NEW YORK
WORKERS' COMPENSATION ALLIANCE

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Re: Proposed Amendment to 12 NYCRR 302-1.6

Hon. Clarissa Rodriguez
Workers' Compensation Board
328 State Street
Schenectady, New York 12305-2018

Honorable Chair Rodriguez:

We have reviewed the proposed amendments to 12 NYCRR 302-1.6 and submit the following comments for your consideration.

I. It Is Neither Realistic Nor In the Interests of Injured Workers To Create Representation By Law Students.

We do not believe that it is either realistic or in the interests of injured workers to create a system in which they would be represented by law students. The attorneys who practice before the Workers' Compensation Board have already completed their legal education, passed the bar examination, and then devoted countless hours to learning, executing, and staying current with the law in the field of workers' compensation, as well

as developing extensive knowledge about medical issues. To do so, attorneys must become familiar with the statute, over a century of case law, the Board's regulations, reports of Board Panel decisions, the Board's Subject Numbers, numerous forms, and medical texts – not to mention developing trial and negotiation skills. The Board, through the issuance of "R" numbers, has itself acknowledged that there is only a small field of practitioners who have dedicated themselves to practicing before it.

Workers' Compensation Law § 24-a provides that "no person … other than an attorney" or someone who has "obtained from the board a license authorizing him or her to appear in matters or proceedings before the board" shall appear before the Board. Pursuant to the statute, the Board permits both attorneys and "licensed representatives" to appear before it. Under the current regulation, in order to become a licensed representative, an individual must successfully pass a test administered by the Board and a character interview. A licensed representative may appear on behalf of an injured worker either with or without a fee.

Over the decades, a number of law students have successfully passed the existing licensed representative test and as a result have obtained full privileges to represent injured workers before the Board. There is therefore no present obstacle to a law student becoming fully conversant in the field and representing injured workers.

However, the proposed amendment would not create a pool of law students who are fully conversant in the law and would be capable of identifying the numerous issues that arise in workers' compensation cases. Instead, it would create a second tier of less qualified individuals to represent injured workers. The creation and promotion of substandard representation is not a solution to the perceived problem.

It is neither practical nor would it serve injured workers well to adopt a regulation in which law students would appear before the Board and attempt to address the complex issues that exist in workers' compensation cases – even when "only" medical treatment is involved. The Workers' Compensation Law contains nearly two dozen provisions related to medical treatment and "independent medical examinations." The Board has adopted four "subchapters" of regulations, each with multiple parts and multiple regulations in the area of medical treatment and health care providers. The regulations in turn refer to "medical treatment guidelines" for the back (81 pages), neck (82 pages), knee (78 pages), shoulder (80 pages), carpal tunnel syndrome (42 pages), and non-acute pain (118 pages) – all of which require significant knowledge of medicine to interpret and apply.

It is simply unrealistic to believe that a law student would be capable of becoming sufficiently familiar with both the medical and legal material and also be capable of representing the interests of the injured worker before the Board. We note that the proposed amendment does not create any sort of litigation equity and that the employer or carrier will continue to be represented by attorneys who are expert in the field while the injured worker is represented by a law student.

We also note that the reason employers and carriers are represented by capable defense counsel before the Board (instead of by law students) is that significant benefits are involved (and thus there is the potential for significant liability on the part of the employer or carrier). According to the New York Compensation Insurance Rating Board (NYCIRB), medical costs in New York are about 35% of all claim costs. NYCIRB, State of the System 2017, http://www.nycirb.org/state-of-the-system/2017/. In a system that involves a reported $10 billion annually, it is clear that medical costs amount to $2 billion

or more. The proposed pool of law students would be involved with a benefit that is neither *de minimus* from a system standpoint nor does it involve a matter that is trivial to the injured worker. To the contrary, the question of how to obtain authorization for medical treatment under the Board's byzantine processes is paramount to almost every injured worker.

We therefore believe that it is completely inappropriate to create a pool of law students who are incapable of becoming well-versed in the field either from a legal or medical perspective, who have not developed meaningful trial skills, who will be assigned to represent vulnerable injured workers regarding issues that are critically important to the individual worker and involve a significant portion of costs and benefits in the system, and who would be appearing against expert counsel for the employer or carrier.

To the contrary, if the Board perceives that workers are having difficulty securing qualified representation, we suggest that the proper course of action would be to encourage representation. Unlike the issue in the civil litigation arena, lack of representation before the Workers' Compensation Board does not occur because the injured worker is indigent. Instead, it occurs because the Board has failed to provide a mechanism for attorneys to be paid in "medical only" cases. There is no shortage of representation in cases where indemnity benefits may be due. Even in cases that involve only trivial awards, low-wage and other workers are routinely able to retain counsel. However, because the Board refuses to provide for payment of attorney fees in medical only cases – which could come from sources other than the injured worker such as the carrier, the health care provider, or the WCL § 151 fund – these injured workers are often

unable to find representation. This occurs not because of their inability to pay an attorney, but instead because the Board will not permit an attorney to be paid. In short, the impediment to representation is not indigence, it is the Board's administrative action or inaction.

The proper solution is therefore not to employ law students to appear for injured workers against experienced defense counsel to address issues of great importance to the injured worker, but instead to provide for attorneys to be paid for representation in "medical only" cases. This suggestion was made nearly a decade ago by the New York State Commissioner of Labor, and more recently on a panel convened by the Board to consider the issue of attorney fees. See, Report of the Commissioner on Return to Work, https://www.labor.ny.gov/agencyinfo/ReturntoWorkReport%20March%2008%20FINAL.pdf.

However, instead of adopting the Commissioner's suggestion, or taking any other action to provide for attorney fees in "medical only" cases, the Board has instead embarked on a campaign to reduce attorney fees in cases involving indemnity. See, Subject Number 046-943, http://www.wcb.ny.gov/content/main/SubjectNos/sn046_943.jsp.

Thus, instead of expanding or encouraging representation by capable and qualified practitioners, the Board has instead chosen to discourage such representation. The proposed amendment to the regulation would further discourage representation by using law students to undermine the existing field of practitioners and to dissuade others from entering the field. The Board has itself acknowledged the potential for this to occur in the Job Impact Statement for the proposed amendment, which states that "one potential

adverse impact would be on legal representatives or attorneys who would normally have represented the party if not for the legal intern."

Although the Job Impact Statement goes on to say that "the Board consulted with members of the private bar" and that "[t]hese stakeholders agreed that the proposed regulation would not negatively impact the private bar," the WCA was not consulted and strongly disagrees with this assessment. It is also noteworthy that – contrary to the Job Impact Statement - the regulation itself does not include a requirement that the Board will refer "cases to a legal intern only if the claimant was unable to find legal representation on their own," nor does it limit their employment to "medical only" cases.

We therefore believe that the proposed amendments to the regulation are unrealistic and contrary to the interests of injured workers, practitioners, health care providers (whose payment for services would depend on the efforts of the Board's "interns"), and the law students themselves. We therefore request that the proposed amendments be withdrawn in their entirety.

II. The Premise Of The Rule-Making Is Flawed.

Turning to the stated basis for the proposed rule-making, the Board asserts that in each year from 2014 through 2016 there were several hundred "unrepresented claimants with cases pending before the Board, in which the claimant did not seek indemnity benefits." There are several significant problems with this premise.

One of our concerns is that the Board has previously provided data in response to a Freedom of Information Law request which included the following information for 2014 through 2016:

	2014	2015	2016
Assembled	256,255	279,844	278,538
Unrepresented	187,945	214,840	218,404
Represented	68,310	65,004	60,134
Medical Only	177,473	211,082	230,661
Medical Only – Unrepresented	160,265	191,010	202,043
Medical Only – Represented	17,208	20,072	28,618

We are frankly unable to reconcile the statement in the justification for the proposed regulation that there are a few hundred unrepresented workers who "did not seek indemnity benefits" with the data the Board provided which indicates that there are a few hundred thousand workers with "medical only" claims who are unrepresented. We note, however, that tens of thousands of "medical only" claimants are being represented by counsel despite the lack of a provision for attorney fees in medical only cases. This speaks to the dedication and professionalism of the members of the bar who currently represent injured workers.

We therefore have significant concerns about the accuracy of the information the Board included as the justification for the proposed amendment to the regulation. In the absence of accurate (and accurately stated) data, it is impossible to create good public policy.

We are also concerned with the phraseology in the proposed rule-making that the few hundred injured workers identified by the Board "did not seek indemnity benefits." It is difficult for an unrepresented worker to obtain accurate information about whether he or she is entitled to indemnity benefits, and it is therefore unclear whether the Board is

defining a "medical only" case as one in which it has determined that the injured worker is not entitled to indemnity benefits, or simply a case in which the injured worker has not asked for indemnity benefits – very possibly due to lack of information, language, or literacy issues. The creation of a vehicle for these workers to be represented by law students would not ensure that workers receive full and proper compensation under the statute, and instead would likely impede that objective.

III. The Regulatory Proposal Is Fundamentally Flawed.

Both the text of the regulation and the Regulatory Impact Statement imply that the Board would obtain co-equal jurisdiction with the Appellate Division over the licensing and appearance of law students in workers' compensation cases. Proposed 12 NYCRR 302-1.6(b); Regulatory Impact Statement §§ 3, 7. The Workers' Compensation Law does not grant such authority to the Board, and (as the Regulatory Impact Statement recognizes), this area is covered by 22 NYCRR § 805.5, which was issued pursuant to the Judiciary Law. In short, the Board lacks statutory authority to implement the proposed amendment.

In addition, the procedure proposed by the Board would create inherent conflicts of interest that would disadvantage the injured worker and create potential jeopardy for the participating law students. According to the Regulatory Impact Statement, "[t]he proposed regulation will permit the Board to directly hire and supervise law school and legal interns, who will represent parties of interest in Board proceedings. The Board expects to hire such legal interns by working with area law schools to arrange a work-for-credit program."

In short, the Board proposes to have law students who it employs ("hire and supervise") appear before it. This places the injured worker – who may want to challenge the Board's regulations, processes, or determinations – at a plain disadvantage, since there is little possibility that a law student who is being "hired and supervised" by the Board will zealously represent the interests of the injured worker against those of his or her employer. In turn, the failure to zealously represent the client, and participation in a scheme in which there is a clear conflict of interest, creates a potential hazard for the participating law student when he or she applies for admission to the bar.

The proposed regulation also fails to identify how the Board intends to address the need for medical testimony in cases where the injured worker is being "represented" by a law student. The Board's current practice is to direct that medical testimony be taken by deposition "in the manner prescribed by the law for like depositions in civil actions in the supreme court." WCL § 121. As only attorneys or pro se litigants are permitted to take depositions "in civil actions in the supreme court," it would be improper for a law student to participate in a deposition of a medical witness on a treatment issue.

The proposed regulation also fails to address the potential for an employer or carrier to raise the issue of fraud on the part of an injured worker, which would require the law student to provide advice (or to recognize the need for advice) in the area of criminal law. Along the same lines, the proposed regulation also places the law student in the position of representing an injured worker who may be entitled to a host of other benefits that interact with workers' compensation (public assistance, SSDI, SSDB, No-Fault, etc.) with which the law student is likely to be unfamiliar. The regulation includes

no provision for legal malpractice insurance to protect the injured worker from any errors or omissions committed in the course of their representation by a non-attorney.

Conclusion

We respectfully suggest that the Board should withdraw the proposed regulation in its entirety. We further suggest that in order to enable proper representation of the hundreds of thousands of unrepresented injured workers who are unable to obtain proper benefits from the workers' compensation system – particularly in view of the recent decreases in employer costs - that the Board adopt the Commissioner of Labor's 2008 recommendation to provide a mechanism for the payment of attorney fees in "medical only" cases.

Thank you for your kind consideration of these comments.

On behalf of the Board of Directors,

Robert E. Grey

Robert E. Grey, Chair