WITH FRIENDS LIKE THESE: AN ASSESSMENT OF NEW YORK STATE WORKERS' COMPENSATION "REFORM"

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Reading the press releases disguised as news articles printed throughout New York in spring 2017, one could be forgiven for believing that the state had revolutionized its budget process, setting a course for a more promising financial and bureaucratic future. Paramount in its litany of self-accolades was the state's avowal that it had dramatically overhauled its Workers' Compensation system. The executive agencies in New York State government proudly touted the purported cost-saving measures that were enacted when the 2017–18 executive budget was passed in April 2017. The New York State Workers' Compensation Board hyped "reforms that generate cost savings for employers while providing better protections for injured workers," [Subj No. 046-936], while the governor's website likewise proclaimed "meaningful workers' compensation reforms that provide cost savings for businesses and better protections for injured workers." [https://www.governor.ny.gov/news/governor-cuomo-and-legislative-leaders-announce-agreement-fy-2018-state-budget]

In the short term, the budgetary acrobatics performed by legislators and the executive branch in New York allowed each to claim victories in this workers' compensation overhaul, ostensibly benefitting employers and labor leaders alike. Following the implementation of these reforms, however, it became clear that the employers in New York lost this round – and badly. Instead of generating "cost savings" for employers, this reform of the workers' compensation system in New York is shaping up to be a financial and logistical setback likely to last a decade or more.

The complications stem in part from the reform's inconsistent timelines for implementation. For instance, the state budget placed a cap of 130 weeks on the duration of temporary benefits – more than one year of additional temporary benefits beyond that contemplated by the Impairment Guidelines. The only potential bright spot for employers was a possible credit on any weeks paid outside the 130 weeks if and when the Workers' Compensation Board establishes permanency. This provision only applies to injuries occurring after April 20, 2017, however, which effectively bars any such credit on already aged claims. Further, it is unclear if this "benefit" is automatically triggered by the board's calculation of benefits or if the carrier/employer has the obligation to keep track and pursue it unilaterally.

Injudiciously, carriers are now prohibited from pursuing labor market attachment as a defense and/or mitigation tool on any case where the board has established permanency. To illustrate the absurdity: An injured worker with only a 25 percent permanent partial disability (PPD) now has no obligation to seek employment within his restrictions once he is classified. This amendment takes effect immediately, and even applies retroactively to all previously classified claimants including those pre-form claimants with lifetime benefits.

Next, the threshold for loss of wage-earning capacity (LWEC) that triggers the extreme hardship provision (a "safety net" allowing claimants with "capped" benefits for PPD to reapply for more capped benefits after 130 weeks have passed) was reduced from 81 percent to 76 percent. This claimant-friendly provision takes effect immediately, and has a particularly gruesome impact on employers: it retroactively decimates their pre-form efforts to avoid the extreme hardship provision when they entered into stipulations for an LWEC of less than 81 percent. These inauspicious actions are disappointing blow to employers in New York.

Yet, the benefits for injured workers do not end here. The state also directed full-board review of any board panel decision that reduced a claimant's LWEC to less than

the safety net, directed the board to prioritize and expedite any claim for which the claimant is losing time and not receiving benefits, and now expressly authorized first responders to file stress claims.

One might expect such significant concessions benefitting the injured workers be offset by amendments at least somewhat advantageous to employers. However, to the extent than any "pro-employer" provisions were included in the reform, they were not unconditionally incorporated.

The state called for the implementation of a drug formulary (a list of prescriptions pre-approved for causally related treatment), by December 31, 2017. The caveat, of course, is that claimants can still obtain prescriptions outside the list via the same variance process that allows for the approval of a majority of surgical procedures outside the state's medical treatment guidelines. The result is a formulary in name only. Such a variance procedure essentially negates the purpose of a drug formulary, creates a new and presently unquantifiable litigation cost for the defense of a purportedly helpful program, and places a procedural burden on the carrier instead of the prescribing physician.

The one highly anticipated concession to the employers' stake was the revision to the Schedule Loss of Use (SLU) Guidelines. Though the legislature imposed a deadline for drafting and implementing the final guidelines, when the Workers' Compensation Board published the initial revisions, it left months for opposition to this proposal to organize and push back.

The cost of SLU awards have more than doubled in the last decade. As in other states, the SLU in New York is awarded for the prospective loss of value to an extremity. In 1996, the board promulgated guidelines that were heavily dependent on range of motion deficits, and was therefore vulnerable to the subjective effort by the claimant and discretion by judges – the combination of which created massively oversized awards, including to those with little or no lost time.

The board had an opportunity to correct this shortcoming with the passage reforms in 2007, yet allowed five years to pass before finally implementing the mandated guidelines in 2012 – which were little more than a mirror image of the 1996 Guidelines. While still encouraging inflated awards, the 2007 reforms also directed an increase in the maximum weekly value of workers' compensation benefits. As such, the SLU findings previously calculated with a $400 maximum weekly rate are now currently calculated with an $870.61 maximum weekly rate. So, a high wage-earner claimant can lose no time for an injury in New York, and based only on their subjective representations of range of motion (as authorized by statue and regulation), can walk away with a tax-free windfall in excess of $100,000.

Thereafter, the Business Council of New York State took the position that the 2012 Guidelines failed to account for medical advancements over the past 20 years. Specifically, it argued surgical outcomes for common claimed injuries had vastly improved, but SLU awards did not adjust or reduce accordingly. In opposition, unions, attorneys, and workers' rights groups simply argued that employers had the chance to revise the SLU impairment guidelines between 2007 and 2012. Though it failed to recognize that SLU guidelines had not seen meaningful change since 1996, the state merely directed the board to revise its impairment guidelines for SLU awards.

The board's first effort, in fall 2017, represented a potential shift from the status quo. The guidelines categorized injuries and complaints, and could have conceivably reduced some catastrophic outcomes against employers. It finally addressed classification claims in those cases where the claimant's complaints of pain were inconsistent with clinical findings, and focused on objective strength and sensory deficits as opposed to the more subjective range of motion reporting. The draft required doctors to complete range of motion testing three times. It also imposed a requirement of honesty – allowing a negative inference where a claimant demonstrably embellished his limitations. Claimants were required to complete a questionnaire prior to an IME, identifying their ability to perform their job, including weight requirements, and other responsibilities.

These guidelines so effectively addressed the inherent problems of the SLU process that unions and their attorneys mobilized immediately. By the end of September, State Assembly hearings were held on the subject. Shortly thereafter, 95 members of the State Assembly's majority executed a letter to the Board advising it had failed to satisfy the mandate. By the end of November, on the eve of Thanksgiving, the Workers' Compensation Board quietly released a new draft of the SLU guidelines that, yet again, closely mimicked the 1996 version, and abandoned the opportunity to create balanced guidelines benefitting all stakeholders. And just like that, employers' hope for reform, died.

The fight over SLU is the best example of how employers in New York State were sold a bill of goods last year when the state and the board assured them they had won any part of the budget reforms. The pro-worker reforms were implemented immediately, and in some instances applied retroactively to all cases – all to the detriment of the employer. Yet, the pro-employer reform, on the other hand, stalled and staggered, allowing a coalition of groups to engage in regulatory trench warfare and prevent any meaningful change.

The coming fronts in the implementation of this reform include the IME process. If history is an indicator, it is almost a certainty that this process will be refined in a way that further undermines an employer's ability to litigate its position in New York State.

Throughout the country, states are constantly considering reforms to their workers' compensation system. The New York experience now seems to be an example for employers that demonstrates how to quickly and effectively snatch defeat from the jaws of victory. Despite being touted as meaningful reform for employers and workers alike, it is now clearer than ever that this proclamation was only half true.

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