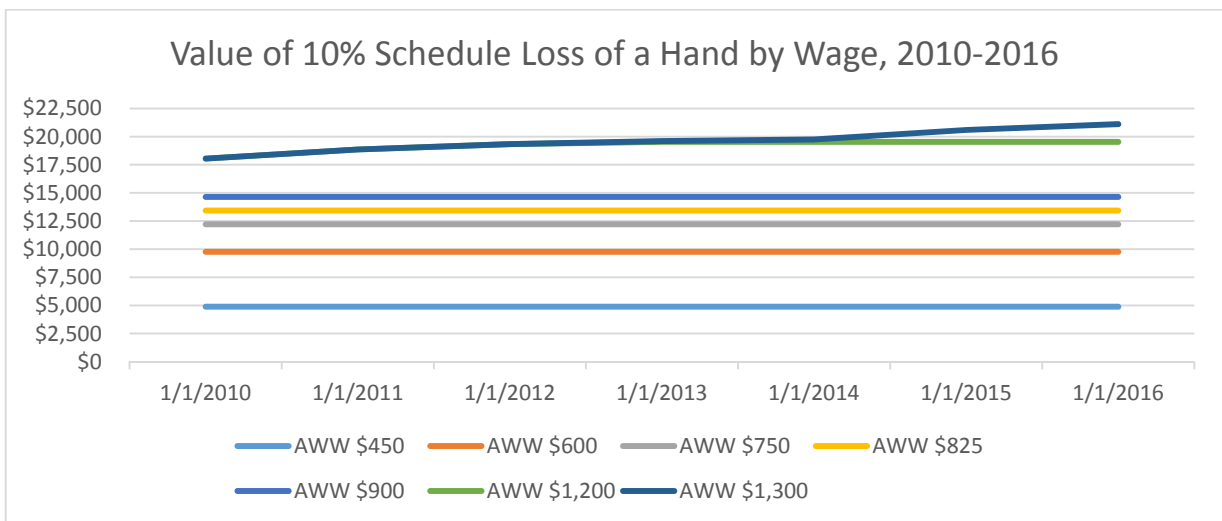
³ See, Schedule Loss Costs 1992 – 2016, NYWCA, available at: <http://www.nyworkerscompensationalliance.org/pdf/NYSLUCOSTS2017.pdf>

rose for about two-thirds of workers from 2007 through 2010. However, since 2010 only a diminishing number of high-wage workers has seen further benefit increases, and those increases have been small and incremental. These trends, and their impact on schedule loss awards, is shown on the charts below.





The charts above make it clear that (1) prior to 2007 there was no increase in benefits for any worker for fifteen years; (2) the bulk of the increase in schedule loss benefits occurred between 2007 and 2010 and affected only medium- and high-wage workers; and (3) since 2010, benefits have increased an average of 2.5% per year – but only for a small and ever-diminishing number of workers. This is further clarified by the chart below.



Thus, there has been little or no increase in schedule loss costs in twenty-one of the past twenty-five years, with the exception being the transition period from 2007 to 2010 as the maximum benefit rate was raised and tied to the state average weekly wage. This increase was, of course, entirely offset by the savings employers obtained by imposing time limits on permanent partial disability benefits.

B. Trends in Employer Workers' Compensation Costs in General.

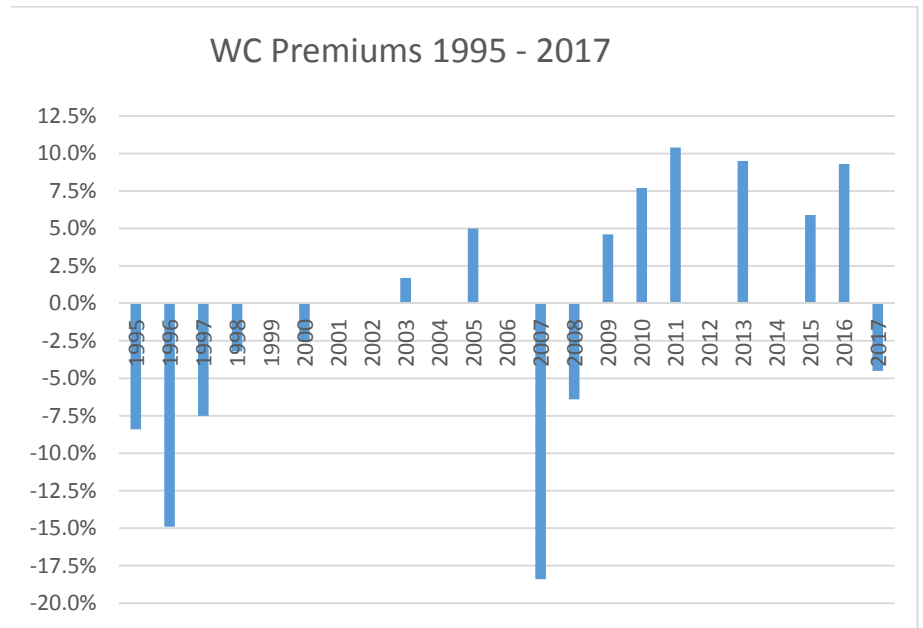
Workers' compensation in general is a small and declining portion of employer costs. Trends in the law, accelerated by statutory changes in 2007 and a host of administrative and regulatory initiatives, have reduced worker access to benefits and have reduced claim costs across the board. Overall, the cost of workers' compensation in New York is slightly lower than other costs in the state, and is comparable to similarly situated states.

From 1995 through 2008, there were only two years in which workers' compensation premium rates rose: 2003 (1.7%) and 2005 (5%). By contrast, there were seven years in which premiums declined (including a 14.9% drop in 1996 and an 18.4% drop in 2007), and five more in which they remained flat. Since 2008, there have been six years in which premium costs rose, two in which they remained flat, and one in which they declined, including this year.⁴ These recent rate increases did not, however, correlate with actual costs in the workers' compensation system, but were driven purely by issues of insurer profitability.

⁴ See, NYCIRB RC Bulletins 1995 through 2017, available at www.nycirb.org.

Overall, since 1994 there have been reductions in New York workers' compensation premiums totaling 65.8%, and increases totaling 54.1%. The net result is that there has been an 11.7% decrease in workers' compensation premium rates since 1994. The history of premium decreases and increases is shown on the table and graph below.⁵

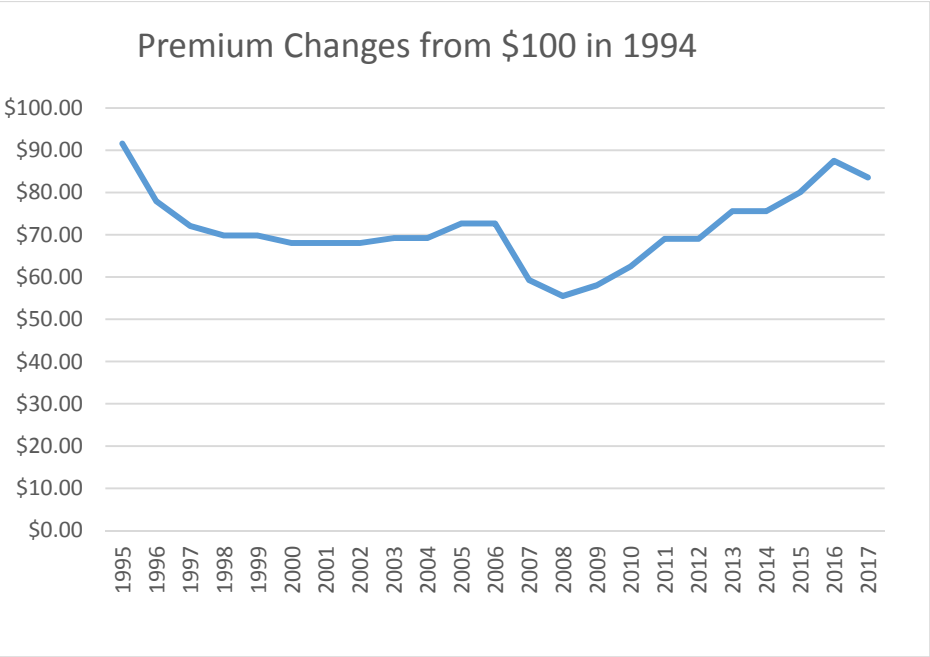
Year	Rate Change
1995	-8.4%
1996	-14.9%
1997	-7.5%
1998	-3.2%
1999	0.0%
2000	-2.5%
2001	0.0%
2002	0.0%
2003	1.7%
2004	0.0%
2005	5.0%
2006	0.0%
2007	-18.4%
2008	-6.4%
2009	4.6%
2010	7.7%
2011	10.4%
2012	0.0%
2013	9.5%
2014	0.0%
2015	5.9%
2016	9.3%
2017	-4.5%



⁵ If only the post-reform years are considered, then from 2007 – 2017 there were premium decreases totaling 29.3% and increases totaling 47.4%, for a net increase of 18.1%. This is an average increase of a mere 1.65% per year.

The impact of the various rate changes can also be analyzed by reference to actual employer dollar costs. The table and graph below demonstrate the actual dollar costs for an employer that was paying \$100 for workers' compensation coverage in 1994, aggregating the impact of the various increases and decreases over the years.

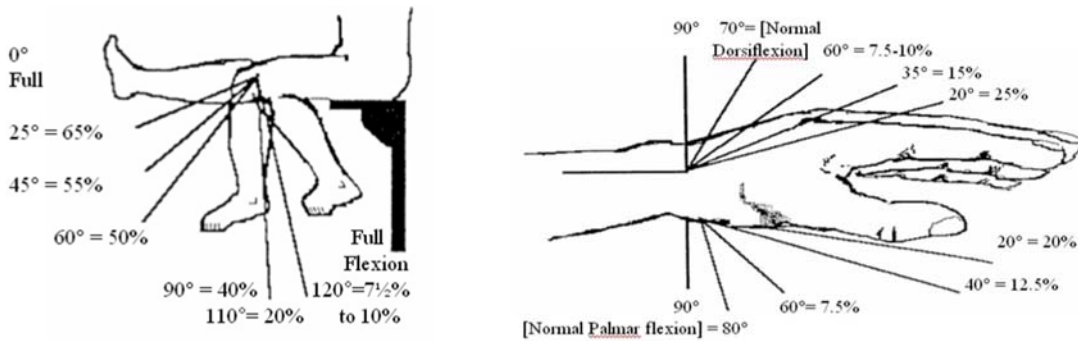
Year	Dollar Change
1995	\$91.60
1996	\$77.95
1997	\$72.10
1998	\$69.80
1999	\$69.80
2000	\$68.05
2001	\$68.05
2002	\$68.05
2003	\$69.20
2004	\$69.20
2005	\$72.67
2006	\$72.67
2007	\$59.30
2008	\$55.50
2009	\$58.05
2010	\$62.52
2011	\$69.03
2012	\$69.03
2013	\$75.58
2014	\$75.58
2015	\$80.05
2016	\$87.49
2017	\$83.55



It is clear that in real terms, employer expenses for workers' compensation have declined over the past two decades, and remain lower today than they were in 1995. In addition, a portion of the recent increases in loss costs has been offset by a significant reduction in assessments, which are another element of employer workers' compensation costs. It is especially noteworthy that two-thirds of this year's 4.5% decrease in loss costs was unrelated to new statutory changes, and was instead the result of declining claim costs. It is therefore clear that employers' workers' compensation costs are declining, and that there is no justification to slash benefits for injured workers.

II. THE EXISTING GUIDELINES ACCOUNT FOR MEDICAL ADVANCES.

The guidelines used by the Workers' Compensation Board to determine schedule loss of use are based largely on range of motion. They include tables and charts that assign percentage losses based on motion of the fingers, hand, wrist, elbow, shoulder, hip, knee, ankle foot and toes. Several of these charts appear below.



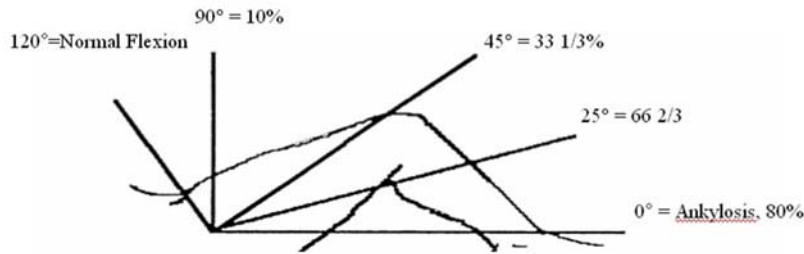


Figure 3.1. Percent Loss of Use of the Leg: Anterior Flexion Defects of the Hip

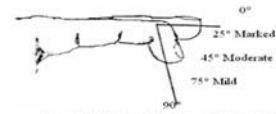


Figure 2.6. Range of Motion of DIP Joint

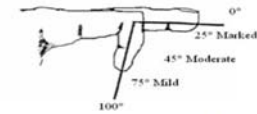


Figure 2.7. Range of Motion of PIP Joint

From the standpoint of the injured worker, the permanent impact of an injury and its impact on wage earning capacity depends largely on the loss of function of the affected limb. Loss of function involves the extent of the workers' symptoms (pain, sensory loss, etc), strength, and range of motion.

Although the existing guidelines largely neglect the role of symptoms and loss of strength in determining schedule loss, they do rely heavily on range motion. As a result, the guidelines already account for advances in medical science and new surgical approaches.

Using the charts above as an example, if an older form of hip surgery left the worker with 45 degrees of anterior flexion, the schedule loss evaluation would have been a 33% loss of use of the leg. However, if a new surgical approach allows the worker to regain 90 degrees of range of motion, the schedule loss evaluation would instead be 10%. Thus, an advance in surgery to the hip could reduce a schedule loss evaluation by more than two-thirds under the present guidelines.

The same is true for the evaluation of a knee injury – if an older, more invasive procedure left the worker with 90 degrees of flexion in the knee, the schedule loss would be 40% loss of use of the leg, but if a newer less invasive procedure allows him or her to regain 110 degrees of flexion then the schedule loss evaluation would be cut in half to 20%.

It is therefore clear that the Board's existing guidelines already account for advances in medical technology, and that schedule loss awards are already reduced based on improved outcomes.

III. EXISTING SCHEDULE LOSS AWARDS ARE INADEQUATE.

Between May 16, 2017 and August 3, 2017, the WCA conducted a survey asking injured workers about their schedule loss of use awards.⁶ Over 1,500 injured workers responded to the survey, 847 of whom had a workers' compensation case that involved a schedule loss award within the past five years.

Workers were asked about:

- their pre-accident wage
- whether they thought the schedule loss evaluation was fair
- whether they thought the money they received was a fair award
- whether they thought the award was fair compensation for their injury
- whether they thought the awards was fair compensation for their wage loss (present and future)

The survey showed that:

- **69% of injured workers believed that their schedule loss evaluation was too low under the present guidelines.** 30% believed it was fair, and only 1% believed it was too high.
- **75% of injured workers believed that the money award they received was inadequate.** 24% believed it was fair, and again only 1% believed it was too high.

⁶ The full survey report is available at: <http://www.nyworkerscompensationalliance.org/wp-content/uploads/2017/08/SLUSurveyArticle.pdf>.

- **75% of injured workers believed the award did not represent adequate compensation for their injury**, while only a quarter believed it was fair.
- **81% of injured workers believed that the award did not adequately compensate them for wage loss resulting from their injury**; only 19% believed it was adequate.

When the survey responses were sorted based on wages, it became apparent that low-wage workers believed they were treated even more unfairly than the overall group. The data shows that:

- **76% of low-wage workers believed their schedule loss evaluation was inadequate**, compared to 65% for all other wage groups.
- **81% of low-wage workers believed that the money award they received was inadequate**, compared to 71% and 72% for the other two wage groups.
- **82% of low-wage workers believed that the award did not represent adequate compensation for their injury**, compared to 70% and 72% for the other two wage groups.
- **88% of low-wage workers believed that the award did not adequately compensate them for wage loss**, compared to 77% for the other two wage groups.

It is important to note that because schedule loss awards are based partly on wages, low-wage workers receive the same compensation for an injury today that they did twenty-five years ago in 1992. Thus, if the guidelines that are used to measure permanency are reduced, these workers would actually receive lower awards today than they received for a comparable injury a quarter century ago. This would truly be an unjust.

Injured workers were also asked for any comments they had about their experience in the workers' compensation system. Hundreds chose to comment, and two broad themes emerged: (1) Even workers who initially thought their award was fair eventually realized that it did not adequately compensate them for the ongoing and permanent consequences of their injury (pain,

loss of strength, loss of motion); and (2) many workers found that they were never able to fully recover from the financial consequences of being injured on the job, and that their award was wholly inadequate to compensate them for their economic loss.

In short, the vast majority of injured workers believe that their compensation for permanent loss or loss of use of limbs is inadequate and unfair under the present guidelines, and would be even more so if the Board accepts the Business Council's fact-free contentions about employer costs and medical advances.

CONCLUSION.

The Business Council's claims about employer costs and medical advances are totally unsupported by the facts. Moreover, reducing the schedule loss guidelines would be fundamentally unfair to injured workers. The Workers' Compensation Board should reject the Business Council's callous campaign to cut workers' compensation benefits for injured workers who have forever lost some or all of the use of their limbs, and remain true to the basic principle of the Workers' Compensation Law: compensating and protecting the injured and disabled workers of New York State.