

What the NY WC Reform Bill Means To You

Workers' Comp reform in NY has been long overdue. Governor Spitzer made it clear that he would be pushing through a reform early in his term. The WC Reform Bill is his first major piece of legislation.

On March 13, 2007, this bill was signed into law. The reform is a result of negotiations between the Governor and the Legislature, with extensive input from the business and labor communities. In addition to changes in the statute, the Governor realized that regulatory reform was also needed to complement the new legislation.

The Governor has charged the Superintendent of Insurance to lead the following regulatory reform efforts:

- **Design of Data Collection System** – The Superintendent is directed to take the steps necessary to gather all data on a regular and ongoing basis necessary to make appropriate policy judgments and determine whether to approve rates. The Superintendent is to report back to the Governor by April 27, 2007, with a report of what data will be captured and when it will begin the capturing of it. The first official report for calendar year 2007 is due by March 1, 2008.
- **Design of a Streamlined Docket** – The Superintendent is directed to develop a set of draft streamlined WC regulations. The goal is to design a system in which an injured workers' case will be adjudicated within 90 days of the initial dispute. A progress report is due by April 27, 2007, and completed regulations are due by June 1, 2007.
- **Design New Guidelines** – The current medical guidelines are inadequate. The Superintendent is directed to develop: (1) guidelines that structure information the treating physician is required to report; (2) a set of best practices for health care professionals who are providing treatment; and (3) protocols and training for WCB law judges and employees. A plan for developing these guidelines is due on April 27, 2007, and the final draft no later than December 1, 2007.

Bill A.6163 results in changes to 76 Sections of the current NY WC law. We have highlighted the major provisions below. This bill addresses the most crucial elements of the current system. There are details that still need to develop favorably if the maximum savings from the bill are to be achieved. First and foremost are the medical guidelines that are due by December 1, 2007.

SUMMARY

Major Provisions:

I. Potential Payout Increases

- Maximum weekly indemnity benefit levels are raised from the \$400 rate that has been in effect since 1992. Minimum weekly indemnity benefit level is increased from \$40 to \$100.
- The dollar threshold above which the provider must secure advance authorization has been raised from \$500 to \$1,000.
- Establishing caps of Permanent Partial disabilities may lead to increased litigation costs as carriers invoke the new law to limit their liabilities. Lengthy litigation to avoid the unwarranted establishment of Permanent Total Disability is anticipated.
- The required deposit of the classification award into the Aggregate Trust Fund prevents any savings on the part of the carrier for any settlement following the deposit.

II. Potential Cost Savings

- The Commissioner of Labor is to promulgate rules and regulations for the implementation of safety, drug and alcohol prevention, and return to work incentive programs. Employers who implement these programs will receive premium credits set by the Superintendent of Insurance.
- The phased out elimination of the Second Injury Fund will eliminate the assessments passed along to NYS employers.
- Permanent partial disability benefits will be capped based on percentage loss of wage earning capacity for accidents on and after **3/13/07**.
- Carriers can contract with networks and require claimants to have diagnostic testing (x-rays, MRIs) performed by network providers.
- Fee schedules will be established for durable medical goods, dental care and pharmaceuticals. Employers and carriers may require a claimant to receive all prescription medicine from a pharmacy or pharmacies with which it has a contract.

III. Administrative Penalties

- The penalty for a frivolous appeal is raised from \$250 to \$500.
- Penalty for untimely payment of pharmacy bill (within 45 days).
- Criminal and Civil penalties for Employers who fail to secure appropriate WC Coverage

IV. Structural/Procedural

- A pre-hearing conference will be scheduled 45 days from the receipt of both a C-7 and a medical report referencing the injury instead of 60 days from the receipt of the C-7 alone.
- Rocket Docket requires all cases with unresolved issues after one year from raising the issue, to be transferred to the expedited hearing part. This was previously done after two years.
- An appeal to the Appellate Division will not stay payment of any medical costs. If the appeal is successful, the WCB will reimburse costs. The mechanism for the recovery of such costs is not clearly outlined in the law.

V. Key Effective Dates

3/13/07	Law was enacted
4/12/07	Employer Fraud sections become effective
4/27/07	Superintendent of Insurance to report on regulatory reform as stated above
6/1/07	New docket regulations to take effect
7/1/07	New Benefit Rates take effect; ATF deposits on all classifications made after this date; claims for SIF can't be made for accidents after this date
7/11/07	Additional fee schedules become effective; Pre-Auth limit increases; Pharmaceutical fee schedule and ability to direct
9/1/07	The Superintendent of Insurance must issue a report on how CIRB has performed tasks, whether any tasks are suitable for other agencies and the rate making process for WC insurance.
12/1/07	New guidelines final draft is due; Commissioner of Labor has to make recommendation how to ensure claimants with PPDs return to gainful employment.
2/1/08	The Rating board is dissolved
3/1/08	The first Data report is due
3/31/08	Commissioner of Labor reports the NYS AWW for previous year
12/1/08	First Safety Net reporting is due

DETAILS OF MAJOR PROVISIONS:

Benefit Rates (Applicable to accidents on or after 7/1/07)

- 1) Maximum weekly indemnity benefit levels are raised from \$400 as follows:
 - \$500 for accidents or disablements on and after 7/1/07
 - \$550 for accidents or disablements on and after 7/1/08
 - \$600 for accidents or disablements on and after 7/1/09
 - Two-thirds of the state average weekly wage as reported by the Commissioner of Labor to the Superintendent of Insurance on and after 7/1/10 and every July 1st thereafter. The current average weekly wage in NYS is \$1,200.

- 2) Minimum weekly indemnity benefit level is increased from \$40 to \$100 for accidents on or after 7/1/07. If the claimant's wages are less than \$100 per week, full wages will be paid. This provision, in all probability, will serve as a disincentive to return to work among low wage earners.

- 3) Death Benefit Increase. The maximum amount of weekly compensation to be taken into consideration in calculating the death benefit will increase from \$600 to:
 - \$750 for accidents or deaths as of 7/1/07
 - \$825 for accidents or deaths as of 7/1/08
 - \$900 for accidents or deaths as of 7/1/09
 - NYS average weekly wage, each year thereafter

Permanent Partial Disability Cap (Applicable to accidents on or after 3/13/07)

Compensation for Injured Workers with permanent partial disability will continue to be 2/3's of the difference between their Average Weekly Wage and the Injured Worker's wage earning capacity. For accidents on or after March 13, 2007, the weekly benefits are capped based on percentage loss of wage earning capacity according to the following schedule:

% Loss of Wage Earning Capacity	Maximum Benefit Weeks	Number of Years
Greater than 95%	525	10.10
90% - 95%	500	9.62
86% - 90%	475	9.13
81% - 85%	450	8.65
76% - 80%	425	8.17
71% - 75%	400	7.69
61% - 70%	375	7.21
51% - 60%	350	6.23
41% - 50%	300	5.77
31% - 40%	275	5.29
16% - 30%	250	4.81
15% or less	225	4.33

The caps do not apply to dates of accidents prior to 3/13/07 regardless of the date of classification. Additionally, the cap is calculated from the date the claimant is classified as having a permanent partial disability. The capping of PPD benefits may generate more claims and/or litigation around permanent total disability for which the injured worker would receive weekly benefits for life. The WC law has always stated that permanent partial benefits are based on the loss of earning capacity. However in practice, benefit rates have been set using degrees of disability expressed in accordance with the Board's medical guidelines. These guidelines assessed disability as mild, moderate and marked with percentages of 25%, 33 1/3%, 50%, 66 2/3 % and 75% respectively. How these degrees of disability will translate into loss of earning capacity is not defined yet. We hope the new medical guidelines called for by Governor Spitzer will be based on objective medical criteria only and will replace the current degree of disability percentages. The determination of percentage loss of wage capacity is ultimately up to the law judge. This is another area where negotiation and litigation is likely. Whether the caps serve to pay out more or less to permanent partially disabled claimants will depend in large part on how the percentage loss of earning capacity is determined.

As a safety net, Injured Workers found to have over an 80% loss of earning capacity may request a reclassification to permanent total disability or total industrial disability within a year prior to the expiration of indemnity benefits if factors reflect extreme hardship. These factors have not been clearly defined in the law. We expect claimants to push for classifications greater than 80% to be afforded this consideration.

This section also creates a presumption that medical services will continue even after the PPD cap is exhausted. Additionally, it places the burden on the carrier in any application to discontinue or suspend such treatment.

Aggregate Trust Fund Deposits (Applicable to any classification made after 7/1/07)

This change will have a significant impact on us. This provision now requires all private insurance carriers to make an immediate present day value payment into the Aggregate Trust Fund (ATF) for any classification award made on or after 7/1/07. This applies regardless of the date of accident or disablement. This deposit into the ATF is not required of self-insured employers or the State Insurance Fund. Who will determine the present day value figure required for deposit is not clearly defined in the law. Deposits into the ATF are not required if Second Injury Relief has been established or if a Second Injury Relief claim or a third party action is pending.

Once the ATF has our deposit of the Present Day Value of the classification award, they are permitted to settle claims under a Section 32 agreement; however, the carrier is not entitled to any refund for deposits made that were more than the settlement amount.

The bill also outlines that the calculation for death cases will presume that all dependent children will remain in school until age 23 and therefore remain eligible for benefits. If the child did not attend school, the carrier is entitled to a refund.

Medical Cost Savings

Section 13 of the WC law is amended to provide potentially significant cost savings on the medical side.

1) Dental Care, Prosthetic Devices, and Additional Fee Schedules. (Effective on 7/11/07)

The amendment to the law adds dental care and prosthetic devices to the list of covered treatments and devices which employers must provide to an injured employee. Fee schedules will be expanded to include all “medical, dental, surgical, optometric or other attendance or treatment, nurse and hospital service, medicine, optometric services, crutches, eyeglasses, false teeth, artificial eyes, orthotics, prosthetic devices, functional assistive and adaptive devices.

2) Diagnostic Testing Networks (Effective Immediately)

Carriers will be allowed to contract with networks to perform diagnostic testing such as x-rays and MRIs. Carriers are required to notify claimants and their providers that they require the use of a provider within the network. Results of the diagnostics must be provided to the requesting physician immediately. The claimants are required to use the designated network provider, except in the event of an emergency.

3) Pre-Authorization Levels (Effective on 7/11/07)

The dollar threshold above which the provider must secure advance authorization has been raised from \$500 to \$1,000. The WCB will issue a list of pre-authorized procedures. There is the potential that more procedures will be performed which may not be necessary, as a result of the change in the pre-authorization level.

4) Pharmaceutical Fee Schedule (Effective on 7/11/07)

A fee schedule for prescriptions will be established. Additionally, generic drugs can be used unless the prescribing doctor specifies that a brand name drug must be dispensed as written. All pharmacy bills must be paid within 45 days of receipt or penalties can be imposed. If the claim is controverted or the medication is unrelated to the claim, written explanation for non-payment must be given to the submitter of the bill (claimant or pharmacy) within 45 days. Employers and carriers may require a claimant to receive all prescription medicine from a pharmacy with which it has a contract, except in the event of an emergency. The network pharmacy must have a location within a reasonable distance to claimant or provide mail-order service.

5) PPO Requirements

The current requirement that a PPO provide claimants with a choice of five doctors for each specialty is reduced to two doctors for each specialty. The in-network hospital requirement is reduced from three to two. This may ultimately allow counties that had been previously unable to be certified to become certified.

Second Injury Fund

The reform amends Section 15.8 to close the Special Disability Fund to new claims as follows:

- No claim for second injury can be made for accidents or disabilities on or after **7/1/07**.
- After **7/1/10**, no claims for reimbursement (C-250) will be accepted regardless of the date of accident or disablement.
- All outstanding claims for second injury fund relief must be perfected by **7/1/10**.

All requests for reimbursement on claims where Second Injury has already been established must be made within one year of the carrier's payment of the requested reimbursement expense or one year from the effective date of this Bill (3/13/08), whichever is later. Cases with established Second Injury relief prior to **7/1/10** will still be subject to reimbursement after that date.

Filing Fee - **Effective 3/13/07**, all C-250s must be accompanied by a filing fee of \$250.00, to be deposited in the Special Disability Fund. Upon any final ruling that a claim is eligible for second injury relief, the fund will refund \$200.00 of this fee to the claimant.

There will be no second injury relief on dust disease claims with disablements on or after **7/1/07**. A C-250 must be filed for any disablement prior to **7/1/07**.

The newly created Waiver Agreement Management Office (WAMO) will be dedicated to securing settlements of the outstanding claims which have qualified for relief under the Second Injury Fund in an effort to reduce the ultimate liability of the Fund. Under the law, WAMO may establish guidelines for settling established second injury cases and is not required to secure the permission of the carrier or Self-Insured Employer during the settlement process. Parties will be given 10 days after the settlement hearing to withdraw from the settlement agreement. The party required to make the settlement payment is not clearly defined in the law but it is believed that the carrier will make the payment and seek reimbursement from Special Funds.

Mandatory Section 32 Offers (Effective 3/13/07)

Both Self-Insured employers and carriers must make a Section 32 offer within two years of the claim being indexed by the WCB or six months after the claimant is classified with a permanent disability, whichever is later. The settlement offer must state what portion of the settlement covers lost wages, medical and prescription benefits as well as attorney fees. This provision appears to be in direct conflict with the provision requiring carriers to deposit a mandatory payment of the present day value of classification award into the Aggregate Trust Fund (ATF). Presuming the payment into the ATF was prior to the six-month mark, we would be unable to make a settlement offer including the indemnity portion of the claim.

Sanctions and Penalties

- 1) Employer Fraud (effective are specific to sections but include: 4/12/07; 7/11/07 and 9/9/07)
The bill focuses on failure of employers to obtain WC coverage. Failure to secure insurance coverage for five or fewer employees is a misdemeanor punishable by a fine of \$1,000 to \$5,000. Failure to secure insurance coverage for more than five employees is a Class E Felony punishable by a fine of \$5,000 to \$50,000 and imprisonment for up to four years. An employer who intentionally understates or conceals payroll or conceals job duties that would affect premium calculation will be subjected to a Class E Felony charge for the first violation. An employer must maintain appropriate records or be subjected to penalties and or criminal sanctions. The Chair is empowered to investigate records and issue "Stop Work Order" against employers failing to secure insurance coverage.
- 2) Sanctions for Frivolous Claims (Effective 3/13/07)
Aimed to discourage so called frivolous claims the new law provides for assessments against parties who institute or maintain actions without reasonable grounds.
- 3) Altering an IME Report (Effective 3/13/07)

The material changing of an IME report will result in the revoking of the registration carried by the IME organization, penalties up to \$10,000 and a referral to the Attorney General's office.

Incarceration

Claimants who are incarcerated upon conviction of a felony are ineligible for benefits while incarcerated. Additionally, they may re-apply for benefits upon being released.