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ANALYSIS OF **THE 2016 GOVERNOR'S BUDGET BILL** **Article VII, Part G**

INTRODUCTION

On January 13, 2016, Governor Andrew Cuomo released the 2016 Executive Budget. Article VII, Part G of the Budget proposes drastic revisions to the Workers' Compensation Law from both a procedural and substantive standpoint.¹ In general, the proposed revisions would significantly reduce due process protection for workers, employers, health care providers and insurers in the system while diminishing benefits for injured workers.

Among the most serious elements are proposals to (1) eliminate mandatory deposits into the Aggregate Trust Fund for widows, dependents, permanently totally disabled and permanently partially disabled workers; (2) eliminate an injured worker's

¹ The relevant sections of the Budget can be found at:

<https://www.budget.ny.gov/pubs/executive/eBudget1617/fy1617artVIIbills/PPGGArticleVII.pdf>

right to continuity of the judge in his or her case; and (3) effectively eliminate the intra-agency appeal process.

The elimination of the Aggregate Trust Fund (ATF) provision would place significant downward pressure on settlements for workers who are permanently partially disabled (PPD), permanently totally disabled, or who are beneficiaries in death cases. It would be a second reduction in benefits for the PPD claimants who were already decimated by the 2007 caps, and would do enormous damage to those who are permanently totally disabled or who are beneficiaries in death cases (to which mandatory ATF deposits always applied, even before the 2007 “reform.”)

Eliminating the injured worker’s right to continuity of the judge on his or her case would allow the Workers’ Compensation Board (the Board) to control the determination of cases as a matter of “fact” even without legislation. By way of example, the amendment would allow the WCB to designate one judge to decide all cases involve an issue of “loss of wage earning capacity,” and to control the determinations of that issue statewide through its choice of judge. This approach could be taken to multiple issues with a view towards determining the outcome by selecting the judge to decide the issue.

In addition, this proposal means that a judge who never saw the injured worker, did not hear the testimony, and has no previous experience with the medical witnesses may be making decisions that largely involve credibility determinations (since cases could be assigned to judges in distant parts of the state for decisions).

Eliminating the existing intra-agency appeal process would undermine the principle of having Commissioners appointed by the Governor and confirmed by the Senate decide cases and establish policy for the Board. The overwhelming majority of

appeals would be decided by the Board's staff attorneys under the direction of the Board's general counsel, and Commissioners would become largely irrelevant. This would remove one of the only elements of Legislative participation in the system.

This paper will review each section of the Budget concerning the Workers' Compensation Law, outline the intent and likely outcome of each provision, and discuss the impact on those who participate in the system.

I. INDEMNITY BENEFIT PROVISIONS

A. Budget Provisions

1. Section 6

Location: Page 42, Line 3

WCL Section: 14

Changes:

- Repeals the requirement that the WCB calculate the average weekly wage of an injured worker by applying a statutory multiplier to his or her average daily wage. Replaces it to establish the average weekly wage by dividing the 13 weeks of earnings prior to the accident.²

2. Section 11

Location: Page 51, Line 22

WCL Section: 27

Changes:

- Eliminates the requirement for carriers to make deposits into the Aggregate Trust Fund after the effective date of the 2016 bill.³

² Page 43, line 21

³ Page 52, line 13

- Imposes a 20% penalty payable to the claimant on any unpaid ATF deposits that were previously directed.⁴
- Replaces the ATF with deposits of 2% of premiums into the workers' compensation guarantee fund.⁵

B. ANALYSIS OF INDEMNITY BENEFIT PROVISIONS

The requirement for private insurers to deposit into the Aggregate Trust Fund (ATF) the present value of their future liability for indemnity payments in cases involving death, permanent total disability, or permanent partial disability serves two purposes: (1) it provides security for payments owed to widows, dependents, and permanently disabled workers; and (2) it ensures that those workers who choose to settle their cases receive fair compensation.

The Budget proposes to eliminate the requirement that insurers make deposits into the ATF, and instead transfers the responsibility to secure the payment of benefits to the Workers' Compensation Security Fund. This proposal is problematic for several reasons.

First, the removal of the ATF deposit requirement will deprive workers and their dependents of the ability to obtain fair settlements in their claims.⁶ Second, the Budget proposal would greatly expand the potential liability of the Security Fund. Presently, the ATF only provides security for indemnity payments in cases of permanent partial disability, permanent total disability, and death claims. The Security Fund provides coverage for all other claims of insolvent carriers, including all other types of indemnity claims and medical in all of the cases.

⁴ Page 52, line 21

⁵ Page 54, line 10

⁶ An insurer's obligation to make a deposit into the ATF is based on the present value of its future liability. Absent this requirement, the insurer's obligation will be to set aside reserves to pay its future liability, a lower figure than the present value calculation.

Thus, if an insurer were to enter liquidation, the Security Fund would have to pay not only the medical expenses and any temporary disability or schedule loss awards that were due in the liquidated carrier's claims, but also the permanent partial disability, permanent total disability, and death benefits for which that carrier was responsible. The Security Fund is presently insulated from those liabilities by the ATF deposit requirement.

If the ATF deposit requirement is eliminated, then instead of each insurer having accounted for its own potential liabilities in advance, in the event of a default that carrier's liabilities will be satisfied by assessing all other carriers. This amounts to a rule requiring solvent carriers to subsidize the insolvent carrier, reducing accountability and responsibility on the part of each carrier.

The Budget proposal to change the method of calculating average weekly wage will generally result in lower average weekly wage determinations and consequently reduce wage replacement benefits for injured workers.

Under current law, a statutory multiplier is applied to the worker's average daily wage. For a 5 day worker the multiplier is 260, for a 6 day worker it is 300. The law prohibits the Board from applying less than a 200 multiplier in any other situation. Most non-salaried workers do not work 260 (or 300) days in a year, and as a result the existing statute ensures that their average weekly wage is a reflection of their earning power in a full work week.

By way of example, if an employee works 236 days in the year and earns \$54,231, then under the current statute his average weekly wage would be calculated as follows:

- \$54,231 divided by 236 days worked = \$229.79 (his average daily wage)
- \$229.79 x 260 (the statutory multiplier for a 5-day worker) = \$59,722 (average annual wage for WC purposes)
- \$59,722 divided by 52 = \$1,148.50 average weekly wage (for WC)

By contrast, if the worker's annual earnings were simply divided by the 52 weeks worked, the result would be as follows:

- \$54,231 divided by 52 = \$1,043.10

The difference in the average weekly wage in the above example is over \$100 per week. This would reduce an injured worker's compensation benefits by over \$67 per week.⁷

The Budget provision regarding average weekly wage would have a similar effect in reducing average weekly wage determinations in most cases.⁸ While this would have a minimal effect for salaried workers, it is very significant for hourly workers. It is especially true for those who work in the building trades and have high average daily wages but miss many days from work each year for a variety of reasons.

Finally, the Budget provisions related to medical treatment discussed in Section II, below, would also indirectly have an adverse impact on indemnity benefits, because indemnity benefits are governed by medical evidence.

C. PARTIES IMPACTED

The provisions of the budget related to indemnity benefits would have a significantly adverse impact on benefits for injured workers. Moreover, the transfer of

⁷ The workers' compensation benefit rate for total disability is two-thirds of the average weekly wage; average weekly wage similarly impacts partial disability benefits.

⁸ The only difference between the Budget proposal and the above example is that the Budget proposal employs a 13-week divisor instead of a 52-week divisor.

the ATF's responsibility to the Security Fund would potentially require carriers who engaged in prudent underwriting behavior to assume responsibility for the imprudent underwriting behavior of other insurers. Finally, the elimination of the ATF would potentially result in a reduction in force at the State Insurance Fund, which administers the ATF.

II. MEDICAL TREATMENT PROVISIONS

A. Budget Provisions

1. Section 1

Location: Page 21, Line 19

Workers' Compensation Law (WCL) Section: 13-b

Changes:

- Deletes the term "physicians" and replaces it with "providers."⁹
- Defines Acupuncturists, Chiropractors, Nurse Practitioners, Occupational Therapists, Physical Therapists, Physicians, Physician's Assistants, Podiatrists, Psychologists, and Licensed Clinical Social Workers as "providers."¹⁰
- Creates an "authorization agreement" between providers and the WCB that permits the providers to render treatment.¹¹ The contents of the "authorization agreement" are not outlined in the Budget.
- Requires providers "to abide by the terms, conditions, and limitations outlined in the authorization agreement."¹²
- Authorizes treatment by physical therapists, occupational therapists, and acupuncturists upon referral of a physician, but

⁹ Page 21, line 24

¹⁰ Page 22, line 15 through page 24, line 25.

¹¹ Page 22, line 25

¹² Page 27, line 26

excludes their opinions on the issues of causal relationship or disability.¹³

2. Section 2

Location: Page 29, Line 24

WCL Section: 13-d

Changes:

- Authorizes the WCB to temporarily or permanently remove any provider who it finds “has failed to render competent, professional or quality medical care and treatment.”¹⁴
- Authorizes the WCB to remove any provider who breaches the “authorization agreement.”¹⁵
- Authorizes the WCB to impose a \$5,000 fine on providers for “professional, medical or other misconduct.”¹⁶

3. Section 3

Location: Page 35, Line 17

WCL Section: 13-k

Changes:

- Deletes provisions related to podiatrists that are replaced by language in Section 1.

4. Section 4

Location: Page 37, Line 21

WCL Section: 13-l

Changes:

- Deletes provisions related to chiropractors that are replaced by language in Section 1.

¹³ Page 26, line 11

¹⁴ Page 31, line 5

¹⁵ Page 32, line 25; page 34, line 8

¹⁶ Page 34, line 24

5. Section 5

Location: Page 39, Line 19

WCL Section: 13-m

Changes:

- Deletes provisions related to psychologists that are replaced by language in Section 1.

6. Section 23

Location: Page 91, Line 10

WCL Section: 167

Changes:

- Authorizes the Uninsured Employers' Fund to pay WTC volunteer claims only if the medical expenses have been denied by the WTC Health Organization.¹⁷

7. Section 24

Location: Page 91, Line 24

WCL Section: 354

Changes:

- Extends the opt-out period from employer-selected Preferred Provider Organizations rendering worker medical care from 30 days to 120 days where PPO use has been collectively bargained.

B. ANALYSIS OF MEDICAL TREATMENT PROVISIONS

The Budget would expand the existing categories of health care providers to add nurse practitioners, physician's assistants, and licensed clinical social workers. These

¹⁷ Page 91, line 20

providers would be permitted to both render treatment and offer opinions on issues such as causal relationship of the injury to the accident and level of disability.

The Budget would replace the existing procedures for the Workers' Compensation Board to "code" providers with the creation of an "authorization agreement," the terms of which are unspecified. The state's medical societies would be removed from the approval process, with sole control transferred to the Board.

The Budget would also replace existing procedures for removal of health care providers from the system – which presently reside with the medical societies and the Department of Education - with broad authority for the Board to bar providers either for breach of the "authorization agreement" or for what it interprets as failure "to render competent, professional or quality medical care or treatment," as well as to impose a fine of \$5,000 on a provider for "professional, medical or other misconduct." The absence of specificity about the terms of the "authorization agreement" and the broad discretion granted to the Board (as opposed to the medical societies or the Department of Education) to determine what it considers "competent, professional or quality medical care or treatment" raise concerns about the potential for arbitrary removal of health care providers from the workers' compensation system.

Taken together, while these provisions may somewhat expand the health care options available to injured workers, they offer the Board broad authority to remove providers from the system. This authority must be viewed in connection with the Board's previous imposition of Medical Treatment Guidelines and its creation of a "Medical Portal" that will require electronic filing of medical reports – permitting it to obtain significant data regarding individual health care providers. The Board has indicated that

it continues to receive approximately 20,000 requests for variances from its Medical Treatment Guidelines each month (nearly a quarter million each year). It has further indicated that it believes a “small number” of providers is responsible for an “inordinate” number of these variances.

There is cause for concern that these provisions would provide authority for the summary removal of providers who seek “too many” variances on behalf of their patients, or whose variance requests are deemed “inadequate” by the Board. There is also cause for concern that these provisions would have a chilling effect on the provision of health care that is perceived as being disfavored by the Board.

Moreover, the Budget would expand the use of employer-selected Preferred Provider Organizations by extending the opt-out period for workers from 30 days to 120 days. The use of PPOs permits employers and insurers to exert significant control over medical treatment and disability determinations for injured workers, including control over the type and extent of the injuries that are documented.

C. PARTIES IMPACTED

We believe that these provisions would have an adverse impact on injured workers and health care providers in the workers’ compensation system. In addition, it is likely to heighten the use of PPOs as an employer priority in collective bargaining, which may be an adverse consequence for labor unions and their members.

III. DUE PROCESS PROVISIONS

A. Budget Provisions

1. **Section 7**

Location: Page 46, Line 1

WCL Section: 20

Changes:

- Deletes the requirement that the WCB continue hearings before the same judge and enables it to assign any case at any time to “any referee as determined by the board” either for a hearing or for a decision.¹⁸

2. **Section 20**

Location: Page 82, Line 20

WCL Section: 140

Changes:

- Reduces the number of Workers’ Compensation Board Commissioners from 13 to 7, and the number of Commissioners who must be lawyers from 4 to 3.¹⁹

3. **Section 21**

Location: Page 83, Line 21

WCL Section: 142

Changes:

- Authorizes appeals to be decided by “any board employee who is licensed to practice law in the state of New York or a single board member.”²⁰

¹⁸ Page 46, line 27; page 27, line 4

¹⁹ Page 82, line 22

²⁰ Page 86, line 13

- Authorizes the Board to issue a “subject number” or rules determining how appeals will be decided.²¹

B. ANALYSIS OF DUE PROCESS PROVISIONS

The Budget proposes to remove the right of the parties to have the hearings in a case continued before the assigned WCL Judge, and instead permits the Board to reassign any case at any time to any WCL Judge in the state. This proposal would adversely impact the due process rights of the parties in several ways.

First, removing the right to continuity of hearings before the same WCL Judge would permit the Board to reassign cases involving certain issues to specific WCL Judges. For example, the Board could theoretically assign one WCL Judge to decide every case involving loss of wage earning capacity. Such a WCL Judge would be unfamiliar with the parties, would not have had the opportunity to observe the injured worker testify in person, and would have no experience or insight into the credibility of the medical witnesses, who may be located in a distant part of the state. Moreover, the WCL Judge assigned to decide a specific issue would potentially be subject to undue influence by the Board, which could thus exert significant control over the outcome of all of the decisions on each issue.

Second, the Board currently conducts hearings by video (where the WCL Judge is present at another location but appears by video on a television screen at the hearing point) in a limited number of cases. The removal of the right to continuity of a hearing would potentially encourage the Board to expand this practice, centralizing its staff of WCL Judges in one location and conducting hearings statewide by video. Such a

²¹ Page 87, line 1

practice would impair the ability of the parties to obtain a meaningful hearing due to the loss of context that would inevitably occur by having the WCL Judges appear remotely on a regular basis.

As a result, the Budget proposal to deny parties the right to continuity of the WCL Judge in their case would significantly curtail their due process right to a fair hearing.

The Budget also proposes to reduce the number of Commissioners from 13 to 7, to permit appeals to be decided by a single Commissioner or a lawyer employed by the Board, and to authorize the Board to set policy for deciding appeals by issuing a “subject number.” These are radical changes to the system and would deprive parties of the right to a meaningful appeal.

The Board is presently governed by 13 Commissioners, who are appointed by the Governor and approved by the Senate to serve a fixed term. This mechanism ensures Legislative participation in the workers’ compensation system, a degree of independence on the part of the Commissioners, and meaningful consideration of appeals from decisions of WCL Judges.

The Budget proposal would largely render the role of Commissioners irrelevant, thus removing all Legislative participation in the system and depriving the parties of a meaningful intra-agency appeal. In the vast majority of cases, instead of appeals being considered by three Commissioners who were confirmed by the Legislature, appeals would be determined by a single lawyer employed by the Board. Similar to the issues presented by the proposal to eliminate the right to continuity of a WCL Judge, this proposal would permit the Board to fully control the outcome of every decision on every appeal through its assignment of appellate review.

In addition, existing law requires the Board to grant an application for Full Board Review where there is a dissenting opinion on the Board Panel that heard the initial appeal. With the elimination of Board Panels, this statutory right is also eviscerated. It is likely that the elimination of meaningful Board review will significantly increase the number of appeals to the Appellate Division, Third Department in workers' compensation cases. This would impose significant costs both on employers and carriers and on injured workers (who are ill-able to afford such appeals and as a result may suffer inordinate loss of benefits).

Taken as a whole, the proposed changes to the hearing and appeal procedures would enable the Board to decide virtually every case as a matter of Board policy, depriving the parties of their due process right to a meaningful hearing and increasing the number of appeals to the Appellate Division, Third Department.

C. PARTIES IMPACTED

The Budget Proposal regarding hearings and appeals would adversely impact every party to the workers' compensation system. The Legislature would be marginalized as a participant in the system. Injured workers, employers, and insurers would be deprived of their due process right to meaningful agency review of their claims and defenses. The role of attorneys as advocates for parties would be diminished. The WCL Judge staff of the Board could be subject to reduction in force depending on the degree to which their positions are geographically centralized, and other Board staff could also be subject to reduction in force if hearing points are downsized or eliminated.

IV. PENALTY PROVISIONS

A. Budget Provisions

1. Section 8

Location: Page 47, Line 5

WCL Section: 23

Changes:

- Authorizes the Board to penalize a carrier 20% of the unpaid compensation if it finds that an appeal was filed “for the purpose of delay and upon frivolous grounds.”²²

2. Section 9

Location: Page 51, Line 1

WCL Section: 25(3)(f)

Changes:

- Authorizes the Board to penalize a carrier 20% of the unpaid compensation if it finds that the carrier objected to a proposed decision or administrative decision “for the purpose of delay and upon frivolous grounds.”²³

3. Section 10

Location: Page 51, Line 22

WCL Section: 25(2)(a)

Changes:

- Authorizes the Board to impose penalties without holding a hearing.²⁴

²² Page 50, line 2

²³ Page 51, line 13

²⁴ Page 52, line 1

3. Section 15

Location: Page 69, Line 16

WCL Section: 25(3)

Changes:

- Permits the Board to issue bulk penalties to carriers for failure to meet the Board's "standards."

B. ANALYSIS OF PENALTY PROVISIONS

The Budget proposals would permit the Board wide latitude to impose large penalties on insurers for engaging in conduct that the Board disapproves. The imposition of 20% penalties for appeals and objections to administrative or proposed decisions would vastly increase employer and carrier liabilities. It also raises the possibility that the Board could use these increased penalties as a means of deterring employers and carriers from asserting legitimate defenses and objections.

Two of the Budget proposals involving penalties directly impact the due process rights of employers and carriers in the system. One proposal would specifically deprive employers and carriers of the right to a hearing on the question of the propriety of a penalty. The other would permit the Board to set arbitrary standards and to then penalize employers and carriers for failure to meet such standards, without consideration of whether the employer or carrier's conduct in any given case was justified. For example, under the Budget proposal the Board could set a standard that an acceptable controversy rate is 15%, and penalize an employer or carrier for having a controversy rate of 20%. Such a penalty would be imposed without regard to whether any or all of the employer or carrier's controversies were actually justified on the merits.

Taken as a whole, these provisions would give the Board greatly increased leverage over employers and carriers, while removing their due process rights to challenge the Board's determinations.

C. PARTIES IMPACTED

The Budget proposals regarding penalties would have a significant adverse impact on employers, insurers, and defense counsel representing these parties.

V. MISCELLANEOUS PROVISIONS

A. Budget Provisions

1. Section 12

Location: Page 54, Line 25

WCL Section: 25-A

Changes:

- Authorizes the use of "debt service" and the issuance of bonds to cover the liability of the 25-a fund (the reopened case fund)²⁵

2. Section 13

Location: Page 61, Line 27

WCL Section: 32

Changes:

- Amends Workers' Compensation Law Section 32 (regarding settlements) to expand the Board's authority to settle cases that are the responsibility of the Special Funds.

²⁵ Page 57, line 12; page 58, line 17

3. Section 14

Location: Page 66, Line 14

WCL Section: 151

Changes:

- Authorizes the Board to collect the bonds issued pursuant to Section 12 of the Budget for use in paying the obligations of the Special Funds.²⁶

4. Section 16

Location: Page 70, Line 24

WCL Section: 50

Changes:

- Entitles the Board to the “procurement records of the group self-insurer” if the Board assumes that self-insurer’s liability.²⁷

5. Section 17

Location: Page 71, Line 9

WCL Section: 50

Changes:

- Creates a pooled bond (instead of individual bonds) for self-insured employers.²⁸

6. Section 18

Location: Page 79, Line 12

WCL Section: 50

²⁶ Page 67, line 3

²⁷ Page 71, line 2

²⁸ Page 71, line 16

Changes:

- Relates to assessments for self-insurers participating in the pooled bond.

7. Section 19

Location: Page 82, Line 1

WCL Section: 134

Changes:

- Creates a published list of large employers with poor safety ratings

8. Section 22

Location: Page 89, Line 5

WCL Section: 151

Changes:

- Authorizes the Board to spend \$60 million on technology to implement reforms.²⁹
- Transfers \$425 million from the WCB to the state insurance fund over a three year period.³⁰

9. Section 25

Location: Page 92, Line 11

WCL Section: 50

Changes:

- Adds public entity group self-insurers to the list of group insurers

²⁹ Page 89, line 11

³⁰ Page 89, line 16

10. Section 26

Location: Page 96, Line 20

WCL Section: 50

Changes:

- Authorizes the creation of public entity group self-insurers.

11. Section 27 - 38

Location: Page 99, Line 11

Changes:

- Amends various sections of the Public Authorities Law and the Insurance Law related to bonds, public entity group self-insurers, and the liabilities of the Special Funds

B. ANALYSIS OF MISCELLANEOUS PROVISIONS

A review of these provisions is generally beyond the scope of this paper. It appears, however, that the miscellaneous provisions would have a significant impact on the operations, funding, and staffing of the Workers' Compensation Board, the Special Funds, and the State Insurance Fund.

It further appears that the vehicles for creation of a "pooled" bond for self-insured employer and "group" trusts for municipal employers would have the effect of centralizing and mutualizing risk among those employer entities. The most recent experience with a similar mechanism involved the Board's failure to adequately supervise the state's group self-insurance trusts. This resulted in a \$1 billion unfunded liability which is still being addressed through a variety of mechanisms.

As a matter of policy, it is generally undesirable to require fiscally responsible employers to subsidize the errors of less responsible employers. This is in many ways the

result of mutualization of risk. While security for benefit payment to injured workers must be provided, we question the wisdom of the approach chosen by the Budget.

C. PARTIES IMPACTED

The miscellaneous budget proposals would have far-reaching impacts on the Board, the Special Funds, employers, carriers, and ultimately injured workers and the Legislature (which would be required to address the outcome of any failure of these mechanisms).

CONCLUSION

The WCA is deeply concerned about many provisions of the Budget with regard to the state's workers' compensation system. The Budget proposals regarding the Aggregate Trust Fund, hearings and appeals are especially problematic.

While the WCA supports the principle of expanding the availability of health care services for injured workers, the current proposals fail to provide transparency or due process protection for health care providers who enter the system, and unjustifiably remove professional organizations from their established role in qualifying (and disqualifying) their members.

Similarly, while the WCA supports the imposition of penalties against insurers for frivolous litigation tactics, unwarranted controversies, and egregious behavior, we recognize that all parties to a litigation are entitled to notice, and opportunity to be heard, and a decision on the merits as opposed to as a matter of policy. We strongly support

Section 19 of the Budget, which would close a loophole enabling employers with poor safety records to evade payment of appropriate insurance premiums.

The WCA defers its position on the miscellaneous provisions impacting the funding of the Board and the Special Funds, creating a pooled bond for self-insurers and providing for group self-insurance for public entities. We note, however, that some of these provisions may increase the risk of widespread system failures and the potential for responsible employers to bear undue responsibility for the failures of irresponsible employers.

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January 22, 2016