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OUTSIDE COUNSEL

BY ROBERT E. GREY

Which Way for Workers' Compensation?

The debate regarding the future of the Workers' Compensation Law could not have more divergent viewpoints.

In one camp, Governor George Pataki and the Business Council believe that workers' compensation is an expense that must be controlled (through reduction of insurance premiums) in order to maintain economic competitiveness for New York employers. In the opposite camp, worker groups including the New York State AFL/CIO and a number of legal organizations take the position that current workers' compensation benefits are inadequate and that the purpose of the Workers' Compensation Law is to protect injured workers from financial ruin, rather than to provide a competitive advantage to employers.

The governor has now proposed legislation[1] that may bring the debate to the point of legislative action. This proposal seeks to reduce benefits paid for permanent injury of all types to all workers, to increase insurance carrier control over the medical treatment for injured workers, and to reduce access to benefits. Given this circumstance, it seems an appropriate time to consider the underlying facts and alternative solutions.

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When the Workers' Compensation Law was initially enacted, the benefit rate for lost wages was fixed at two-thirds of the state's average weekly wage (the average weekly salary of the average working New Yorker). Because the rate was not indexed to changes in the state's average weekly wage, it has been the subject of periodic legislation in order to remain a relevant means of support for injured workers. The last such legislative increase occurred in 1990, when the maximum rate was raised from $300 per week to $400 per week over a three-year period ending in 1992. At that time, however, the $400 per week rate was less than 50 percent of the state's average weekly wage.[2] Measured in 1992 dollars, $400 per week is now worth less than $288.

Today, the state's average weekly wage is approximately $960 which means that honoring the principles of the original Workers' Compensation Law would require a maximum compensation rate of $640 per week.

An Alternative Approach

The challenge for the Legislature is to manage the cost of workers' compensation insurance to employers while ensuring that the result for injured workers is neither harsh nor inconsistent with enlightened social policy.[3] Meeting this challenge requires recognition by the Legislature of several facts.

First, the rate "increase" that has been proposed by the governor is wholly inadequate to provide fair and reasonable benefits to New York's injured workers. The proposed rate increase affords no benefit at all to those who earn less than $600 per week. The maximum weekly workers' compensation rate should be increased to $640 per week. In addition, it should thereafter be indexed to the state's average weekly wage so that the rate will rise in a predictable fashion as wages rise, rather than requiring a pitched battle every decade over whether (and how much) the rate should be raised. Employers and carriers will know how and when the cost of workers' compensation insurance will rise (as wages rise), rather than having to make plans based on the unpredictable outcome of periodic legislative action.

The minimum workers' compensation rate (presently only $40 per week) should also be raised to a livable amount. To permit an injured worker —especially the type of low-wage worker who is most likely to be affected by the minimum rate—to be paid at a Depression-era rate is wholly contrary to the humane and social purposes of the Workers' Compensation Law. Raising the minimum rate ($100 per week might be appropriate) would have almost no effect on insurance rates and would provide enormous relief for thousands of low-wage workers who are subject to financial ruin at the current minimum rate (and who are also driven to taxpayer-supported public assistance as a result).

Second, proposals to reduce and cap benefits for permanent injury and disability are unnecessary and unwarranted. The permanent loss of use of an extremity is simply not worth less in 2006 than it was worth in 1990. To terminate the weekly payments of individuals who are no longer able to work, or who have had their ability to earn a living reduced by occupational injury or illness, and to transfer the burden of their support to public assistance, charity, or family is simply unacceptable.

Third, while allowing insurance carriers to control the medical treatment of injured workers (as proposed by the governor) might provide a cost-savings for the carriers in the short term, the long-term effect might well be a lack of maximal rehabilitation for the worker and thus an increase in the overall costs of claims. Practitioners have often observed that delays in authoriz-

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ing testing prolong the period of worker disability and increase the permanent effect of an injury. Professional athletes receive diagnostic testing, surgery, and therapy as soon as medically possible in order to minimize their period of disability and maximize their recovery. Injured workers, on the other hand, must often wait months for approval for testing and treatment. The proper approach to limiting workers' compensation costs would be to give injured workers and their treating physicians more, not less, say in medical treatment issues. A good start might be to raise the authorization limit from $500 (where it has been since 1990) to $1,000. This would allow injured workers to obtain common diagnostic tests such as MRI and EMG/NCV studies more expeditiously, improving their chances for recovery and return to work.

Fourth, private insurers, the New York State Insurance Department and the Workers' Compensation Board have historically been less than forthcoming with financial data regarding workers' compensation claims. The New York State Insurance Fund, which is a carrier of last resort and thus must accept some of the worst insurance risks in the state, has long operated with complete financial stability. Indeed, on more than one occasion the reserves of the State Insurance Fund have been tapped to supplement the funds of the State Treasury, without apparent ill effect on the state fund's ability to pay claims. The lack of transparency in similar financial data for private insurance carriers renders suspect the extent of their claimed expenses, profits, and efficiency connected with providing benefits. This situation should be remedied by legislation requiring the carriers to provide, and the board and the Insurance Department to verify and tabulate, data regarding claims made and paid. Not only would this permit employers to make informed judgments when purchasing insurance, it might well lead to the identification of trends in occupational injury.

The Governor's Bill

Contrary to the progressive approach outlined above, the governor has issued a program bill for the Workers' Compensation Law that would increase the maximum compensation rate to only $500 per week.[4] By way of comparison, the maximum weekly benefit rates in other states in the region range from a low of $691 in New Jersey to a high of $1,005 in Connecticut.

Coupled with this nominal increase in the weekly workers' compensation rate, however, the governor's bill proposes a reduction in benefit amounts for loss or loss of use of extremities and a cap on benefits for those permanently disabled from work.

The Workers' Compensation Law currently recognizes two different types of permanent injury, known to practitioners as "schedule loss" injuries and "permanent partial" disabilities. The amount of a "schedule loss" award, typically payable for loss of function of an extremity, is calculated based on a statutory number of weeks of compensation.[5] Those weeks are then made payable at the worker's maximum weekly rate (up to the $400 weekly maximum). Any payments made to the worker for time lost from work are deducted from the award.

While the governor's bill increases the maximum weekly rate for temporary disability to $500 per week, it makes scheduled loss awards payable at half of the worker's maximum rate to the extent that the award is not attributable to lost time. Thus, a worker whose award is today calculated at $400 per week would under the governor's bill have that same award calculated at $250 per week. This is an unmitigated reduction in benefits. An analysis of the governor's bill has revealed that it would cut the amounts paid to injured workers for schedule loss injuries by one-third to one-half from current levels.

Workers who are permanently disabled from earning their pre-injury wages as the result of on-the-job injury may be found "permanently partially disabled" in the workers' compensation system. For the past 90 years, such workers have been compensated for as long as their disability prevented them from earning their pre-accident salary, often for life.[6] Thus, a seriously injured 40-year-old construction worker who had previously earned $1,000 per week and who is now unable to earn more than $475 per week would be entitled to $350 per week in compensation benefits for the rest of his life.

The governor's bill, however, proposes a schedule for permanent injury under which a worker who is 90 percent to 100 percent disabled would be capped at 500 weeks of benefits, with those who are less disabled afforded progressively shorter periods. Based on the Workers' Compensation Law definition of total disability (which requires a complete loss of all earning capacity), the most seriously ill and injured workers would be deprived of workers' compensation after less than 10 years of benefits.

Most workers, of course, would receive far less than 10 years of benefits. For example, the construction worker described above would be entitled to less than seven years of benefits in exchange for a lifetime's loss of earnings.

Contrary to the progressive approach, the governor has issued a program bill for workers' compensation that would increase the maximum compensation rate to only $500 per week. In comparison, maximum weekly benefit rates in other states in the region range from a low of $691 in New Jersey to a high of $1,005 in Connecticut.

The governor's bill would also abrogate an injured worker's current statutory right to a hearing before a judge at the Workers' Compensation Board.[7] Some would argue that this right has already been de facto abrogated by administrative changes over the past decade (which have resulted in a decline in the number of claims indexed by the Workers' Compensation Board each year from 2000 through 2004).[8] A further chilling effect on access to benefits would result from the governor's proposal to authorize a penalty against attorneys for appeals deemed "frivolous" by the board. A less obvious, but no less chilling proposal is to prohibit compensation benefits for injuries suffered while the claimant was engaged in "illegal activity." This provision could well have the effect of further deterring undocumented workers from filing legitimate claims for on-the-job injury.

Rationale

The justification offered in support of the governor's bill is that it

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would lead to a reduction in insurance premiums paid by employers for workers' compensation, which is a seemingly obvious consequence of a reduction in the benefits themselves. However, some of the available data calls into question whether the governor's bill would in fact reduce costs for employers.

Although the workers' compensation system was born as a compromise between employers and workers, the system is now dominated by a third constituent—insurance companies that accept premium dollars from employers and provide benefits to employees. Although coverage is available to all employers from the New York State Insurance Fund, and while some employers are self-insured, many employers opt to purchase workers' compensation insurance coverage from private carriers.

In 2004, private insurance carriers retained 35 cents out of every premium dollar, while injured workers received 39 cents. Similarly, while the insurance carriers have petitioned the Insurance Rating Board for double-digit premium increases, indemnity claims resulting in cash benefits paid to workers declined by over 36 percent from 1988 through 1997.[9] During that same period, indemnity claims made by workers also declined by over 32 percent, while new claims indexed by the Workers' Compensation Board declined by about 27 percent from 1991-2000.[10]

A 1996 legislative change has also operated to the further benefit of workers' compensation insurers. Prior to 1996, if an injured worker sued a third party, that third party could implead the employer under *Dole v. Dow Chemical Co.*,[11] in which event the employer's workers' compensation carrier provided a defense and indemnity under §1B of the workers' compensation insurance policy (absent contractual indemnification). As a result, compensation carriers' liability under §1B offset any benefit from lien recovery under WCL §29. The 1996 amendments shielded employers from impleader absent contractual indemnification, thus relieving compensation carriers from liability except in cases of "grave injury," which are exceedingly rare.[12] As a result, workers' compensation carriers now benefit almost completely from lien recovery, minimizing expenditures and boosting profits.

All of this data leads to the increase in workers' compensation costs to employers. To the contrary, the evidence establishes that workers' compensation costs related to claims made by injured workers have decreased significantly over the course of the last 15 years. There is, however, an alternative explanation for an increase in workers' compensation costs to employers.

On Feb. 9, 2006, the office of the New York State Attorney General announced that insurance company American International Group (AIG) had agreed to pay $1.6 billion to settle charges related to fraud, bid-rigging, and improper accounting.[13] About $344 million of that sum was earmarked for "states harmed by AIG's practices between 1986 and 1995 involving workers' compensation funds." On March 27, 2006 the office of the New York State Attorney General announced that insurance company Zurich Financial Services had agreed to pay $153 million to settle charges related to bid-rigging.[14] The Zurich settlement brought the sums recovered by the attorney general from insurance carriers and their executives to $2.6 billion.

In view of the available statistical data, taken together with the documented behavior of certain insurance carriers that both directly and indirectly increased the costs to employers for insurance, it may be concluded that the claims of injured workers are not the driving force behind any increase in costs. If that is so, then there would appear to be no valid justification for the proposals contained in the governor's bill, which would substantially reduce the benefits paid to those injured in the service of their employers.

1. Budget Bill, Article VII A.9561/S.6461.
2. Source: Bureau of Labor Statistics, United States Department of Labor.
3. See, e.g., *Cifolo v. General Electric Co.*, 305 N.Y. 209, 215, 112 N.E.2d 197 (1953).
4. Budget Bill, Article VII A.9561/S.6461.
5. WCL §15(3).
6. WCL §§15(5-a), 15(5-b).
7. WCL §20 ("The chair or board...upon application of either party, shall order a hearing.")
8. Summary Annual Reports available at www.wcb.state.ny.us.
9. Burton, et. al., "Workers' Compensation Benefits Continue to Decline," 10 Workers' Compensation Monitor, 1,7 (July/August 1997).
10. Ballantyne, "Workers' Compensation Research Institute, Revisiting Workers' Compensation in New York: Administrative Inventory," January 2002, p. 127; table 5.8 at p. 84.
11. *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143; 282 N.E.2d 288; 331 N.Y.S.2d 382.
12. WCL §11.
13. Source: Press Release, Feb. 9, 2006, Office of the Attorney General of the State of New York.
14. Source: Press Release, March 27, 2006, Office of the Attorney General of the State of New York.

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its decision in *Annenberg*. Last week, however, the court offered a revised interpretation.

"If compliance with SEQRA is procedural for the purpose of determining the availability of article 78 review, a failure of notice, however egregious it may be, must be procedural as well, and therefore falls within the category of cases in which article 78 review is available," Justice Spolzino wrote.

The judge noted that the Third Department had treated both SEQRA and notice violations as procedural, citing *Matter of Llana v. Town of Pittstown*, 234 AD2d 881, a 1996 ruling from the Third Department that involved both notice and SEQRA challenges.

John D. Cavallaro, a private attorney in Tarrytown who acts as the village attorney for the Village of Tuckahoe, said the ruling was significant because it would give local governments increased certainty about when their local laws could face these types of challenges.

Vivian L. Hausch of White Plains represented the plaintiffs. She could not be reached for comment.

Justices Howard Miller, David S. Ritter and William F. Mastro concurred on the ruling.

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