IWBA Memorandum on WCB Proposed Schedule Loss of Use Guidelines and Regulations

Introduction

In New York's 2017-18 budget bill, the Workers' Compensation Board was tasked to create new medical impairment guidelines for schedule loss of use awards that are "reflective of advances in modern medicine that enhance healing and result in better outcomes" through consultation with "representatives of labor, business, medical providers, insurance carriers, and self-insured employers." See, WCL § 15(3)(x). On September 1, 2017, the Board released its proposed regulations and impairment guidelines.[1]

The Board's proposals unfortunately fail in several respects to achieve the primary legislative objective. In the first instance, Board has provided no true indication as to the process by which these proposed medical guidelines were generated or any medical evidence supporting the changes.[2] Substantively, the proposals ruthlessly diminish the benefits available to permanently disabled workers, and strip them of legal rights insurance companies retain, which does not in any sense comport with the Legislature's direction.

Moreover, the Board's proposals are contrary to the existing statute, case law, and "the fundamental principle that the Workers' Compensation Law is to be liberally construed to accomplish the economic and humanitarian objects of the act." See, Smith v. Tompkins County Courthouse, 60 NY2d 939. The IWBA strongly objects to the proposed regulations and impairment guidelines as set forth in the following memorandum.

1. The existing 1996/2012 guidelines methodology is based almost entirely upon assessments of residual functional impairment, which automatically results in a lesser percentage as medical technology improves. The new guidelines contain no indication as to how they serve the legislative purpose of reflecting "advances in modern medicine."

As a general matter, the proposed guidelines are devoid of any information, nor has any been otherwise proffered to the public, as to how the changes serve the objective of ensuring the guidelines are "reflective of advances in modern medicine." The stated objective of the enabling

[1] Available at: http://www.wcb.ny.gov/content/main/wclaws/Proposed/Part300_2_300_39_325_1-6.jsp.
[2] The Board notes only that it consulted with the New York State Society of Orthopedic Surgeons and on a single day in August of 2017 "conferred and consulted with a group of key stakeholders" of the Board's selection.

legislation was not merely to diminish awards to injured workers for permanent disability, though such is the essential effect of the Board's proposals. Some indication of the medical evidence and/or studies relied upon in creating the new guidelines should be made available, provided the same exist.

The vast majority of the current 1996/2012 guidelines are based upon assessments of residual functional impairment following appropriate medical care. As such, these guidelines have a built-in and automatic mechanism for ensuring that the SLU awards are consistent with improvements in medical technology. Indeed, the very logic and structure of the 1996/2012 guidelines ensures that the impairment analysis will always keep pace with advances in modern medicine, subject to the crucial notion that various pathologies and procedures can and do produce differing outcomes in differing individuals, consideration of which is entirely absent from the proposed new guidelines. To serve the legislative objective, all that was truly necessary was to revise various "special considerations" to reflect that the automatic percentages based on pathology or procedure would be reflective of modern medical advances.

In any event, absent any information as to how the new guidelines were generated, or how they reflect changes in modern medicine, there is no way to appropriately analyze the text, the process, or whether the legislative goals were in any sense served, as opposed to the result simply being an effort to slash benefits for permanently disabled workers.

2. The Board lacks the legislative authority to consider impact on earning capacity as part of the schedule loss of use assessment.

The schedule loss of use award, as a legal concept, differs dramatically from wage replacement benefits for temporary or non-schedule permanent partial disability. These later categories of awards depend, by legislative mandate, upon an assessment of a claimant's residual earning capacity and the effects of an injury upon the same. See, WCL §§ 15(3)(w), 15(5), and 15(5-a).

A schedule loss of use award, on the other hand, reflects a predetermined legislative judgement as to the effects of a permanent medical impairment on a worker's future earnings. The statute supplies the Board only the discretion to decide on the percentage of pure medical impairment. Beyond this, the Legislature has specifically delineated the presumed loss of future earning capacity, which the injured worker is not required to affirmatively prove on a continuing basis (as he is in cases of temporary or non-schedule permanent partial disability).

The New York Court of Appeals has affirmed that an SLU award is not in any way connected to a present loss of earnings or earning capacity. See, Slawinski v. J. H. Williams & Co., 298 NY 546. Indeed, the plain language of the statute supports this notion, as WCL § 15(3)(t) directs that in some instances the Board is to consider the earning capacity of an injured employee in making its disfigurement assessment. WCL §§ 15(3)(a) through (q) are devoid of any such language or grant of authority.

Even the Board itself has held that when "a claimant's permanent disability is subject to schedule loss of use, the claimant's ability or inability to perform regular work duties is immaterial to the determination of percentage of loss. In those circumstances, there is no need to take lay testimony, since any determination is based upon relevant medical evidence…The Board Panel also notes that lay testimony is irrelevant to that strictly medical determination. In addition, the Board Panel finds that the claimant's ability to continue working does not impact a schedule loss of use finding." See, Matter of Con Edison, WCB No. G030 0696 (1/24/13). The current proposal appears to be a complete reversal of the Board's position.

The concept of the Board measuring the effects on earning capacity in connection with an SLU assessment is thus flawed at the outset, and the attempt by the Board to introduce this discretionary element into the equation is a clear usurpation of the Legislature's authority.[3]

3. The proposed limitation on a claimant's right to obtain an independent medical examination, while permitting insurers to retain this right, is discriminatory on its face, contrary to the statute, and entirely inconsistent with the humanitarian intent of the compensation law.

It is wholly improper for the Board to eliminate the injured worker's right to obtain an independent medical examination on the issue of schedule loss of use while insurance carriers remain free to hire consultants for this purpose. Such an obviously biased disparity is a stark violation of both the statute and the claimant's due process rights.

First, the Board's proposal is inconsistent with WCL § 13-a(4)(b), which unambiguously provides: "Upon receipt of the notice provided for by paragraph (a) of this subdivision, the employer, the carrier, and the claimant each shall be entitled to have the claimant examined by a physician authorized by the chair in accordance with sections thirteen-b and one hundred thirty-seven of this chapter..."

The proposal also represents a violation of the injured worker's due process rights, especially given the complexity of the new guidelines. It is very likely that if an attending physician does not properly complete the prescribed forms, the claimant's evidence will be subject to preclusion, much in the manner of the current form C-4.3 practice in cases of non-schedule permanent disability. Given this peril, the claimant should have the option of hiring a professional consultant, just as the carrier does, to ensure the medical report is accurately and timely completed in accordance with the new guidelines – as is directed in amended § 300.2(d)(2) – and will not face preclusion based upon a minor or even ministerial error by the attending physician.

---

[3] Given the foregoing, there is also no useful purpose for a new form SLU-1 to supplant the current C-4.3, which contains sections for all necessary information short of that relative to an earning capacity assessment.

The proposal likewise ignores the common-sense reality that attending physicians would rather involve themselves with medical and not legal matters. Given the option of analyzing complicated guidelines and completing complex legal forms versus devoting time to caring for their patients, the choice appears fairly obvious, and the Board should not mandate an alternate dynamic. In most instances, the attending physicians would frankly prefer that a claimant obtain an independent examination so they may avoid the irritation of the litigation and deposition process.

Finally, if the new guidelines successfully constrain the opinions on loss of use to ensure consistency amongst examiners, one of the stated purposes, there seems no reason beyond a simply punitive or discriminatory measure to forbid claimants from obtaining IMEs on loss of use while permitting carriers this option – whether completed by an attending physician or an independent consultant, the percentage should be essentially the same.

4. The vague new requirements that injured workers be "cooperative" and non-disruptive at an insurance company's IME are punitive and serve no useful purpose.

This ill-defined aspect of the Board's proposal is plainly discriminatory and places undue control in the hands of the insurance company and its medical examiners. It cannot be denied that the conduct of the carriers' medical examiners can vary greatly; the Board's proposal presupposes that all examiners conduct plain and proper examinations, which is not accurate.

An injured worker is generally cooperative with an independent medical examiner to the extent possible. If the IME feels the claimant is not providing maximum effort, that is merely one physician's opinion, which is noted in IME reports even now, and ultimately is nothing beyond a question of fact for the Board to resolve. Evidence of symptom magnification based upon medical testing can be noted in IME reports as is currently done. Yet even mere knowledge of the proposal as written would give IME examiners a powerful tool to coerce injured workers into exceeding their reasonable capacities during an exam. This ill-defined new requirement of cooperation, with associated penalties, should be stricken from any revision proposal.

The legally binding requirement that a claimant "accurately and truthfully complete any questionnaire or intake sheets provided by the independent medical examiner," under penalty of a negative inference, should also be removed. Clearly this would be the functional equivalent of a sworn written statement taken from a client in absence of his counsel, with no opportunity in many instances for counsel to review and advise on this process. While injured workers must of course be truthful, most are not advanced academics. This proposal is similar in nature to a hypothetical requirement that a represented claimant submit to an interview by a carrier's investigator in absence of her attorney.

5. The inclusion of pain as an element of schedule loss assessment, with the simultaneous admonition that any rating of three or higher may result in a classification finding, even if all doctors agree the case is amenable to schedule closure, is wholly improper.

While the IWBA agrees that pain should be a factor in calculating residual medical impairment and hence schedule loss of use, we strongly disagree with the attendant admonitions in the new proposals, which essentially warn that inclusion of too many percentage points for pain (more than two) may result in no schedule loss of use, even if all physicians agree that is the proper outcome. This is little more than a thinly veiled warning to physicians not to include too many percentage points in their SLU opinion under the new guidelines. Such a scheme is inconsistent with the humanitarian nature of the statute and at worst, appears to be an intimidation tactic directed at attending physicians. These indications should be removed from the new guidelines, and the indications listed in the former section as to schedule loss of use versus classification should remain in effect.

6. The new distinction between digit/wrist and other injuries based upon their purported occupational significance is misplaced.

The aspect of the new guidelines that provides for dramatically decreased SLU awards in general, while placing digit and wrist injuries into a separate category based upon their purported increased occupational significance is misplaced. While it cannot be denied that these body sites do have substantial importance based upon the increased “use of computers and other hand functions” in the modern economy, it is erroneous to assume that a laborer with a shoulder injury and loss of motion is less impacted in her position than a computer programmer with a damaged hand. For one, laborers are injured in the course of their employment far more frequently than sedentary office workers. And in reality, a laborer who is unable to move her shoulder above the horizon line will be dramatically affected viz. future earning capacity. It is difficult to discern how the Board deems these permanently disabled laborers will suffer so much less loss under such circumstances in January of 2018 than was the case in December of 2017.

The new guidelines drastically reduce awards for permanent damage to extremities in general, with little to no explanation or medical justification, which is wholly inconsistent with the legislative mandate of the 2017-18 budget bill as well as the humanitarian intent and purpose of the Workers’ Compensation Law.

Conclusion

Given the foregoing problems and issues with the Board's proposed regulations and new impairment guidelines, the current proposals should be rescinded in their entirety, subject to revision which truly includes all interested stakeholders and an open and apparent process in which necessary information and/or research is shared with the public. Alternatively, the IWBA requests that the Guidelines and regulations be amended to remove the objectionable provisions as noted.

DATED: September 13, 2017