

NEW YORK WORKERS' COMPENSATION ALLIANCE

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THE WCA 2018 LEGISLATIVE AGENDA: IMPROVING THE WORKERS' COMPENSATION SYSTEM FOR EMPLOYEES AND EMPLOYERS

New York's workers' compensation system is intended to serve workers by providing adequate wage replacement benefits and medical care without unnecessary obstacles or litigation. Regrettably, trends in the system have resulted in the accumulation of significant barriers to benefit delivery to workers. Those same trends have diverted a significant percentage of the premium dollars paid by employers from compensation and into defense costs, system administration, and insurer profits.

The WCA 2018 Legislative Agenda is designed to improve the workers' compensation system for both employees and employers by (1) improving essential benefits; (2) eliminating issues that create friction and litigation; and (3) creating transparency and a level playing field for employers.

I. IMPROVING ESSENTIAL BENEFITS WHILE REDUCING FRICTION.

The WCA proposes five bills to improve essential benefits for injured workers while reducing friction and litigation in the system.

A. Social Security Presumption Bill. Many workers who are found unable to engage in substantial gainful employment by the federal Social Security Administration are required to relitigate the same issues in their workers' compensation claims. Adding a rebuttable presumption that a worker who is entitled to Social Security Disability Insurance as a result of a compensable injury is totally disabled for workers' compensation purposes would limit litigation while improving and expediting benefits for seriously injured workers without removing an employer's ability to challenge the determination in appropriate circumstances.

B. Labor Market Attachment Bill. The issue of "labor market attachment" generates significant litigation in the workers' compensation system. Instead of being used as a defense to protect employers from paying benefits where the injured worker's wage loss is unrelated to the compensable injury, it is often used as a sword to cut off benefits for disabled workers.

Although the Legislature addressed part of the issue in 2017, more needs to be done to ensure that labor market attachment is only required in appropriate circumstances.

C. Major Schedule Loss Bill. Section 15(3)(v) of the Workers' Compensation Law provides permanent partial disability compensation for workers who suffer more than 50% of the loss of use of a limb, cannot return to their previous employment, and cannot be retrained. Under the statute, these benefits are intended to continue until the injured worker is eligible for

Social Security retirement benefits. Unfortunately, the adoption of the time limitations on permanent partial disability benefits has been interpreted to reduce this necessary coverage in some cases. The Major Schedule Loss Bill would prevent this injustice and would clarify that benefits under Workers' Compensation Law § 15(3)(v) are payable up to retirement age, as intended by the statute.

D. Protracted Healing Period Bill. In the 2017 budget, the Legislature recognized that advances in medicine have reduced healing times and improved outcomes for injured workers. Workers' Compensation Law § 15(4-a) provides benefits for "protracted healing period" in cases where the worker is totally disabled for longer than the expected period of time. As the Legislature has recognized the reduction in healing times due to medical advances, these statutory periods (which are nearly a century old) must be revisited and updated to reflect current medical outcomes. The Protracted Healing Period bill would reduce the anticipated healing time by 50% for schedule loss injuries in order to better reflect the improvement in healing times associated with medical advances.

E. Cost of Living Adjustment Bill. Workers' compensation benefits are fixed on the date of the accident, without adjustment for inflation or other costs. As a result, the value of workers' compensation benefits slowly slides into irrelevance for workers who are permanently totally disabled, and surviving spouses and dependent children who receive death benefits. The adoption of a cost of living adjustment in such cases would preserve the viability of workers' compensation benefits for widows, minor children, and the most seriously injured workers.

F. Minimum Rate Bill. Although the maximum workers' compensation benefit rate is indexed to the state average weekly wage, the minimum rate is not. Indexing the minimum benefit rate is critical to basic purpose of the workers' compensation law, which is to provide adequate benefits during a period of disability and keep the injured worker from poverty.

G. Safety Net Bill. The 2007 workers' compensation reform established a "safety net" for permanently partially disabled workers who lost significant wage-earning capacity, and in 2017 the Legislature slightly reduced the threshold for safety net eligibility. However, safety net eligibility depends upon a finding of "extreme hardship," which remains undefined. This ambiguity is likely to result in both litigation and the deprivation of essential benefits. Defining "extreme hardship" for the purpose of safety net eligibility is necessary to protect workers with significant permanent partial disabilities and to limit friction and litigation.

II. CREATING TRANSPARENCY AND A LEVEL PLAYING FIELD.

The WCA proposes three bills that would provide employers with greater transparency about their workers' compensation costs, limit the degree to which premiums paid by law-abiding employers are used to subsidize those who cheat the system, and improve workforce stability and productivity.

A. Transparency Bill. By some estimates, half of the premium dollars paid by employers never reach their injured employees. There is little transparency about how insurers distribute the billions of dollars paid by employers that do not go to benefits. Not only does not raise serious questions about the relationship between benefits and employer costs, it deprives

employers of information that could be used to meaningfully compare insurer performance. Employers deserve transparency about how their premium dollars are spent by insurers.

B. Return To Work Bill. In March, 2008 the New York State Commissioner of Labor issued a report recommending a series of return to work initiatives that would benefit both workers and employers. To date, none of those initiatives have been adopted. The inclusion of return to work provisions in the statute would improve workforce stability and productivity for employers, while simultaneously reducing claim costs and speeding the rehabilitation of injured workers.

C. Mandatory Audit Bill. A significant portion of employer workers' compensation premiums are based on payroll and job classification. While many employers accurately report this information, some do not. Due to competitive pressures, most private insurers do not routinely audit employers, instead building the cost of inaccurate payroll reporting and misclassification into premiums across the board. This results in law-abiding employers paying more so that those who cheat the system can pay less. The creation of a requirement for mandatory annual payroll audits of employers – as already performed by the State Insurance Fund – would help to resolve this issue.

CONCLUSION

The WCA 2018 Legislative Agenda would serve both workers and employers by improving essential benefits, eliminating issues that create friction and litigation, and creating

transparency and a level playing field for employers. These are healthy system initiatives that should be adopted by the Legislature and implemented by the Workers' Compensation Board.