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NEW YORK

1. Citation for the state's workers' compensation statute

New York Workers' Compensation Law.

SCOPE OF COMPENSABILITY

2. Who are covered "employees" for purposes of workers' compensation?

Any employee, except the following: Domestic employees working less than 40 hours per week; clergymen and other non-manual employees of religious, charitable or educational institutes; volunteers for non-profit organizations; employees of municipalities and other political subdivisions who are not engaged in hazardous employment; licensed real estate brokers, insurance agents, and media sales representatives, whose services performed are pursuant to contract, and said contract expressly defines the broker as an independent contractor; "black car" livery cab operators; uniformed sanitation workers, firefighters and police officers in the employment of the City of New York; babysitters and minors over the age of 14 engaged in casual employment in and about one-family owner- occupied residences or the premises of non-profit, non-commercial organizations, not involving the use of power driven machinery; longshoremen, harbor workers, railroad employees and Federal employees; anyone engaged in yard work or household chores or making repairs or painting in and about a one-family owner-occupied residence; partners, sole proprietors, and officers of one/two-officer corporations with no subordinates; spouse and minor children of farmers. NY WCL Sections 2 and 3.

3. Identify and describe any "statutory employer" provision

An employer who has in employment, one or more employees at least 30 days in any calendar year except an employer of personal or domestic employees in a private home unless the domestic employees work for a minimum of 40 hours per week and are employed at least 30 days in any calendar year. NY WCL Section 355.4.

An employer who by operation of law becomes successor to a covered employer, or who acquires by purchase or otherwise the trade or business of a covered employer, immediately becomes a covered employer. NY WCL Section 202.

Whenever an employee of a covered employer, with the consent of the employer, engages or permits another to do any work in employment for which the employee is employed, the employer shall be deemed for the purpose of this article to be the employer also of such other person, regardless of whether the employee or the employer pays for his service. *Id*.

An employer is not liable for contribution or indemnity to any third person based upon liability for

injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability. NY WCL Section 11. "Contribution" and "indemnification" shall not include a claim arising out of a written contract in which the employer expressly agreed to provide contribution or indemnification of the claimant or the person asserting the cause of action. *Id*.

4. What type of injuries are covered and what is the standard of proof for each:

A. Traumatic or "single occurrence" or "accident" claims.

Any injury is compensable under a theory of a single occurrence if it occurs as the result of an accident which arises out of and in the course of employment, except those that are the result of an employee's intent to cause a self-inflicted injury or which are due solely to intoxication of the employee while on duty. NY WCL Section 10(1). There is a presumption that accidents which occur in the course of a worker's employment are presumed to have arisen out of such employment. NY WCL Section 21. There is also a presumption that an employee did not intend an injury or that it was not solely due to intoxication of the employee. Substantial evidence is required to rebut these presumptions. These injuries can include both direct physical trauma as well as psychological injuries precipitated by a specific psychic trauma, except for purely mental conditions that arise out of a lawful personnel decision made by an employer.

B. Occupational disease (including respiratory and repetitive use).

Any disease contracted within the course of employment is compensable for any disability that results if the disease is found to be occupational in nature. A disease is occupational if it is the result of a distinctive feature of the kind of work performed by the employee and others similarly employed. Diseases that result because of the peculiar place in which a particular employee happens to work or which are caused by ordinary contact with fellow employees are not occupational diseases.

5. What, if any, injuries or claims are excluded?

As stated above, injuries that have been solely occasioned by intoxication from alcohol or a controlled substance of the injured employee while on duty; or by willful intention of the injured employee to bring about the injury or death of himself or another; or where the injury or occupational disease was sustained by the injured employee in the perpetration of a felony or misdemeanor for which the employee is convicted.

Self-inflicted injuries and injuries which result solely because of an employee's intoxication are excluded. Diseases which arise because of the peculiar place in which a particular employee happens to work or which are caused by ordinary contact with a fellow employee are excluded.

6. What psychiatric claims or treatments are compensable?

Any psychiatric claim is compensable as long as it arises out of and in the course of employment or is an occupational disease if the disease is found to be occupational in nature.

7. What are the applicable statutes of limitations?

Absent a waiver, failure to file a written claim within two years of the date of accident or disability results in an absolute bar to a claim. NY WCL Section 28. For a hearing loss claim, the date of disablement takes place three months after claimant is removed from the environment causing the hearing loss, however a claim will not be barred for failure to file within two years thereafter, as long as it is filed within 90 days after knowledge that the hearing loss was caused by the nature of employment. NY WCL Section 49-bb. A waiver occurs if the statute of limitations is not raised at the first hearing at which all parties in interest are present. Also, an advance payment of compensation in the form of medical expense payment, lost wage benefit payment or light work or less hours for the same pay because of the injury constitutes a waiver. The statute of limitations is tolled for periods of infancy and incompetence.

In cases of occupational disease, the period for determining the statute of limitations begins to run on the date that claimant "knew or should have known" that the condition was work-related. However, it is within the Law Judge's discretion to set the "date of disablement" as either the date claimant stopped working, the date claimant started treating, or the date that a physician first determined the condition to be causally related. This can result in the Law Judge making a claim timely when it otherwise would not be.

8. What are the reporting and notice requirements for those alleging an injury?

Ordinarily, a claim is reported by the employee filing a written claim on a prescribed form. However, oral notice recognized as being sufficient if the facts of the injury are stated with reasonable certainty and it can be reasonably inferred that a claim for compensation is being made.

Per Section 18, a claimant has 30 days from the date of accident to notify the employer. However, this can be excused where there is no prejudice to the employer, such as where the employer has actual knowledge that the accident happened, notwithstanding any knowledge of any injury.

Per Section 45, a claimant has two years from the date claimant knew, or should have known, that the condition was work-related, to notify the employer.

9. Describe available defenses based on employee's conduct:

Ordinarily, a claim is reported in writing, specifically with Form C-3.0, by the employee filing a written claim on a prescribed form. However, as stated above, oral notice is recognized as being sufficient if the facts of the injury are stated with reasonable certainty and it can be reasonably inferred that a claim for compensation is being made.

A. Self-inflicted injury.

Self-inflicted injuries are excluded from compensation coverage.

B. Willful misconduct, "horseplay," etc.

Willful misconduct is not an exclusion to a right for compensation benefits as long as the injury arises out of and in the course of the employment.

C. Injuries involving drugs and/or alcohol.

Injuries that are solely due to intoxication are excluded.

10. What, if any, penalties or remedies are available in claims involving fraud?

Section 114-a of the WCL deals directly with claimants who attempt to perpetrate a fraud by obtaining benefits through deceit and/or misrepresentation. Said provision authorizes the disallowance and/or cessation of benefits where it is shown through substantial evidence that a claimant has willfully falsified information before the Board in order to obtain indemnity payments. However, no such disqualification is available against treatment for established injuries.

This provision is separate and distinct from criminal prosecution and, of course, utilizes a different standard of proof. A finding of Section 114-a can result in a vacating of all potential wage and medical benefits as well as a referral to the Fraud Inspector General of the Board, who can further refer the matter to the Attorney General's Office or a local District Attorney's office for criminal prosecution. However, no such disqualification is available against treatment for established injuries.

Per the 2007 amendments, the statute was expanded to include sanctions and penalties for "frivolous" claim or defense, which are not necessarily fraud. This provision provides that if the Board determines that a proceeding either has been instituted or continued without reasonable ground, the cost of the proceeding shall be assessed against the party instituting said proceeding (typically a carrier) and the attorney's fees would be assessed against the attorney representing

that party (i.e. the defense counsel.) This provision also prevents the attorney to recoup the penalty assessed from the client.

11. Is there any defense for falsification of employment records regarding medical history?

No.

12. Are recreational and other non-work activities paid for or supported by the employer compensable?

Yes, provided the recreational activity (1) occurs on the premises during a lunch or recreational period as a regular incident of the employment, (2) the employer, by expressly or impliedly requiring participation, or encouraging it, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment, or (3) the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.

13. Are injuries by co-employees compensable?

Yes.

14. Are acts by third-parties unrelated to work, but committed on the premises, compensable (e.g. "irate paramour" claims)?

Yes, as long as the injury arises out of and in the course of employment. An employee who suffered physical injuries due to sexual abuse can seek recovery from compensation as well as other remedies at law or equity.

BENEFITS

15. What criteria is used for calculating the average weekly wage?

NY WCL Section 14 authorizes using the 200 (for seasonable workers), 260 (5-day workers), or 300 (6-day workers) multiple in calculating the claimant's average weekly wage. This method takes into consideration the worker's earnings in the 52 weeks prior to the date of accident/disablement, as well as the number of days worked per week.

16. How is the rate for temporary/lost time benefits calculated, including minimum and maximum rates?

The rate for maximum compensation benefits depends on the year in which the injury occurred, as the Legislature has periodically revised and increased the maximum recoverable benefit. Effective 2010, the maximum weekly benefit is two-thirds of the average weekly wage in New York. For claims with dates of accident or disablement after July 1, 2018, the maximum weekly benefit rate is $904.74. The maximum weekly benefit rate is subject to change when the Commissioner of Labor to the Superintendent of Insurance issues a report on the New York State average weekly wage. However, effective May 1, 2013, the minimum benefit is $150.00 per week in the case of a permanent or temporary partial disability, unless the employee's actual wages at the time of injury are less than $150.00 per week, respectively. In that instance, the employee shall receive full wages.

17. How long does the employer/insurer have to begin TTD benefits from the date disability begins?

Where a claim for benefits is not controverted, the first payment is due on the 14th day of disability and must be paid within 4 days thereafter, except that the employer must have had knowledge of the accident for at least 10 days. NY WCL Section 25(1)(b).

18. What is the "waiting" or "retroactive" period for temporary benefits (e.g. must be out 14 days before recovering benefits for the first 7 days)?

There is a seven-day waiting period for recovery of benefits. If an employee is out of work for 0 to 7 days, there is no compensable benefit. If the employee is out from 7 to 14 days, there is a compensable benefit of only those days after the first week of disability. If an employee is disabled for more than 14 days, compensation is payable from the date of disablement. NY WCL Section 12.

19. What is the standard/procedure for terminating temporary benefits?

In circumstances where there has not been an award directing the payment of compensation benefits, the carrier may unilaterally suspend payments provided there is medical proof of no disability, or claimant returning to work at full wages, and Form SROI-S1 is filed. Within 16 days of termination of benefits, the employer is required to serve on the claimant and file Form SROI-S1.

If there has been an award from the Board and a direction to continue payments, the employer cannot suspend payments unilaterally, but may request a hearing for an order suspending or terminating benefits. This is accomplished by filing with the Board Form RFA-2 to suspend payments. This form must be served on the claimant and counsel, if an.. The carrier still must continue payments until otherwise directed by the Board.

20. Is the amount of temporary total disability paid credited toward the amount entitled for permanent partial disability?

No, unless there is an award for "schedule loss of use," which a finding of permanent disability to an arm, leg, hand, foot, etc. NY WCL Section 15(3). Then, all prior payments are credited towards the SLU award.

21. What disfigurement benefits are available and how are they calculated?

An award of up to $20,000 for serious facial or head disfigurement the actual amount to be awarded is within the discretion of the Law Judge. WCL Section 15(3)(t).

22. How are permanent partial disability benefits calculated including the minimum and maximum rate?

A. How many weeks are available for scheduled members/parts and the standard for recovery?

The weeks of compensation applicable to various scheduled members or parts of the body are determined by statute for schedule loss of use (SLU). They range from 15 weeks for the total loss of the fourth finger to 312 weeks for the total loss of an arm. Partial loss or loss of use of a member is compensated proportionately by assessment of a percentage loss, which is used to determine the weeks of compensation that are recoverable. The permanent partial disability for scheduled awards is paid at a rate of 66 and 2/3 percent of the claimant's average weekly wage.

B. Number of weeks for "whole person" and standard for recovery.

Any injury other than for specifically defined parts of the body, usually the back and neck, fall within a category known as non-scheduled loss. These are paid at a rate of two-thirds of the difference between the claimant's average weekly wage and his or her wage earning capacity for a limited number of weeks, based on the percentage of claimant's Loss of Wage Earning Capacity (LWEC). This ranges from 225 weeks (1-15% LWEC) to 525 weeks (greater than 95% LWEC).

LWEC is based on a number of factors, specifically the permanent medical impairment as well as claimant's vocational abilities (level of education achieved, English language proficiency, and age). While the medical impairment determination is governed by the 2012 Impairment Guidelines, there is no set formula to calculate LWEC, and it is determined solely on a case-by-case basis.

In the case of both SLU and LWEC, the minimum benefit is $150.00 per week. The maximum permanent partial disability rate is dependent on the year in which the injury occurred, as the Legislature has periodically changed the rates.

23. Are there any requirements/benefits for vocational rehabilitation and what is the standard for recovery?

Vocational rehabilitation is entirely voluntary in New York. Employers are not required to provide rehabilitation programs and, if provided, employees are not required to submit to them. However, the law does make available to the claimant an opportunity to receive an additional compensation benefit, not exceeding $30 per week, if it is determined by the State Education Department that the employee is able to be rendered fit to engage in a remunerative occupation if rehabilitated.

24. How are permanent total disability benefits calculated, including the minimum and maximum rates?

Permanent total benefits are paid at the same rate as those for temporary total disability. The rate depends on the year of injury. The current rate, effective for any disablement or injuries that occur on or after July 1, 2018, is two-thirds of the average weekly wage, with a maximum weekly benefit rate of $904.74.. The minimum payment is $150 per week or, if the actual wages were less than $150 per week, then full wages are paid.

25. How are death benefits calculated, including the minimum and maximum rates?

A. Funeral expenses.

Funeral expenses may be paid up to $12,500.00 in Metropolitan New York City counties; up to $10,500.00 in all others.

B. Dependency claims.

Surviving spouse with no children: 66 and 2/3 percent of the average weekly wage indefinitely. If the surviving spouse remarries, he/she receives one final lump-sum of two years' worth of death benefits, and then they cease.

Surviving spouse with children: 36 and 2/3 percent of the average weekly wage paid to the spouse, 30 percent of the average weekly wage paid to the child or children, equally.
Child or children with no spouse: 66 and 2/3 percent of the average weekly wage to be paid to the child or children, shared equally.

Children are eligible for death benefits until age 18, or until age 23 if enrolled in school full-time.

No child or children, no spouse, but dependent grandchildren, brothers and sisters: 40 percent of the average weekly wage.

None of the above, but dependent parents and grandparents: 25 percent of the average weekly wage if they are minors, 40 percent if they are otherwise dependent.

None of the above, but surviving non-dependent parents: a lump-sum of $50,000.00.

None of the above, $50,000.00 to decedent's estate.

Social Security offset: There is a reduction in benefits varying from 5 percent to 50 percent of the benefit, depending on average weekly wage, for Social Security benefits received.

26. What is the criteria for establishing a "second injury" fund recovery?

The 2007 Amendments eliminated the Second Injury Fund for all accidents or occupational diseases occurring prior to July 1, 2007.

27. What are the provisions for re-opening a claim for worsening of condition, including applicable limitations periods?

A claim can be re-opened because of a worsening of a condition that is not anticipated at the time of final determination by the Workers' Compensation Board. The re-opening requires a statement (Form C-27) by a physician that the condition has worsened and was not otherwise previously anticipated. The period within which a claim can be re-opened for the purposes of seeking further indemnity is 18 years from the date of accident/disablement or eight years after the most recent payment of indemnity, whichever is longer. A claim can be reopened at any time for additional medical treatment. WCL Section 123.

28. What situation would place responsibility on the employer to pay a claimant's attorney's fees?

Attorney's fees are paid out of the award made to a claimant and are not an additional responsibility of the employer. The percentage is usually 15% of any "new money moving" to claimant, based on custom and usage.

EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive?

A. Scope of immunity.

In general, the employer is immune from direct action by an employee, unless the employer is uninsured, in which case the claimant can "elect remedies" between seeking compensation from the Uninsured Employers' Fund, and directly suing the employer. However, the employer is not protected from third-party actions by defendants who have been sued by employees, per the

"grave injury" and contractual indemnification set forth in Section 11. Thus, if an employee sues a third-party on some grounds, the defendant in that action can implead the employer under some comparative fault or indemnification theory.

B. Exceptions (intentional acts, contractual waiver, "dual capacity," etc.).

There is no exclusivity of rights under the Compensation Law where the statute does not provide a remedy to a particular employee, where the party seeking redress is an employee or is not an employee at the time of the injury. Thus, the Compensation Law will be the exclusive remedy for any employee who suffers an injury as the result of an accident or occupational disease that arises out of and in the course of employment. Since the statute refers to injuries arising out of an accident, the statute does not apply to injuries that result from an intentional act of the employer or the intentional act of a co-employee while that co-employee was acting within the course and scope of his employment. Although the Compensation Law does not provide for recovery of pain and suffering, an employee is precluded under the Compensation Law from presenting an action against the employer for pain and suffering on the theory that the accident which brought about the injury (and thus the pain and suffering) was the result of an accident, thus invoking the exclusive remedy of the Compensation Law. In the event that an employee accepts compensation benefits for an injury that might otherwise create an independent right of action against the employer, the employee generally waives any rights to proceed by an action at law.

30. Are there any penalties against the employer for unsafe working conditions?

Under the WCL, there are no penalties against the employer for unsafe working conditions. However, the New York State Labor Law, which defines obligations to provide safe work places, is often invoked in third-party actions against employers, particularly in construction site accidents.

31. What penalty, if any, for an injured minor?

The average weekly wage of a minor can be increased beyond the amount of his actual average weekly wages under a theory that a minor would expect to have increases in earnings after reaching majority (e.g., minor's "wage expectancy"). However, the Board must have some evidence to substantiate that the particular employee had a reasonable expectation of increased earnings to warrant an increase in the average weekly wage upon which the compensation benefits are to be determined. In rare cases, where it can be established that an employer knowingly employed illegal minors, an injured minor has been found entitled to double compensation.

32. What is the potential exposure for "bad faith" claims handling?

The WCL permits the Board to assess penalties against an employer under certain circumstances:

A. If a claim is not timely controverted, a $300.00 penalty may be imposed. Section 25(2)(a).

B. If an employer objects to the compensation claim without just cause, a penalty of $300.00 shall be imposed. Section 25(2)(c).

C. If an employer fails to timely pay an award made by the Board (10 days from the date of filing of a notice of decision), a penalty of 20% of the total award shall be imposed. This penalty provision does not apply if there is an application for review of the Law Judge's decision.

33. What is the exposure for terminating an employee who has been injured?

An employer is not obligated to hold a position for an employee. However, the law does make specific provision for employers who dismiss an employee or who threaten to dismiss an employee for presenting a compensation claim or who has or is about to testify in a compensation proceeding. Discrimination claims under Section 120 of the N.Y. Workers' Comp. Law must be brought before the Compensation Board within two years of the date of the alleged discrimination. If the Board finds discrimination, the employee is entitled to be restored to the same employment and to be compensated for any lost wages arising from the discrimination, together with any fees or allowances determined by the Board for services rendered by an attorney. The employer shall also be fined a penalty of $100 to $500. The penalty and any compensation or fees allowed are the sole responsibility of the employer and cannot be assessed against the employer's compensation carrier.

THIRD-PARTY ACTIONS

34. Can third-parties be sued by the employee?

In addition to receiving workers' compensation benefits, a claimant may also commence a third-party action against a potential tortfeasor for alleged negligence associated with the compensable injury.

35. Can co-employees be sued for work-related injuries?

Generally, a co-employee is protected by the exclusivity of the WCL expect in the event of an intentional injury to the employee. That intentional act may be attributable to the employer and, thereby, raise a right of action by the injured employee directly against the employer if the intentional act was performed in the course and scope of the offending employee's job.

36. Is subrogation available?

A workers' compensation carrier who has paid benefits may seek recovery from a potential tortfeasor in situations where the claimant has chosen not to commence a third-party action. In those situations where a third-party action has been commenced, the workers' compensation carrier retains a lien on any and all recovery as well as a potential future holiday on future benefits to the claimant. WCL Section 29.

MEDICALS

37. Is there a time limit for medical bills to be paid and are penalties available for late payment?

Employers have 45 days from receipt of the bill to either pay or challenge bills for medical care. Failure to make timely payment entitles the provider to an award of a penalty equaling 1 and 1½ percent interest per month for any unpaid amount. WCL Section 13-g.

38. What, if any, mechanisms are available to compel the production of medical information (reports and/or an authorization) at the administrative level?

The production of medical information can be compelled at workers' compensation hearings through subpoena power vested in attorneys representing any party. Alternatively, records can be obtained through executed authorizations. In the event that an employee refuses to execute an authorization, the only option available, other than subpoena, is to request a hearing for the purpose of obtaining an order of the Law Judge to provide authorization for release of medical records.

39. What is the rule on choice (a) claimant's choice of physician; (b) employer's right to a second opinion and/or Independent Medical Examination?

An employee is entitled to be treated by any physician authorized by the Workers' Compensation Law. WCL Section 13-a. In New York, the employer and carrier are barred from playing any part in the selection of a claimant's physician except when there is a contract between the carrier and a Preferred Provider Organization (PPO), as set forth in Sections 13-a(6) and 350-355. Also, the employer can ask claimant to execute Form C-3.1, in which the claimant acknowledges his/her right to select their own physicians, but they may also choose a provider or network that is recommended by the employer or carrier within 30 days following the accident.

The employer/carrier can schedule an IME with a physician of their choosing at any time. However, IME's are subject to strict deadlines. The notice of examination (Form IME-5) must be served on seven business days' notice, and must advise the claimant if their right to videotape the exam. Once the exam is held, the report must be forwarded (with Form IME-4), to the Board, the claimant, the attorney, and all treating physicians who treated claimant in the last six months, "on

the same day and in the same manner," within 10 business days of the exam, or face preclusion.

40. What is the standard for covered treatment (e.g. chiropractic care, physical therapy, etc.)?

The employer has a duty to provide any medical treatment that is reasonably necessary or appropriate for the injury or occupational disease. WCL Section 13.

41. Which prosthetic devices are covered and for how long?

The employer is obligated to provide any prosthetic devices reasonably necessary or appropriate for the care and treatment of the injury or disease for as long as is required for recovery. WCL Section 13.

42. Are vehicle and/or home modifications covered as medical expenses?

Expenses for such modifications can be awarded by the Board, but only upon a showing that the modifications were a medical necessity or a medical apparatus or device. Mere convenience is insufficient to warrant such expenses. WCL Section 13.

43. Is there a medical fee guide or schedule or other provisions for cost containment?

Yes. WCL Section 13.

44. What, if any, provisions or requirements are there for "managed care"?

Although there is presently a movement towards a general managed care system, New York State still allows for employees to utilize their own primary care physician for treatment related to on-the-job injuries. However, as stated above, carriers can contract with PPO's, and employers can recommend treatment to claimants who sign Form C-3.1.

PRACTICE/PROCEDURE

45. What is the procedure for contesting all or part of a claim?

A. Before any awards have been made by the Board, an employer can controvert the claimant by filing with the Board Form FROI-04 or SROI-04. The FROI must be filed with the Board on or before the 18th day after disability or within 10 days of the employer's first knowledge of the injury, whichever is greater. If the claim is not initially controverted, but before it is indexed, a FROI-00 can be followed by a SROI-04. On receipt of the filed form, the Board schedules a hearing for the next available calendar for a preliminary hearing on the question of the employee's right to compensation benefits. At the first hearing, where all parties are present, the employer must

raise all of the grounds upon which the compensation is controverted.

B. In the event that an employer does not initially controvert a compensation claim, but at some time prior to awards for compensation having been made without liability, the employer can suspend or reduce payments. WCL Section 21-a. If this is to be done, the employer must file with the Board a SROI-S1 documenting a suspension of payments. The employer is obligated to file this form within 16 after the date on which compensation payments are stopped or modified. The Board will schedule a hearing for the next available calendar to address the question of the employee's entitlements to benefits and the rate of those benefits.

C. After the Board has determined that a claimant is entitled to compensation benefits, benefits cannot be modified or discontinued except by order of the Board. The employer can request a hearing to determine whether benefits can be reduced or discontinued by filing with the Board a Form RFA-2.

46. What is the method of claim adjudication:

A. Administrative level.

The administrative level (Workers' Compensation Board) is the primary forum for hearings on compensation claims. The Law Judge resolves any controverted claims, determines the rate of compensation, the period of disability, the level of disability and whether a claim is compensable as a scheduled or non-scheduled loss.

B. Trial Court.

N/A

C. Appellate.

i. Application for review:

An objection to the decision of the Law Judge is first addressed to the Board Panel by means of an application for review of the Law Judge's decision. Application for review of the decision must be filed with the full Board within 30 days of the filing of the notice of decision from which application for review is taken. This review is of the entire record. The Board Panel is empowered to reverse, modify or remand for further hearings. It is empowered to review both facts and law.

ii. Appeals:

An objection to the review by the full Board is appealable to the New York State Appellate

Division for the Third Department. The scope of review is whether the Compensation Board's decision is supported by "substantial evidence."

47. What are the requirements for stipulations or settlements?

All stipulations or settlements must be approved by the Compensation Board and reduced to Board orders or decisions. Absent approval by the Board, no stipulations or settlements are binding.

48 Are full and final settlements with closed medicals available?

Yes. While there can also be indemnity-only settlements, full and final settlements, referred to as lump sum settlements, are inclusive of medical expenses under Section 32. There is no right to further medical expenses after lump sum settlement of any claim. The Board must approve the settlement, considering both the question of need for further medical care and the claimant's ability for self-support without the periodic receipt of compensation benefits.

49. Must stipulations and/or settlements be approved by the state administrative body?

Yes, lump sum settlements are approved by the full Compensation Board. Settlements regarding periods and extent of disability are subject to approval by the Administrative Law Judge assigned to the claim.

RISK FINANCE FOR WORKERS' COMPENSATION

50. What insurance is required? What is available (e.g. private carriers, State Fund, assigned risk pool, etc.)?

Security for payment of compensation is required for any of the benefits provided by the Workers' Compensation Law. Coverage can be provided through the following:

A. State Insurance Fund

B. Private insurance carrier

C. Approval by the Compensation Chairman of the employer's financial ability to self-insure for compensation benefits

D. Approved group self-insurance. NY WORK COMP § 50.

51. What are the provisions/requirements for self-insurance?

A. For individual entities.

In order to qualify for self-insurance, the employer must furnish to the Compensation Chairman satisfactory proof of the employer's ability to pay compensation benefits. The Chairman may require a surety bond and may require that the employer pay any awards for future benefits into the Special Fund of the State Insurance Fund. The Chairman shall also have the authority to deny any application for self-insurance or to revoke a previously granted consent for any good cause. WCL Section 50.

As of July 1, 2007, carriers who are liable to claimants for LWEC permanency awards or death claims must make a deposit into the Aggregate Trust Fund (ATF) of the present value of the unpaid permanency award (after at least six months from classification). Self-insured employers cannot be directed to make this deposit.

B. For groups or "pools" of private entities.

Group self-insurance is available to employers with a related activity in a given industry, and incorporated or unincorporated association of such employers, provided they employ persons who perform work in connection with that industry. Such employers may adopt a plan for self-insurance under which the group assumes liability of all of the employers within the group and pays compensation for which the employers are liable under the Workers' Compensation Law. The group is required to provide satisfactory proof to the Chairman of its ability to pay such compensation benefits and the Chairman shall require the deposit of sufficient securities as may be deemed necessary. The Chairman may also require payment of awards for future benefits into an aggregate trust fund as a condition of being allowed to operate as a group self-insurer. The Chairman has the authority to deny the application of any group or to revoke any previously consent authorization.

As stated above, effective July 1, 2007, the deposit into the Aggregate Trust Fund (ATF) is mandatory for all cases with permanent partial disability classification. This provision requires a carrier to pay the present value of a claim to the ATF when a claimant is classified as having a permanent partial disability by the WCB and remains out of work. The mandatory deposit does not apply to the self-insured employers. It should be noted that the carrier remains liable for the payments of medical treatments, even after the ATF deposit is completed.

The carriers are not required to deposit into the ATF in claims where Section 15-8 apply. In cases where either a third-party action or a 15-8 claim is still pending, the carriers also are not required to make the payments to the ATF.

52. Are “illegal aliens” entitled to benefits of workers’ compensation as The Immigration Control Act indicates that they cannot be employees although most state acts include them within the

definition of "employee"?

The WCL does not specifically exclude "illegal aliens" from receiving workers' compensation benefits. Further, there has been case law stating that they are nevertheless entitled to receive it.

53. Are terrorist acts or injuries covered or excluded under workers' compensation law?

Presently, the New York State Workers' Compensation Law does not specifically exclude injuries that are sustained as a result of terrorist acts. As such, any injuries which are sustained in the course of employment will be covered under the New York State Workers' Compensation Law.

Moreover, injuries sustained in the cleanup, recovery, or rescue effort due to work performed in lower Manhattan between September 11, 2001 and September 12, 2001 are also compensable. Per statute, Section 28 does not apply to these claims and the statute governing the final deadline for same has been continually extended by amendment. See WCL Article 8-A; specifically Section 162.

54. Are there any state specific requirements which must be satisfied in light of the obligation of the parties to satisfy Medicare's interests pursuant to the Medicare Secondary Payer Act?

No. However, per the statute and regulations governing Medicare Set-Asides, any Section 32 Agreement that resolves the medical portion of the claim must indicate that Medicare's interests are being addressed, either with a CMS letter where required, or through some other form of allocation addressing future medical expenses.

55. How are subrogation liens of Medicaid and health insurers treated under workers' compensation law?

The Federal Medicaid statute requires States to include in their plan for medical assistance provisions (1) that the individual will assign to the State any rights to payment for medical care from any third party and (2) that the individual will cooperate with the State in pursuing any third party who may be liable to pay for care and services available under the Medicaid plan. 42 U.S.C.A. §1396k(a). The State is authorized to retain such amount as is necessary to reimburse it (and the Federal Government as appropriate) for medical assistance payments and to pay the remainder to the individual. 42 U.S.C.A. §1396k(b).

Although the WCL does not specifically recognize a subrogation right against a compensation carrier as a result of health insurance benefits and/or Medicaid benefits paid on their behalf, these entities certainly have other forms of recovery. For instance, a third-party entity certainly has the right to commence an action in Supreme Court alleging amount improperly paid and seek

equitable relief against the compensation carrier.

56. What are the requirements for confidentiality and privacy of medical records under workers' compensation law and how are they affected by state and federal law (HIPAA)?

At the present time, HIPAA, 45 C.F.R. parts 160-164 and 65 F.R. 82462 provides an exception for workers' compensation claims so as to allow the collection of medical records by employers and insurers. [45 C.F.R. 164.512(b)(v)(A)(2)]. Therefore, your current practice of obtaining medical records could proceed under state law.

Presently, the New York State Workers' Compensation Law does not take into account newly enacted provisions concerning HIPAA compliancy. Health providers, although, are now recognizing the federally mandated legislation by requiring a claimant to execute a detailed authorizations which specifically identify the medical provider. Also included in these authorizations is a limitation as to what Agency or Entity shall have access to said records, the specifics of exactly what records are to be released, i.e. dates of treatment, and date and nature of injury, purpose of disclosure, and a specific expiration date.

Section 110 provides confidentiality requirements that are even stricter than HIPAA. Only parties of interest to a claim (claimant, employer, carrier, and Board) may have access to materials that are filed, or will be filed, with the Board. The only exception is when claimant executes the Form OC-110A authorization granting access to a Board file to anyone else. If anyone other than the claimant obtains or provides such access, they are guilty of a misdemeanor.

57. What are the provisions for "Independent Contractors"?

None.

58. Are there any specific provisions for "Independent Contractors" pertaining to professional employment organizations/temporary service companies/leasing companies?

No.

59. Are there any specific provisions for "Independent Contractors" pertaining to owner/operators of trucks or other vehicles for driving or delivery of people or property?

Yes. The New York State Construction Industry Fair Play Act and the New York State Commercial Goods Transportation Industry Fair Play Act both state that workers in such industries are deemed employees unless there is sufficient proof that they are independent contractors. NY Labor Law 861-B; 862-B Employers and carriers who seek to controvert claims on the basis of no employer/employee relationship therefore seek a higher burden of proof.