

# **NEW YORK WORKERS' COMPENSATION ALLIANCE** **2011/2012 LEGISLATIVE AGENDA**

## **A. SUMMARY OF LEGISLATIVE AGENDA**

The New York Workers' Compensation Alliance recognizes that benefits and due process for injured workers in the workers' compensation system are governed not only by statute, but also by regulation and administrative procedures. Our 2011 Legislative Agenda focuses primarily on statutory amendments, but also identifies areas in need of additional regulation.

Our legislative priorities are:

1. **Restoring** the safety net for permanently partially disabled workers.

We support:

- a. S00728 - the Social Security Presumption Bill;
- b. Amending WCL Section 15(3)(v) to prevent discrimination against immigrant workers;
- c. Amending WCL Section 35(3) to reduce the threshold for Safety Net consideration from an 80% loss of wage earning capacity to a 50% loss of wage earning capacity;
- d. Adopting guidelines for the determination of loss of wage earning capacity that are fair to injured workers.

2. **Preserving** the right to due process for injured workers.

We support:

- a. A1817 - the Right to a Hearing Bill;
- b. S04112 - the Reporter Bill;
- c. Amending WCL Section 24 to provide for attorneys fees in cases involving medical treatment;
- d. Amending WCL Sections 23 and 24 to provide for the provision of attorney fees to claimant attorneys in connection with appeals to the Appellate Division;

- e. Amending WCL Section 162 to extend the time frame for filing WTC-12 registration forms;
- f. Enacting regulations that prohibit unfettered cross-examination of injured workers and health care providers in the absence of contrary evidence submitted by the employer or carrier.

We oppose:

- a. A5923/S4176 – requiring injured workers to respond to insurance carrier questionnaires.

3. **Protecting** the right to appropriate medical treatment for injured workers.

We support:

- a. A6294/S3746 - the Medical Treatment Guidelines Retroactivity Bill;
- b. A01972/S3056 - expanding the availability of medical care for psychological injury and disability by authorizing treatment by certified social workers;
- c. Withdrawal and re-evaluation of all current Medical Treatment Guidelines regulations and process;
- d. Enacting regulations that govern employer and carrier relationships with diagnostic test networks, notice of such relationships, quality care standards, and provision of diagnostic test reports;
- e. Enacting regulations that govern the Board’s use of impartial specialists, guaranteeing the impartiality of such specialists and providing oversight.

4. **Repairing** gaps in the law.

We support:

- a. A00186 - a cost-of-living adjustment for permanently totally disabled workers and dependents in death cases;

- b. Amending WCL Sections 15(3)(w) and 15(6) to harmonize the effective dates of the caps on permanent partial disability benefits and increased benefit rates;
- c. Amending WCL Section 15(6) to index the minimum benefit rate;
- d. Amending WCL Section 16(4)(b) to increase no dependency awards to \$100,000 and indexing same;
- e. Amending WCL Section 15(6)(a)(4) to prohibit reduction in the state average weekly wage for purposes of the Workers' Compensation Law;
- f. Amending WCL Section 204 to increase the maximum rate for NYS Disability Benefits from \$170 per week to \$500 per week;
- g. Amending VFBL Sections 8 through 11 to increase the rates for Volunteer Firefighter Benefit Law claims to correspond to the maximum workers' compensation benefit rate, as indexed;
- h. Amending WCL Section 27 to include self-insured employers and the State Insurance Fund in addition to private insurance carriers;
- i. Amending WCL Section 29 to provide employers and carriers with a lien on the portion of third-party recoveries corresponding to workers' compensation benefits;
- j. Adopting regulations governing "independent medical examinations," delineating permissible relationships between medical consultants, IME vendors, and carriers, establishing data tracking for the reports of such physicians, and strengthening and clarifying existing regulations regarding IME examinations and reports.

## **B. DESCRIPTION OF LEGISLATION**

### **1. SAFETY NET LEGISLATION**

#### **a. S00728 - the Social Security Presumption Bill.**

Many workers who apply for workers' compensation benefits also apply for Social Security Disability benefits. The process used by the Social Security Administration is more objective, impartial, and thorough than that used by the Workers' Compensation Board. If the Social Security Administration awards benefits, it has determined that the worker has a significant medical impairment and that he or she is

unable to perform any substantial gainful activity in employment in the local or regional economy.

A worker who meets the stringent standard to receive Social Security Disability benefits is not employable in any meaningful way, which means he or she is totally disabled. The workers' compensation system spends considerable resources adjudicating the question of whether injured workers are "totally" or "partially" disabled. Countless hours are devoted to taking medical testimony on this issue, providing a market for insurance company medical consultants and other litigation-based vendors, while delaying and denying justice for injured workers.

The WCA supports S00728, which would replace this litigation system with a presumption that a worker who is approved for Social Security Disability benefits is totally disabled for workers' compensation purposes.

b. Amending WCL Section 15(3)(v) to prevent discrimination against immigrant workers.

Workers' Compensation Law Section 15(3)(v) provides crucial protection for some of the most seriously injured workers. Under this statute, workers who lose more than 50% of the use of an extremity (arm, leg, hand or foot) and who would ordinarily be deprived of wage replacement benefits beyond the statutory "schedule loss" award are potentially entitled to additional compensation. In order to be eligible for such additional benefits, the worker must "participate in a board approved rehabilitation program; or shall have demonstrated cooperation with efforts to institute such a board approved program and shall have been determined by the board not to be a feasible candidate for rehabilitation."

In Matter of Ramroop v Flexo-Craft Print, Inc., 11 NY3d 160, 866 NYS2d 586, 896 NE2d 69 (2008), the Court of Appeals upheld the Board's determination that injured workers who are precluded from participating in board approved rehabilitation programs by virtue of their immigration status are not entitled to benefits under Section 15(3)(v), notwithstanding the provisions of Workers' Compensation Law Section 17, which provides that "compensation under this chapter to aliens not residents or about to become nonresidents of the United States or Canada, shall be the same in amount as provided for residents." The Ramroop decision effectively provides unequal compensation based on immigration status, in direct contradiction of the purpose of the Workers' Compensation Law, which is intended to protect and compensate injured workers. Moreover, the very workers most likely to be maimed by industrial machinery, and most in need of the protection offered by WCL Section 15(3)(v), are those excluded from coverage under this decision.

The WCA supports an amendment to WCL Section 15(3)(v) to overrule the Ramroop decision and provide proper and adequate compensation for severely injured workers, regardless of immigration status.

c. Amending WCL Section 35(3) to reduce the threshold for Safety Net consideration from an 80% loss of wage earning capacity to a 50% loss of wage earning capacity.

The 2007 amendments to the Workers' Compensation Law imposed time limits on permanent partial disability benefits. Prior to these reforms, workers who were permanently partially disabled from work could receive benefits for the duration of their disability, unencumbered by artificial time restrictions. The 2007 legislation also provided a "safety net" for workers who suffered more than an 80% loss of wage earning capacity. Under the safety net provisions, within one year of his or her benefits being exhausted, the injured worker may apply to the Board for re-classification as industrially totally disabled, showing "extreme hardship."

To date, the Board has yet to issue any meaningful guidance regarding the evaluation of loss of wage earning capacity. As a result, the workers' compensation system continues to rely on medical impairment determinations based on the 1996 Workers' Compensation Board Medical Guidelines, which divide disability into "mild" (25%), "moderate" (50%), "marked" (75%) and "total" (100%). Under this regime, it is unlikely that any injured worker will reach the 81% threshold for safety net eligibility. Moreover, many workers who are deemed "50% disabled" under the present system are not employable in a meaningful fashion. New York State Department of Labor statistics demonstrate that most workers who are found to be permanently partially disabled with at least a 50% disability do not return to work in any capacity, and other evidence indicates that most of such workers qualify for Social Security disability benefits due to unemployability. It is therefore clear that the 81% threshold is too high to provide meaningful protection to workers whose benefits will be terminated through the 2007 caps on permanent partial disability benefits.

The WCA supports an amendment to WCL Section 35 that would create eligibility for the safety nets with a finding of a 50% loss of wage earning capacity.

d. Adopting guidelines for the determination of loss of wage earning capacity that are fair to injured workers.

The 2007 amendments to the Workers' Compensation law created a group of Task Forces in the New York State Insurance Department that were assigned the responsibility of recommending a way to refocus the workers' compensation system on awarding benefits for loss of wage earning capacity, not medical disability. The present system makes awards in an inequitable fashion based on medical impairment as opposed to loss of earning power. For example, while a bricklayer and an accountant with identical back injuries may have identical medical impairments, the impact on their ability to earn a living will be dramatically different. Under the existing system, however, their "disability" is the same.

In 2010, the Insurance Department issued a report declaring an inability to reach consensus on a method of calculating loss of wage earning capacity and referring the matter to the Workers' Compensation Board for further consideration. Meanwhile, workers are unable to pursue classifications of permanent disability because there is no guidance on how to determine their loss of wage earning capacity due to the compensable injuries.

The WCA calls on the Workers' Compensation Board to create and implement guidelines that will restore the focus of the system on compensating injured workers for loss of wage earning capacity. The WCA also calls on the Board to make substantial use of the safety net provisions of the 2007 statutory amendments that relieve permanently disabled workers from the caps on their benefits, and to expand consideration of industrial total disability, as intended by the Legislature when it specifically incorporated that provision in the 2007 amendments.

## **2. DUE PROCESS LEGISLATION**

### **a. A1817- the Right to a Hearing Bill.**

Over the past decade, the Workers' Compensation Board has increasingly denied injured workers their right to a hearing before a Workers' Compensation Law Judge, despite a provision of the Workers' Compensation Law that guarantees that right. The Board has issued "desk decisions" by non-judicial Board employees that decide legal issues, expanded the use of "conciliation," a process in which cases are decided without a formal hearing and without a stenographic record, and has increasingly denied applications for hearings filed by claimants and other parties to workers' compensation claims.

It is clear that the legal protection for the right to a hearing must be strengthened in order to prevent the further denial of the due process rights of injured workers. A11337 would require the Board to schedule a hearing where a request is filed together with substantiating evidence, thus limiting the Board's increasing administrative denial of the basic due process right to a hearing.

The WCA supports A1817.

### **b. S04112 - the Reporter Bill.**

For decades, hearings at the Workers' Compensation Board have been recorded by court reporters, or stenographers. Stenographic recording – which is what is used in civil and criminal cases throughout the State of New York – provides a reliable, accurate means of recording judicial proceedings and trial testimony.

The Workers' Compensation Board has suggested that court reporters can be replaced with electronic recording equipment. The WCA supports the stenographic recording of hearings by court reporters, and opposes the use of electronic recording equipment. The Workers' Compensation Board has suggested that it may try to exploit a potential loophole in the law, which already requires that hearings be "transcribed" by reporters, by taking the position that a court reporter may not be necessary to "record" the hearing.

The WCA supports S04112, which would require hearings to be "recorded and transcribed" by court reporters, thus closing this loophole.

c. Amending WCL Section 24 to provide for attorneys fees in cases involving medical treatment.

For injured workers, access to benefits in an increasingly complex workers' compensation system depends largely on the availability of representation. Within the system, claimant attorney fees are awarded by the Workers' Compensation Board as a lien on the awards made by the Board. "Medical only" claims, in which no indemnity benefits are payable because there is no wage loss or "schedule loss" award due, are the largest category of claims in which workers lack representation. This shortfall is due to the Board's interpretation of its authority under WCL Section 24 to consider only the value of indemnity benefits as part of an "award," and to limit attorney fees to cases in which an indemnity award is entered.

This approach is both archaic and deprives injured workers of access to benefits by depriving them of representation that would otherwise be available. In 2010, the value of medical benefits paid in workers' compensation claims exceeded the value of indemnity benefits paid – yet the value of medical benefits was wholly excluded from consideration by the Board in awarding attorney fees.

The New York State Department of Labor, in its Report of the Commissioner on Return to Work, recommended that the Board provide compensation to attorneys in medical only cases. The Commissioner observed that the lack of representation deprives injured workers of needed benefits and disadvantages them in the system.

The WCA supports an amendment to WCL Section 24 that would permit and encourage the Workers' Compensation Board to consider the value of medical benefits in workers' compensation cases and to award claimant attorney fees in connection therewith.

d. Amending WCL Sections 23 and 24 to provide for the provision of attorney fees to claimant attorneys in connection with appeals to the Appellate Division.

Workers' Compensation Law Section 24 provides that a claimant's attorney in a workers' compensation case may only be paid for representation before the Workers' Compensation Board when the Board awards a fee, and that such fee is a lien on the award. The attorney may not charge or receive a fee directly. Pursuant to WCL Section 23, appeals from decisions of the Workers' Compensation Board are heard by the Supreme Court, Appellate Division, Third Judicial Department.

Although the Third Department hears appeals in workers' compensation matters, representation in connection with such appeals is not representation before the Board. In a letter dated November 22, 2010, the Chair of the Workers' Compensation Board implied that the Board may be of the opinion that it retains jurisdiction over attorney compensation related to matters pending before the Appellate Division. While those matters are concerned with workers' compensation issues, they are by definition not before the Board (from whose decision the appeal was taken), but rather are before the Court.

The ambiguity created by the Board's assertion of potential jurisdiction over attorney fees in appeals to the Appellate Division has had a chilling effect on the ability of injured workers to pursue appeals from the Board's decisions. Attorneys in such matters must either prosecute appeals *pro bono*, or reject the Board's apparent interpretation of the statute and charge a fee to the injured worker – many of whom can ill afford the cost of an appeal. Insurance carriers, however, suffer no such disadvantage, creating and perpetuating unequal access to justice for injured workers..

The WCA supports an amendment to WCL Sections 23 and 24 that would clarify the Board's jurisdiction over attorney fees in appeals to the Appellate Division and the Court of Appeals and provide for payment to claimant attorneys in such matters.

e. Amending WCL Section 162 to extend the time frame for filing WTC-12 registration forms.

The September 11<sup>th</sup> attacks killed thousands of New York workers and injured tens of thousands of workers who heroically participated in rescue, recovery and clean-up activities. In August, 2006 the Legislature added Article 8-A to the Workers' Compensation Law. Article 8-A permits those who participated in rescue, recovery and clean-up operations to file a WTC-12 registration form. The deadline to file a WTC-12 form expired on September 11, 2010.

The WCA, labor unions, and other organizations that protect the rights of injured workers have made extensive efforts to publicize the registration provision and to register

injured workers. Unfortunately, hundreds of these workers did not file registrations before the deadline and are now denied benefits.

The WCA supports an amendment to WCL Section 162 to extend the deadline to file WTC-12 registration forms so that those who participated in rescue, recovery and clean-up operations at the World Trade Center and related sites can register and preserve their right to claim workers' compensation benefits.

f. Enacting regulations that prohibit unfettered cross-examination of injured workers and health care providers in the absence of contrary evidence submitted by the employer or carrier.

The Appellate Division has held that “in the absence of a viable difference in the expert opinions expressed in the medical reports, no prejudice accrues as a result of the denial of the right to cross-examine a medical expert.” Bryan v. Borg-Warner Automotive, 293 A.D.2d 856, 742 N.Y.S.2d 393 (3rd Dept. 2002); *see also*, Robideau v. Van Rensselaer Manor, 56 A.D.3d 866, 866 N.Y.S.2d 457 (3rd Dept. 2008). The reason that there is no right to cross-examination in the absence of a joined issue is that the Workers' Compensation Board has no right to fashion its own medical opinion. If there is only medical opinion in the record, then the Board's decision must be in accord with the substantial evidence. Cerami v. City of Rochester School District, 82 N.Y.2d 809, 604 N.Y.S.2d 543 (1993); *see also*, Findling v. Comm. General Houses, 288 A.D.2d 798, 720 N.Y.S.2d 630 (3rd Dept., 2001).

Although the Board has exposure to cases involving medical questions and a “certain expertise” in such matters, this expertise is to be employed in weighing and balancing evidence with appropriate regard for its probative character, not in fashioning the Board's own medical opinion.” Doersam v. Oswego Co. Dep. of Soc. Servs., 171 A.D.2d 934, 566 N.Y.S.2d 978 (3rd Dept., 1991); Smith v. Bell Aerospace, 125 A.D.2d 140, 512 N.Y.S.2d 541 (3rd Dept. 1987). The Board may not fashion a medical opinion of its own. Lincoln v. Con Ed., 46 A.D.3d 1176, 848 N.Y.S.2d 418 (3rd Dept., 2007); Sullivan v. Sysco, 199 A.D.2d 849, 606 N.Y.S.2d 77 (3rd Dept., 1993); Knouse v. Millshoe, 260 A.D.2d 948, 689 N.Y.S.2d 266 (3rd Dept., 1999).

Notwithstanding the law set forth by the Appellate Division, the Board has often concluded that one of its rules, 12 NYCRR Section 300.10, requires it to grant requests for cross-examination even in the absence of contrary evidence. This approach encourages frivolous and dilatory litigation, delaying the payment of benefits to injured workers and imposing an unnecessary burden and cost on the Board.

The WCA supports an amendment to 12 NYCRR Section 300.10 that would permit the Board to deny a request for cross-examination where no contrary evidence is submitted.

g. A5923/S4176 – requiring injured workers to respond to insurance carrier questionnaires.

A5923/S4176 would provide that an insurance carrier must advise an injured worker when there is a required time frame for the worker to respond to the carrier's communication, and also give notice of any adverse consequence from the failure to respond. This bill is contrary to existing worker's compensation law and practice, which is superior to the approach taken by the bill. Under 12 NYCRR Section 300.23, where there is a direction for the carrier to continue payments, the carrier may not unilaterally suspend absent a hearing.

The WCA believes that injured workers are not required to respond to insurance carrier communications and questionnaires. There is no present legal authority which requires an injured worker to do so. The insurance carrier is entitled to receive medical reports from the doctor, and notification from the claimant about a return to work. There is no present circumstance in which the carrier has the right to send an inquiry to the claimant and then unilaterally suspend payments if it does not receive a response in what it believes is a timely fashion. Any carrier that did so would be subject to a penalty by the Workers' Compensation Board.

The WCA does not support A5923/S4176, which would weaken existing legal protection for injured workers and could be read to authorize predatory insurance carrier conduct which is presently illegal.

### **3. MEDICAL CARE AND TREATMENT LEGISLATION**

a. A6294/S3746 - the Medical Treatment Guidelines Retroactivity Bill.

On December 1, 2010, the Workers' Compensation Board implemented Medical Treatment Guidelines intended to establish a standard of medical care in workers' compensation cases. The Board further stated that these Guidelines – which substantially restricted the availability of pain medication, physical therapy, and chiropractic treatment – would be applied to all workers' compensation claims, regardless of the date of accident. The WCA wrote the Board expressing grave concern about the retroactive application of the Guidelines.

As predicted by the WCA, the retroactive application had the effect of terminating treatment for thousands of injured workers. In many instances, the treatment had been approved or agreed upon years or even decades prior to the implementation of the Guidelines.

The Medical Treatment Guidelines developed by a New York State Insurance Department Task Force were never intended to be applied in a retroactive fashion, and the Board's interpretation and application of the Guidelines has been an unmitigated

disaster for injured workers, health care providers, employers, carriers, attorneys, and the Board's own staff.

The WCA supports A6294/S3746, which would prohibit the Board from applying the Medical Treatment Guidelines in a retroactive fashion.

b. A01972/S3056 - expanding the availability of medical care for psychological injury and disability by authorizing treatment by certified social workers.

Injured workers who require psychological or psychiatric care have few available resources. There is an extremely limited number of psychiatrists who are "coded" by the Workers' Compensation Board and who are willing to accept new patients. Factors which contribute to this situation include inadequate reimbursement for treatment under the workers' compensation fee schedule and the high controversy rate associated with claims for mental illness. Although the availability of psychiatric care is somewhat expanded by existing statutory authorization for treatment by licensed psychologists, referral from a medical doctor is required for such treatment and the same disincentives that discourage psychiatrists from participating in the workers' compensation system affect psychologists.

Authorizing certified social workers to provide treatment in workers' compensation cases under the same ground rules that are applicable to psychologists would expand the availability of medical care for work-related psychological injuries. In addition, social workers are uniquely suited to address the secondary consequences of work-related injury and disability on family dynamics.

The WCA supports A01972/S3746.

c. Withdrawal and re-evaluation of all current Medical Treatment Guidelines regulations and process.

The Workers' Compensation Law guarantees injured workers adequate care and treatment "for such period as the nature of the injury or the process of recovery may require." The regulations and process implemented by the Workers' Compensation Board have had the effect of denying such care and treatment in violation of the law. In particular, although the Guidelines only address acute-phase medical treatment, the Board has misapplied them to palliative care, thus terminating needed medical care for thousands of workers.

In addition, the process adopted by the Board is irredeemably fraught with problems and should be abandoned. Under the prior system, doctors and carriers understood the circumstances in which advance written authorization was required and could proceed with relative certainty. The Board's new process has created substantial

uncertainty among health care providers as to whether any particular treatment is authorized and will be paid for by the liable insurance carrier.

In terms of delivering medical treatment to injured workers in a timely fashion, the process has failed. Rather than expediting treatment, it has served to delay medical treatment while health care providers attempt to decipher a complex set of regulations and engage in back-and-forth communication with carriers in the absence of any formal process. In essence, the new process has destroyed the former authorization process and replaced it with a void within which most health care providers and carriers are unable to function.

The WCA calls on the Workers' Compensation Board to withdraw the Medical Treatment Guidelines and all related regulations and process pending further study and refinement in order to ensure the delivery of adequate medical care to injured workers.

d. Enacting regulations that govern employer and carrier relationships with diagnostic test networks, notice of such relationships, quality care standards, and provision of diagnostic test reports.

The 2007 amendments to the Workers' Compensation Law authorized employers and insurance carriers to enter into contracts with diagnostic test networks for the performance of radiological and other diagnostic tests in workers' compensation cases. The amendments were intended to provide cost savings to employers and carriers while preserving quality of care for injured workers.

Four years of experience under the statutory amendments has highlighted the need for additional regulation under the statute. Among other matters, provision must be made for (1) notice of the required use of the employer or carrier's network to the injured worker and the treating physician(s); (2) proximity of the test facility to the injured worker's residence; (3) provision of reports and films to the injured worker and the treating doctor; (4) quality standards; and (5) filing and public disclosure of contracts between employers, carriers, and diagnostic test facilities.

The WCA calls on the Workers' Compensation Board to promulgate and issue for public comment regulations related to employer and carrier diagnostic test networks.

e. Enacting regulations that govern the Board's use of impartial specialists, guaranteeing the impartiality of such specialists and providing oversight.

The Workers' Compensation Law authorizes the Workers' Compensation Board to utilize impartial specialists in cases involving questions of diagnosis or causal relationship. The Board's use of such specialists is, however, wholly unregulated. This has called into question the impartiality and qualifications of physicians selected by the

Board to serve as impartial specialists, undermining the confidence of the parties in the system.

This oversight should be remedied with regulations addressing, among other items, (1) the circumstances in which impartial specialist examinations are appropriate; (2) the circumstances in which the authority to direct such examination may rest with a WCL Judge or with the Board; (3) qualifications to serve as an impartial specialist and periodic re-certification of same; (4) the mechanism for a party to object to the direction for an impartial specialist examination or the qualifications or appointment of a particular impartial specialist; (5) the conduct of impartial specialist examinations; (6) filing and service of impartial specialist reports; (7) cross-examination of impartial specialists.

The WCA calls on the Workers' Compensation Board to promulgate and issue for public comment regulations related to the use of impartial specialists.

#### **4. RESTORATION OF BASIC PRINCIPLES LEGISLATION**

##### **a. A00186 - a cost-of-living adjustment for permanently totally disabled workers and dependents in death cases.**

Unlike Social Security Disability benefits, workers' compensation benefits do not rise as the cost of living rises over time. Workers who were injured years ago are still receiving the benefit rates in effect at the time of their accidents - in some cases less than \$150 per week. These workers include the most seriously injured, who have been found permanently totally disabled, and the surviving spouses and children of workers who were killed on the job.

A00186 would provide a cost of living adjustment for those who are most in need – workers who are permanently totally disabled and the dependents of those who died on the job. This much-needed adjustment would further the basic purpose of the Workers' Compensation Law, which is to provide economic support to injured workers and their dependents.

The WCA supports A00186.

##### **b. Amending WCL Sections 15(3)(w) and 15(6) to harmonize the effective dates of the caps on permanent partial disability benefits and increased benefit rates.**

The 2007 amendments to the Workers' Compensation Law imposed time limitations, or caps, on permanent partial disability benefits for workers injured on or after March 13, 2007. That same legislation increased the maximum weekly benefit rate for workers injured on or after July 1, 2007.

It is fundamentally unfair for workers who were injured between March 13, 2007 and July 1, 2007 to be subject to the permanent partial disability “caps” while being denied the benefit of increased maximum weekly rates. The basic compromise of the 2007 legislation was a trade – increased weekly maximum rates for time limits on permanent partial disability benefits. The workers who fall in the “gap” between March 13, 2007 and July 1, 2007 are victimized by suffering all of the considerable downside of that trade, while reaping none of the benefits.

The WCA supports amending the 2007 legislation to make the permanent partial disability caps effective for accidents occurring on or after July 1, 2007, which is the same date as the increased maximum rates became effective.

c. Amending WCL Section 15(6) to index the minimum benefit rate.

The 2007 amendments to the Workers’ Compensation Law “indexed” the maximum weekly workers’ compensation rate for accidents occurring on or after July 1, 2010. As a result of the indexing provision, the maximum weekly benefit rate for accidents occurring between July 1, 2010 and June 30, 2011 is now \$739.83, compared to \$400 for accidents occurring prior to July 1, 2007.

While the 2007 legislation did raise the minimum weekly benefit from \$40 per week to \$100 per week, it did not index the minimum rate as it did the maximum rate. The minimum rate is crucial to tens of thousands of low-wage workers. Just as the maximum weekly benefit rate was indexed to prevent it from falling into economic irrelevance (as occurred when it was not raised from 1992 – 2007), the minimum weekly benefit should also be indexed.

The WCA supports amending the Workers’ Compensation Law to provide that the minimum weekly benefit shall be 25% of the maximum weekly benefit beginning July 1, 2010, the effective date of indexing for the maximum weekly benefit.

d. Amending WCL Section 16(4)(b) to increase no dependency awards to \$100,000 and indexing same.

Workers’ Compensation Law Section 16(4)(b) provides for an award of \$50,000 payable to a workers’ parents or estate in cases of work-related death where there is no surviving spouse or other dependents. This provision was added to the law in 1990, and has remained unchanged since that time. In the interim, the maximum weekly workers’ compensation benefit rate has nearly doubled.

It is plainly inequitable for the award in a death case to remain unchanged for over twenty years. This award should be increased in accordance with the increase in other workers’ compensation benefit rates, and should be similarly indexed.

The WCA supports an amendment to WCL Section 16(4)(b) that would increase the “no dependency” death case award to \$100,000 and index that award in future years.

e. Amending WCL Section 15(6)(a)(4) to prohibit reduction in the state average weekly wage for purposes of the Workers’ Compensation Law.

The 2007 amendments to the Workers’ Compensation Law tied the statutory maximum benefit rate to the state average weekly wage. While this indexing achieved the salutary result of providing for automatic increases in the statutory maximum rate without the need for further legislative review, it leaves open for the potential reduction of the statutory maximum rate from one year to the next depending on the calculation of the state average weekly wage.

The maximum workers’ compensation benefit rate has never been reduced from one year to the next in nearly a century of workers’ compensation practice in this State. It was not the intent of the Legislature in enacting the 2007 amendments to permit for a reduction in weekly workers’ compensation benefits; to the contrary the intent was to enact an increased weekly benefit in exchange for a limitation of permanent partial disability benefits.

The WCA supports an amendment to WCL Section 15(6)(a)(4) that would provide that any calculation of the state average weekly wage that results in a lower figure than the year prior shall be deemed to be equal to the previous year, thus preventing a reduction in the maximum weekly benefit rate from one year to the next.

f. Amending WCL Section 204 to increase the maximum rate for NYS Disability Benefits from \$170 per week to \$500 per week.

Although the maximum weekly workers’ compensation benefit rate has been adjusted periodically over the past quarter century, the maximum benefit rate for New York State Disability Benefits has remained unchanged at only \$170 per week. New York workers who are disabled for non-occupational causes, and those whose workers’ compensation claims are contested, depend on New York State Disability Benefits for income support during periods of temporary disability.

The current Disability Benefits rate is less than half the unemployment insurance benefit rate and less than one-third of the maximum workers’ compensation benefit rate, and is inadequate to support a disabled worker even at poverty level.

The WCA supports an amendment to WCL Section 204 to increase the maximum New York State Disability Benefit rate to \$500 per week.

- g. Amending the VAWBL and VFBL Sections 8 through 11 to increase the rates for Volunteer Firefighter Benefit Law claims to correspond to the maximum workers' compensation benefit rate, as indexed.

Although the 2007 amendments to the Workers' Compensation Law increased the maximum workers' compensation benefit rates for the first time in 15 years, the Legislature neglected to enact a corresponding increase in the benefit rates for volunteer firefighters covered by the Volunteer Firefighter Benefit Law and volunteer ambulance workers covered under the Volunteer Ambulance Workers Benefit Law. Benefit rates and certain other provisions in the Volunteer Firefighter Benefit Law and Volunteer Ambulance Worker Benefit Law have historically been drawn from corresponding provisions in the Workers' Compensation Law, and the Workers' Compensation Board administers claims brought under the VFBL and the VAWBL.

Just as the \$400 maximum weekly benefit rate was inadequate to compensate workers for wage loss due to on-the-job injury, it is inadequate to compensate volunteer firefighters and ambulance workers who suffer line-of-duty injuries and are disabled from their occupation.

The WCA supports amendments to the VFBL and VAWBL that would increase the maximum weekly benefit rates under these statutes to mirror the Workers' Compensation Law, and to proportionally increase the rates for partial loss of wage earning capacity.

- h. Amending WCL Section 27 to include self-insured employers and the State Insurance Fund in addition to private insurance carriers.

Prior to the 2007 amendments to the Workers' Compensation Law, private insurers were required to deposit the present value of the future liability for indemnity payments into the Aggregate Trust Fund in cases of death and permanent total disability, while the Board retained discretion to require such deposits in cases of permanent partial disability.

In order to encourage the settlement of permanent partial disability claims, the 2007 amendments made Aggregate Trust Fund deposits mandatory for permanent partial disability claims involving private insurers. The amendments excluded, however, the State Insurance Fund and self-insured employers.

The exclusion of the State Insurance Fund and self-insured employers is contrary to the underlying legislative intent to encourage settlement of claims, particularly with regard to many self-insured employers which refuse to appropriate funds for the settlement of claims, instead extending their fiscal liability years into the future.

The WCA supports an amendment to WCL Section 27 that would mandate deposits to the Aggregate Trust Fund in all cases of permanent partial disability, regardless of the identity of the responsible payor.

i. Amending WCL Section 29 to provide employers and carriers with a lien on the portion of third-party recoveries corresponding to workers' compensation benefits.

Workers' Compensation Law Section 29 provides employers and carriers with a lien on the proceeds of any third-party action brought by the injured worker. This provision is intended to preclude a "double recovery" by the injured worker. In its present form, however, the courts have interpreted the statute to grant the compensation carrier a lien for wage loss and medical expenses paid against "any" recovery obtained by the injured worker, regardless of its character. Compensation payments for wage loss and medical expenses become liens on personal injury recoveries for pain and suffering.

Rather than preventing "double recoveries" by injured workers, this interpretation provides a windfall to employers and carriers. In many instances, the entirety of the worker's personal injury recovery goes to satisfy the employer or carrier's lien and credit, leaving the worker with no benefit from his or her personal injury suit and no compensation for pain and suffering.

The WCA supports an amendment to WCL Section 29 that would provide employers and carriers with a lien and credit on the portion of third-party recoveries that corresponds to the workers' compensation benefits that were paid, but not on the portions of third-party recoveries that do not correspond to workers' compensation benefits.

j. Adopting regulations governing "independent medical examinations," delineating permissible relationships between medical consultants, IME vendors, and carriers, establishing data tracking for the reports of such physicians, and strengthening and clarifying existing regulations regarding IME examinations and reports.

The use by employers and insurance carriers of "independent medical examinations" is pervasive in the workers' compensation system. Reports resulting from these examinations are used to reduce and deny medical and indemnity benefits to injured workers.

The IME process has historically been the source of substantial abuse by employers and insurance carriers. In 2000, the Workers' Compensation Law was amended in an effort to remedy that abuse, and the Workers' Compensation Board subsequently issued regulations in furtherance of the statutory amendment. Although the statute and existing regulations have been beneficial, the use of "IME vendors" continues to result in the submission of inaccurate and sometimes fraudulent IME reports.

Among other matters, provision must be made to address (1) relationships between insurers and IME companies; (2) disclosure of such relationships; (3) relationships between IME companies and IMEs; (4) disclosure of such relationships; (5) permissible fees for the conduct of independent medical examinations; (6) restriction of the application of the regulations to employer and carrier consultants; (7) data collection regarding the outcome of IME examinations by IME, IME company, and carrier; (8) service and filing of IME reports.

The WCA calls on the Workers' Compensation Board to promulgate and issue for public comment regulations related to the conduct of independent medical examinations.