THE EXPERIENCE OF IMMIGRANTS AND LOW-WAGE WORKERS IN THE NEW YORK WORKERS' COMPENSATION SYSTEM

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I. INTRODUCTION

The conception and eventual adoption of New York's Workers' Compensation Law is best understood in the context of the tide of immigration to New York that occurred at the turn of the twentieth century. The creation of a workers' compensation system as the foundational element of what would in later decades become the social safety net was a direct result of the onset of industrialization and urbanization. Immigrant workers, who were mostly employed in low-wage occupations, provided the labor that drove this new industrial economy. At the same time, the population explosion caused by their arrival created the need for massive infrastructure projects—in which they were also employed. The ensuing explosion of injuries—often crippling or fatal—demanded a governmental response in order to provide benefits for the injured workers and their families at a limited predictable cost to employers.

Thus, as the workers' compensation system developed in response to industrialization and urbanization, the benefits it provided were intended largely for the benefit of immigrants and other low-wage workers. This article will discuss the connection between immigrants and low-wage workers (two populations with substantial overlap) and the workers' compensation system over the past century.

Section II of the article discusses the historical relationship between immigration and the creation of New York's Workers' Compensation Law.

Section III explores the areas in which the statute expressly limits workers' compensation benefits based on immigration status.

Section IV provides an overview of the general decline of workers' compensation as an element of the social safety net that has occurred in the last quarter-century, with a focus on how that decline has had an especially adverse impact on immigrant and low-wage workers.

Section V discusses specific issues that immigrant and low-wage workers face in the present-day New York workers' compensation system.

Section VI outlines ten proposals that would improve the availability and substance of workers' compensation benefits for low-wage and immigrant workers.

II. THE RELATIONSHIP BETWEEN IMMIGRATION AND THE ADOPTION OF THE NEW YORK STATE WORKERS' COMPENSATION LAW

A. Immigration at the Turn of the Century.

"Between 1880 and 1920, close to a million and a half immigrants arrived and settled in [New York City]—so that by 1910 fully 41 percent of all New Yorkers were foreign born."[1] In the mid-1800s, the primary groups of immigrants had been Irish and German, but by the turn of the century the vast majority were Italian and Russian.[2] "By 1920 nearly half a million foreign-born Russian Jews and about four hundred thousand immigrant Italians lived in the city."[3]

Two-thirds of the Russian Jewish immigrants were skilled workers, primarily in the garment industry trades of tailoring and dressmaking.[4] By contrast, three-quarters of the Italian immigrant population were unskilled farm workers or laborers.[5] Moreover, about half of Italian immigrants were illiterate.[6]

These immigrants arrived in an age of industrialization, in which low-wage factory work was rapidly expanding.[7] "Between 1880 and 1910, the number of industrial wage earners more than doubled, growing from 275,000 to over 554,000."[8] In 1910, that figure represented about forty percent of employed New Yorkers. [9] The sharp increase in the city's population demanded the creation of additional infrastructure, with construction of the

[1] NANCY FONER, FROM ELLIS ISLAND TO JFK: NEW YORK'S TWO GREAT WAVES OF IMMIGRATION, 1 (Yale University Press, 2000).

[2] *Id.* at 6.

[3] *Id.*

[4] *Id.* at 14.

[5] *Id.*

[6] *Id.* at 71-72.

[7] *Id.* at 75.

[8] *Id.*

[9] *Id.*

Williamsburg Bridge, the Manhattan Bridge, the New York City subway system, and more.[10]

The new immigrants provided a ready source of labor for the industrial and urban boom. "The great Italian beachhead into New York's economy was unskilled construction work. Lacking urban industrial skills, most Italians had nowhere to start but in the most menial occupations. Cheap, low-skilled labor was in demand in the booming building industry—and Italians fit the bill."[11] They were frequently employed "in the arduous and nonunionized sectors of the industry, such as road and subway construction," in such numbers that in 1890 they "made up more than 90 percent of those involved in New York City's public works" and in 1910, "one in five construction workers."[12] Over four thousand Italian immigrants were hired to begin the excavation of the Lexington Avenue subway in 1900; another five thousand built the Bronx Aqueduct in 1904.[13]

Meanwhile, the Russian Jewish immigrants largely found work in the garment industry, where by 1910 they were producing seventy percent of the national total of women's clothing and forty percent of the men's.[14] "Conditions in the garment sweatshops were notorious," and "[a]ccidents and shop fires were not uncommon."[15] This was inherently low-wage work: "by 1910 clothing workers earned on average only $567, but by 1914 the minimum cost for a family of five had risen to $876."[16] As a result, "more than three-quarters of unmarried Jewish immigrant daughters over sixteen [and sixty-two percent of young Italian women] worked for wages" so their families could make ends meet.[17]

B. The Adoption of the Workers' Compensation Law.

The flood of nearly a million immigrant workers, most of whom were unskilled, into hazardous employment in factories and construction predictably resulted in an explosion of workplace accidents and injuries. According to the federal Centers for Disease Control and Prevention (CDC):

> The earliest systematic survey of workplace fatalities in the United States in this century covered Allegheny County, Pennsylvania, from July 1906

[10] *Id.* at 42.
[11] *Id.* at 81.
[12] *Id.*
[13] *Id.*
[14] *Id.* at 75.
[15] *Id.* at 85.
[16] *Id.* at 86.
[17] *Id.* at 111.

> through June 1907. (1) [T]hat year in the one county, 526 workers died in "work accidents"; 195 of these were steelworkers. … (2) The National Safety Council estimated that in 1912, 18,000-21,000 workers died from work-related injuries. (3). In 1913, the Bureau of Labor Statistics documented approximately 23,000 industrial deaths among a workforce of 38 million, equivalent to a rate of 61 deaths per 100,000 workers.[18]

During that same period, "about three hundred out of every one hundred thousand miners were killed on the job each year," as compared to a rate of nine for one hundred thousand today.[19] Mark Aldrich discusses the source of the dangers contributing to the high number of worker deaths:

> American manufacturing also developed in a distinctively American fashion that substituted power and machinery for labor and manufactured products with interchangeable parts for ease in mass production. Whether American methods were less safe than those in Europe is unclear, but by 1900, they were extraordinarily risky by modern standards, for machines and power sources were largely unguarded. And while competition encouraged factory managers to strive for ever-increased output, they showed little interest in improving safety.[20]

These working conditions developed in an environment in which workplaces were unusually dangerous and accidents were cheap. At the turn of the century, about half of fatal workplace accidents resulted in no recovery at all; the remainder averaged about six months' worth of wages. This lack of accountability encouraged the development of industrial methods that had little regard for worker safety.[21]

These trends—including the explosion of serious workplace injuries and fatalities—fully encompassed New York, which was newly flooded with hundreds of thousands of immigrant workers, many unskilled, employed in industrial and construction work.

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[18] *Achievements in Public Health, 1900-1999: Improvements in Workplace Safety—United States, 1900-1999*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/mmwr/preview/mmwrhtml/mm4822a1.htm (last updated June 11, 1999).

[19] Jamie Durisko, *A History of Safety in a Construction Environment*, VING, https://blog.vingapp.com/the-history-of-safety-in-a-construction-environment (citing total number of coal fatalities from 1900 to 2019) (last visited Apr. 14, 2020, 8:34 PM); *see* MARK ALDRICH, SAFETY FIRST: TECHNOLOGY, LABOR AND BUSINESS IN THE BUILDING OF AMERICAN WORK SAFETY xi, 1870-1939 (The Johns Hopkins University Press ed. 1997); *see also* ROGERS C. B. MORTON, U.S. DEPARTMENT OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES COLONIAL TIMES TO 1970 PART 1, Series 1029-36 (Bureau of the Census ed. 1975).

[20] *History of Workplace Safety in the United States, 1880-1970*, EH.NET, https://www.eh.net/page/4/?s=The+Economic+History+of+the+Fur+Trade (last visited Apr. 14, 2020, 4:30 PM); *see* ALDRICH, *supra* note 19, at 77-78.

[21] PETER V. FISHBACK & SHAWN EVERETT KANTON, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS COMPENSATION 34-39 (The Johns Hopkins Univ. Press ed., 1997).

In response, in 1909 the New York Legislature passed a law creating what would come to be known as the Wainwright Commission after its chair, State Senator Jonathan Wainwright. This Commission was charged with investigating the function and failings of New York's law governing employer liability for industrial accidents, and comparing it to the laws of other states and countries.[22] The Wainwright Commission found that:

> *First*, that the present system in New York rests on a basis that is economically unwise and unfair, and that in operation it is wasteful, uncertain and productive of antagonism between workmen and employers. *Second*, that it is satisfactory to none and tolerable only to those employers and workmen who practically disregard their legal rights and obligations, and fairly share the burden of accidents in industries. *Third,* that the evils of the system are most marked in hazardous employments, where the trade risk is high and serious accidents frequent. *Fourth*, that, as matter of fact, workmen in the dangerous trades do not, and practically cannot, provide for themselves adequate accident insurance, and, therefore, the burden of serious accidents falls on the workmen least able to bear it, and brings many of them and their families to want.[23]

In response to this "indictment of the old system," the Commission proposed a program of workers' compensation, under which the employer would be compelled "to share the accident burden in intrinsically dangerous trades" by purchasing insurance, the cost of which would be passed on to its customers and thus ultimately "borne by the community."[24] The authority on which this proposition rested was "the police power of the state for the safeguarding of its workers from destitution and its consequences."[25]

It is apparent that the primary intended beneficiaries of the Wainwright Commission's concept were the million-plus new immigrants who were the ones most frequently engaged "in intrinsically dangerous trades" and at risk of "destitution and its consequences." In *Ives v. South B.R. Co.*, however, the Court of Appeals found the statute to be "plainly revolutionary" and "radical" compared to the common law, under which the employer was largely held immune from liability for workplace accidents under one of three theories: (1) assumption of risk, (2) contributory negligence, or the (3) "fellow servant rule."[26]

First, under the doctrine of assumption of risk, the injured worker was barred from recovery if the injury flowed from an ordinary hazard of the

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[22] Ives v. S. Buffalo Ry. Co., 201 N.Y. 271, 284 (1911).

[23] *Id.* at 286 (emphasis added).

[24] Ives, *supra* note 22, at 286.

[25] *Id*.

[26] *Id*. at 285, 288-90.

employment he had accepted.[27] Second, the contributory negligence rule required him to be entirely free of fault in the occurrence of the accident.[28] Third, the fellow servant rule did not obligate the employer to answer in damages to one worker for injuries resulting from the fault or neglect of another.[29]

As a result, on March 24, 1911, the Court of Appeals declared the workers' compensation system that the Wainwright Commission recommended and the Legislature had adopted to be unconstitutional because "the liability sought to be imposed upon the employers enumerated in the statute before us is a taking of property without due process of law."[30]

The very next day, on March 25, 1911 146 young women, many of them recent immigrants, were burned to death in the Triangle Shirtwaist Factory fire.[31] Locked fire doors, cramped working conditions, and a lack of safety features all contributed to the death toll.[32] More than 350,000 people attended the funeral march.[33]

The Triangle Fire spurred the enactment of new laws concerning fire safety, factory inspections, sanitation, wages and hours, employment of minors, and more. Chief among these early workplace safety and labor law advances was the amendment of the New York State Constitution to allow "the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault."[34]

The Legislature promptly enacted a "Workmen's Compensation Act" effective July 1, 1914.[35] It thereafter survived constitutional challenges in both the New York Court of Appeals and the United States Supreme Court.[36]

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[27] *See id*. New York did not adopt a comparative negligence rule until 1975. L. 1975, c. 69. Under the previous contributory negligence rule, a plaintiff was required to demonstrate freedom from fault or recovery was entirely barred. *See* Rossman v. La Grega, 28 N.Y.2d 300, 304 (1971).

[28] *Id*.

[29] *Id*.

[30] *Id*. at 317.

[31] *The Triangle Shirtwaist Factory Fire,* OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, https://www.osha.gov/aboutosha/40-years/trianglefactoryfire (last visited Feb. 13, 2020) [hereinafter *The Triangle Shirtwaist Factory Fire*, OSHA].

[32] *Id*.

[33] The Triangle Shirtwaist Factory Fire, AFL-CIO, https://aflcio.org/about/history/labor-history-events/triangle-shirtwaist-fire (last visited Feb. 13, 2020) [hereinafter *The Triangle Shirtwaist Factory Fire,* AFL-CIO].

[34] N.Y. CONST. ART. I, § 18.

[35] L. 1914, c. 41.

[36] *See generally* Jensen v. S. Pac. Co., 215 N.Y. 514 (1915); New York Cent. R.R. Co. v. White, 243 U.S. 188 (1917).

The immediate beneficiaries of the new law were the immigrant workers—largely Italians and Russian Jews—whose injuries and death had necessitated its adoption. One claim was filed by the family of a worker named Spaduccino who was involved in a workplace accident while working in Rome, New York and died of his injuries, leaving a wife and child in Italy.[37] Another was filed by the wife of Galzino Esoni, who also died in an a workplace accident.[38] Giovanni Babino was killed on the job while working in Brooklyn[39] and John Pifumer was injured and died while working in Syracuse, each being survived by parents in Italy who filed for benefits.[40] Vincenzo Bonnano, age 15, met the same fate while working in Buffalo, also leaving behind parents in Italy.[41] Thomas Paola broke his collarbone when the trestle he was standing on collapsed and he died of pneumonia within two weeks, leaving a widow and children in Italy.[42] Alexander Fedorchuck "had his right arm torn off and died the same day," leaving behind a child in Russia.[43] Ignatz Werenjchik met a similar fate.[44]

The remaining sections of this article will consider how these immigrant workers and their dependents, as well as generations of immigrants over the following decades, have been treated by the system of workers' compensation that New York devised to relieve them from "the burden of serious accidents" that they were in no position to bear and which impoverished their families.[45]

III. IMMIGRATION STATUS AND WORKERS' COMPENSATION BENEFITS

From its inception, the Workers' Compensation Law provided benefits to injured workers largely without regard to immigration status. The original statute provided in part that: "Aliens. 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."[46] The Court of Appeals has held that under the plain and direct language of the statute, "[a]ll workers, whether or not they are authorized to work in this country, are

[37] Spaduccino v. Hayes, 167 N.Y.S. 483, 484 (3d Dep't 1917).

[38] Esoni v. Tisdale Lumber Co., 210 N.Y.S. at 344 (3d Dep't 1925).

[39] Casella v. McCormick, 167 N.Y.S. 564, 565 (3d Dep't 1917).

[40] Pifumer v. Rheinstein & Haas, Inc., 175 N.Y.S. 848, 849 (3d Dep't 1919).

[41] Bonnano v. Metz Bros. Co., 177 N.Y.S. 51, 52 (3d Dep't 1919).

[42] Paola v. Porter Bros., 205 N.Y.S. 281, 282 (1924).

[43] Fedorchuck v. Houbigant, Inc., 246 N.Y.S. 31, 32 (3d Dep't 1930).

[44] Werenjchik v. Ulen Contracting Corp., 240 N.Y.S. 619, 621 (3d Dep't 1930).

[45] Ives, *supra* note 22, at 286.

[46] WORK. COMP. LAW § 17.

eligible for workers' compensation benefits as such benefits are available."[47] The Court also observed that:

> To further the claimant's ability to establish his [or her] right to benefits, the statute creates a presumption that the injuries are compensable. The statute was enacted for humanitarian purposes, framed, in the words of Chief Judge Cardozo, to insure that injured employees might be saved from becoming one of the derelicts of society, a fragment of human wreckage. To further that purpose, we have held that the statutory obligation to compensate injuries sustained in the course of employment which are causally related to it does not depend on the equities of a particular case, nor may it be avoided because of the workers' fraud or wrongdoing: it is absolute (Matter of Richardson v Fiedler Roofing, 67 NY2d 246, 251, 493 NE2d 228, 502 NYS2d 125 [1986] [citations and internal quotation marks omitted]).[48]

The statute, did not, however, provide the same equal treatment to the non-resident dependents of workers who were killed on the job. These dependents also faced special challenges in demonstrating their eligibility for benefits. Moreover, despite the language of the statute and the above-quoted interpretation, in recent decades benefits have been restricted for injured immigrants in several important ways. These issues are explored in the following subsections.

A. Death Benefits: Commutation.

The original statute included two important limitations on an award of death benefits to non-resident aliens (with the exception of Canadians). One of these limitations was a "commutation" provision that halved benefits for the dependents of a deceased worker who were "not residents or about to become nonresidents of the United States or Canada."[49]

The 1914 version of Workers' Compensation Law § 17 provided that that "the Commission may, at its option, or upon the application of the insurance carrier, shall, commute all future installments of compensation to be paid to such aliens, by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Commission."[50] Unsurprisingly, this provision motivated

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[47] Ramroop v. Flexo-Craft Printing, Inc., 11 N.Y.3d 160, 169 (2008) (Ciparick, J., dissenting in part).

[48] *Id*. at 169-70.

[49] L.1913, c. 816, § 112; amended L.1914, c. 41.

[50] *Id*.; *The Bulletin*, 1(5) New York State Industrial Commission 1, 2 (The Commission ed. 1915), https://books.googleusercontent.com/books/content?req=AKW5QafqvCQvhxoNcKaySlZEP34SE7hLOCVTTzb6Gsd1QS82KMroRF67gyFgZSXUC5SHEWoYfpNOKir6qQWXGnxxpF19MrW8l0hgz4JNaDmVrKELA4nxrwa54KG-5BqMmLjBXf3owH7SVwZ8AsxkPUGctuCjN7IWYhStSS1Y9DKqJF7vuSSTCBvFZJ5YBQZFfKzo72alkKYRNHCZdj9eav7j8u7cpjnBmWGP5tEcU07eQBnTLXcHcW7Bh3q1zW03qDmMKsocsaki (cited text appears on page 57 in the hyperlinked PDF file).

employers and insurers to seek commutation and reduction of death benefits in many instances in which the deceased worker's dependents were non-residents, or in which an argument could be made that they were "about to become nonresidents."

In *Spaduccino v. Hayes*, the immigrant worker was injured and died while working in New York, leaving behind a wife and child in Italy. [51] These dependents later came to New York and filed a claim for compensation benefits, which resulted in an award.[52] In the course of her testimony, the widow mentioned that she wanted to return to Italy, whereupon the employer requested commutation of the award into a lump sum, reduced by half.[53]

After the Industrial Commission[54] granted the employer's request and commuted the award, the widow changed her mind about returning to Italy, whereupon the Commission promptly rescinded the commutation.[55] The employer then appealed, seeking to enforce the commutation and statutory reduction of the award to the widow and child.[56] In upholding the Commission's decision to rescind the commutation of the death benefits, the Court held that:

> The evident purpose of the provisions of section 25, regulating the times of payment of compensation, was not only for the convenience of the employee and dependents by requiring the payments to be in general made with the usual frequency of the payment of wages, but also to guard against the liability of unfortunate or improvident employees or dependents becoming charges upon public charity. As to non-resident alien dependents, or aliens about to become non-residents, the latter danger did not exist, hence the propriety of the provisions of section 17, providing for the making of commuted payments. After the claimant had determined to remain a resident of this country neither she nor the appellants had longer any right to insist upon the payment of the commuted award which she had obtained upon the application of the insurance carrier and under the representation that she was about to return to Italy and reside there. At the time the Commission rescinded the award no payment had been made thereon, nor any appeal taken therefrom, nor had the rights of any third party intervened, so far as appears. The payment of the award in a lump sum would not only have been most unwise, but the Commission was fully justified as matter of law in rescinding the award.[57]

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[51] Spaduccino, *supra* note 37, at 484.

[52] *Id*.

[53] *Id*.

[54] The predecessor entity to the Workers' Compensation Board.

[55] Spaduccino, *supra* note 37, at 484.

[56] *Id*.

[57] *Id*. at 39. *But cf* Esoni, *supra* note 38 (in which the widow affirmatively sought commutation of the award so that she could return to Italy. A related issue in Esoni was whether the commutation of the

In so holding, the Appellate Division reaffirmed the core purpose of the Workers' Compensation Law: to ensure that injured workers and their dependents were provided with adequate benefits and income so that they would not become "charges upon public charity."[58] However, inherent in the Court's rationale is the addition of the phrase "in this country"—the potential for the dependents of deceased workers to become charges upon public charity in their native land was not a matter of concern to the Legislature that had enacted the statute.

Consistent with that underlying philosophy, Presiding Judge Kellogg dissented from the majority opinion in Spaduccino, observing that the majority's opinion provided an incentive for non-resident alien dependents to come to New York solely for the purpose of obtaining full compensation benefits.[59] Judge Kellogg proposed that instead, the employer's right to commutation should be measured by the location and intent of the dependents as of the date of the accident, rather than the date of the award.[60]

However, in *Gorman v. Forty-Second S., M. & S. N. A. R. Co.*, Judge Kellogg wrote for a unanimous Court that commutation was not required when the deceased worker's widow remarried and relocated to Great Britain.[61] The Court rejected the insurer's argument that she was now a non-citizen, citing the Federal Married Women's Naturalization Act of 1922, which provided that women would not lose American citizenship by marrying a foreign citizen unless they either (a) renounced their citizenship; or (b) married "an alien ineligible to citizenship."[62] Finding that citizens of Great Britain are not "ineligible to citizenship," and absent proof that the widow had renounced her American citizenship, the Court found that she remained an American citizen and that commutation was not appropriate.

A decade later, "Alexander Fedorchuck, an employee of Houbigant, Inc., on November 26, 1927, while leaning over a powder mixing machine, had his right arm torn off and died the same day."[63] Fedorchuck left behind a wife and an adopted son, who lived with his maternal grandfather in Russia but "it is claimed that he is about to become a resident of this country."[64] On the strength of this testimony, the Industrial Commission declined to commute the award, but on the insurer's appeal the Court found that the

award to the widow permitted a second award to the surviving father. The Court held that it did not, an issue that is discussed further in Section III.B. in this Article.).

[58] *Id*.

[59] Spaduccino, *supra* note 37, at 485-486.

[60] *Id*.

[61] Gorman v. Forty-Second S., M. & S. N. A. R. Co., 203 N.Y.S. 632, 634 (3d Dep't 1924).

[62] *Id*.

[63] Fedorchuck v. Houbigant, Inc., 246 N.Y.S. 31, 32 (3d Dep't 1930).

[64] *Id*.

commutation was warranted because the child was indisputably a non-resident alien.[65]

To the contrary, in *Wastie v. McIlvaine*, the decedent's wife was an English citizen who had lived in the United States for thirty years.[66] Although she was not in the country at the time of the accident, she was at the time the Industrial Commission Board commuted the award.[67] On these facts, the Appellate Division reversed the Commission's decision, a decision that was ultimately upheld by the Court of Appeals on the basis that going abroad from time to time does not transform a resident to a non-resident.[68]

The increasing reluctance of the administrative agency and the courts to implement the statutory commutation and reduction provision is best exemplified by *Follo v. Phipps Houses*, in which the decedent was an American citizen and the widow lived in Italy.[69] In Follo, the Workers' Compensation Board's decision to commute the award was reversed by the Appellate Division on the grounds that although the widow lived in Italy, "there is no proof in the record that [she] is an alien."[70]

Marriage laws and treaties between the United States and other countries stemming from World Wars I and II also significantly eroded the commutation provision of New York's Workers' Compensation Law. In *Hansen v. Corson Const. Corp.*, the Norwegian decedent became an American citizen in 1903 and later married his wife, a Norwegian citizen, in 1913.[71] She subsequently returned to Norway, where a daughter was born in 1918.[72] After decedent was killed on the job and an award of benefits was made, the insurer moved for commutation of the award.[73]

Noting that federal law permitted the widow to appear before a U.S. consul to register to retain her citizenship notwithstanding her residence in Norway, and finding that the employer and insurer bore the burden of proof that she did not do so, the Appellate Division upheld the Board's refusal to commute the award.[74] The Court additionally refused to apply the provisions of a treaty between the United States, Sweden and Norway treaty on the

[65] *Id*.

[66] Wastie v. McIlvaine, 287 A.D. at 842 (3rd Dept. 1936); aff'd 272 N.Y. 541 (1936).

[67] *Id*.

[68] *Id*.

[69] Follo v. Phipps Houses, 125 N.Y.S.2d 736, 737 (3d Dep't 1953).

[70] *Id*.

[71] Hansen v. Corson Const. Corp, 253 N.Y.S. 96, 97-98 (3d Dep't 1931).

[72] *Id*.

[73] *Id*.

[74] *Id*.

grounds that the treaty applied to naturalized citizens as opposed to the widow, who was instead a citizen by marriage.[75]

Similarly, in *Johansen v. Staten Island Shipbuilding Co*., 272 N.Y. 140, 5 N.E.2d 68 (1936), the Norwegian decedent became a United States citizen in 1900 after which he returned to Norway, was married and had four children before being killed in an industrial accident in New York in 1926.[76] After initially commuting the award, the Industrial Commission then reopened the case and instead made a full award to the widow on the same basis as in Hansen—that by marrying a citizen, she herself became one notwithstanding her residence and that absent a showing by the employer and insurer that she had renounced her citizenship, the full award was payable.[77]

On the employer's appeal, the Appellate Division departed from its prior decision in Hansen, holding that if the widow failed to demonstrate that she took affirmative steps to maintain her citizenship while residing in another country, she was presumed to be a non-resident alien and commutation was proper.[78] With regard to the children, however, the Court held that a different federal statute made them citizens by birth and, needing nothing to retain that status, the award to them could not be commuted.

The role of treaties recurred in *Iannone v. Radory Constr. Corp.*, in which the decedent's widow and child were non-resident aliens in Italy.[79] Although the Board commuted the award on the basis of Workers' Compensation Law § 17, the Appellate Division reversed the commutation on the basis of a post-World War II treaty between the United States and Italy that provided reciprocal rights "regardless of alienage or place of residence."[80] The Court of Appeals affirmed this decision, effectively ending commutation in cases where the dependents resided in countries with treaties providing their citizens and American citizens with reciprocal rights.[81]

The case of *Testa v. Sorrento Restaurant, Inc*., presented the same facts as *Iannone*, except that the injured worker was an illegal immigrant.[82] After the accident, he was "granted the right to depart the country voluntarily, in lieu of deportation."[83] The Board declined to commute the award, and the

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[75] *Id*.

[76] Johansen v. Staten Island Shipbuilding Co., 272 N.Y. 140, 144 (1936).

[77] *Id*.

[78] *Id*.

[79] Iannone v. Radory Constr. Corp., 141 N.Y.S.2d 311, 313, (3rd Dept. 1955), aff'd 1 N.Y.2d 671 (1956).

[80] *Id*.

[81] *Id*. at 672. *But see* Heaton v. Delco Appliance Div., General Motors Corp., 180 N.Y.S.2d 173 (1958), in which the language of a treaty between the United States and Great Britain was found not to provide reciprocal rights sufficient to override the commutation provision.

[82] Testa v. Sorrento Restaurant, Inc., 197 N.Y.S.2d 560, 561 (3d Dep't 1960).

[83] *Id*.

insurer appealed, contending that the claimant was a non-resident alien and that his immigration status vitiated the role of the treaty between the United States and Italy.[84] The Appellate Division rejected this argument on the basis of the principle laid out by the Court of Appeals early in the history of the law: "Workmen's compensation 'is given without reservation and wholly regardless of any question of wrongdoing of any kind.'"[85]

After seventy years, the Legislature ultimately removed the commutation provision from the statute in 1985.[86] As a matter of both statute and practicality, however, this amendment did not fully equalize benefits between citizens and resident aliens on the one hand, and non-resident aliens on the other.

B. Death Benefits: Proof of Eligibility

After the elimination of the commutation provision the statute continued to restrict benefits for some non-resident aliens who were dependents of workers involved in fatal accidents. The following provision has remained in Workers' Compensation Law § 17 from 1914 until now:

> 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, except that dependents in any foreign country shall be limited to surviving spouse and child or children, or, if there is no surviving spouse or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year prior to the date of the accident.[87]

While the present-day statute thus provides the same benefits for both resident and non-resident alien surviving spouses and/or children of a worker who is killed on the job, it restricts other non-resident potential beneficiaries to a "surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year prior to the date of the accident."[88] This stands in contrast to the death benefits available to dependents who are residents, which (in the absence of a surviving spouse and children) include grandchildren, brothers, sisters, parents and grandparents of the decedent "if dependent upon him at the time of the accident" as well as a lump-sum award to the decedent's estate if there are no dependents.[89]

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[84] *Id*.

[85] Testa, *supra* note 82, at 562 (citing Matter of Post v. Burger & Gohlke, 216 N. Y. 544, 550 (1916)).

[86] L. 1985, c. 538, § 1, p. 2615.

[87] WORK. COMP. LAW § 17.

[88] *Id*.

[89] WORK. COMP. LAW §§ 16(4), 16(4-b).

The statute thus continues to exclude a number of non-resident individuals as potential beneficiaries (brothers, sisters, grandchildren, grandparents, the estate) while also imposing the additional requirement on those who remain eligible ("surviving father or mother") of proving dependency "for the period of one year prior to the accident" instead of merely "at the time of the accident."[90]

Moreover, non-resident aliens often confront additional barriers in providing proof of their relationship to the decedent in a form acceptable to a New York court or quasi-judicial agency. The Legislature recognized this issue soon after its enactment of the statute, and in 1923 amended it to include Workers' Compensation Law § 121-a, which provides that:

> **Proof of dependency in foreign countries.** In cases involving the dependency of aliens residing in foreign countries, transcripts of birth or marriage certificates, also documents and affidavits, certified by a local official or local magistrate and authenticated as to such official or magistrate by the secretary of state or other official having charge of foreign affairs, or a United States consul, in said foreign country, may be received in evidence, but in all such cases proof of present existence and of dependency may be made by the personal appearance of each and all persons claiming relationship to or dependence upon a deceased worker under the provisions of sections sixteen and seventeen of this chapter, before a diplomatic or consular officer of the United States, and statements made to or evidence presented before such diplomatic or consular officer under oath may be received in evidence in whole or in part by the board upon any such claim. Questions regarding admissibility and adequacy of evidence arising in connection with proceedings before the consul shall be determined by the board. The board may by rule prescribe the conditions under which proofs other than personal appearance before a diplomatic or consular officer of the United States may be accepted as proof of the facts of existence, relationship and dependency.[91]

These provisions of Workers' Compensation Law §§ 17 and 121-a, as well as the practical consequences of the different legal systems and forms of documentation from one country to another, have often impacted claims for benefits by spouses, parents, and children of deceased immigrant workers.[92]

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[90] WORK. COMP. LAW §§ 16, 17.

[91] WORK. COMP. LAW § 121-a; L. 1941, c. 492, § 121-a, p. 26.

[92] This is the lead-in sentence to the discussion of all of the cases cited in the ensuing sections, so this footnote is going to be all of those cases. *See, e.g.,* Paola v. Porter Bros, 205 N.Y.S. 281 (3rd Dept. 1924); Babington v. Yellow Taxi Corp., 220 N.Y.S. 420 (3rd Dept. 1927); Pifumer v. Rheinstein & Haas, Inc., 175 N.Y.S. 848 (3rd Dept. 1919); Bonnano v. Metz Bros. Co., 177 N.Y.S.51 (3rd Dept. 1919); Schaubel v. Simons, Stewart & Foy, Inc., 261 N.Y. 544 (1933); Mizugami v. Sharin West Overseas, Inc., 583 N.Y.S.2d 577 (3rd Dept. 1992)

1. Spouses

In *Paola v. Porter Bros*., the immigrant worker fell eight feet and broke his collarbone when the trestle he was working on collapsed.[93] Within two weeks, the worker developed pneumonia and died.[94] The widow and children in Italy submitted "an affidavit by the consul general of Italy in New York of facts clearly not within his knowledge, which if evidence would make out the entire case," along with affidavits from the decedent's brother and a clergyman.[95] The Court rejected all of these documents as "not legal evidence" and reversed the Board's award of "over $4,000 without any legal evidence whatever as to the essential facts above indicated."[96] Pointing to recently-enacted Workers' Compensation Law § 121-a, the Court held that "[t]he statute provides a simple and expeditious method of procuring the necessary evidence from a foreign country, and there is no great difficulty in complying with its provisions. Such compliance is deemed essential and not unreasonable."[97]

In *Babington v. Yellow Taxi Corp*., the decedent was an American who married an Englishwoman.[98] A few years after the marriage "he deserted her," and she returned to England.[99] Asserting a belief that her American "husband was not alive and not having heard that he was alive since prior to the year 1914 [the wife then] entered into a form of marriage with" another man in England.[100] As it developed, however, her American husband was still alive until he later died as the result of a work-related accident.[101]

Reversing the Board's decision to commute the award to the widow on the grounds that she was a non-resident alien, the Appellate Division held that the second (bigamous) marriage was void *ab initio*, meaning that she remained married to an American citizen at the time of his death, and was thus an American citizen by marriage and not subject to the commutation provision.[102]

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[93] Paola v. Porter Bros., 205 N.Y.S. 281, 282 (3d Dep't 1924).

[94] *Id*.

[95] *Id*.

[96] Paola, *supra* note 93.

[97] *Id*.

[98] Babington v. Yellow Taxi Corp., 220 N.Y.S. 420, 421 (3d Dep't 1927).

[99] *Id.*

[100] *Id*.

[101] *Id*.

[102] *Id*. The Court observed, however, that co-habitation with her English husband after the death of her American husband could potentially constitute a post-death common-law marriage, thus removing her American citizenship.

2. Parents.

The provisions of Workers' Compensation Law § 17 have affected parents of deceased immigrant workers by increasing their burden of proof on the issue of dependency as well as by reducing the amount of their benefits.[103]

a. Dependency.

In *Pifumer v. Rheinstein & Haas, Inc.*, the decedent "and his brother sent two remittances, aggregating less than $50, during the year in question, to the father, and the brother testified that 'they lived on what he sent them.'"[104] Other documents submitted indicated that the parents owned a home and property valued at fifteen dollars, and subsisted "on the fruits of small jobs."[105] The Appellate Division reversed an award to the parents, holding that "[t]here is no presumption of dependency on the part of the parents of a man 32 years of age; hardly a presumption that such parents are living in a foreign country."[106]

Similarly, in *Bonnano v. Metz Bros. Co.*, the Court declined to find that the parents of the fifteen-year old decedent were dependent upon him based on "the general allegation of a brother and sister" that he "periodically sent money to his family for support" in Italy.[107] The same result pertained in *Schaubel v. Simons, Stewart & Foy, Inc*. and *Duffy v. W.G. Cornell Co.*[108]

After World War II, however, treaties between the United States and other countries eroded the requirement that a non-resident parent demonstrate dependency for a period of one year, as opposed to merely at the time of death. In *Mizugami v. Sharin West Overseas, Inc*., the decedent "was stabbed to death at the company headquarters in New York City," leaving a mother in Japan.[109] Although the Appellate Division "agree[d] with the employer that there was no proof that Mizugami had supported claimant for one year prior to the accident as required by the statute," it found "that under the terms of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan (4 UST 2063) (hereinafter the Treaty), a nonresident Japanese national making a claim for death benefits under the Workers' Compensation Law must be treated in the same manner as a United States

[103] *See, e.g.,* Cassella v. McCormick, 167 N.Y.S. 564 (3d Dep't 1917; Skarpeletzos v. Counes & Raptis Corp., 228 N.Y. 46 (1920)

[104] Pifumer, *supra* note 40.

[105] Pifumer, *supra* note 40, at 850.

[106] *Id*. at 850.

[107] Bonnano, *supra* note 41.

[108] Schaubel v. Simons, Stewart & Foy, Inc., 257 N.Y.S. at 1085 (dissenting opinion), reversed 185 N.E. 731, (1933); Duffy v. W.G. Cornell Co., 282 N.Y.S. at 304 (3d Dep't 1935).

[109] Mizugami v. Sharin West Overseas, Inc., 583 N.Y.S.2d 577, 578 (1992).

citizen," thus superseding the one-year requirement in the statute.[110] Moreover, the Court held that in consideration of the mother's financial information, "the Board could reasonably infer that the loss of Mizugami's contribution had a detrimental effect upon claimant," thus establishing dependency.[111]

Despite the decision in *Mizugami* and similar cases, however, there remains a different standard to evaluate dependency for non-resident alien parents of deceased immigrant workers than for residents, except where a treaty applies to supersede the statutory limitations.

b. Amount of Benefits.

Shortly after the statute was enacted, "Giovanni Babino came to his death in June, 1916, as the result of accidental injuries" suffered in the course of his employment.[112] He left no widow or child, but was survived by a father and mother in Italy.[113] "Both were dependent upon him for support, which he had furnished them wholly or in part for more than one year prior to the date of the accident."[114]

The Board made an award of 25% of the decedent's average weekly wage to each of the parents (for a total of fifty percent of the decedent's wage), from which the employer appealed, contending that the statute's reference to the "surviving father or mother" permitted an award to one or the other, but not to both.[115] The Court rejected this argument, holding that in the context of the statute the term "or" should be read as "and," and further observing that in view of the commutation provision the outcome of the alternative approach would be to provide the parents jointly with only 12.5% of the average weekly wage of the decedent upon whom they had been mutually dependent.[116]

Three years later, however, in the first case it decided involving Workers' Compensation Law § 17, the Court of Appeals overruled this interpretation.[117] In *Skarpeletzos v. Counes & Raptis Corp.*, the Court held that the Appellate Division's interpretation of the statute in *Cassella* "would

[110] *Id*.

[111] Mizugami, *supra* note 109, at 579.

[112] Cassella v. McCormick, 167 N.Y.S. 564 (3d Dep't 1917).

[113] *Id.*

[114] *Id*.

[115] *Id*. at 95.

[116] *Id*. Because the parents were non-resident aliens, the 25% award would be commuted to a lump sum and then halved, leaving the parents with a combined award of 12.5% of the decedent's wage, or 6.25% each. *Id*. The outcome of the award in Cassella was a combined award of 25% after commutation, or 12.5% to each parent. *Id*.

[117] Skarpeletzos v. Counes & Raptis Corp., 228 N.Y. 46, 49 (1920).

thus give as wide a range of benefit to the alien family as to the citizen family. Non-resident alien relatives may thus be discriminated against, and they are expressly excluded or paid in half the amounts provided for residents under some of the acts."[118] The Court therefore held that "[t]he award may be made to one dependent parent, but not to both."[119]

Thus, even after the elimination of the commutation provision in 1985, the statute retains the distinction that an award may be made to both parents who are citizens or resident aliens. However, such award may be made to only one parent if the parents are non-resident aliens.

3. Children.

The case of *Werenjchik v. Ulen Contracting Corp.*, in which the children of the deceased employee lived in "Soviet Russia, which is not recognized by the United States of America" provided an early test of Workers' Compensation Law § 121-a.[120] The Board accepted the children's Soviet birth certificates and the employer appealed.[121] The Appellate Division upheld the award on the basis that "[t]here is no practical way to reach the result contemplated by our humane statute otherwise."[122]

Similarly, in *Brady v. Fifth Madison Corp.*, the decedent's daughter was over the age of eighteen, totally and permanently disabled, and a resident of Ireland.[123] The employer contested her entitlement to death benefits, contending that the definition of "child" under Workers' Compensation Law § 17 did not incorporate its meaning under Workers' Compensation Law § 16, under which the daughter would have been eligible if she was a citizen or resident alien.[124] The Appellate Division rejected this contention, holding that at least with regard to children, the "language [of section 17] requires a reference to section 16 of the Workmen's Compensation Law to determine the compensation to which a resident would be entitled."[125] The Court concluded that—unlike parents—non-resident alien children were to be treated in the same manner as citizens and resident aliens.[126]

Taken as a whole, these cases point to a number of issues concerning eligibility for benefits by dependents of immigrant workers who are killed on

[118] *Id*. at 48 (citation omitted).

[119] *Id*. at 49.

[120] Werenjchik, *supra* note 44, at 620.

[121] *Id*.

[122] Werenjchik, *supra* note 44.

[123] Brady v. Fifth Madison Corp., 108 N.Y.S.2d 24, 25 (3d Dep't 1951), *app. dismissed*, 303 N.Y. 769 (1952).

[124] *Id*.

[125] *Id*.

[126] *Id*.

the job or who die as the result of injuries suffered in a work-related accident, even after the 1985 elimination of the commutation provision. Non-resident parents, spouses, and children all face both practical and statutory obstacles to prove identity and dependency. Some are excluded from benefits as a result of lack of proof; others are expressly excluded by the statute from benefits for which citizens and resident aliens are eligible.

C. Wage Replacement Benefits

Immigrant workers who are injured on the job have also faced legal obstacles to wage-replacement benefits, in addition to the practical obstacles which are discussed in Section V., infra. These obstacles were created by the United States Supreme Court opinion in *Hoffman Plastic Compounds, Inc. v. NLRB*.[127] In *Hoffman*,[128] the employer had fired the plaintiff in retaliation for engaging in union organizing efforts. An administrative law judge found that this was discriminatory, but[129] the Supreme Court held that IRCA is "a comprehensive scheme prohibiting the employment of illegal aliens in the United States" and that:

> Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations. The [NLRB] asks that we overlook this fact and allow it to award backpay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud. We find, however, that awarding backpay to illegal aliens runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer. Therefore, as we have consistently held in like circumstances, the award lies beyond the bounds of the Board's remedial discretion.[130]

The message sent by the *Hoffman* decision soon echoed in New York tort law, as defendants questioned whether an undocumented alien could seek compensation for lost wages following an accident. The issue reached the Court of Appeals in 2006 in several cases that were decided together under the caption of *Balbuena v. IDR Realty LLC*.[131]

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[127] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 140 (2002).

[128] *Id*. at 140.

[129] *Id*. at 141 (citation omitted).

[130] Hoffman, *supra* note 127, at 147-49.

[131] Balbuena v. IDR Realty LLC, 845 N.E.2d 1246, 348 (2006).

In *Balbuena*, the plaintiffs were undocumented immigrants who were injured while working in construction and had brought personal injury claims based on violations of New York's Labor Law. Their cases included claims for lost wages. The defendants contended that their immigration status precluded any claim for lost wages.[132] The Court of Appeals observed:

> In addition to the provisions relating to the responsibilities of employers, IRCA also declares that it is a crime for an alien to provide a potential employer with documents falsely acknowledging receipt of governmental approval of the alien's eligibility for employment (see 8 USC § 1324c [a]). Similar to the INA, however, IRCA does not penalize an alien for attaining employment without having proper work authorization, unless the alien engages in fraud, such as presenting false documentation to secure the employment. In order to preserve the national uniformity of this verification system and the sanctions imposed for violations, Congress expressly provided that IRCA would "preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens" (8 USC § 1324a [h] [2]) … The implications of Hoffman underlie the controversies in the two appeals before this Court. The main thrust of defendants' arguments is that IRCA, as construed by Hoffman, precludes an undocumented alien from recovering lost wages in a state personal injury action. According to defendants, such an award is a penalty upon the employer that is expressly preempted by IRCA, specifically 8 USC § 1324a (h) (2). Defendants also assert that the doctrine of "field preemption" prohibits an award of past or future earnings because the federal government has exclusive authority to regulate immigration and Congress has exercised that power by enacting the comprehensive schemes established in the INA and IRCA. Finally, defendants claim that permitting an undocumented alien to recover lost wages is in contravention of the purposes and objectives of IRCA in that it condones past transgressions of immigration laws and encourages future violations.[133]

The Court of Appeals rejected all of these arguments, holding that (1) IRCA does not pre-empt state law concerning personal injury recoveries; (2) denying lost wages in a Labor Law case would undermine the state interest in workplace safety law and regulations; but (3) undocumented status is admissible in jury evaluation of lost wages.[134] Its decision was soon followed by the Second Circuit Court of Appeals in *Affordable Hous. Found., Inc. v. Silva*.[135]

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[132] *Id*. at 348.

[133] Balbuena, *supra* note 131, at 354-355.

[134] *Id*. at 357-362.

[135] Affordable Hous. Found., Inc. v. Silva, 469 F.3d 219, 227-28 (2d Cir. 2006).

Meanwhile, employers in workers' compensation cases were advancing the same arguments as tort defendants, seeking to bar undocumented immigrant workers from receipt of post-injury workers' compensation benefits for lost wages. In *Matter of Hernandez v. Excel Recycling Corp.*, the worker "filed for workers' compensation benefits after he was injured in August 2003 while working for Excel Recycling Corporation. At a hearing before a Workers' Compensation Law Judge (hereinafter WCLJ), he admitted to buying his Social Security card to obtain work in the United States."[136] The employer and insurer contended that IRCA and the Supreme Court's decision in Hoffman, supra, preempted the Board's policy that immigration status was not relevant to workers' compensation benefits.[137]

The Appellate Division denied the employer's appeal in *Hernandez* not on the merits, but because the issue had not been raised before the Board.[138] Within two years, however, it was compelled to address the substance of the argument in *Matter of Amoah v. Mallah Mgt., LLC*.[139]

In *Amoah*, the injured worker came to New York under a visa and then stayed on, working under another person's name and legal documents.[140] After he was injured at work, the other individual attempted to extort the injured worker for a portion of his workers' compensation benefits and anticipated personal injury recovery in exchange for permitting the worker to continue using his name and documents.[141]

Seeking to avoid both extortion and the theft of his wage-replacement payments, the injured worker instead informed the insurer himself that his workers' compensation claim had been filed under a different identity and requested that further wage replacement payments be issued in his real name.[142]

In response, the workers' compensation insurer took the position "that it was contesting the payment of benefits to claimant based on claimant's utilization of fraudulent documents to obtain employment," which it later revised to a contention that he was not entitled to wage replacement benefits due to his immigration status.[143] Each of these arguments was rejected by the Board and the insurer appealed, relying on IRCA and *Hoffman*, *supra*.[144]

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136 Hernandez v. Excel Recycling Corp., 820 N.Y.S2d 340, 341 (3d Dep't 2006).

137 *Id*. at 1092; *see, e.g.*, Matter of Testa v. Sorrento Rest., 197 N.Y.S.2d 560 (3d Dep't 1960).

138 *Id*.

139 Amoah v. Mallah Mgmt., LLC, 866 N.Y.S.2d 797, 798-99 (3d Dep't 2008).

140 *Id*. at 30.

141 *Id*.

142 *Id*.

143 Amoah, *supra* note 139, at 798.

144 *Id*.

The Appellate Division upheld the Board's decision.[145] Citing the Court of Appeals decision in *Balbuena*, *supra*, it found that "Congress '[did] not intend to supplant state law,' especially laws regarding 'the states' historic police powers over occupational health and safety issues.' The Appellate Division noted that it is well settled that the status of an injured worker as an undocumented alien does not, in and of itself, prohibit an award of workers' compensation benefits."[146] It further observed that limiting the amount that an undocumented worker may collect would "lessen an employer's incentive to … supply all of its workers the safe workplace that the Legislature demands."[147] The Appellate Division reasoned that this result would incentivize "employers to violate IRCA by disregarding the employment verification system and would undermine IRCA's primary goal of combating the employment of undocumented workers," but still acknowledged that "it is unlikely that denying wage-replacement benefits to injured unauthorized workers will deter illegal aliens from violating IRCA in order to obtain employment in the first place."[148] The Appellate Division therefore found that undocumented immigration status does not bar the receipt of workers' compensation benefits for lost wages.[149]

After the Appellate Division's decision in *Amoah*, another workers' compensation insurer pursued the defense that had been originally raised and abandoned by the insurer in that case—that the injured worker's submission of invalid Social Security information constituted workers' compensation fraud sufficient to bar him from benefits *ab initio*.[150] The Board rejected the carrier's contention, finding that the issue raised did not constitute fraud under the Workers' Compensation Law.[151]

Thus, notwithstanding the Supreme Court's decision in *Hoffman, supra*, it is now well-established that immigration status does not, either standing alone or as the result of the submission of false identification documents, preclude an injured worker from receiving wage-replacement benefits.

We therefore see that notwithstanding Workers' Compensation Law § 17—and in some instances because of it—immigration status continues to play a role in eligibility for and the amount of New York workers' compensation benefits. There are different rules for proof of dependency for non-resident alien parents of deceased workers, a limitation to an award to only one such parent, exclusion of certain non-resident relatives as potential

145 *Id*.

146 *Id*. at 799 (citations omitted).

147 Amoah, *supra* note 139, at 800 (citing Balbuena v. IDR Realty LLC, 6 N.Y.3d at 359).

148 *Id*.

149 *Id*.

150 Matter of Restaurant Assoc., 2009 LEXIS 14416 (N.Y. Workers' Comp. Bd. Sept. 28, 2009).

151 *Id*.

dependents, and the prospect of future Supreme Court decisions that could potentially affect the viability of the holding in *Balbuena*.

IV. THE DECLINE OF WORKERS' COMPENSATION AS PART OF THE SOCIAL SAFETY NET.

Worker access to New York's workers' compensation system and the availability of benefits within the system have declined precipitously in recent years. While these changes affect all injured workers, they have had an especially adverse impact on workers who are undocumented, lack proficiency in language and/or literacy, and who are engaged in low-wage employment.[152] Lack of documentation, language and literacy all compound the difficulty an injured worker faces in trying to access benefits in an increasingly complex administrative system. Meanwhile, statutory benefit changes have increased benefits for high-wage workers with short-term disabilities at the expense of low-wage workers with permanent disabilities.

A. National Trends.

In October 2016, the United States Department of Labor (DOL) issued a report titled Does the Workers' Compensation System Fulfill Its Obligations to Injured Workers?[153] The Department of Labor report analyzed the increasing rate at which—contrary to the original purpose of the Workers' Compensation Law—the cost of workplace injury is being shifted from employers and onto workers and taxpayers. According to the DOL report:

> [O]nly a small portion of the overall costs of occupational injury and illness is borne by employers. Costs are instead shifted away from employers, often to workers, their families and communities. Other social benefit systems—

[152] Over a century after the enactment of the Workers' Compensation Law, it remains equally true that immigrant workers make up a disproportionate share of the labor market in unskilled, low-wage, and often hazardous employments.

[153] DOES THE WORKERS' COMPENSATION SYSTEM FULFILL ITS OBLIGATIONS TO INJURED WORKERS? U.S. DEP'T OF L. (2016), https://www.dol.gov/sites/dolgov/files/OASP/files/WorkersCompensationSystemReport.pdf [hereinafter DOL REPORT]. As of 2018, the report has been removed from the DOL website. William Rabb, *Vaunted 2016 Report on Comp Problems Goes Missing From DOL Site*, WORKCOMPCENTRAL (Apr. 22, 2020), https://ww3.workcompcentral.com/news/story/id/8bb08c838f1002d4455f7fc899053646cb0e796f/qs/words=Vaunted%202016%20Report%20on%20Comp,state=,start=0,type=,sort=,past=,records_per_page=10,stype=AND,pgno=0, (last visited Apr. 23, 2020). Some say this is "a blatant effort by the Trump administration to rewrite federal agency information about global warning. *Id.* Michael Grabell, *U.S. Labor Department: States are Failing Injured Workers*, PROPUBLICA (Oct. 5, 2016), https://www.propublica.org/article/us-labor-department-states-are-failing-injured-workers (last visited Apr. 22, 2020).

> including Social Security retirement benefits, Social Security Disability Insurance (SSDI), Medicare, and, most recently health care provided under the Affordable Care Act—have expanded our social safety net, while the workers' compensation safety net has been shrinking. There is growing evidence that costs of workplace-related disability are being transferred to other benefit programs, placing additional strains on these programs at a time when they are already under considerable stress. As the costs of work injury and illness are shifted, high hazard employers have fewer incentives to eliminate workplace hazards and actually prevent injuries and illnesses from occurring.[154]

The DOL noted that "[a]ccording to one researcher, employers now provide only about 20 percent of the overall financial cost of occupationally caused injuries and illnesses."[155] In the case of immigrant workers, who are often ineligible for the social safety net programs identified by the DOL, the costs that are not covered by workers' compensation are effectively shifted to the workers themselves, as well as their families.

The DOL observed that "[r]ecent years have seen significant changes to the workers' compensation laws, procedures, and policies in numerous states, which have limited benefits, reduced the likelihood of successful application for workers' compensation, and/or discouraged injured workers from applying for benefits."[156] Further, the DOL also observed barriers to claim-filing in the current environment:

> Many workers who might be eligible for workers' compensation benefits never file claims … [C]oncerns about retaliation and stigmatization—enhanced by investigations regarding alleged fraud—undoubtedly discourage workers from filing claims. Undocumented or otherwise particularly vulnerable workers are particularly unlikely to file claims. Programs and policies of employers may themselves discourage reporting. Workers are more vulnerable to retaliation without unions—and few workers in the private sector are now unionized. Legislative changes over the past quarter century contribute to these problems. As benefits are reduced or friction in the system is increased, it is reasonable to assume that workers will respond to these changes by filing fewer claims, given the associated stigma and administrative barriers.[157]

The impact of legislative changes is reflected in worker benefits—though not in employer costs:

> Not surprisingly, benefits per $100 of payroll have declined since a high of $1.65 in the early 1990s to $0.98 in 2013. … [R]esearch suggests that a

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[154] DOL REPORT, *supra* note 153, at 1.

[155] *Id.* at 5.

[156] *Id.* at 2.

[157] *Id.* at 14.

> significant component of the decline in total benefits can be attributed to statutory changes that reduced the availability of benefits. Average employer costs have not always followed this downward pattern, further fueling the political attacks on benefits.[158]

However, the challenges for injured workers extend far beyond legislative changes. According to the DOL:

> Overly complicated procedures are frustrating for workers and employers, mystify the processes and increase worker-employer animosity. Changes in proof requirements and procedures have resulted in ever-increasing levels of complex and expensive litigation, often involving expert testimony. The combination of unfiled legitimate claims, benefit caps, barriers to accessing medical care, and potentially inadequate settlements of permanent disability claims together means that the direct costs of worker morbidity and death are transferred away from employers, decreasing any direct economic incentive to invest in safety.[159]

One benchmark against which these problems can be measured is the recommendations of the 1972 National Commission on workers' compensation.[160] By 2015, only seven states were following at least 15 of the National Commission's 19 "essential" recommendations, while four states complied with less than half.[161] The most common area of compliance was the level of weekly temporary total disability benefits, but this was offset by other, more subtle, statutory changes that reduced worker benefits.[162]

These concerns have been echoed by many prominent academics who study workers' compensation. According to Professor Emily Spieler:

> The administration of claims is terribly flawed. Workers tell endless stories about their wanderings through these systems, about delayed medical care, about unpleasant and stigmatizing interactions, about confusion about what is happening, about feeling pressured into settlements. Lawyers—even the best of them—are unable to solve the problems for their clients. State administrators lack information in the languages that injured workers speak. The more complex the claim, the more difficult this becomes. But the stories about even in simpler claims. The qualitative research confirms these impressions … Our system for protection of workers from retaliation is largely broken. Workers who legitimately fear retaliation will not seek benefits, report injuries, or voice concerns about safety. While those covered

158 *Id.* at 13.

159 *Id.* at 22.

160 *Id.*

161 *Id.*

162 *Id.*

> by collective bargaining agreements may have much better job security, the vast majority of workers lack that protection.[163]

Similarly, Professor Alison Morantz has noted that "the general scholarly consensus is that benefit levels are inadequate on equitable grounds, efficiency grounds, or both."[164] She goes on to identify the fact "that benefit adequacy became particularly acute in the 1990s, when many states imposed onerous procedural hurdles and restrictive compensability requirements on workers' compensation claimants."[165] Far from being immune to these national trends, New York has instead exemplified many of them.

B. New York.

In New York, as in other states, the erosion of benefits has resulted from a combination of statutory changes and administrative action commencing in the 1990s. In each of these areas, the changes have had a disproportionate adverse impact on the very same groups the system was originally intended to benefit - immigrant and low-workers.

1. Statutory Changes.

The Workers' Compensation Law generally provides benefits for temporary disability, permanent disability, medical treatment and death.[166] Temporary disability benefits are paid for either a total disability (defined as the inability to perform any work of any kind, even on a part-time basis) or a partial disability.[167] Permanent disability benefits are paid for either permanent total disability (either as the result of a statutorily defined set of injuries or based on the evidence) or for permanent partial disability.[168] Permanent partial disability is further divided into loss or loss of use of a limb, known as "schedule loss of use," and all other types of permanent partial disability, referred to as "classifications" of permanent partial disability.[169]

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[163] Emily A. Spieler, *(Re)Assessing the Grand Bargain: Compensation for Work Injuries in the United States*, 1900-2017, 69 RUTGERS U.L. REV. 891 (2017).

[164] Alison Morantz, *Workers' Compensation at a Crossroads: Back to the Future or Back to the Drawing Board?*, 69 RUTGERS U. L. REV. 45 (forthcoming May 2017), http://www.poundinstitute.org/wp-content/uploads/2019/04/morantz-symposium-draft-9-13-16.pdf.

[165] *Id*. at 46.

[166] WORK. COMP. LAW §§ 13 *et. seq.*, 15, 16.

[167] WORK. COMP. LAW §§ 15(2), 15(5); *see also* Matter of Mandeville v. Sears, Roebuck & Co., 348 N.Y.S2d 178, at 180 (3d Dep't 1973).

[168] WORK. COMP. LAW §§ 15(1), 15(3).

[169] WORK. COMP. LAW §§ 15(3)(a)-(t); 15(3)(w); *see also*, *Landgrebe v. County of Westchester*, 57 N.Y.2d 1 (1982).

The statute fixes the weekly benefit rate for total disability (and death benefits) at two-thirds of the injured worker's average weekly wage—subject to the statutory maximum and minimum benefit rates in effect on the date of the injury or death.[170] Similarly, schedule loss awards are payable for the number of weeks prescribed in the statute at two-thirds of the injured worker's average weekly wage.[171]

For periods of temporary partial disability or classifications of permanent partial disability, the statute requires the Board to fix the benefit rate at two-thirds of the difference between the injured worker's average weekly wage and his or her post-injury wage-earning capacity, based on the worker's actual post-accident wages if any, and otherwise based on the Board's judgment.[172] In practice, an injured worker's benefit rate for partial disability might range from one-sixth of his or her average weekly wage (for a "mild partial disability") to one-half (for a "marked partial disability").[173]

a. Maximum and minimum benefit rates.

At the time it was enacted in 1914, the Workers' Compensation Law provided fixed sums for the maximum and minimum weekly benefit rates.[174] As a result, the Legislature was compelled to periodically amend the law in order to harmonize the benefit rate with inflationary increases in wages and the cost of living.[175] By 1989, the statutory benefit rates were a maximum of $300 per week for periods of total disability and a maximum of $150 per

[170] WORK. COMP. LAW §§ 15(1), 15(2), *see also* WORK. COMP. LAW § 14.

[171] WORK. COMP. LAW § 15(3)

[172] WORK. COMP. LAW § 15(5-a); *see also* Meisner v. UPS, 675 N.Y.S.2d 164, 166 (3d Dep't 1998).

[173] *Id*. Pursuant to Sections 15(1) and 15(2), a worker's weekly benefit rate for total disability (temporary or permanent) is two-thirds of the average weekly wage. WORK. COMP. LAW §§ 15(1), 15(2). This is subject to the statutory minimum and maximum, which are contained in Section 15(6). *Id*; WORK. COMP. LAW § 15(6). Partial disability, whether permanent or temporary, is calculated under Sections 15(5) and 15(5-a). WORK. COMP. LAW § 15(5). Those sections provide that (if the worker is not working), the benefit rate is two-thirds of the difference between the average weekly wage and the post-accident "wage-earning capacity," but that the post-accident wage-earning capacity cannot be set at less than twenty-five percent unless it is based on actual earnings. *Id.*

This means is that if a worker is assessed as having a seventy-five percent "disability," they have a twenty-five percent wage earning capacity. If they have a fifty percent disability, they have a fifty percent wage earning capacity. And if they have a twenty-five percent disability, they have a seventy-five percent wage-earning capacity. Mathematically the way this works is that if a total disability (100%) is two-thirds of the average weekly wage, then 100/150 = 2/3. A seventy-five percent disability is thus one-half, because 75/100 = 50%. A fifty percent disability is one-third, because 50/150 – 1/3. A twenty-five percent disability is one-sixth, because 25/150 = 1/6. There are other ways to do the mathematical analysis, but that is one approach. This is all still subject to the 15(6) maximum and minimums. WORK. COMP. LAW § 15(6).

[174] L. 1914, *supra* note 35.

[175] WORK. COMP. LAW § 15(6).

week for periods of partial disability, along with a minimum benefit rate of $30 per week.[176]

In 1990, the Legislature increased these benefits in three annual stages, culminating in a maximum benefit rate in 1992 of $400 per week for both total and partial disability and a minimum benefit rate of $40 per week.[177] Thereafter, New York's workers' compensation benefit rates remained unchanged for fifteen years until the enactment of the New York State Workers' Compensation Reform Act of 2007.[178]

The 2007 legislation made fundamental changes to workers' compensation benefits in New York. Notably, it increased the maximum benefit rate in three stages from $400 per week in 2006 to $600 per week in 2009 and tied ("indexed") it to the state average weekly wage beginning in 2010.[179] As a result, the maximum benefit rate rose to $739.83 per week in 2010, reached $803.21 per week by 2013 (more than double the pre-reform maximum of $400 per week), and presently stands at $934.11 per week.[180] Simultaneously, the minimum benefit rate was increased from $40 per week to $100 per week—but the minimum benefit rate was not indexed in the same manner as the maximum benefit rate. The Legislature further increased the minimum benefit rate from $100 per week to $150 per week in 2013.[181]

However, the 2007 legislation also imposed new time limits, or "caps," on classifications of permanent partial disability, which had previously been payable for the duration of such disability—which in most cases was for the injured worker's lifetime.[182] The new "PPD caps" instead limited the payment of benefits resulting from a permanent partial disability classification to a period between 225 and 525 weeks, depending on the level ("degree") of the disability.

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[176] *Id.*

[177] L. 1990, c. 924, p. 3965; WORK. COMP. LAW § 15(6).

[178] L. 2007, c. 6, p. 20; WORK. COMP. LAW § 15(6).

[179] WORK. COMP. LAW § 15(6).

[180] WORK. COMP. LAW § 15(6); New York State Workers' Compensation Board Subject Numbers (specific New York Workers' Compensation Board Subject Numbers are as follows: (1) 046-416 (4/22/10), *available at* http://www.wcb.ny.gov/content/main/SubjectNos/sn046_416.jsp; (2) 046-465 (5/4/11), *available at* http://www.wcb.ny.gov/content/main/SubjectNos/sn046_465.jsp; (3) 046-481 (5/11/12), *available at* http://www.wcb.ny.gov/content/main/SubjectNos/sn046_481.jsp; (4) 046-523 (4/30/13), *available at* http://www.wcb.ny.gov/content/main/SubjectNos/sn046_523.jsp; (4) 046-674R (6/13/14), *available at* http://www.wcb.ny.gov/content/main/SubjectNos/sn046_674R.jsp; (5) 046-761 (6/18/15), *available at* http://www.wcb.ny.gov/content/main/SubjectNos/sn046_761.jsp; (6) 046-864 (6/28/16), *available at* http://www.wcb.ny.gov/content/main/SubjectNos/sn046_864.jsp; (7) O46-951 (6/28/17), *available at* http://www.wcb.ny.gov/content/main/SubjectNos/sn046_951.jsp; (8) 046-1061 (4/20/18), *available at* http://www.wcb.ny.gov/content/main/SubjectNos/sn046_1061.jsp; and (8) 046-1159 (4/17/19), *available at* http://www.wcb.ny.gov/content/main/SubjectNos/sn046_1159.jsp))

[181] *Id*.

[182] L. 2007, *supra* note 178; WORK. COMP. LAW § 15(3)(w)

These statutory changes had a substantially disparate impact on the benefits payable to high-wage workers with short-term disabilities as compared to low-wage workers with permanent disabilities. In a very real sense, benefit cuts to the latter group went to fund benefit improvements for the former. Analysis of several concrete examples will make this clear.

The table below shows the benefit rates payable across a range of disability determinations and wage levels in 1999 (reflecting the last benefit rate adjustment before the 2007 legislation),[183] 2009 (the last year before the onset of "indexing" in 2010), and 2019 (the present). Changes in benefits that occurred as a result of the 2007 legislation are marked in **bold.**

Benefit Rate by Year, Degree of Disability, and Average Weekly Wage					
Year	Degree of Disability	Average Weekly Wage / Benefit Rates			
		$300	**$600**	**$1,200**	**$1,800**
1999	Total (100%)	$200	$400	$400	$400
	Marked Partial (75%)	$150	$300	$400	$400
	Moderate Partial (50%)	$100	$200	$400	$400
	Mild Partial (25%)	$50	$100	$200	$300
2009	Total (100%)	$200	$400	**$600**	**$600**
	Marked Partial (75%)	$150	$300	**$600**	**$600**
	Moderate Partial (50%)	$100	$200	$400	**$600**
	Mild Partial (25%)	**$100**	$100	$200	$300
2019	Total (100%)	$200	$400	**$800**	**$934.11**
	Marked Partial (75%)	$150	$300	$600	**$900**
	Moderate Partial (50%)	**$150**	$200	$400	$600
	Mild Partial (25%)	**$150**	**$150**	$200	$300

[183] The figures shown for the year 1999 would have been the same in any year from 1992 through 2006; the year was selected simply to provide comparisons by the decade. WORK. COMP. LAW § 15(6); see footnote 183 for specific New York Workers' Compensation Board Subject Numbers.

The table above shows that after the 2007 legislation, the total disability benefit rate for workers who earn $1,200 per week increased by one-third from $400 per week to $600 per week between 1999 and 2009, and another twenty-five percent from $600 per week to $800 per week between 2009 and 2019—at which point it had doubled as compared to the pre-reform figure. For workers who earn $1,800 per week, the total disability benefit rate increased by the same one-third from $400 per week to $600 per week between 1999 and 2009, and again by more than thirty-five percent from $600 per week to $934.11 per week between 2009 and 2019.

Moreover, the increased maximum benefit rates also increased partial disability benefit rates for both middle-wage and high-wage workers. For middle-wage workers, awards for marked partial disability increased by one-third by 2009. For high-wage workers, awards for both moderate partial and marked partial disability increased by one-third by 2009, with awards for marked partial disability increasing yet another one-third by 2019.

By contrast, because benefits are a function of wages, the increased maximum benefit rates provided by the 2007 legislation had no impact whatsoever on either group of low-wage workers. The sole impact of the 2007 legislation was to improve the minimum benefit rate from $50 per week to $100 per week for the poorest group of workers (those earning $300 per week) in situations where they were categorized as "mildly" disabled.

Stated one way, by 2009 the 2007 legislation had substantially increased five out of the eight (62.5%) benefit possibilities shown for middle-wage and high-wage workers, while minimally increasing one out of eight (12.5%) benefit possibilities shown for the two groups of low wage workers shown. Measured in this manner, the 2007 reform was five times as beneficial for middle-wage and high-wage workers as it was for low-wage workers.

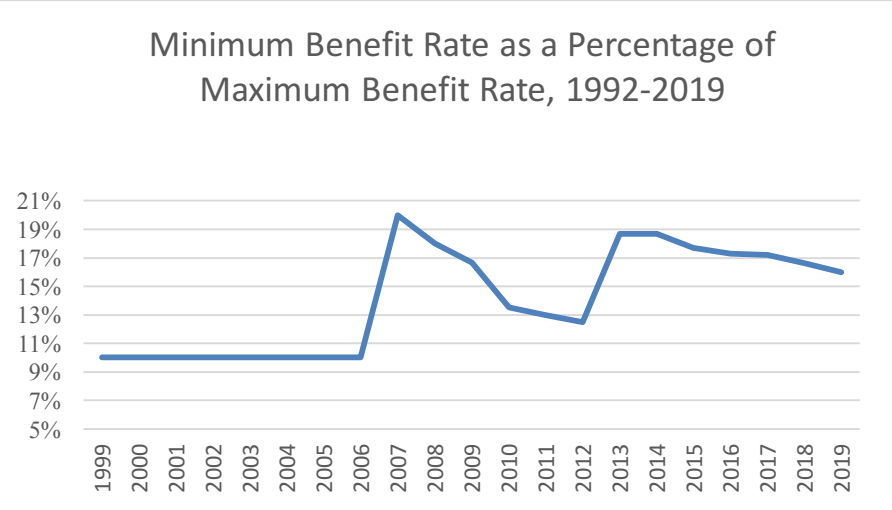
As extraordinary as that ration may seem, when measured in dollars the 2007 legislation yielded an additional $1,834.11 in potential benefits for middle-wage and high-wage workers—as compared to $50 for low-wage workers.[184] By that measure, the 2007 legislation was more than thirty-six times as beneficial for middle-wage and high-wage workers as it was for low-wage workers.

Even when the impact of the further increase in the minimum benefit rate in 2013 is taken into consideration (in essence artificially "crediting" the 2007 legislation with the 2013 adjustment), the number of "disability

[184] Middle-wage workers obtained an additional $400 per week for total disability and $200 per week for marked partial disability ($600), while high-wage workers had obtained an additional $534.11 per week for total disability, $500 per week for marked partial disability and $200 per week for moderate partial disability ($1,234.11).

categories in which low-wage workers benefits rises to three out of eight (37.5%) as compared to five out of eight (62.5%) for middle-wage and high-wage workers (a ratio of 1.67 to 1), and the "raw dollar" improvement figure rises to $250 as compared to $1,834.11, a ratio of more than seven to one.

It is abundantly clear that low-wage workers derived little benefit from the 2007 legislation, particularly in contrast to high-wage workers for whom wage replacement benefits were significantly improved. The Legislature's decision to "index" the maximum weekly benefit rate, but not the minimum weekly benefit rate, provides further evidence of its priorities in this regard. The chart and table below show the ratio of the minimum benefit to the maximum benefit from 1999 through 2019.[185]



[185] The data on the chart would be identical if 1992 were used as the starting point. WORK. COMP. LAW § 15(6); see footnote 183 for specific New York Workers' Compensation Board Subject Numbers.

Maximum and Minimum Rates, 1999 - 2019			
Year	Maximum Rate	Minimum Rate	Min. as % of Max.
1999	400	40	10%
2000	400	40	10%
2001	400	40	10%
2002	400	40	10%
2003	400	40	10%
2004	400	40	10%
2005	400	40	10%
2006	400	40	10%
2007	500	100	20%
2008	550	100	18%
2009	600	100	16.67%
2010	739.83	100	13.50%
2011	772.96	100	13%
2012	792.97	100	12.50%
2013	803.21	150	18.67%
2013	808.65	150	18.67%
2015	844.29	150	17.70%
2016	864.32	150	17.30%
2017	870.61	150	17.20%
2018	904.74	150	16.60%
2019	934.11	150	16%

In percentage terms, the 2007 legislation immediately doubled the minimum weekly benefit rate from 10% to 20% of the maximum weekly benefit rate (although in real-dollar terms the increase ranged from zero to $60 per week depending on the worker's wage). However, to the extent that this may have represented a commitment to improving benefits for low-wage workers, the failure to "index" the minimum benefit rate promptly resulted in almost complete abandonment of such a commitment, since by 2012 the minimum rate had regressed from 20% of the maximum rate to 12.5% of the maximum rate—close to the pre-2007 ratio of ten percent.

When the Legislature made a second adjustment to the minimum weekly benefit rate in 2013, it rose to 18.67% of the maximum benefit in that year, which was still short of its high-water mark (in percentage terms) of 20% in 2007. However, as the chart and table above demonstrate, the failure to index the minimum benefit rate has since resulted in a steadily increasing disparity as the maximum rate rises automatically and the minimum rate does not.[186]

[186] WORK. COMP. LAW § 15(6).

b. Permanent partial disability.

As discussed in the prior section,[187] the increased maximum weekly rates created by the 2007 legislation provided significant additional wage-replacement benefits for middle-wage and high-wage workers during periods of temporary disability, while offering little or nothing to low-wage workers. However, other aspects of the 2007 legislation provided still greater benefits to middle-wage and high-wage workers, while affirmatively reducing compensation for low-wage workers.

i. Schedule loss of use.

The Workers' Compensation Law provides a "schedule" of benefits for the permanent loss or loss of use of a limb, vision, hearing, or permanent facial disfigurement.[188] Such awards are payable at the injured worker's maximum partial disability benefit rate, subject to the statutory maximum benefit in effect on the date of the injury.[189]

By way of example, the statute provides that the loss of a hand entitles an injured worker to 244 weeks of benefits.[190] Thus, if the injured worker suffers an injury that results in a ten percent loss of use of the hand, the award is for 24.4 weeks of compensation. Any benefits paid for wage-replacement during a period of time lost from work are deducted from this award with the balance, if any, paid to the worker in a lump sum to account for the loss of wage-earning capacity that is presumed to have resulted from the injury.[191] The table below shows the value of such an award for our previous group of workers. Once again, benefit increases resulting from the 2007 legislation are shown in **bold.**

Value of 10% Schedule Loss of Use of a Hand by Wage, 1999 -				
Year /	$300	$600	$900	$1,800
1999	$4,880	$9,760	$9,760	$9,760
2009	$4,880	$9,760	**$14,640**	**$14,640**
2019	$4,880	$9,760	$14,640	**$22,792.98**

[187] See Section IV.B.1.a.

[188] WORK. COMP. LAW § 15(3)(a)-(t).

[189] *Id.*; *see also* WORK. COMP. LAW § 15(6).

[190] WORK. COMP. LAW § 15(3)(c).

[191] WORK. COMP. LAW § 15(3)(u); *see also* Marhoffer v. Marhoffer, 220 N.Y. 543, 546-47 (1917); Landgrebe, *supra* note 169, at 6-7; Dietrick v. Kemper Ins. Co., 76 N.Y.2d 248, 251-52 (1990).

It is once again apparent that the 2007 legislation provided no additional compensation to low-wage workers with schedule loss of use injuries, while demonstrably improving this class of benefit for middle-wage and high-wage workers. However, the 2007 legislation did not provide these additional benefits to middle-wage and high-wage workers for temporary disability and schedule loss at an increased cost to employers. Instead, it reduced other benefits within the system with the overall goal of decreasing costs for employers.[192] As discussed in the next subsection, the burden of these benefit reductions fell most heavily on low-wage workers.

ii. Classifications of permanent partial disability.

The second type of permanent partial disability provided by the statute is a "classification" of permanent partial disability, which is appropriate in cases that do not involve a "schedule loss of use" and where the injured worker has an ongoing loss of wages or wage-earning capacity.[193] As mentioned previously, the 2007 legislation eliminated the payment of lifetime benefits for this class of disability for accidents that occurred on or after March 13, 2007, instead limiting payment of "permanent" partial disability benefits to a period of four to ten years, depending on the extent of the disability.[194]

In May of 2019, Professor James Parrott published the results of a study that included an assessment of the impact of the "PPD caps" imposed by the 2007 legislation.[195] Among his key findings was this: "A 2007 increase in the maximum and minimum benefit levels raised the benefits for high-wage workers, did nothing for middle-wage workers, and provided a slight benefit to some, but not all, low-wage workers. However, a cap on permanent partial disability payments wiped out benefits for all such injured workers beyond 10 years. For most long-term partially disabled high-wage workers, this 10-year limit more than offset the higher maximum."[196]

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[192] The target of the 2007 legislation was to reduce employer costs by $1 billion. *See* NEW YORK STATE WORKERS' COMPENSATION BOARD, THE SUCCESS OF NEW YORK'S 2007 WORKERS' COMPENSATION REFORM, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjhw_uFytrkAhWmc98KHVCTBXQQFjAAegQIAhAC&url=http%3A%2F%2Fwww.wcb.ny.gov%2Fcontent%2Fmain%2FTheBoard%2FPost2007Reform.pdf&usg=AOvVaw3-SbJFP0uClMPAN2cBKg9v.

[193] WORK. COMP. LAW § 15(3)(w).

[194] *Id*.

[195] James Parrott & Nicholas Martin, *Time for a Real Look at How the New York Workers' Compensation System Treats Workers*, THE NEW SCHOOL CENTER FOR NEW YORK CITY AFFAIRS, https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5ceeafcd0d9297b6c62de94b/1559146449020/Time+for+Real+Final+Merge_052419.pdf (May 2019).

[196] Parrot, *supra* note 195, at 3-4.

Professor Parrott went on to observe that "[f]or longer-term (more than 15 years) injured workers, the wage replacement value of indemnity benefits is much lower than before the 2007 changes, and before that there had been no enhancements since 1992 (now more than a quarter-century ago)."[197] Considered as a whole, "[i]ndemnity benefits for those suffering workplace injuries are woefully inadequate, falling far short of lost earnings and posing an extra hardship on low-wage workers."[198] This is because "[f]or low-wage workers, losing a third or more of their wage, as happens in every workers' comp case, can be financially devastating, and can lead to indebtedness and the possible risk of losing their cars or homes."[199]

In numerical terms, Professor Parrott found that before the 2007 legislation, workers' compensation benefits replaced 24.5 percent of the wages lost by a low-wage or middle-wage worker with a permanent partial disability anticipated to last twenty years and 16.3 percent for a similarly situated high-wage worker.[200] Following the 2007 legislation, these figures fell to 12.9 percent for a low-wage worker, 12.6 percent for a middle-wage worker, and 12.6 percent for a high wage worker.[201] In short, the 2007 legislation slashed workers' compensation-based wage-replacement for low-wage and middle-wage workers with long-term permanent partial disabilities by almost fifty percent, and for high-wage workers by almost twenty-five percent.

These benefit cuts for injured workers with classifications of permanent partial disability—which fell disproportionately on the low-wage workers least able to bear such cuts—went to fund the increases in temporary disability and schedule loss for middle-wage and high-wage workers discussed above.

Moreover, in 2017 the Legislature amended the statute once again to impose additional duration limits of one hundred thirty weeks for temporary disability benefits ("the TPD caps") in cases in which the injured worker was later found to have a classifiable permanent partial disability.[202] Professor Parrott found that these new duration limits further reduced workers' compensation-based wage replacement for long-term permanent partial disabilities to 10.1 percent for all workers, regardless of wage classification.[203] In dollars, Parrot calculated the uncompensated wage loss resulting from the 2007 and 2017 statutory reforms to be almost $600,000 for

197 *Id.* at 4.

198 *Id*.

199 *Id*.

200 *Id. at* App. 1-3.

201 *Id*.

202 L. 2017, c. 59, 253.

203 *Id*.

a low-wage worker, over $1.1 million for a middle-wage worker, and almost $2.3 million for a high-wage worker.[204] The resulting remaining income for permanently disabled low-wage workers is reminiscent of 1910, when "clothing workers earned on average only $567, but by 1914 the minimum cost for a family of five had risen to $876."[205]

These extraordinary cuts in the payment of wage-replacement benefits to the most disabled injured workers, falling especially heavily upon low- and middle-wage workers, created the system "savings" which the 2007 legislation "spent" to increase compensation for high-wage workers for periods of temporary disability and schedule loss of use.

2. Administrative Changes.

Professor Morantz's observation that the imposition of "onerous procedural hurdles" in recent decades significantly reduced the availability of benefits for injured workers has proven especially true in New York.[206] Here, new procedural hurdles have been created by way of regulation, promulgation of mandatory forms, and informal administrative policy. Although the full scope of administrative change is beyond the scope of this article, we will focus on a number of issues that directly concern low-wage and immigrant workers.

In New York, as elsewhere, the onset of the increasing technicality (and corresponding worker-unfriendliness) of the system began in the mid-1990s. For eight decades from its inception in 1914 until the mid-1990s, the Board's processes for the initiation of a workers' compensation claim were simple and straightforward. First, upon receipt of any document indicative of a work-related injury, the Board would create ("index") a case. Second, an initial hearing would be scheduled for an administrative law judge ("WCL Judge") to review the claim. The injured worker would receive a notice to appear for the hearing, as would the employer and its insurer.

The benefits of this process are apparent. It avoided the use of any formal legal process for claim filing, thus protecting workers who might otherwise have failed to file a formal claim due to obstacles presented by language, literacy, education, or other impediments. In addition, once the case file was created, the initial hearing enabled the WCL Judge, on behalf of the Board, to communicate effectively with the injured worker about the substance of the claim and the benefits the statute provided.[207]

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[204] *Id*.

[205] Foner, *supra* note 1, at 86.

[206] Morantz, *supra* note 164, at 45.

[207] *See*, *e.g.*, Surace v. Danna, 161 N.E. 315, 316 (N.Y. 1928) ("The strength of the desire to give protection to the workman is accentuated also by the final words of the section, "which exemption may not be waived." The claimant is to be protected against his own improvidence or folly (cf. the cognate

In the mid-1990s, however, the Board began to abandon its long history of ensuring that the claims of injured workers were identified, that they were informed about their benefits under the law in terms or in a language they could understand, and that benefits were delivered to them with a minimum of formal legal process.

In lieu of scheduling hearings, the Board began to use the "conciliation" provision of the statute as a basis for the issuance of "Administrative Decisions" and "Proposed Decisions."[208] Mailed to the worker in lieu of a hearing, only in English (even where the injured worker had filed a claim form indicating fluency in another language), and replete with bureaucratic terminology, these non-hearing determinations made binding legal findings about the nature of the injury, the worker's pre-accident wage, and the period and extent of any temporary disability—and almost invariably resulted in administrative closure of the worker's claim.[209] The injured worker is provided with a few lines on the back of the form in which to write in an objection and mail it back to the Board, apparently on the theory that he or she has sufficient inherent knowledge of the Workers' Compensation Law to evaluate whether the decision is proper and to be aware of the additional benefits (such as an award for schedule loss of use) that the statute might provide in their claim.[210]

In short, the Board's decision to discontinue scheduling an initial hearing to consider each injured worker's claim and to substitute the use of bureaucratic decisions issued without the benefit of a hearing substantially reduced the ability of injured workers to obtain information about their claims and to access the benefits provided by the statute. While this adversely impacted the full spectrum of injured workers, it had an especially negative impact on benefits for those with limited English language and literacy—predominantly immigrant workers.

sections 24 and 32). We are blind to the policy of workmen's compensation if we say that the purpose of the exemption, thus emphatically guarded, is to promote the convenience of the State … At the root of the exemption is something more benignant than bureaucratic formalism, a dislike of complicating documents. The exemption like the compensation is for the protection of the man.").

[208] WORK. COMP. LAW § 25(2-b); *see also* Matter of Liberius v. New York City Health & Hosp. Corp., 11 N.Y.S.3d 305 (N.Y. App. Div. 2015).

[209] 12 NYCRR Parts 312 and 313; WCB Subject Number 046-777 (1/22/16) http://www.wcb.ny.gov/content/main/SubjectNos/sn046_777.jsp; Matter of Robert B. Friednman, 2001 LEXIS 93433 (N.Y. Workers' Comp. Bd. Jul. 6, 2001); Matter of Bell Atlantic, 2001 LEXIS 97762 (N.Y. Workers' Comp. Bd. Dec. 6, 2001); Matter of Onondaga County, 2008 LEXIS 8959 (N.Y. Workers' Comp. Bd. Sept. 9, 2008); Matter of Sungary Donuts, Inc., 2016 LEXIS 19966 (N.Y. Workers' Comp. Bd. Dec. 16, 2016). None are perfect, and the issue is largely a matter of practical experience, but they shed some light on the regulations, processes, and the need to understand what rights are involved and the requirement to file an objection if the decision is inadequate.

[210] *Id.*

The pace of administrative change, usually adverse to the interests of injured workers, accelerated rapidly after the 2007 legislation. One of the earliest post-2007 administrative reforms was the Board's promulgation of an expanded employee claim form.[211] The new form doubled in length from the previous version, included questions about previous injuries or illnesses, and was accompanied by a mandatory medical release in the event the worker had suffered a previous injury or illness involving the same body part.[212] The increased complexity of the claim form, as well as the imposition of new requirements and an additional form, created an increased barrier to accessing benefits for workers with limited English proficiency, literacy, or who otherwise struggle with formal legal requirements—often immigrant and low-wage workers.

In addition, the Board revised its "case indexing" process to include the additional requirement that an injured worker's claim would not be considered fully filed until—in addition to submission of the new claim form—his or her treating physician had submitted a medical report using the specific form promulgated by the Board for that purpose.[213] Taken together, these initiatives transformed the workers' compensation claim filing process from an informal one in which the Board considered any document indicative of a work-related injury sufficient to open and process a claim into a technical legal procedure requiring the use of specific, information-intensive forms. This needlessly imported into the workers' compensation system the same well-documented difficulty that low-wage and immigrant workers face in accessing the civil justice system.[214]

Thus, a century after the Workers' Compensation Law was enacted largely for the purpose of protecting and compensating immigrant workers who were injured in hazardous employment, the Board had devised a group of administrative procedures that impeded such workers from filing claims, receiving information about benefits, and obtaining benefits. Moreover,

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[211] Zachary S. Weiss, *Core Board Forms Revised*, WORKER'S COMPENSATION BOARD (Sept. 17, 2008), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_250.jsp; STATE OF NEW YORK WORKERS' COMPENSATION BOARD, Employee Claim, C-3.0 4-19, http://www.wcb.ny.gov/content/main/forms/c3.pdf; REVISITING THE REFORMS, PUB. POL'Y INST. 19 (2012), http://www.ppinys.org/reports/2012/Workers-Comp-Costs-Revisiting-the-Reforms.pdf; see also Subject Numbers 046-250 (9/17/08), *available at* (http://www.wcb.ny.gov/content/main/SubjectNos/sn046_250.jsp, 046-254 (10/3/08), *available at* http://www.wcb.ny.gov/content/main/SubjectNos/sn046_254.jsp, 046-492 (3/5/09), *available at* http://www.wcb.ny.gov/content/main/SubjectNos/sn046_292.jsp, and the current Form C-3, *available at* http://www.wcb.ny.gov/content/main/forms/Forms_CLAIMANT.jsp.

[212] *Id*.

[213] N.Y. Comp. Codes R. & Regs. tit. 12, § 300.37 (2008).

[214] *See*, *e.g.*, Myriam Gilles, *Class Warfare: The Disappearance of Low Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531 (2016); LEGAL SERVICES CORPORATION, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans* (2017), https://www.lsc.gov/media-center/publications/2017-justice-gap-report.

those workers who succeed in accessing the system face a byzantine maze of forms, regulations and procedures that govern their ability to obtain medical treatment, request a hearing, obtain administrative review of WCL Judge decisions, and more.[215]

Professor Spieler's observation is all too true of the administrative state of the modern New York workers' compensation system: "[T]he administration of claims … is terribly flawed … Workers tell endless stories about their wanderings through these systems, about delayed medical care, about unpleasant and stigmatizing interactions, about confusion about what is happening, about feeling pressured into settlements. Lawyers—even the best of them—are unable to solve the problems for their clients."[216]

V. CURRENT BARRIERS FOR IMMIGRANTS AND LOW-WAGE WORKERS IN THE WORKERS' COMPENSATION SYSTEM

As we have seen in Section II, *infra*, the workers' compensation system was created largely in order to protect and compensate low-wage and immigrant workers, who are often engaged in hazardous employment and who have little ability to withstand the economic blow of workplace injury and loss of income. Section III, *infra*, discussed the historical and remaining statutory limitations on benefits for non-resident aliens, while Section IV, *infra*, analyzed how the overall decline of workers' compensation systems both nationally and in New York has had a disproportionately adverse impact on immigrant and low-wage workers. In this section we will consider a number of the remaining barriers that these workers routinely face in the current New York workers' compensation system.

A. Language Access.

As the Center for Popular Democracy ("CPD") has reported, "[t]he state government provides New Yorkers with a multitude of services and benefits necessary for their survival and success: nutritional supports, health benefits, unemployment insurance and driver's licenses, to name but a few. In order for these services to be equally accessible to all of the diverse residents of the state, it is essential that government agencies be linguistically accessible, providing interpretation and translation services for the over two million individuals in New York State who are limited English proficient (LEP)."[217]

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[215] N.Y. Comp. Codes R. & Regs. tit. 12, § 324.

[216] Spieler, *supra* note 163, at 989.

[217] THE CENTER FOR POPULAR DEMOCRACY, *Language Access in New York State: A Snapshot From a Community Perspective* (2013), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahU

CPD noted that in 2011, Governor Cuomo issued "a statewide order which requires all state agencies with direct public contact to translate vital documents into the top six languages spoken by LEP individuals in New York State, provide interpretation services for all New Yorkers in their primary language, develop a language access plan, and designate a language access coordinator."[218]

However, CPD also found that implementation of Executive Order 26 had fallen short of "the ultimate measure of the success of government and advocacy efforts [which] is whether all LEP New Yorkers who interact with government agencies are provided with the interpretation and translation services to which they are entitled."[219] As a result, most LEP workers do not receive translated documents or interpretation services, and in-person translation remains critically important."[220]

The Workers' Compensation Board was included in CPD's 2013 study of state agency responses to Executive Order 26.[221] Although it "did not have a significant number of survey participants" who had interacted with the Board, CPD "did conduct on-site visits, phone monitoring and website reviews for the agency."[222] CPD found that the Board's "language assistance services, while quite strong in some respects, vary with the mode of agency interaction."[223] On the positive side, CPD found that language services were advertised by the Board for "monitors who visited WCB locations" and that three of the five monitors (60%) who expressly requested claim forms in another language received them.[224] Its monitors were also advised that language access services "would be made available via telephonic interpretation," but not in person.[225]

However, CPD ls found that "[a]nalysis of phone reviews" yielded "more mixed results," as non-English speakers were unable to consistently obtain telephone assistance from the agency and in a number of instances were simply directed to its website.[226] Unfortunately, "the assistance made available via the web does not appear to be as helpful as that available to those who visit WCB locations in person."[227]

KEwjU8YXz5Y_nAhUrzlkKHWYOArAQFjAAegQIAxAB&url=https%3A%2F%2Fpopulardemocracy.org%2Fnews%2Flanguage-access-report&usg=AOvVaw3EUunUCQF6dguOvBCWPG8m.

[218] *Id*.

[219] *Id.* at 6.

[220] THE CENTER FOR POPULAR DEMOCRACY, *supra* note 217, at 6-8.

[221] *Id*. at 25.

[222] *Id*.

[223] *Id*.

[224] *Id*.

[225] *Id*.

[226] *Id. at* 26. It must be noted that the sample was limited to nine telephone calls. *Id.*

[227] *Id*.

The language access issues identified by CPD must be considered in the context of the claim-filing procedures and shift away from a hearing-based approach discussed in Section IV.B.2. As the CPD report makes abundantly clear, workers who interact with the agency in person receive far superior information and assistance than those for whom contact is limited to mail, telephone, and the internet. This in turn results in increased access to and receipt of benefits. By contrast, workers who are not afforded in-person service, or who are required to affirmatively seek such service, do not receive adequate information about the system or benefits.

As we noted in Section IV.B.2., when the Board held an initial hearing in every case, it ensured the delivery of information about the system and its benefits to injured workers in a manner and language that was appropriate for their needs. The elimination of this approach in favor of the issuance of non-hearing decisions, using technical language and in English only, significantly reduced access to benefits and in turn the substance of benefits for workers with limited English proficiency.

A more in-depth study of the Board's approach to language access was conducted by the National Center for Law and Economic Justice ("NCLEJ") in 2017.[228] NCLEJ noted that more than two hundred languages are spoken in New York City, and "[h]alf of all New York City residents speak a language other than English at home."[229] Statewide, thirteen percent of New York residents have limited English proficiency.[230]

The population studied by NCLEJ was reminiscent of the origins of the Workers' Compensation Law, when hazardous construction work was performed predominantly by Italian immigrants: "In 2013, 32.3% of people working construction jobs in the United States were Latino or Hispanic, while Latino and Hispanic individuals make up only 16.1% of people working in all occupations."[231] Meanwhile, "construction-related jobs were among the most dangerous in the country," with "903 Latino workers … killed on the job in 2015."[232] This is consistent with Professor Parrott's observation that immigrants "hold over one-third of all jobs in the many higher-than-average injury-prone industries with large numbers of low-wage workers, such as construction, transportation hotels and hospitals."[233]

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[228] NATIONAL CENTER FOR LAW AND ECONOMIC JUSTICE, *Compensation Not Open to Interpretation: Language Access in New York State Workers' Compensation Hearings* (2017), https://nclej.org/wcb_report (last visited Apr. 15, 2020, 12:52 AM).

[229] *Id*. at 4.

[230] *Id*.

[231] NATIONAL CENTER FOR LAW AND ECONOMIC JUSTICE, *supra* note 228, at 5; see Section II.A.

[232] *Id*.

[233] Parrot, *supra* note 195, at 3.

After observing "close to 500 hearings," NCLEJ reported that "the Workers' Compensation system is not functioning properly for many New York residents. Workers with limited English proficiency (LEP) require translation and interpretation (language access) services to benefit from Workers' Compensation on an equal basis with English-speaking workers. However, these services are vastly inadequate in New York's Workers' Compensation System."[234]

According to NCLEJ, the Board's language access practices are failing workers with limited English proficiency:

> While the Board provides interpretation to some LEP claimants during hearings, interpretation is not provided to all who need it. When interpretation is provided, it is sub-standard and not sufficient to allow LEP workers to understand issues being decided at the hearings, which are essential to the success or failure of their Workers' Compensation claims … We found [that] (a) [i]n 18% of all hearings observed, the claimant required interpretation[; (b) 42% of LEP claimants were not provided interpretation by the Board; (c) 0 of 51 hearings in which interpretation services were provided were interpreted in their entirety; and (d) When the Board provides interpretation, it employs telephone interpretation services, which are inadequate because interpreters are not familiar with Workers' Compensation terminology, the telephone calls have poor audio quality, and interpreters make errors that are uncorrected in the record.[235]

The NCLEJ report points to another layer of complexity for immigrant workers even beyond that identified by the CPD report. As discussed above, the CPD report identifies barriers for injured immigrant workers in filing claims and obtaining initial access to the system and its benefits. The NCLEJ report shows that even when an immigrant worker overcomes those barriers, further language access-based obstacles await which play a significant role in reducing the availability of benefits.

The outcome of all of this is summarized by Professor Parrott, who wrote that the impact of these multiple barriers is shown by a "National Employment Law Project survey of over 600 low-income injured workers in New York City, Chicago and Los Angeles, [which] found that only nine percent received benefits."[236]

B. Retaliation.

Although fear of retaliation affects many injured workers, it is especially acute for immigrant workers. As Professor Spieler observed,

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[234] *Id.* at 1.

[235] NATIONAL CENTER FOR LAW AND ECONOMIC JUSTICE, *supra* note 228, at 5 (punctuation omitted).

[236] *Id*. at 5.

although immigrants are frequently employed in occupations that involve a high risk of on-the-job injury, their immigration status, language skills, and fear of retaliation often dissuade them from filing for benefits.[237] Spieler goes on to note the ineffectiveness of laws that are designed to prevent employers from retaliating against workers for raising safety concerns or reporting injuries.[238] The general protection under the health and safety laws for workers in these situations is among the least effective of all of the anti-retaliation laws, and courts require a heightened showing of causation under anti-retaliation provisions of federal discrimination laws.[239] In sum, it is difficult for workers to bring successful challenges to their employers' retaliatory acts.[240]

Additional information about this issue was provided by the National Economic and Social Rights Initiative (NESRI) in 2015.[241] Providing important context about the issue, NESRI stated that "[t]he growth of low-wage and precarious work, one of the many factors of increasing inequality, has deepened the imbalance of power in the workplace, leaving ever more workers vulnerable to retaliation—being fired, punished, and intimidated in any number of ways—when they seek compensation and care for their work-related injuries and illnesses."[242] As a result, only about half of injured workers—and less than ten percent of seriously injured workers—file for workers' compensation out of fear of retaliation.[243] This gap between the number of work-related injuries and the number of claims filed is persistent and has significant economic consequences for immigrant populations.[244] This is borne out by data from the U.S. Government Accountability Office, to which two-thirds of occupational health providers reported observing fear of retaliation among workers, and more than half reported pressure from employers to evade reporting injuries to public agencies.[245] In addition, nearly half reported receiving requests from injured workers themselves not to file through workers' compensation out of fear of retaliation.[246]

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[237] Spieler, *supra* note 163, at 960-61; *see also* X. Dong, K. Ringen, Y. Men, et al., *Medical costs and sources of payment for work-related injuries among Hispanic construction workers*, 49 J. OC & ENVIRON. MED. 1367, 1367-75 (2007).

[238] *Id.* at 970.

[239] *Id.* at 970-71.

[240] *Id.*

[241] NAT. ECONOMIC & SOC. RIGHTS INITIATIVE, *Injured, Ill and Silenced: Systemic Retaliation and Coercion by Employers against Injured Worker* (2015), https://www.nesri.org/sites/default/files/WC%20retaliation%20policy%20brief%204%2010%2015%20FINAL.pdf.

[242] *Id.* at 1.

[243] NAT. ECONOMIC & SOC. RIGHTS INITIATIVE, *supra* note 241.

[244] *Id.*

[245] *Id.*

[246] *Id.*

Professor Morantz and others have pointed to potential solutions that would reduce the fear of retaliation among low-wage and immigrant workers, thus removing one barrier to their ability to access the workers' compensation system and benefits: "For workers, the two best ways to accomplish this goal are strengthening anti-retaliation protections for workers who report injuries (with a presumptive award of costs, attorney's fees, treble damages, as well as punitive damages) and banning incentive programs that reward workers for not reporting injuries or penalize them for doing so. Counteracting the incentives of employers is more challenging, but one possible route is to charge employers (or their agents) a sizable financial penalty for any claim that was initially denied yet ultimately, after an appeal, found to be compensable."[247]

New York presently employs none of these tools to protect low-wage and immigrant workers (or other injured workers) from retaliation. Workers' Compensation Law § 120 presently defines discrimination as retaliation "because [a worker] has claimed or attempted to claim compensation from such employer, requested a claim form for injuries received in the course of employment, or claimed or attempted to claim any benefits provided under this chapter or because he or she has testified or is about to testify in a proceeding under this chapter and no other valid reason is shown to exist for such action by the employer."[248] This standard unreasonably restricts the scope of conduct that constitutes discrimination, while creating an excessive burden of proof for the worker ("no other valid reason is shown to exist"). In addition, the penalties provided by the statute (other than reinstatement of the worker), are inadequate.

C. Misclassification.

Another issue that presents a barrier for many immigrant and low-wage workers is their employment in fields that lend themselves to misclassification of employees as "independent contractors" who are not covered by workers' compensation. All too frequently, employers in these fields fail to secure workers' compensation coverage, under-report the number of employees, or mis-report the job classifications of their employees—all in violation of the statute.[249] In these circumstances, workers are easily misled into believing that they are ineligible for workers' compensation benefits, while employers who have skirted the law have every incentive to keep the potential claim out of the workers' compensation system and to contest it if filed by the workers.

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[247] Morantz, *supra* note 164, at 59.

[248] WORK. COMP. LAW § 120.

[249] WORK. COMP. LAW §§ 50, 114.

In 2007, the Fiscal Policy Institute (FPI) found that:

> Employer non-compliance with the state's workers' compensation program is a growing problem in New York. Many companies fail to provide this coverage for their workers. This deprives the workers of coverage and limits the insurance pool of workers covered, in turn increasing the premium costs for other employers and shifting the costs of medical care for injured workers to the injured workers themselves, taxpayers and other employers. The scope of the problem is significant. Conservative estimates suggest that between 500,000 and a million New York workers who should be covered by workers' compensation are not.[250]

FPI further reported that "in 2003 the total annual payroll of workers covered by workers' compensation was only 80 percent of the unemployment insurance payroll," pointing to a substantial shortfall potentially attributable to employer misclassification of employees as independent contractors.[251]

New York took a number of important steps in response to the FPI report. One significant step was the creation of a Joint Enforcement Task Force on Employee Misclassification ("JETF").[252] In 2014 alone, the JETF "identified nearly 26,000 instances of employee misclassification; discovered nearly $316 million in unreported wages; and assessed nearly $8.8 million in unemployment insurance contributions."[253] In the aggregate, the JETF "identified nearly 140,000 instances of employee misclassification and discovered nearly $2.1 billion in unreported wages" between 2007 and 2014.[254]

This data provides some insight into the extent of employee misclassification, and additionally identified the construction field—which frequently employs low-wage and immigrant workers—as an area in which such behavior was commonplace. In response, New York enacted the Construction Fair Play Act in 2010, which was designed to ensure that these workers were properly classified as employees for workers' compensation and other purposes.[255] Under the Fair Play Act, a construction worker is deemed to be an employee unless he or she is (1) free from direction and control in performing the job, (2) is performing work that is not part of the

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[250] James Parrott, *New York State Workers' Compensation: How Big Is the Coverage Shortfall?*, FISCAL POLICY INSTITUTE (2007), http://fiscalpolicy.org/new-york-state-workers-compensation-how-big-is-the-coverage-shortfall.

[251] *See id*. at 2.

[252] *See* Exec. Order No. 17, 9 CRR-NY 6.17 (2007).

[253] *Misclassification of Workers as Independent Contractors*, RES. FOUND. CUNY, https://www.rfcuny.org/RFWebsite/principal-investigators/manage-an-award/misclassification-of-workers/ (citing the Joint Enforcement Task Force on Employee Misclassification's annual report in 2014).

[254] *Id*. at 3.

[255] The New York State Construction Industry Fair Play Act, Art. 25-B, § 861-a.

usual work done by the business that hired him or her, *and* (3) has an independently established business of their own.[256]

While there is little evidence that the Fair Play Act has altered employer behavior in treating workers as employees instead of independent contractors, it has proved effective in resolving controversies about employer/employee relationship when injured construction workers do file claims, and in improving the ability of such workers to recover benefits.[257] It is important to observe however, that claims filed by these workers remain contested on a routine basis.[258] The Fair Play Act does nothing to enhance access to the system for injured workers, and its impact on dissuading employers and insurers from contesting claims is minimal; it becomes useful only after the injured worker has successfully navigated those obstacles and has secured a trial of his or her claim. Needless to say, between the date of the injury and the date of the ultimate outcome (which may involve a delay of months or even years), the injured worker is provided with no compensation or medical coverage for the work-related injuries.[259]

The Fair Play Act also does not address the predominant modern cause of employee misclassification: the rise of the "gig economy." Workers' compensation laws were conceived to address occupational injuries and illnesses that occurred in the context of traditional employment models, which were themselves an outgrowth of historical master and servant relationships. By contrast, the model of employment in the "gig economy" generally involves a "digital matchmaker" connecting the worker with an employer in the service industry on the one hand and the customer on the other.[260]

The scale of the gig economy is enormous:

> Companies that would be considered part of the gig economy started appearing in 2005, with the launching of Amazon's Mechanical Turk, widely considered one of the first gig economy platforms. Since then, they have exhibited a high rate of growth, in size, number, and revenue. The global "sharing economy" market as a whole was valued at $26 billion in 2013, and some predict it will grow to become a $110 billion revenue market in the coming years. Based on tax receipts, it has been estimated that, since, 2009, nearly 1.3 million new non-employer establishments were created—nearly

[256] The New York State Construction Industry Fair Play Act, Art. 25-B.

[257] *See*, *e.g.*, Matter of Melvin Bonilla, 2018 LEXIS 976 (N.Y. Workers' Comp. Bd. Jan. 31, 2018); Matter of John Senisi, 2017 LEXIS 6554 (N.Y. Workers' Comp. Bd. Apr. 14, 2017); Matter of James Trackey Painting, Inc., 2016 LEXIS 6050 (N.Y. Workers' Comp. Bd. Jun. 10, 2016).

[258] *Id*.

[259] WORK. COMP. LAW § 25(2); 12 NYCR § 300.38

[260] Aaron Smith, *Gig Work, Online Selling and Home Sharing*, PEW RES. CTR., Nov. 17, 2016, 8-9, 11 https://www.pewresearch.org/internet/2016/11/17/gig-work-online-selling-and-home-sharing/.

> 75% of all businesses. Of the nearly 270,000 non-employer businesses added between 2012 and 2013, three sectors accounted for 60% of the growth: other services; transportation and warehousing; and real estate, rental, and leasing. As of December 2014, Uber had about 2000 employees but more than 160,000 "driver-partners" in the United States alone, while Netflix employs a small fraction of the number of employees that used to work in the company it supplanted, Blockbuster. Uber, one of the few companies for which data are available, has more than doubled the number of new drivers every 6 months for the last 2 years.[261]

Workers' compensation systems have struggled to adapt to the challenge the gig economy presents to the core issue of employer/employee relationship and whether gig economy workers are misclassified employees or are truly independent contractors. California recently responded to these developments with the enactment of Assembly Bill 5, which declared most of its gig economy workers to be employees—and at the time of this writing is being challenged in court.

Thus far, New York has taken a hybrid approach to this issue. In the area of for-hire transportation, it has defined medallion taxi drivers as employees of the medallion owner, created the Black Car Operators Injury Compensation Fund to provide workers' compensation benefits to drivers employed by "black car" bases who join the fund (including Uber and Lyft), and, subject to a few exceptions, excluded all other for-hire drivers (known as "livery cab" drivers) from coverage as employees.[262] In essence, New York treats medallion taxicab drivers as traditional employees, considers black car drivers to be employees of the Fund instead of the base for workers' compensation purposes, and has statutorily approved the classification of all other drivers as independent contractors, regardless of the actual nature of the relationship between the driver and the livery base.

This model has succeeded in providing workers' compensation coverage for taxicab and black car drivers, within limits. Because the Black Car Fund's status as an employer is based on the statute, rather than an actual relationship between it and the driver, the Fund lacks the driver's wage information. In a system in which compensation is a critical function of wages, this is a significant issue.

In practice, the Black Car Fund has adopted, and the Board has generally approved, the use of an "industry standard" figure of $250 per week

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[261] Molly Tran and Rosemary K. Sokas, *The Gig Economy and Contingent Work: An Occupational Health Assessment*, J. OC & ENVIRON. MED. e63-e66 (2017).

[262] WORK, COMP. LAW § 2(3); N.Y. EXEC. L. § 160-CC, ART. 6-F (2015); NY EXEC. L. § 160-DDD (2019); *see, e.g.,* Matter of NYBCOIF, 2003 LEXIS 89281 (N.Y. Workers' Comp. Bd. Dec. 19, 2003) (discussing of the operations of the Black Car Operators Injury Compensation Fund); Matter of Nepel Car Service Inc., 2011 LEXIS 5082 (N.Y. Workers' Comp. Bd. Sept. 12, 2011) for the ILDBF).

as the wage of an injured black car driver.[263] If the driver contends that this figure is not an accurate representation of their income, then he or she must produce tax returns, which are then analyzed to exclude "mandatory" deductions from income, while including "permissible" deductions.[264]

However, the Black Car Fund model, with both its benefits and its drawbacks, has thus far been limited to for-hire drivers. The Board has expressly refused to extend coverage to delivery workers and others who are employed in an identical manner as drivers, but who deliver food, documents, or objects instead of people.[265] These delivery employments pay low wages and require limited English proficiency and as a result are often occupied by immigrant workers—who are thus excluded from the workers' compensation system as the result of being classified as independent contractors, rather than employees.

D. The Wage Basis of Worker's Compensation

As discussed in Section IV.B.1 and mentioned in the discussion of black car drivers, the foundational element of workers' compensation benefits is the injured worker's average weekly wage.[266] The average weekly wage does not only affect the injured worker's benefit rate for periods of total disability (subject to the statutory maximums); it also affects the extent to which compensation is paid for periods of partial disability and even the value of awards payable for the loss or loss of use of limbs resulting from a workplace accident.[267]

The Board assumes that the worker's employer maintains payroll information and that it will be submitted in order to permit a proper calculation of the average weekly wage and consequent awards of compensation.[268] However, for workers who are employed "off the books"—day laborers and many others—proof of average weekly wage presents special complications. At the outset, the employer may submit either a fictitious payroll, no payroll at all, or (not infrequently) a payroll which alleges the injured worker had only been employed for a short time before the accident. If the injured worker disputes the employer's account of his or

[263] *See*, *e.g.*, Matter of Black Car Operators, 2016 LEXIS 12040 (N.Y. Workers' Comp. Bd. Nov. 10, 2016).

[264] *See*, *e.g.*, Matter of Communicar, Inc., 2019 LEXIS 6637 (N.Y. Workers' Comp. Bd. Jun. 25, 2019).

[265] *See*, *e.g.*, Matter of Postmates, 2019 LEXIS 2945 (N.Y. Workers' Comp. Bd. Mar. 18, 2019); Matter of Uber Eats, 2018 LEXIS 11859 (N.Y. Workers' Comp. Bd. Dec. 18, 2018); Matter of Door Dash, 2018 LEXIS 9270 (N.Y. Workers' Comp. Bd. Dec. 11, 2018).

[266] WORK. COMP. LAW § 14.

[267] *See* Section IV.B.1.

[268] WORK. COMP. LAW § 14; STATE OF NEW YORK WORKERS' COMPENSATION BOARD, Employer's Statement of Wage Earnings, C-240 (6-17), http://www.wcb.ny.gov/content/main/forms/c240.pdf.

her wages, then s/he bears the burden of proof on the issue—which is often difficult or impossible to meet if payment was made in cash.

As a result of these issues, immigrant and low-wage workers employed by small employers in an "off the books" capacity often suffer even more substantial loss of wages than ordinarily occurs in the workers' compensation system, because the starting point from which their compensation was measured has been artificially depressed by the employers' conduct and/or a lack of proof to the contrary. In some fields, such as the for-hire drivers discussed above, the use of *de minimus* arbitrary figures for average weekly wage absent proof to the contrary ("industry standard") has become legitimized and standardized.[269]

The impact of average weekly wage on the amount of benefits for total and partial disability has been previously analyzed in Section IV.A.1. and will not be repeated here. Although the role of average weekly wage in schedule loss of use was briefly discussed in Section IV.B.1.b.i., it bears further consideration.

As the chart in that section shows, in 1999 the value of a schedule loss of use of a limb was the same for workers who earned $600 per week, $1,200 per week and $1,800 per week ($9,760 in our example), although all received twice as much for the same injury as a worker who earned $300 per week ($4,880 in our example). In 2009, there had been no change in the value of an award for the same injury for workers earning $300 per week or $600 per week, but there had been a fifty percent increase for middle-wage and high-wage workers (from $9,760 to $14,640 in our example). By 2019, there had still been no change from 1999 for the two groups of low-wage workers, and there had been no further increase for the middle-wage worker, but the value of the award for the high-wage worker had increased more than another fifty percent (from $14,640 to $22,792.98 in our example).

Put another way, in 1999 there was no wage-based disparity in the value of a limb for any worker who earned $600 per week or more. By 2009, however, the limb of a high-wage worker was considered to be one and a half times as valuable as that of a low-wage worker, and by 2019 it had become two and one-third times as valuable.

Moreover, in one category of schedule loss of use awards, undocumented immigrants have been effectively barred from receiving the same compensation as other injured workers. Workers' Compensation Law § 15(3)(v) provides that where an injured worker has a schedule loss of use of 50% or more of a hand, arm, foot, or leg, is unable to return to full wages as a result of that injury, and cannot be retrained, then additional weekly

[269] See footnotes 249 and 250.

benefits are payable in the form of a classifiable permanent partial disability.[270]

However, in *Matter of Ramroop v. Flexo-Craft Print, Inc.*, an undocumented immigrant worker "sustained a severe crush injury involving four fingers when he caught his right hand in a printing press" and was found to have a 75% schedule loss of use.[271] He was then "referred to the New York State Education Department's Office of Vocational and Educational Services for Individuals with Disabilities (VESID), but the agency found that he was ineligible for services because he is an undocumented alien who cannot be legally employed in the United States."[272]

The Board then found that he "did not meet the requirements of section 15(3)(v) and that Workers' Compensation Law § 17 should not change this result. Claimant appealed to the Appellate Division, which affirmed. The court held that 'the Board quite properly found that because claimant was an undocumented alien, he was ineligible for employment in the United States and, thus, his loss of earning capacity was not solely attributable to his compensable injury' and that 'Workers' Compensation Law § 17 [did] not compel a contrary result.'"[273] The Court of Appeals granted leave to appeal and upheld the denial of benefits, although on different grounds than the Appellate Division.[274]

The majority read the statute as containing two requirements: that the worker participate in a "board-approved rehabilitation program" and that he or she be found an infeasible candidate for rehabilitation.[275] It went on to find that the claimant was unable to meet these statutory requirements because his immigration status rendered him ineligible for participation in a rehabilitation program, which is available only to those who can be legally employed.[276] It rejected the injured worker's reliance on Workers' Compensation Law § 17 on the grounds that the statute was only intended to ensure the equal payment of benefits to non-resident aliens, not to provide the same rights to compensation for undocumented immigrants as citizens and resident aliens.[277]

Thus, the Court of Appeals decision in Ramroop limited the payment of certain schedule loss benefits based on immigration status, in addition to the impact of wages on schedule loss awards discussed above.

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270 Work. Comp. Law § 15(3)(v).

271 Matter of Ramroop v. Flexo-Craft Print, Inc., 11 N.Y.3d 160, 164-65 (2008).

272 Ramroop, 11 N.Y.3d at 165.

273 Ramroop, 11 N.Y.3d at 165-66.

274 *Id*.

275 *Id*.

276 *Id.*

277 Ramroop, 11 N.Y.3d at 168.

E. Labor Market Attachment.

In *Matter of Zamora v. New York Neurologic*, the Court of Appeals was presented with the question of whether a worker who was partially disabled—unable to return to their at-injury job, but retaining the ability to perform some work—should be obligated to look for work within his or her restrictions as a condition precedent to the receipt of workers' compensation benefits for lost wages.[278] Prior to *Zamora*, the Appellate Division had routinely held that if the work-related disability was the reason the worker had been separated from the at-injury job, the Board was required to infer that any subsequent lost wages were caused by the injury, as long as the disability continued.[279]

In *Zamora*, the Board and the insurer contended that the inference was unwarranted, and that instead the Board should be free to require proof of "labor market attachment" from all partially disabled workers as a condition of the payment of indemnity benefits, although such a requirement is absent from the statute itself.[280] A majority of the Court of Appeals accepted this argument, holding that "[a]n inference of causation may be drawn from the disability-related withdrawal, depending on the nature of the disability and the nature of the claimant's work."[281] The Court thus changed the status of the inference from mandatory to permissible, allowing the Board to require proof of labor market attachment by partially disabled workers.[282] With no exceptions, the Board has since required every partially disabled worker to make such a showing upon request by the employer or insurer.[283]

The issue of labor market attachment affects both low-wage and immigrant workers in different ways.

For low-wage workers with substantial disabilities, the requirement to demonstrate labor market attachment is largely divorced from reality. By way of example, if the injured worker has an average weekly wage of $450 and is considered to have a 75% disability, then by definition he or she is deemed to have a 25% wage earning capacity.[284] Where the average weekly

[278] Zamora v. New York Neurologic Assocs., 970 N.E.2d 823, 824 (2012).

[279] *Id*. at 826.

[280] *Id*.

[281] Zamora, 970 N.E.2d at 826.

[282] *Id*. at 826-27.

[283] In 2017, the Legislature partially overruled the Zamora decision by amending Work. Comp. Law § 15(3)(w) to provide that permanently partially disabled workers who were entitled to benefits at the time of their permanent partial disability classification were no longer obligated to demonstrate attachment to the labor market. L. 2017, c. 59, part NNN, subpart A, § 1; s*ee* Matter of O'Donnell v. Erie County, 2020 LEXIS 654, at *1-12 (N.Y. Ct. App. Mar. 26, 2020).

[284] A worker's "disability" is defined in terms of their "loss of wage-earning capacity;" thus the difference between their average weekly wage and their loss of wage-earning capacity equals their remaining wage-earning capacity. WORK. COMP. LAW § 15(5-a).

wage is $450, this amounts to an estimation that the worker has the remaining capacity to perform work at a wage of $112.50 per week.[285] With a minimum wage of $15 per hour, a requirement that this worker demonstrate attachment to the labor market is tantamount to requiring him or her to look for a job that will provide employment for 7.5 hours per week. Meanwhile, failing to do so results in the worker forfeiting $225 per week in workers' compensation wage-loss benefits.[286]

By contrast, an injured worker with a $1,500 average weekly wage and a 75% disability would theoretically retain the ability to earn $375 per week—a figure at which the prospects of finding at least part-time employment are far more realistic.

For low-wage workers with substantial disabilities, therefore, the requirement to demonstrate labor market attachment is often a futile effort to seek hypothetical employment that does not exist in the real word. Moreover, the requirement overlooks the fact that such workers generally require the entirety of their pre-accident wage to make ends meet and have no motivation whatsoever to remain out of work at the reduced benefit they receive from the workers' compensation system. As Professor Parrott observed, the loss of a third of their wages—which is the best-case scenario for an injured worker—is still financially devastating for low-wage workers."[287]

Undocumented immigrant workers face a different issue resulting from the requirement to demonstrate labor market attachment: the question of their ability to be legally employed. Although the Court of Appeals held in *Balbuena*, that they could be compensated for lost wages after an injury, a principle that was extended to workers' compensation benefits in Amoah, neither case specifically addressed the role of an administrative agency requirement that an undocumented immigrant seek employment.

In *Matter of Deb El Food Products, LLC*, the injured worker was an "undocumented illegal alien" who was receiving workers' compensation benefits for lost wages.[288] Upon a finding that she had a "temporary partial disability," the insurer sought suspension of her benefits on the grounds that she had failed "to produce evidence of labor market attachment."[289] When the worker "did not produce evidence of a job search or participation with

[285] $450 x .25 = $112.50.

[286] $225 is the benefit rate for a 75% disability for a worker with a $450 average weekly wage. WORK. COMP. LAW § 15(5-a). It should also be noted that if an injured worker returns to employment, workers' compensation benefits are paid based on the reduction in earnings as compared to the pre-accident average weekly wage. *Id.* Thus, if a worker with a $450 average weekly wage returns to work earning $100 per week, their benefit rate would be $233.33 per week ($450 - $100 = $350; $350 x 2/3 = $233.33). *Id.*

[287] Parrot, *supra* note 195, at 4.

[288] Deb El Food Prods. LLC, 2016 LEXIS 14054 (N.Y. Workers' Comp. Bd. July 7, 2016) [hereinafter *Deb El*].

[289] *Id*. at 1-2.

ACCES-VR, One Stop or similar job placement and retraining services[, the] WCLJ found voluntary withdrawal [from the labor market] by the claimant … and suspended further awards in the case. . .."[290]

The injured worker appealed, contending that because her immigration status precluded her from legally seeking employment, the Board could not properly demand proof of attachment to the labor market from her as a condition of awarding benefits.[291] Relying on Workers' Compensation Law § 17, the Board held that the claimant failed her obligation to search for work, despite the fact that she was partially disabled and that undocumented aliens are not precluded from benefits merely due to their immigration status.[292]

The Board has since followed its decision in *Deb El Food Products* without exception, and it appears that no further appeals have been taken by either injured workers or insurers on the issue.[293] It is therefore well-established that undocumented immigrants who are injured on the job and are partially disabled are obligated to demonstrate attachment to the labor market as a condition of receiving workers' compensation benefits for wage loss, regardless of the impact of their immigration status on their ability to be legally employed.

VI. IMPROVING THE AVAILABILITY AND SUBSTANCE OF WORKERS' COMPENSATION BENEFITS FOR IMMIGRANT AND LOW-WAGE WORKERS

The remaining question is clear: What meaningful steps can be taken to remove the obstacles faced by immigrants and low-wage workers in order to restore their access to workers' compensation benefits and to improve the substance of those benefits? We have ten proposals that would substantially improve the workers' compensation system for these groups of workers.

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290 *Id*.

291 *Id*. at 2-3.

292 *Id*. at 5-6.

293 *See*, *e.g.*, Wafler Farms, Inc., N.Y. St. Workers' Comp. Bd. G1353022 (2018) 2018 LEXIS 8787 (holding that a partially disabled claimant, who testified that he could work in Jamaica but not the States anymore due to visa expiration, is required to show proof of attachment to the labor market); All. Welding & Steel, N.Y. St. Workers' Comp. Bd. 1985506 (2019) 2019 LEXIS 6322 (holding that claimant's online job search, being sporadic and not within his physical restrictions, did not overcome the labor market attachment requirement, despite claimant's immigration status); CS Wholesale Grocers, N.Y. St. Workers' Comp. Bd. G0176201 (2017) 2017 LEXIS 14082 (holding that although immigration status is not an exception from labor market attachment requirement, claimant proved his reattachment by submitting documents of ESL class enrollment and job applications on Indeed.com.").

1. Equalize the status of dependents between Workers' Compensation Law §§ 16 and 17.

As discussed in Section III.B, even after the elimination of the commutation provision in 1985, Workers' Compensation Law § 17 still retains several provisions that exclude or reduce the benefits payable to the dependents of immigrant workers. These provisions include the one-year dependency requirement for parents in death cases,[294] the rule that death benefits are payable to one parent "or" the other, and the exclusion of several categories of dependents who are eligible to receive death benefits under Workers' Compensation Law § 16, but not 17. An appropriate statutory remedy would be to remove the remaining language from Workers' Compensation Law § 17 that perpetuates these reductions and exclusions from coverage.

2. Increase and index the minimum weekly benefit rate.

As discussed in Section IV.B.1.a, the minimum weekly benefit rate is presently only sixteen percent of the maximum weekly benefit rate, nearly a one-quarter drop from its high-water mark as twenty percent of the maximum weekly benefit rate in 2007. Even at that figure, the minimum weekly benefit rate was inadequate compared to the maximum, and in the absence of indexing the disparity will continue to grow in future years. An appropriate statutory remedy would be to fix the minimum weekly benefit rate at twenty-five percent of the statutory maximum weekly benefit rate, thus preserving its adequacy both currently and on an ongoing basis.

3. Require the payment of awards for schedule loss of use at no less than seventy-five percent of the statutory maximum weekly benefit rate, regardless of average weekly wage.

As discussed in Section IV.B.1.b.i, the 2007 legislation has created a significant and unwarranted disparity in the workers' compensation system's measure of the value of the loss or loss of use of a limb for low-wage workers as compared to high-wage workers. An appropriate statutory remedy would be a requirement that weekly compensation benefit rate used for the calculation of schedule loss awards be the worker's maximum weekly benefit rate or seventy-five percent of the statutory maximum weekly benefit rate, whichever is greater. Under this approach, the disparity in valuation between the loss of a limb for a low-wage worker and the loss of a limb for a high-

[294] This requirement is abrogated by the superseding provisions of treaties in some, but not all cases. Hansen, *supra* note 71, at 98-99; Iannone, *supra* note 79, at 315; Johansen, *supra* note 76, at 144; Testa, *supra* note 82, at 561-62; Heaton, *supra* note 81, at 175-76; Mizugami, *supra* note 109, at 579.

wage worker would never be greater than twenty-five percent for the impact of the injury.[295]

4. Rescind the duration limits for classifiable permanent partial disability benefits.

As discussed in Section IV.B.1.b.ii, the duration limits the 2007 legislation imposed on classifiable permanent partial disability benefits had a disproportionate adverse impact on low-wage workers, with the "savings" from the "PPD caps" going to fund long-overdue increases in the maximum benefit rate that improved temporary disability and schedule loss benefits for high-wage workers. The architecture of the workers' compensation system does not call for low-wage workers to fund benefits for high-wage workers, or for any group of workers to receive less compensation so another group can receive more. Instead, the basis of the system is that benefits are to be provided at the expense of the employer, which is able to pass the cost on to the consumer of its goods or services.[296]

5. Reduce the complexity and formality of the system.

As discussed in Section IV.B.2, the increasing complexity of the workers' compensation system creates significant barriers to access to benefits for low-wage and immigrant workers. Although there are numerous areas that would benefit from reduced complexity and formality, key items would include reducing or eliminating the formal requirements associated with filing a claim and the scheduling of an initial hearing in every case. The former would help ensure that the system captures the claims of injured workers who require its protection, and the latter would help ensure that those workers are informed about the nature of their claims, any issues that they present, and the benefits that the statute provides. From a legislative standpoint, the adoption of a statute similar to Vermont Labor Law § 602(a)

[295] Periods of actual lost wages would remain payable based on the injured worker's actual average weekly wage. A schedule loss award is payable for a set number of weeks at a weekly rate of two-thirds of the injured worker's average weekly wage. WORK. COMP. LAW § 15(3)(a)-(t). So currently a worker who earns $1,500 per week has a schedule loss award paid at $934.11 per week, whereas a worker with a $300 average weekly wage has his or her award paid at $200 per week. *See id.* Loss of a hand is equal to 244 weeks under the statute, so 10% loss is equal to 24.4 weeks. *See id.* This means that the high-wage worker's loss is worth $22,792.28 (24.4 x $934.11) while the low-wage worker above's loss is worth $4,880 (24.4 x $200). *See id.* The proposal is that the weekly rate used to calculate schedule loss awards be no less than 75% of the statutory maximum. *See id.* Currently that means the low-wage worker's award would be paid at $700.58 per week ($934.11 x .75), regardless of their $300 wage. *See id.* That would make the award in the example $17,094.21 (24.4 x $700.58), and thus more injury-consistent and less wage-variable; *see id.*; WORK. COMP. LAW § 15(3).

[296] *See* Post v. Burger & Gohlke, 111 N.E. 351, 353 (1916).

would be beneficial.[297] That statute provides that "[a]ll process and procedure under the provisions of this chapter shall be as summary and simple as reasonably may be" and that the Commissioner must print and provide "free of charge, to any employer or employee such forms as he or she deems necessary to facilitate or promote the efficient administration of such provisions."[298]

6. Improve language access for workers with limited English proficiency.

As discussed in Section V.A, the inadequacy of language access services is a significant obstacle for immigrant workers. Along with reducing the formality and complexity of the system, recommendations similar to those made by NCLEJ would substantially improve the situation. First, Governor Cuomo' Executive Order requiring state agencies to provide language access services should be incorporated into the statute. Second, The Board should provide in-person interpretation of its hearings for those who are not fluent in English, as well as employ interpreters at each of its hearing locations. Selective certification could be used in order to employ individuals with language skills in other positions. Contract interpreters could be employed to provide additional capacity. Finally, affirmative efforts should be made to identify workers who are in need of interpretation and to communicate with them in their native language. Community engagement and collaboration with other agencies to identify best practices should be an integral part of these efforts. Taken together, these recommendations would significantly improve the availability of information about the system, create greater transparency about its function and the benefits it provides, and permit immigrant workers to more easily obtain access to those benefits.[299]

7. Liberalize the standards and increase penalties for retaliation and discrimination.

As discussed in Section V.B, Workers' Compensation Law § 120 unreasonably restricts the scope of conduct that constitutes discrimination, creates an excessive burden of proof for the worker, and includes penalties that are wholly inadequate. An appropriate remedy would be to expand the statute to include a broader array of discriminatory conduct, to reduce the burden of proof, and to substantially increase the statutory penalties for employer who engage in discriminatory behavior.

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297 VT. STA. ANN. tit. 21, § 602(a) (2019).

298 *Id*.

299 NATIONAL CENTER FOR LAW AND ECONOMIC JUSTICE, *supra* note 228, at 2.

8. Provide workers' compensation coverage for workers in the "gig economy."

As discussed in Section V.C, the system currently provides no coverage for many workers in the "gig economy," who are often low-wage and immigrant workers. In order to remain relevant as a means of worker protection, the Workers' Compensation Law must be adapted to the realities of the modern labor market. An appropriate remedy would be to deem workers in the gig economy employees of the business entity that depends upon their labor, or alternatively to replicate the model provided by the Black Car Fund in order to provide workers' compensation coverage.

9. Provide workers compensation benefits for immigrant workers with significant limb injuries.

As discussed in Section V.D, the Court of Appeals decision in *Ramroop*, barred undocumented immigrants from accessing benefits under Workers' Compensation Law § 15(3)(v) for loss or loss of use greater than fifty percent of a limb. An appropriate remedy would be to enact legislation amending the statute to modify the present requirements and permit access to these benefits for all severely injured workers, regardless of immigration status.

10. Eliminate the requirement for proof of labor market attachment.

As discussed in Section V.E, the requirement that low-wage and immigrant workers who are partially disabled demonstrate "attachment to the labor market" as a condition of receiving wage replacement benefits is both unreasonable and problematic. An appropriate remedy would be to expand the Legislature's 2017 amendment of Workers' Compensation Law § 15(3)(w) to eliminate the labor market attachment requirement in cases involving temporary partial disability.

VII. CONCLUSION

New York's workers' compensation system evolved in order to provide compensation to immigrant and low-wage workers, who were often engaged in hazardous employment and, as a result, were frequently injured. Today's population of immigrant workers arrived from different lands and face different hazards but remain employed at relatively low wages and face an increased risk of injury compared to other workers.

Regrettably, changes in the workers' compensation system over the past several decades have substantially eroded the ability of today's immigrants and low-wage workers to obtain benefits. The system has become increasingly formal and complex, making it difficult for these workers to file claims and even more difficult for them to obtain benefits.

The issues identified in this article are each capable of being remedied by a combination of legislative action and administrative motivation. It is important that both occur in order to ensure that workers' compensation remains a viable portion of the social safety net for the most vulnerable population of workers, and those who are most in need of its protection.