



IWBA MEMORANDUM

TO: For Public Release
FROM: Justin S. Teff, Esq., President
SUBJECT: Schedule Loss of Use Reform Efforts
DATE: March 19, 2017

INTRODUCTION

One of the primary agenda items for New York's business and insurance lobby in 2017 is the reduction and/or elimination of so-called schedule loss of use awards in workers' compensation. Various reasons have been advanced as to why this goal is purportedly laudable. The purpose of this memorandum is to correct several common misconceptions regarding schedule loss of use awards, associated costs, and the compensation process itself, that have been perpetuated by interest groups adverse to the rights of New York's permanently disabled workers.

MYTH #1: The current schedule loss of use guidelines "reflect thirty-year old medical assumptions" and thus lead to inappropriate calculation of SLU awards.

The Board's SLU guidelines, much like the 2012 update to the non-schedule permanency guidelines, are almost entirely indexed to measurements of a person's residual functional capacity in determining permanency ratings, and are based little if at all on the nature of any particular pathology or procedure.¹ As such, any improvements in medical technology, the result of which would be a better outcome for the patient, will automatically by the very logic and structure of the current guidelines result in a lower severity or percentage loss. An accounting for improvements in medical technology is thus already built in to the current guidelines.

MYTH #2: Eliminating schedule loss of use awards will dramatically reduce costs for insurance companies and businesses.

Contrary to the above notion, the elimination of schedule loss of use awards will dramatically increase the number of disputes between workers and insurance companies regarding every aspect of a person's disability and lost time, temporary or permanent. Whether in the form of requests for judicial intervention, or carrier defenses to workers'

¹ The Workers' Compensation Board's 2012 Impairment Guidelines can be found at:
<http://www.wcb.ny.gov/content/main/hcpp/ImpairmentGuidelines/2012ImpairmentGuide.pdf>



claims, litigation in the compensation forum will skyrocket, which in turn will markedly increase the costs of defending each file over time. In the end, the only true casualties of this proposal will be New York's permanently disabled workers, and the only true beneficiaries the defense counsel who bill the carriers for their services. Costs will not be decreased overall but simply transferred.

MYTH #3: If a permanently impaired worker does not lose significant time from work, she is not truly disabled and does not deserve to be compensated.

Those who have sustained any form of permanent injury in any aspect of life can likely attest that lost time from work is not the only gauge of permanent damage to one's existence or future earning capacity, it is merely the most immediate. A worker who has lost an entire arm (even a doctor or a lawyer) will almost certainly experience impairments in wage earning capacity over the course of her life, however accommodating her present employer or situation may be. In light of all the effects such a permanent loss would engender, should a worker that loses one entire arm in a work accident get no monetary compensation whatsoever simply because she returns to work the day after her amputation surgery?

MYTH #4: People who are injured in work accidents are unfairly given too much compensation.

When a worker – or anyone for that matter – is permanently disabled, for example having lost one of his arms, it can fairly be stated that no amount of monetary recovery will ever truly make that person whole again. The workers' compensation system begins by entirely exempting many forms of monetary recovery for injury that other tort systems provide, such as pain and suffering, loss of life enjoyment, and loss of spousal relationship, to name only a few. In other forums, a monetary recovery for a truly devastating permanent loss can be in the millions.

MYTH #5: Only New York has such a bizarre system of compensating permanently disabled workers.

In reviewing the compensation systems of nearly all 50 states, it can fairly be said that there is no perfect calculus for adequately compensating injured workers while maintaining the lowest possible cost structure to do so. Compensation premiums are based primarily upon average wages, which of course are higher in New York than elsewhere; this renders a dollar-for-dollar comparison inadequate. As of 2004, however, about 43 states utilized some form of schedule, or list of covered body parts, to compensate for permanent impairment to an extremity.² Several states actually employ a "whole body" schedule, which also includes lump-sum payments for spinal and other impairments.

² "Compensating Workers for Permanent Partial Disabilities," Peter Barth, Social Security Bulletin, Vol. 65, No. 4 (2003/2004), at 16, 18-19, located at: <https://www.ssa.gov/policy/docs/ssb/v65n4/v65n4p16.html>.



MYTH #6: Schedule losses of use have led to unanticipated costs and revision would simply be a further step in the 2007 reforms.

In 2007 labor and industry struck a grand bargain in the form of a comprehensive modification of the workers' compensation scheme. The primary trade-off was the capping of non-schedule permanent disability benefits in exchange for a periodic increase in the maximum compensation rate, which had not been raised in 15 years. Because schedule awards have been indexed, since the statute's inception, to a worker's weekly compensation rate, it was entirely foreseeable and indeed anticipated that the increase in weekly rates would bring a corresponding increase in the amount of these awards. As such, to now call for revision of the loss of use guidelines or elimination of schedule awards entirely, industry is not prompting further reform, but rather is merely renegeing on a good faith promise it made in 2007. Its proposal calls for nothing more than a dramatic cut in benefits for permanently disabled workers with no hint of betterment for those most affected.