NEW YORK
WORKERS' COMPENSATION ALLIANCE

Mailing Address
c/o Caruso, Spillane
Suite 1200
132 Nassau Street
York, NY 10038

Inquiry Contact:
Robert Grey
Grey & Grey, LLP
(212) 964-1342

WORKERS' COMPENSATION 2016: THE AFTERMATH OF THE 2007 REFORMS FOR INJURED WORKERS AND THE IMPACT OF THE BUSINESS COUNCIL AGENDA

I. INTRODUCTION

Juana is a patient care aide at a large hospital. With overtime, she earns about $600 per week. Fred is a laborer in the heavy construction field who earns about $1,200 per week. In this paper, we will look at how the 2007 workers' compensation reforms affected the benefits they receive from the system – and how much of their lost wages are never replaced.

There are three basic types of workers' compensation benefit: temporary disability (when a worker is out of work for a limited period of time), "schedule loss" (where the worker suffers permanent damage to a limb, or has permanent vision or hearing loss), and "permanent partial disability" (where the worker is permanently disabled from his or her old job, but theoretically might be able to do something else.[1]

[1] There are also permanent total disability and death benefits. There are a limited number of these types of claims, and as a result they are not considered in this paper.

In 2007, the Workers' Compensation Law was changed in two fundamental ways. In one, the maximum weekly benefit rate was increased in stages from $400 per week to two-thirds of the "state average weekly wage," adjusted annually. As of July 1, 2014 this resulted in a new maximum benefit rate of $808.65 per week. However, an injured worker's benefit rate is limited to two-thirds of their own "average weekly wage." As a result, a worker who earns $600 per week or less did not see their workers' compensation benefits rise for any type of disability, whether temporary, permanent, or schedule loss.

The other significant change made in 2007 was that permanent partial disability benefits for injured workers were time-limited, or "capped." For the first time, instead of being paid permanently for a permanent disability, workers were limited to payment of between four and ten years for permanent disability. This change was made based on the Business Council's arguments about the "high cost of permanent partial disability claims," and its allegation that imposing time limits on permanent disability benefits would save employers billions of dollars.[2]

The 2016 Executive Budget has proposed another round of benefit reductions and new limitations on the processes workers use to obtain benefits from the workers' compensation system. In looking at these proposals, it is useful to see how the 2007 changes affected both low-wage workers like Juana and high-wage workers like Fred.

II. CHANGES IN WORKERS' COMPENSATION BENEFITS: 2006 VS 2014

Scenario 1: Temporary Disability Benefits. In October, 2006, Juana injures her back while lifting a patient. She misses ten weeks from work, and is paid workers' compensation

[2] See, e.g., , http://www.wcb.ny.gov/content/main/TheBoard/Post2007Reform.pdf

benefits at $400 per week – two-thirds of her “average weekly wage” of $600 per week. If she suffered the same injury in October of 2014, her compensation benefits would be exactly the same. Even though the maximum weekly benefit rate rose to $808.65 per week, Juana’s wages aren’t high enough for her to receive any more than the old maximum rate of $400 per week.

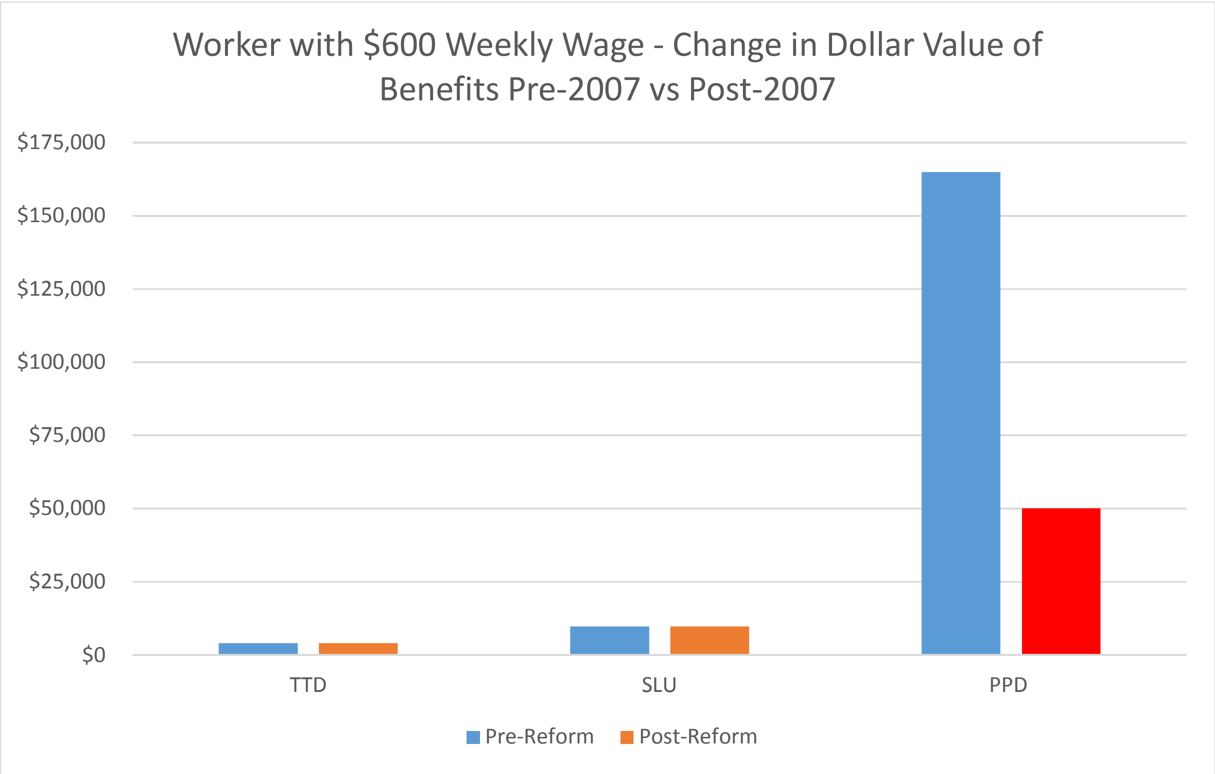
Scenario 2: Schedule Loss of Use Benefits. In October, 2006, a door closes on Juana’s hand as she is pushing a cart into a patient’s room. She misses ten weeks from work, and is later found to have a 10% “schedule loss of use” of the hand due to a fracture. Her award for the injury is calculated based on her weekly workers’ compensation benefit rate, and is worth a total of $9,760. However, the $4,000 in compensation benefits she was paid for time out of work ($400 per week for ten weeks) are deducted from her award. Juana also lost another $2,000 in wages that were not covered by workers’ compensation, because her salary was $600 per week and compensation only paid her $400 per week. In the end, Juana gets $3,760 for her broken hand.

Once again, Juana’s benefits in 2014 would be exactly the same as they were in 2006. Her award for schedule loss of use, like her award for temporary disability, is based on her average weekly wage. Because she does not earn enough to benefit from the increase in the maximum rates, her benefits for schedule loss were not improved by the 2007 reforms.

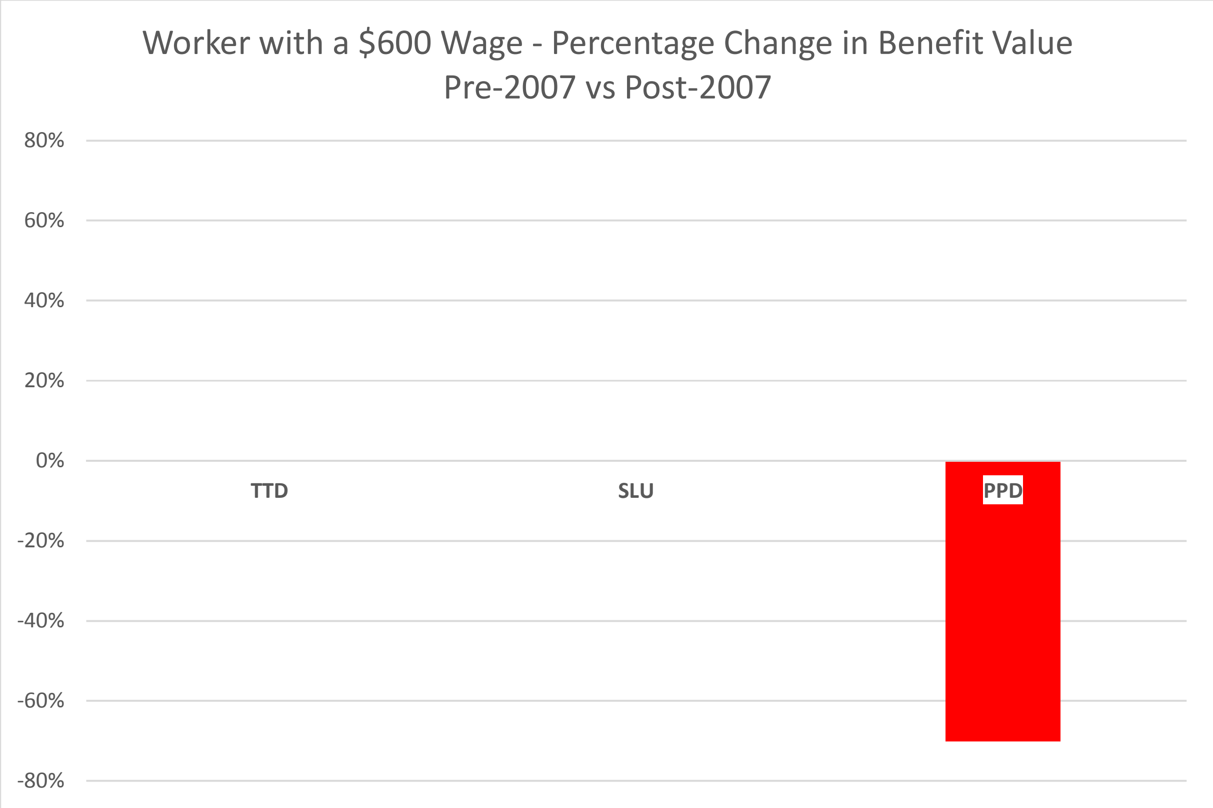
Scenario 3: Permanent Partial Disability Benefits. In October, 2006, Juana is assaulted by a patient and suffers multiple injuries. She is permanently disabled from her job as a patient care aide, and the Workers’ Compensation Board decides that she has a “moderate permanent partial disability.” This finding entitles her to only $200 per week in compensation benefits – one-third of her average weekly wage of $600. However, she is entitled to receive these benefits for as long as she remains disabled. If Juana is 45 years old at the time of the accident, these permanent disability benefits are worth about $165,000.

If Juana suffered the same injury in 2014, she would be entitled to the same $200 weekly compensation rate. However, because of the caps on permanent partial disability benefits (the "PPD caps"), she will only be paid for 300 weeks. Her permanent partial disability benefits are now worth only $50,000 – less than 2 years' wages - even if she is never able to return to work.[3]

Summary: The 2007 reforms did not improve Juana's compensation benefits for temporary disability or for schedule loss, but they reduced her compensation for permanent disability by 70%, from $165,000 to $50,000. This is shown on the charts below.



[3] The figure shown is the present value of $200 per week for 300 weeks, using a discount rate of 5%. The same present value formula was used to arrive at the value of uncapped permanent partial disability benefits in the preceding paragraph.



Scenario 4: Temporary Disability Benefits. In October, 2006, Fred injures his back while lifting some cinderblocks and misses ten weeks from work. Although two-thirds of his "average weekly wage" of $1,200 per week would be $800 per week, his benefits are limited to the maximum statutory rate of $400 per week. As a result, Fred is paid a total of $4,000, while losing another $8,000 in wages. If Fred suffered the same injury in October of 2014, his compensation benefits would now be $800 per week as a result of the 2007 reforms. He now receives $8,000 in compensation, and loses $4,000 in wages. Unlike Juana, whose benefits for temporary disability remained the same despite the 2007 reforms, Fred's compensation for this type of disability has increased, while the amount of his uncompensated wage loss has decreased.

Scenario 5: Schedule Loss of Use Benefits. In October, 2006, a brick falls on Fred's hand and breaks two bones. He misses ten weeks from work, and is later found to have a 10%

"schedule loss of use" of the hand. His award for the injury is calculated based on the maximum weekly workers' compensation benefit rate of $400 per week, and is worth a total $9,760. However, the $4,000 in compensation benefits he was paid for time out of work ($400 per week for ten weeks) is deducted from his award. Fred also lost another $8,000 in wages that were not covered by workers' compensation, because his salary was $1,200 per week and compensation only paid him $400. In the end, even after receiving an award for "schedule loss," Fred loses $2,240 as a result of his injury.

If Fred's accident occurred in 2014, the result would be different. His award for schedule loss of use would now be paid at $800 per week, and would be worth $19,520, instead of $9,760. Payments for his time out of work would again be deducted, which would now be $8,000 instead of $4,000. Even after taking into account his $4,000 in uncompensated wage loss, Fred still receives $7,520 for his injury – as opposed to losing $2,240.

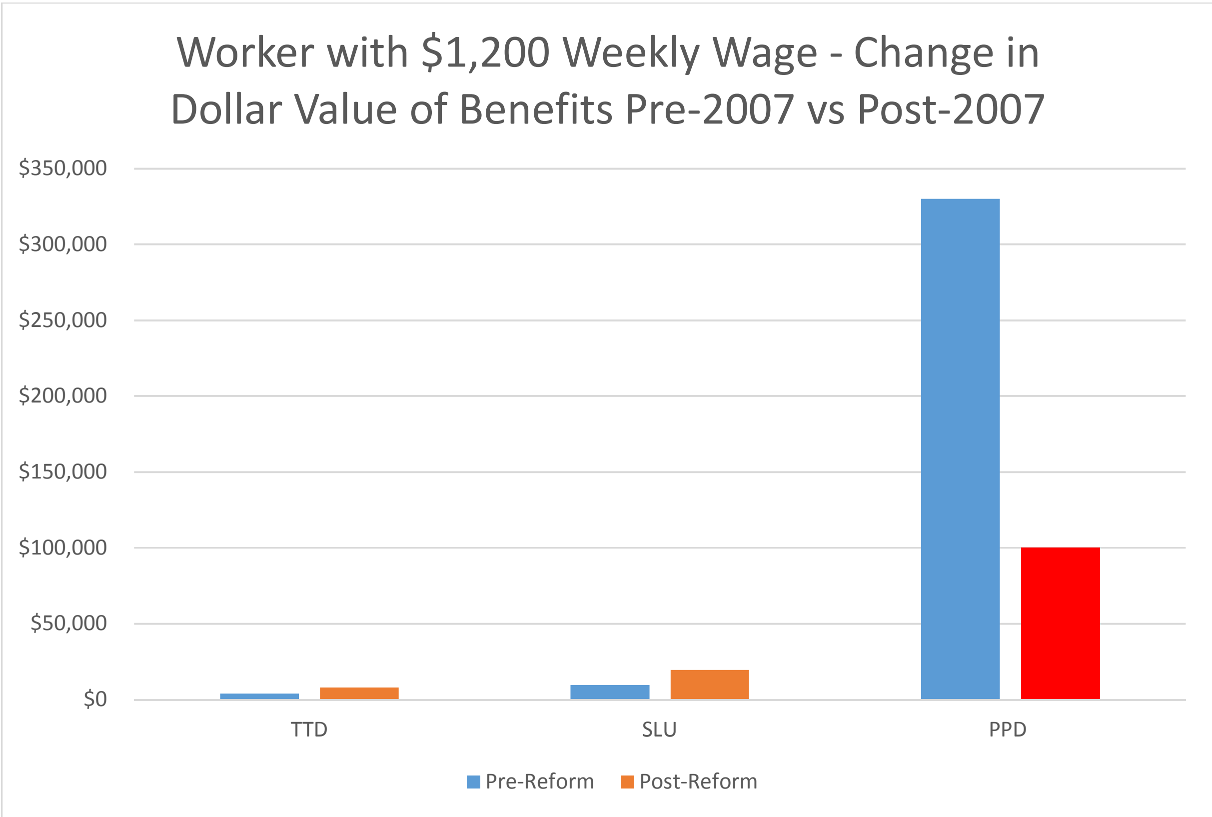
<u>Scenario 6: Permanent Partial Disability Benefits</u>. In October, 2006, Fred slips on some debris at a work site and suffers multiple injuries. He is permanently disabled from his job as a construction worker, and the Workers' Compensation Board decides that he has a "moderate permanent partial disability." This finding entitles him to $400 per week in compensation benefits – one-third of his average weekly wage of $1,200. However, he is entitled to receive these benefits for as long as she remains disabled. If Fred is 45 years old at the time of the accident, these permanent disability benefits are worth about $330,000.[4]

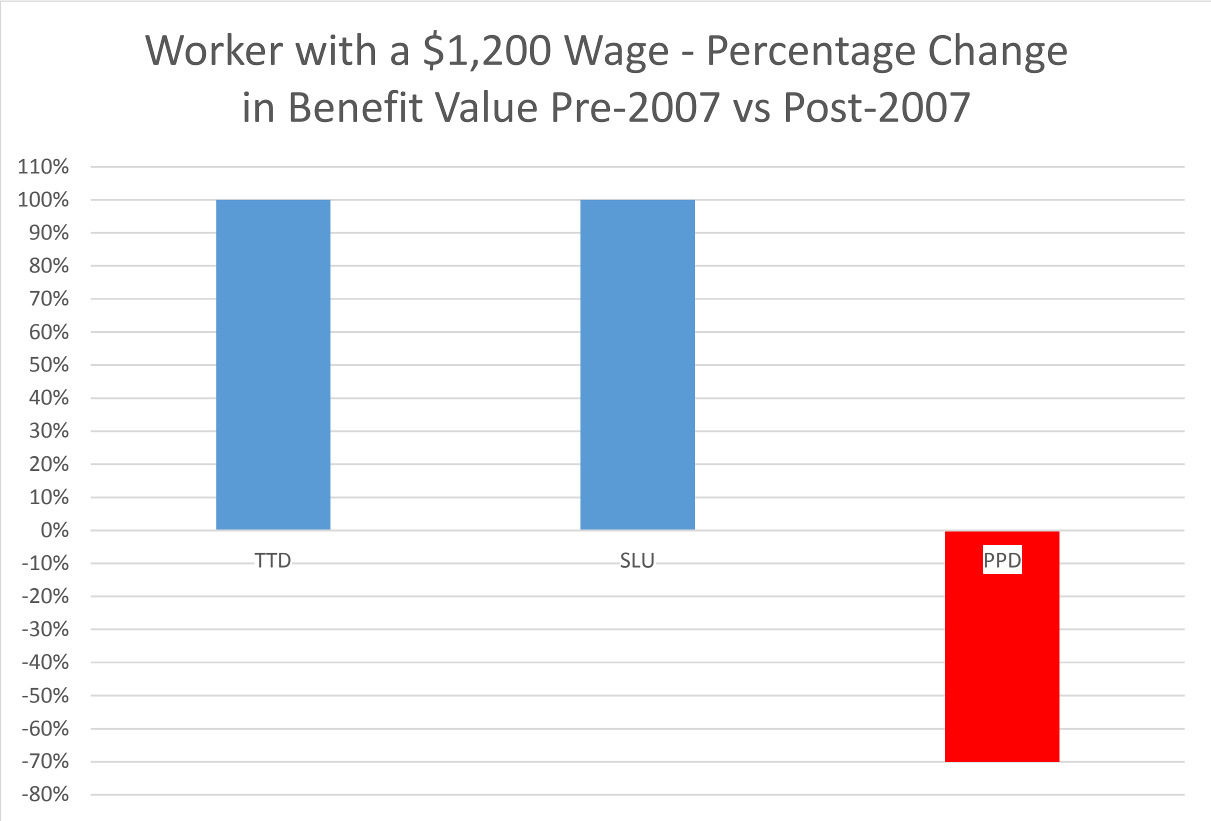
If Fred suffered the same injury in 2014, he would be entitled to the same $400 weekly compensation rate. However, because of the PPD caps he will only be paid for 300 weeks. His

[4] The same present value calculations are used here as in in Scenario 3, above.

permanent partial disability benefits are now worth only $100,000 – less than two years' wages - even if he is never able to return to work.

Summary: The 2007 reforms improved Fred's compensation benefits for temporary disability and for schedule loss, but reduced his compensation for permanent disability by 70%, from $330,000 to $100,000. This is shown on the charts below.





<u>Impact of the 2007 Reforms on Compensation Benefits</u>.

The examples above illustrate four important facts about the impact of the 2007 reforms on workers' compensation benefits.

First, the 2007 reforms did not increase benefits for low-wage workers who had temporary disabilities or injuries that resulted in schedule loss awards.

Second, permanent partial disability benefits for these workers were slashed by 70% or more, creating huge savings for insurers at a huge cost to the most vulnerable part of the working population.

Third, the 2007 reforms did increase benefits for high wage workers for periods of temporary disability and for schedule loss, in some instances doubling these awards.[5]

[5] According to wage distribution data published by the Workers' Compensation Board, less than 15% of all injured workers would fall into this category.

Fourth, the 2007 reforms decimated permanent partial disability benefits for high-wage workers to the same extent – 70% - as for low-wage workers. However, the application of the PPD caps to high-wage workers created even larger dollar savings in unpaid benefits.

III. <u>THE UNCOMPENSATED WAGE LOSS OF INJURED WORKERS</u>

The benefit reductions that resulted from the 2007 reform legislation are only part of the cost of on-the-job injury to a worker. In almost every instance, workers lose wages and benefits that they never recover. The examples below illustrate how the 2007 legislation affected uncompensated wage loss for Juana and Fred.

<u>Scenario 7: Temporary Disability Benefits</u>. In Scenario 1, we saw that if Juana misses ten weeks from work, she is paid $400 per week regardless of whether she was injured before or after the 2007 reform legislation. In either case, she loses $6,000 in wages ($600 per week for ten weeks) and is only paid $4,000 ($400 per week). Her uncompensated wage loss, therefore, is $2,000, or 33% of her pre-accident wages.[6]

It must be noted that these calculations assume that Juana is paid for "temporary total disability" for her entire period of lost time. In practice, this is rarely the case. Employer use of so-called "independent medical examiners" routinely results in the reduction of weekly workers' compensation payments to injured workers, and a corresponding increase in uncompensated wage loss. In many cases, the result is a very significant increase in uncompensated wage loss, even in cases that only involve temporary disability from work.

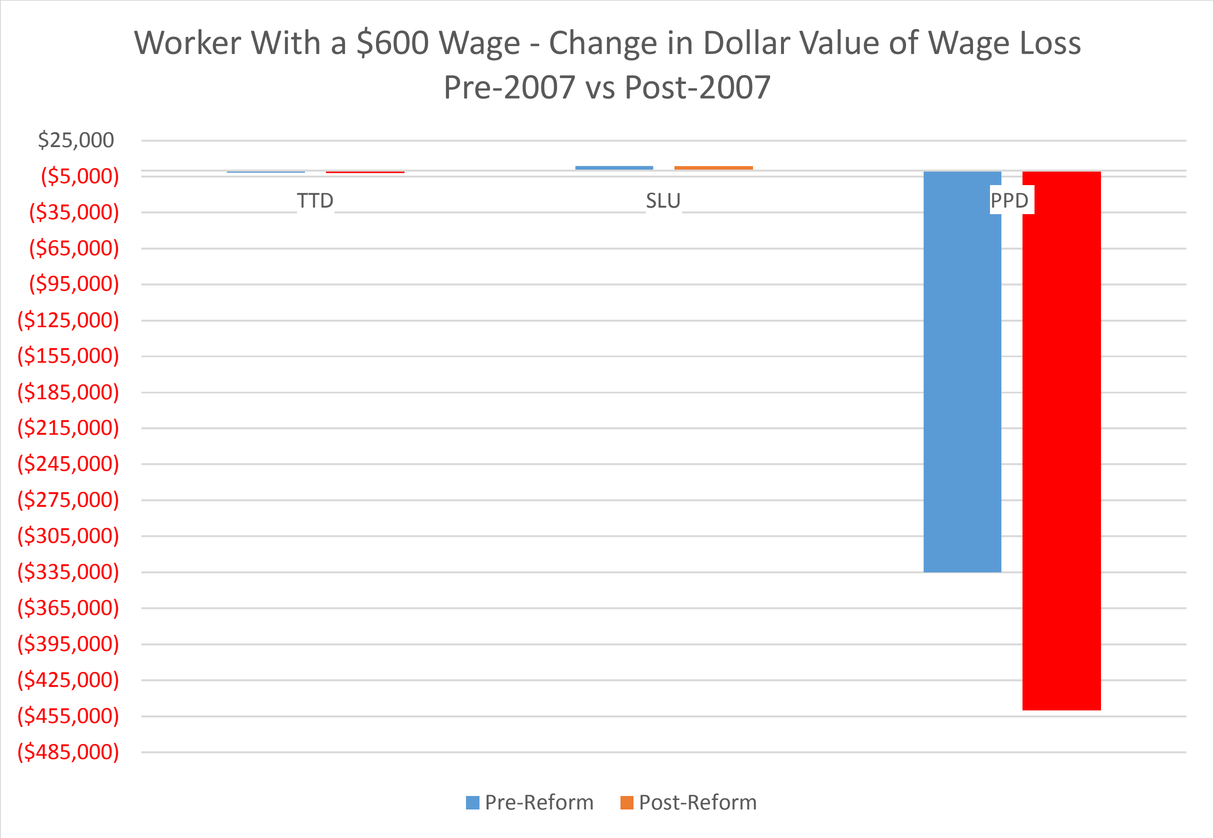
[6] This does not take into account the loss of employment benefits (such as health insurance, accrued time, pension benefits, etc.) or other benefits (such as credit earned for Social Security benefits) the worker forfeits while out of work.

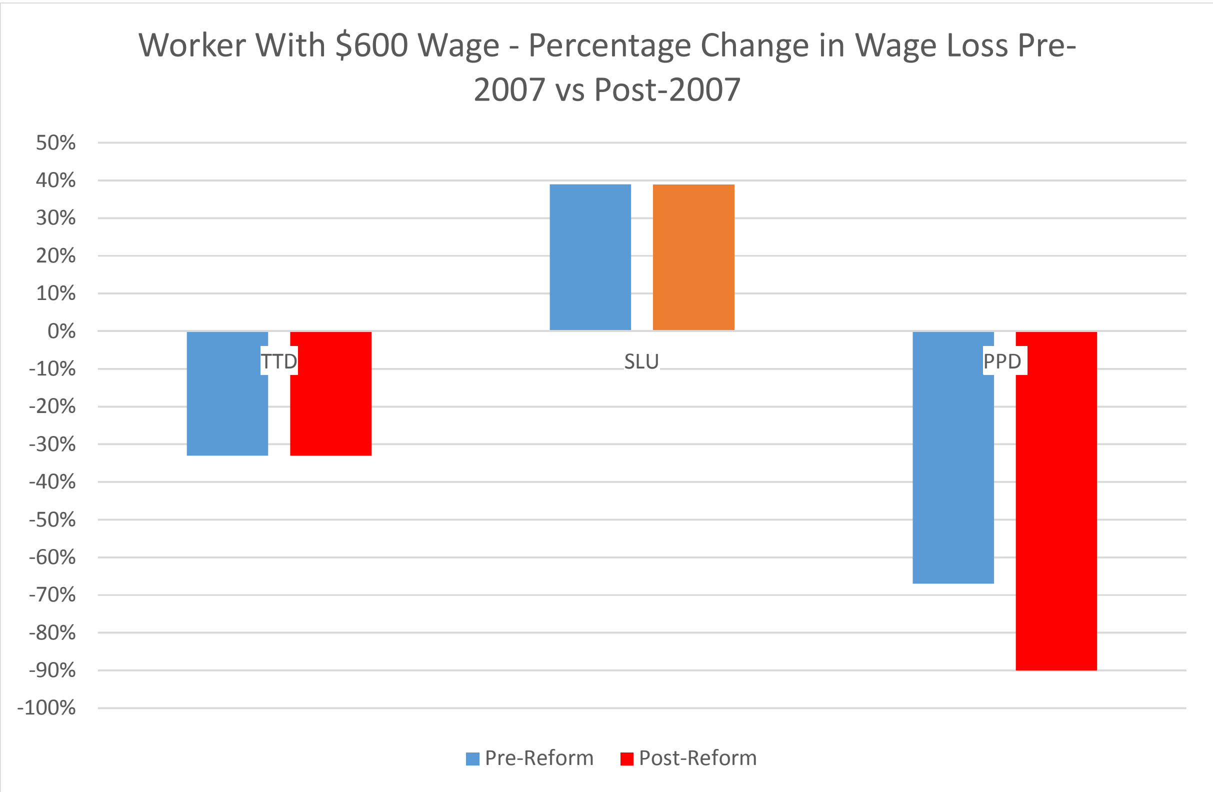
Scenario 8: Schedule Loss of Use Benefits. Similarly, in Scenario 2, we saw that if Juana loses ten weeks from work and is later found to have a "schedule loss of use" of 10% of her hand, her real award is $3,760 after her lost wages are taken into account. Again, the result is the same for her regardless of the 2007 legislation.

Scenario 9: Permanent Partial Disability Benefits. In Scenario 3, we saw that the 2007 reforms slashed Juana's compensation for permanent disability by 70%, from $165,000 to $50,000. What was not shown in Scenario 3, however, was Juana's uncompensated wage loss for her permanent partial disability. If Juana had not been injured, then her future earnings would have been more than $500,000 over the rest of her working career.[7] Before the PPD caps imposed by the 2007 reforms, Juana's uncompensated wage loss was $335,000, or 67%. With the application of those caps, it rose to $450,000 – meaning that 90% of Juana's lost wages are uncompensated by the workers' compensation system.

Summary: Both before and after the 2007 reforms, Juana suffered an uncompensated wage loss of 33% for injuries resulting in temporary disability, while receiving a small benefit for injuries involving a schedule loss of use. However, Juana suffered from enormous uncompensated wage loss if she had a permanent partial disability before the 2007 reform, and as a result of that reform her compensation benefits now replace barely 10% or her lost earnings. These outcomes are shown on the charts below.

[7] This figure represents the present value of her average weekly wage over her estimated work life, without taking into account inflation or cost of living increases. It is therefore the most conservative possible figure from which to calculate her uncompensated wage loss.


Worker With a $600 Wage - Change in Dollar Value of Wage Loss Pre-2007 vs Post-2007
$25,000
($5,000)
($35,000)
($65,000)
($95,000)
($125,000)
($155,000)
($185,000)
($215,000)
($245,000)
($275,000)
($305,000)
($335,000)
($365,000)
($395,000)
($425,000)
($455,000)
($485,000)
TTD
SLU
PPD
Pre-Reform
Post-Reform


Worker With $600 Wage - Percentage Change in Wage Loss Pre-2007 vs Post-2007
50%
40%
30%
20%
10%
0%
-10%
-20%
-30%
-40%
-50%
-60%
-70%
-80%
-90%
-100%
TTD
SLU
PPD
Pre-Reform
Post-Reform

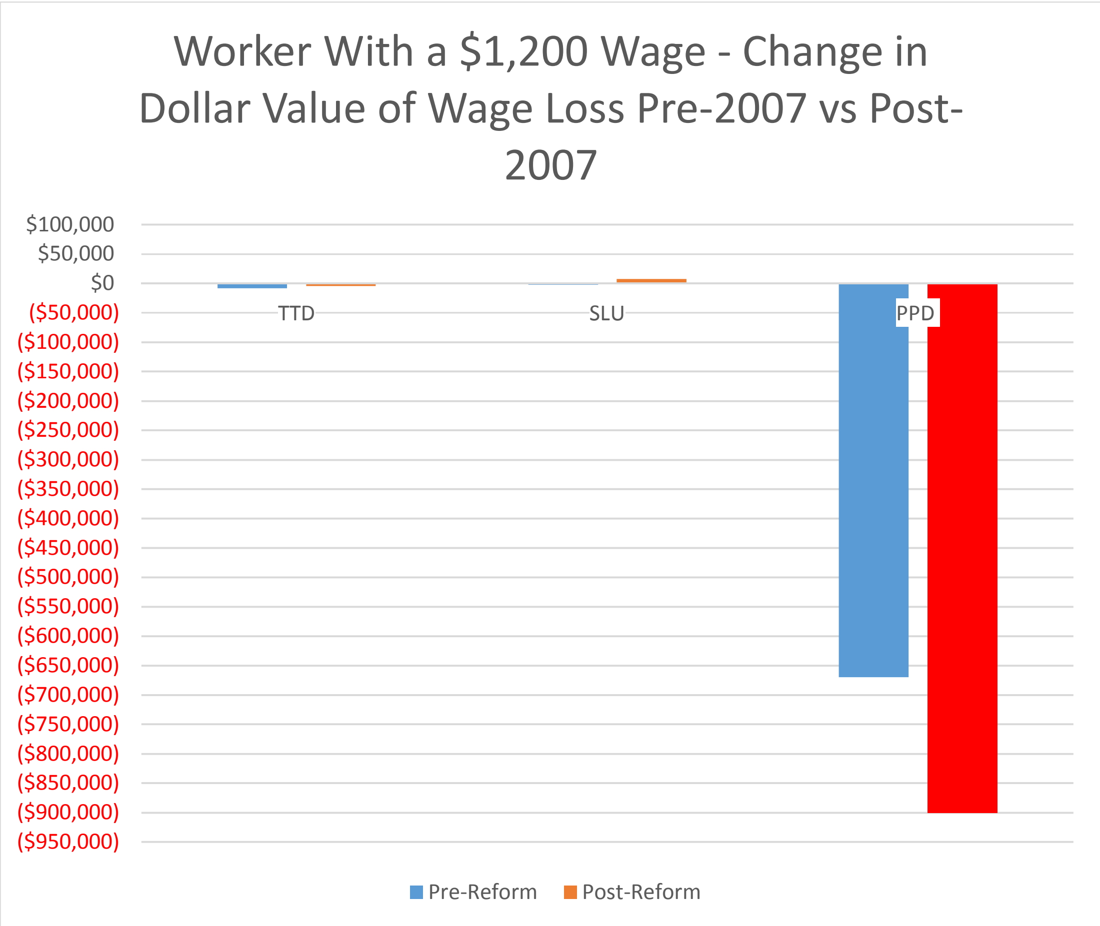
Scenario 10: Temporary Disability Benefits. In Scenario 1, we saw that if Fred missed ten weeks from work before the 2007 reforms, he was paid $400 per week in workers' compensation benefits and lost $800 per week, meaning that $8,000, or 67%, of his wage loss was uncompensated. By contrast, following the 2007 reforms, he can be paid $800 per week in compensation and loses $400 per week. As a result, the 2007 reforms reduced his uncompensated wage loss from 67% to 33% - but the system still leaves him with a significant uncompensated wage loss of $4,000.

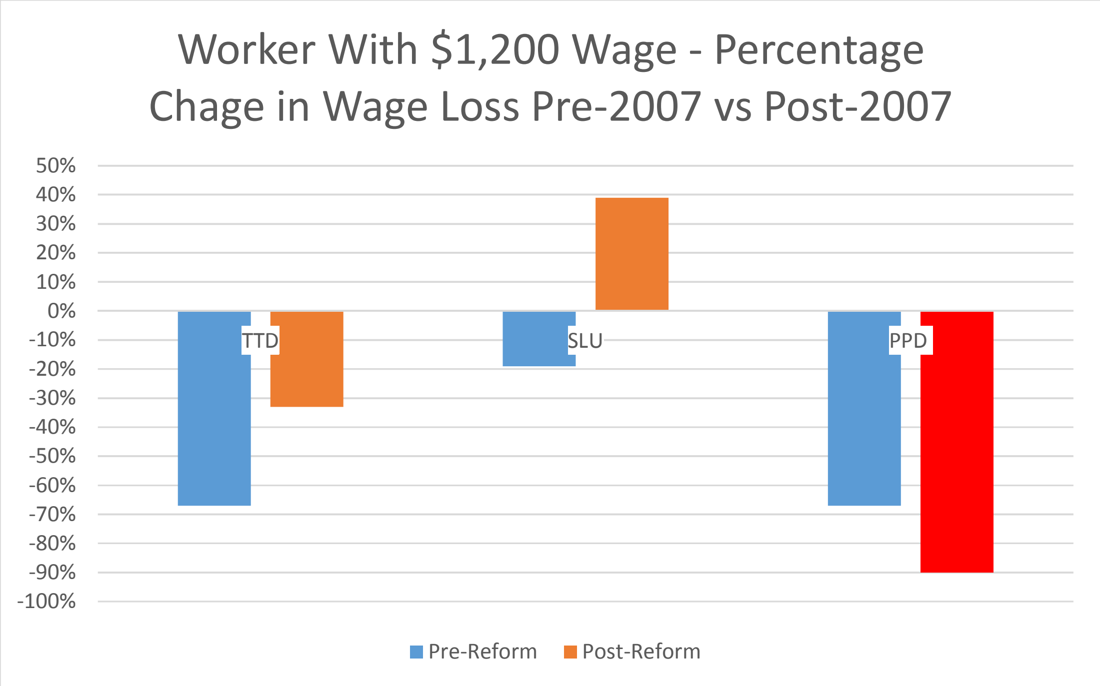
Scenario 11: Schedule Loss of Use Benefits. In Scenario 2, we saw that if Fred missed ten weeks from work and was later found to have a "schedule loss of use" of 10% of his hand, his total workers' compensation benefit was $9,760, while his lost wages were $12,000. As a result, he suffered a 19% wage loss of $2,240 even after receiving a schedule loss award. By contrast, after the 2007 reform Fred finally receives something for his injury, with a gain of $7,520 – the same benefit as Juana on a percentage basis.

Scenario 12: Permanent Partial Disability Benefits. In Scenario 3, we saw that the 2007 reforms slashed Fred's compensation for permanent disability by 70%, from $330,000 to $100,000. Like Juana, however, Fred also suffers from enormous uncompensated wage loss, made far more severe by the 2007 reforms. If Fred had not been injured, then his future earnings would have been more than $1,000,000 over the rest of his working career.[8] As a result, before the PPD caps imposed by the 2007 reforms, Fred's uncompensated wage loss was $670,000, or 67%. With the application of those caps, it rose to $900,000 – meaning that 90% of Fred's lost wages are uncompensated by the workers' compensation system.

[8] The same conservative approach is taken in estimating Fred's future earning potential as in Scenario 9; a more accurate figure would be far greater.

Summary: Before the 2007 reforms, Fred suffered an uncompensated wage loss of 67% for injuries resulting in temporary disability. After the reforms, Fred still has an uncompensated wage loss of 33%. The 2007 reforms also eliminated Fred's 19% uncompensated wage loss in cases involving schedule loss of use, resulting in his receipt of the same benefit from schedule loss awards as Juana (on a percentage basis). However, like Juana, Fred suffered from enormous uncompensated wage loss if he had a permanent partial disability before the 2007 reform, and as a result of that reform his compensation benefits now replace barely 10% or his lost earnings. These outcomes are shown on the charts below.





<u>Impact of the 2007 Reforms on Compensation Benefits</u>.

The examples above illustrate four important facts about the impact of the 2007 reforms on uncompensated wage loss.

First, the 2007 reforms did not affect uncompensated wage loss for low-wage workers with temporary disabilities, nor did it increase their benefits from schedule loss awards.

Second, while the 2007 reforms did reduce uncompensated wage loss for high wage workers in cases of temporary disability, these workers still suffer from significant uncompensated wage loss as the result of on-the-job injury.

Third, the 2007 reforms eliminated uncompensated wage loss for high wage workers in some schedule loss cases, providing them with the same benefit (in percentage terms) as low-wage workers.

Fourth, before the 2007 reforms workers suffered uncompensated wage loss of 67% or more in cases of permanent partial disability. As a result of the 2007 reforms, this figure rose to

90%, meaning that the workers' compensation system now replaces less than 10% of the wages lost by a permanently disabled worker.

IV. THE IMPACT OF THE BUSINESS COUNCIL AGENDA AND THE EXECUTIVE BUDGET

The Business Council's legislative agenda and portions of the 2016 Executive Budget must be considered in the context of (1) the impact of the 2007 reforms on reducing benefits; and (2) the degree to which the workers' compensation system already fails to replace the lost wages of injured workers.

The Executive Budget proposes to eliminate the requirement that insurers deposit the present value of their future liability into the Aggregate Trust Fund in cases involving permanent partial disability, permanent total disability or death benefits. As a result of this action, permanently disabled workers, widows and dependents would no longer receive the "present value" of their benefits discussed in Scenarios 3, 6, 9 and 12. Instead, they would receive an even lower amount, in some instances perhaps half as much. Instead of receiving 10% of their lost wages, injured workers would be reduced to 5%. Nineteen of every twenty dollars of lost wages would be uncompensated, rendering the workers' compensation system virtually meaningless as a source of income for the permanently disabled and beneficiaries of death benefits.

The Budget also proposes to replace the current method by which a worker's "average weekly wage" is calculated with one which would reduce that figure for most workers, and especially for those who are paid on a daily or hourly basis. This would have a particularly adverse impact on low wage and immigrant workers. As shown in every scenario, a worker's compensation benefits depend in large part on their pre-accident wage. A reduction in average weekly wage would translate into a reduction in compensation benefits – and further exacerbate the issue of uncompensated wage loss.

Meanwhile the Business Council has advanced a proposal to cap temporary disability benefits, in addition to the existing caps on permanent disability benefits. This would, of course, further reduce benefits for injured workers and create still more uncompensated wage loss. Given the existing rate of 90% uncompensated wage loss and the fact that the Budget proposal would increase that figure to perhaps 95%, it appears that the Business Council's position is that the workers' compensation system should provide workers with no more than 1% of the wages they lose as the result of on-the-job injury and illness that permanently rob them of the ability to earn a living.

The Business Council has simultaneously advanced a proposal to reduce schedule loss awards. As shown in Scenarios 2 and 8, the 2007 reforms did not increase the value of these awards for low-wage workers, while slashing their wage replacement benefits in cases of permanent disability. The Business Council's proposed change would further impoverish this group of workers, and create still more cases in which the workers' compensation system fails to replace their lost wages. Meanwhile, as shown in Scenarios 5 and 11, one of the very few benefits for workers from the 2007 reforms was a modest improvement in schedule loss benefits for high-wage workers. The Business Council proposal would retain and expand the enormous savings to insurers from the PPD caps, and add still further savings from schedule loss awards. All of this would come at great cost to injured and disabled workers.

V. CONCLUSION

Before the 2007 reforms, the workers' compensation system did not adequately compensate injured workers for lost wages due to temporary disability, permanent disability, or (in many instances) schedule loss of use. For low-wage workers, the 2007 reforms did not improve benefits for temporary disability or schedule loss, and drastically reduced their compensation for permanent disability. In almost every instance, these workers suffer from significant uncompensated wage loss, which was made worse by the 2007 reforms and would further deteriorate if the Executive Budget or Business Council proposals were adopted.

The situation is little better for high wage workers. While the 2007 reforms improved their compensation for temporary disability and schedule loss, they suffered the same blow as low wage workers in cases of permanent disability. In many ways, the Executive Budget and Business Council proposals would roll back the few areas in which the 2007 reforms improved benefits for these workers.

The pressing need in the workers' compensation system is not for benefit reduction, but rather for benefit improvements to reduce the uncompensated wage loss of injured workers and keep them from impoverishment and reliance on taxpayer-funded benefits, as opposed to employer-funded benefits. The costs of workplace injury should not be borne by injured workers or the public, but instead by employers, who in return are shielded from all other liability.

Dated: Farmingdale, New York
February 1, 2016