

# **NEW YORK WORKERS' COMPENSATION ALLIANCE**

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## **ANALYSIS AND COMMENTS ON THE NOVEMBER, 2017 PROPOSED SCHEDULE LOSS OF USE GUIDELINES**

November 27, 2017

### **INTRODUCTION**

On April 10, 2017, the New York State Legislature directed the Workers' Compensation Board to:

consult with representatives of labor, business, medical providers, insurance carriers, and self-insured employers regarding revisions to permanency impairment guidelines, including permitting review and comment by such representatives' chosen medical advisors, and after consultation shall, in accordance with the state administrative procedure act, propose for public comment revised permanency guidelines concerning medical evaluation of impairment and the determination of permanency as set forth in paragraphs a through v of this subdivision by September first, two thousand seventeen, with such guidelines to be adopted by the chair by January first, two thousand eighteen. The permanency impairment guidelines shall be reflective of advances in modern medicine that enhance healing and result in better outcomes.

On September 1, 2017, the Board issued a proposed amendment to 12 NYCRR 300.2, proposed two new regulations (12 NYCRR 300.39 and 12 NYCRR 325-1.6), and a draft of new

“impairment guidelines” for schedule loss of use, which were incorporated by reference into the proposed regulations. A public comment period was provided, which expired on October 23, 2017.

On November 22, 2017, the Board issued a second set of proposed regulations and guidelines. The November, 2017 set of proposals (1) rescinded the September proposed regulations; (2) rescinded the September proposed guidelines; and (3) carried forward the existing schedule loss guidelines, with several significant exceptions.

This document provides a summary of the proposed changes in the guidelines, the WCA’s analysis of their impact, and the WCA’s recommendations for further improvements.

## **SUMMARY OF CHANGES IN THE NOVEMBER, 2017 PROPOSED GUIDELINES**

**Fingers.** The current impairment guidelines include a provision known as “loading.” This is applied where the injury involves multiple fingers, and involves increasing the award by a percentage and converting the result into a percentage loss of use of the hand. The November, 2017 proposal would increase the load percentages from 25%, 50% and 100% to 30%, 60% and 120%. Sections 2.3, 2.6, 2.7.

The November, 2017 proposal also changes the evaluation for trigger fingers from “25% - 33.33%” to “up to 33.33%.” Section 2.5.

**Thumb.** As compared to the current guidelines, the November, 2017 guidelines reduce the definition of normal radial abduction of the thumb from 90 degrees to 60 degrees. Depending on interpretation, they may also reduce ankylosis (total loss of motion) from 100% to 80%. Section 2.4.

**Hand.** As compared to the current guidelines, the November, 2017 proposal changes the evaluation for mild loss of dorsiflexion from “7.5% - 10%” to “7.5%.” Sections 3.3, 3.4.

**Elbow:** As compared to the current guidelines, the November, 2017 proposal changes the percentage loss for mild loss of flexion from “7.5% - 10%” to “7.5%,” and for moderate loss of flexion from “33.33% - 40%” to “33.33%.” Section 4.4.

**Shoulder.** As compared to the current guidelines, which arguably permit the addition of percentage losses for forward flexion and abduction, the November, 2017 proposal states that the greater of the two losses should be used. The November, 2017 proposal permits the addition of 10% to the schedule loss if there are moderate defects of motion in both planes. Section 5.4.

The November, 2017 proposal deletes entirely the assignment of a 10% - 15% schedule loss of use for rotator cuff tear. Section 5.5.

As compared to the current guidelines, the November, 2017 proposal replaces the provision that a total shoulder replacement should be assigned a 60% - 66.67% schedule loss of use with a provision for a range of 35% - 80% depending on a variety of factors. Section 5.5.

**Hip.** As compared to the current guidelines, the November, 2017 proposal replaces the provision that a total hip replacement should be assigned a 60% - 66.67% schedule loss of use with a provision for a range of 35% - 80% depending on a variety of factors. Section 6.5.

**Knee.** The November, 2017 proposal deletes entirely the assignment of a 7.5% schedule loss of use for a meniscus tear, as well as the guidance that the typical award is an average of 15% - 20%. Section 7.5.

As compared to the current guidelines, the November, 2017 proposal replaces the provision that a total knee replacement should be assigned a 60% - 66.67% schedule loss of use with a provision for a range of 35% - 80% depending on a variety of factors. Section 7.5.

**Foot.** As compared to the current guidelines, the November, 2017 proposal changes the evaluation for mild loss of dorsiflexion from “7.5% - 10%” to “7.5%.” Section 8.4.

## **ANALYSIS OF CHANGES IN THE NOVEMBER, 2017 IMPAIRMENT GUIDELINES**

The Board’s November, 2017 proposals represent a significant improvement over its September, 2017 proposal. The regulations proposed in September that would have restricted the rights of injured workers and could have been subject to widespread fraud and abuse by so-called “independent medical examiners” used by insurers to defend claims have been rescinded. The September version of the impairment guidelines that would have created significant uncertainty and litigation in the system, while simultaneously slashing benefits for workers, has also been rescinded.

The November proposal is a credit to Governor Cuomo and Chair Rodriguez, as well as the New York State Assembly Majority, the New York State Senate Democrats, the Independent Democratic Conference and the individual Republican State Senators who heard and responded to the concerns that injured workers and others expressed about the Board’s September proposal. However, the November proposal still represents a reduction in benefits that cannot be entirely justified by “advances in modern medicine that enhance healing and result in better outcomes.”

**Total Joint Replacement.** It seems likely that advances in surgical techniques have resulted in better outcomes for total hip, knee, and shoulder replacements, and that the reduction from a floor of 50% or 60% to 35% may be justified. However, the 35% figure in the November guidelines incorporates many range of motion deficits, thus making it unlikely that the final award will exceed the 35% figure except in the event of a disastrous medical result. The November, 2017 guidelines therefore represent about a one-third reduction in the average award for these injuries.

WCA Position: The 35% baseline figure should be retained, but range of motion deficits should be added to that figure, not included in it.

**Knee and Shoulder Tears.** The November proposal assigns no schedule loss of use for tears of the meniscus or rotator cuff, as compared to the existing guidelines which assign 7.5% and 10% - 15%, respectively, for these conditions. This change will cut the awards for these injuries at least in half, since the current guidelines envision average awards of 15% for meniscal tears and 25% - 30% (or more) for rotator cuff tears. Unlike total joint replacements, there is no apparent medical advance that would justify the conclusion that the tear of an essential anatomical structure no longer results in permanent damage. In addition, the elimination of the “special consideration” for meniscal tears and rotator cuff tears, while leaving intact the special considerations that apply to many other conditions, is more indicative of an ends-oriented approach aimed at reducing benefits than an outcome justified by medical advances.

WCA Position: The “special considerations” for tears of the meniscus and rotator cuff tear in the existing guidelines should be retained.

**Range of Motion.** The November proposal includes minor reductions in the percentage loss assignable to range of motion in several areas, often by either reducing the range of potential outcomes under the present guidelines to the lowest figure, but in one instance (radial abduction of the thumb) by changing the definition of “normal” range of motion. While we are in favor of clarity and certainty in the guidelines, we cannot support the re-definition of “normal” range of motion in the absence of medical support for the change.

WCA Position. Radial abduction of the thumb should remain defined as “normal” at 90 degrees, not 60 degrees. In all other areas where the current guidelines provided a range, the new figure should be the midpoint of that range (for example, where the current guidelines provide a range of 7.5% - 10%, the new figure should be 8.75%, not 7.5% as in the November proposal).

**Loading.** The November proposal clarifies the role of loading in the event of injuries to multiple fingers, and slightly increases the percentages to be used. This appropriately reflects the impact of significant injury to multiple fingers on the function of the hand.

WCA Position. The WCA supports the November, 2017 proposed guideline provisions regarding loading.

## **CONCLUSION**

Although the November, 2017 proposal represents a significant advance over the Board’s September, 2017 proposals, there remain areas in which benefits for injured workers can be improved.