

# **THE HIDDEN BENEFITS OF ATTORNEY REPRESENTATION IN WORKERS' COMPENSATION IN NEW YORK: THE "VALUE ADDED" BENEFIT AND REALITIES OF SYSTEM "FRICTION"**

12/2/07

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Recent data published by the NYS Workers' Compensation Board (WCB) demonstrates that claimants who have legal representation enjoy a substantial "value added" benefit in "medical only" cases, reopened claims, and claims in process, e.g. a hearing on a contested (as distinguished from a controverted) issue.

For purposes of comparison and reliability, this review utilizes data published by the WCB for dates of accident in 2004 as well as data from the WCB Annual Report for 2004 and for the years 1999 to 2005. In addition, a survey of claimant and defense firms was conducted to test the data and obtain cost estimates concerning overhead expense for conducting an intake, attending a hearing, and conducting a deposition. That information yielded estimates from \$250 to \$300 per intake (scheduling and interview, forms completion and filing, correspondence with WCB and health providers, file maintenance, etc.) and \$200 to \$250 for hearing preparation and attendance (file review, ECF review, calendar management, etc.). The most substantial factor in firm overhead costs is attributed to attorney time along with support staff that produces and receives correspondence, maintains files, and receives and answers claimant, carrier, and provider phone calls.

With respect to deposition costs and billing by defense firms, several were surveyed to secure a per hearing and "per deposition" costs which latter item produced cost estimates averaging approximately \$500 per deposition witness and \$100 per hearing. Most defense firms have "routinized" this procedure to schedule multiple depositions in a single day. As the IME witnesses are carrier witnesses, claimant counsel have little, if any, control of the scheduling of a deposition for an IME. This mismatch of control adds to the costs to both sides in completing the deposition testimony.

In 2004, the WCB's Annual Report recorded 149,034 claims filed and, in the same year, the WCB recorded 173,012 reopened claims for a total of 322,046. In the same period, 319,781 hearings were conducted or at the rate of 99.30% of the filed and reopened claims total. Unfortunately, the WCB does not distinguish the reasons for the reopening of a claim nor why the number of reopened claims in 2004 and subsequent years now exceed the number of claims filed in most of those years.

More recent WCB data for 2004 indicates that "medical only" and indemnity claims totaled 107,490 or 72.12% of the total of 149,034 claims filed in 2004. The data further refine this number with respect to legal representation as reflected in the table:

	<u>Medical</u>	<u>Indemnity</u>	<u>Totals</u>
Totals	28,657	78,833	107,490
Represented	9,265	42,263	51,528
% Represented	32.33%	53.61%	47.94%

Applying the per cent represented (47.94%) to the total number of hearings in 2004 produces an estimate that claimants were represented at 153,271 hearings including reopened claims.

The recent WCB data also verified that a fee was awarded in 34,885 claims for 2004 on the total of 42,263 indemnity claims in that year, or in 82.54% of instances. This fact, however, means that in 7,378 claims (42,263 minus 34,885) no fee was awarded in represented claims or at the rate of 17.5%. Moreover, the WCB reported that claimants were represented in 51,528 instances which increases the total represented without fee to 16,643.

Since the majority of reopened claims generally involves more complex legal matters (e.g. 15.8, 25(a), requests for medical services, lifetime representation in PPD and PTD claims), it is reasonable to extrapolate that the 173,012 reopened claims in 2004 had legal representation at the 47.94% rate for all represented claims or in a total of 82,942 reopened claims in 2004.

Applying the lower overhead information from the survey of firms, to the 7,378 (x \$250) represented claimants in “medical only” and indemnity claims without a fee in 2004 yields a “value added” \$1,844,500 of “free” legal services. To this total, again employing the lower overhead figure of \$200 for hearing preparation and appearance (\$200 x 82,942) yields another \$16,588,000 in “value added” legal representation. Together, this “value added” representation benefit presents a staggering total of \$18,432,900 for the year 2004 alone. While this “value added” amount appears enormous, the data do not include the uncompensated efforts that claimant counsel expends in the conduct of the thousands of depositions ordered by the WCB (see discussion below).

In comparison, even employing a figure of only \$100 per attendance at a hearing for a carrier, the 319,781 hearings in 2004 yields \$31,978,100 in carrier appearance fees and costs. In a more direct comparison of the appearance fee costs in the 82,942 reopened claims in 2004 at which a claimant has legal representation and no fee is likely to be awarded for that representation, carrier hearing appearance costs total \$829,940. There is no comparable data to measure or compare carrier costs paid to defense counsel; nor is such data available for cost comparison where defense counsel appearance involves trial work, appeals, or deposition billing by defense firms. But the data suggest that such costs can be inferred with a reasonable degree of reliance on the WCB data.

Moreover, since the WCB’s reported data on claims filed, number of reopened claims, and number of hearings are reasonably constant from 1999 to 2005, the annual “value added” benefit of claimant representation in 2004 can be expected to be repeated to a large extent in those seven (7) years; so, too, are the substantial defense costs likely repeated year to year, as may be seen below in the discussion of “friction” costs in the system.

#### **SOME REALITIES IN THE MYTH OF “FRICTION” COSTS IN THE SYSTEM**

Both nationally and in New York, the predominant criticism or onus of creating “friction” (*viz.*, litigation and litigation costs) is most often directed toward counsel representing claimants. The origin of the criticism is likely the lay myth that workers’ compensation systems ought to be neutrally administered by a state agency in behalf of the injured worker. This criticism is buttressed – often without data or “hard” information – by further citing to fees earned by claimant counsel. Rarely are the earnings of defense counsel included in this evaluation.

With respect to financial incentives and reopened claims in New York, the data indicate there is little, if any, financial incentive for claimant’s legal counsel to reopen a claim as no fee is likely to be awarded. On the other hand, there is a financial incentive for the reopening of claims for defense counsel, as well as securing deposition orders and contesting issues to increase trial work at the thousands of hearings conducted each year.

In regard to the gross number of hearings conducted annually by the WCB – 319,012 in 2004 – it is axiomatic that carriers are always represented. Carriers represented by in-house staff have little financial incentive (other than apportionment and/or in the application of an IME to reduce or suspend benefits) to re-open a claim previously “resolved” by the WCB.

This, however, does not apply to carriers represented by defense firms. In fact, with respect to the number of hearings (or multiple hearings on one claim), defense counsel has significant control of subsequent hearings simply by contesting an issue at the first or threshold hearing (e.g. ANCR site, AWW) or even at a second or subsequent hearing by contesting a medical matter (e.g. frequency of treatment). Multiplied by the number of years such option operates, the result invites a financial incentive in the hearing process.

Assuming one-half of the 82,942 claimants represented in 2004 were claims re-opened by their counsel, the result would be 41,463 reopenings at which defense counsel enjoys a fee earning event while the claimant’s counsel likely does not. The irony is that claimant counsel has created 41,463 income events or \$414,630 (at \$100 per hearing) worth of potential earnings for the opposition. Again, multiplied over a number of years, the financial incentive is impressive.

WCB data indicate that claimants are represented at a higher level in claims involving permanency of the injuries. The table below demonstrates this.

	<u>2004 INDEMNITY CLAIMS</u>		
	<u>All Indemnity</u>	<u>With Fee</u>	<u>Per Cent</u>
TEMP TOTAL	59,826	20,149	33.63
SLU	17,067	12,958	75.92
PPD/NOT SLU	1,718	1,604	93.36
PTD	34	34	100.00
DEATH	188	140	74.47
TOTALS	<u>78,833</u>	<u>34,885</u>	<u>42.25</u>

As previously noted, 149,034 claims were filed in 2004. Thus, the 34,885 indemnity claims with fee represent only 23.4% of all claims filed in that year or which resulted in an opportunity for claimant counsel to be considered for a fee. The subset of indemnity claims involving permanency (SLU to DEATH) total 19,007 of which 14,736 were represented with fee, or 18.7% of all indemnity claims and 77.5% of indemnity claims involving permanency. This data supports the focused effort of claimant counsel to join an issue that may result in an award to a claimant and a fee to his/her counsel. This conclusion is supported by the low number of TEMP TOTAL claims resulting in a fee award. This lower per cent likely reflects previously “resolved” claims by way of Administrative Decision. In light of this data, there exist only a small number of claims for which counsel for a claimant seeks a hearing on the merits of the claim and an opportunity to be awarded a fee.

In its 2005 Annual Report, the WCB reported 15,187 depositions were ordered. Claimant firms report that very few of this number involve the testimony of a single medical witness and, very often, involve as many as 4-6 medical witnesses. Applying a conservative multiple of 2.5, the number of witnesses to be deposed totals 37,968. Multiplying this total by \$500 per deposition witness yields a gross dollar amount of \$18,984,000 in litigation costs to carriers. Even assuming only one-half this amount inures to the benefit of defense firms, \$9,492,000 remains a powerful financial incentive to litigate by deposition any claim on any issue. Curiously, these figures correlate very neatly – virtually dollar for dollar - to the “value added” total of \$18,505,500 uncompensated costs rendered by claimant counsel in

**2004. While this totals a gross of more than \$36 million dollars in litigation costs in a single year, only one portion is an actual litigation cost to carriers.**

**Moreover, the litigation costs to carriers – ultimately reflected in premium ratings – appear to be constant over the years 1999 to 2005 based upon the WCB’s published data. Whether or not the claimant prevails and claimant counsel does not receive a fee, these costs are far more constant in actual dollar amounts and reflected in litigation and premium costs.**

**Who benefits from legal representation? Certainly, claimants do. However, especially for the “value added” representation in the 82,940 reopened claims with claimant representation in 2004, the WCB – the system - benefits through resolution (15.8, 25(a), and medical issues); providers benefit in both “medical only” and all represented claims to secure payment for their services. Carriers (especially defense counsel) and Special Funds, to an extent, are other beneficiaries of the “value added” representation of claimants. Without legal representation, the likelihood of subsequent hearings in the unrepresented cohort of reopened claims of 90,087 in 2004 (173,012 total minus 82,925 represented) in all years from 1999 to 2005 adds both to the income and incentive for defense firms as well as to the “balloon” of pending hearings in the WCB’s inventory. In this respect, the existence of unrepresented claimants, especially in re-opened claims and those involving permanency and apportionment issues, strongly suggests consideration of insuring that this group of claimants obtains legal counsel in their claims.**

**With respect to “friction” costs in the system, the data tend to indicate that financial interests are not a primary motivation for representing claimants, especially in multiple hearings and in depositions, while the same data strongly presents a financial consideration for defense firms.**

**In contrast, the “value added” or “free” legal counsel demonstrated in the data and enjoyed by all participants, represents a latent value to the vitality of the system as well as development of the system’s jurisprudence. It is not a direct cost to the system in real dollars. On the other hand, the demonstrable financial incentives to invite defense interests to litigate a claim or secure multiple hearings is a clear factor in evaluating system “friction” due to litigation and suggests strongly the development of further data in this aspect. Who benefits from litigation is the key question, not the fee compensation to claimant counsel in the limited number of claims in which claimants are represented. More vital to the functioning of the system is the “value added” legal benefit to the system produced by claimant counsel.**

**Thus, in regard to the reality of “friction” in the system due to litigation, the data clearly tend to negate (overhead, hearing appearance, deposition costs to claimant counsel) financial incentives as a factor in claimant representation while supporting a financial incentive for, at least, for defense firms which often dictate the subsequent actions on a claim to their carrier clients and have substantial control of the hearing process. In short, as the newly elected policy makers for New York’s workers’ compensation system have announced, speedy delivery of both medical and indemnity to claimants benefits most directly the population – not customers – whose stake in the system is the most substantial – the claimant.**