

New York State
Budget Hearing
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Presented by:

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I represent injured workers, before the New York Workers' Compensation Board. The first hearing I conducted was in August of 1982. I am a partner in the law firm of Meggesto, Crossett and Valerino, LLP. We maintain an office in Syracuse, New York.

Since 1982, I have been active in issues concerning Injured Workers. I am a past officer of the Central New York Workers' Compensation Bar, a founding member and now Second Vice President of the Injured Workers' Bar Association of New York, and past Chair of the Workers' Compensation section of the New York State Bar Association's Committee on Torts, Insurance and Workers' Compensation. Currently, I am a member of the State Bar's Special Committee on Workers' Compensation Issues. I have attended many meetings with the Chair and his staff, discussing the recent proposals and efforts designed to decide cases off-calendar.

At each meeting, I strive to emphasize the importance of a hearing to the Injured Worker. The Injured Worker looks to the Board to administer justice. The Injured Worker wants and needs an opportunity to express their concerns, to know that their case matters and that they are not just a number in a vast system. The Injured Worker wants the court to know that the injury has dramatically changed their life, in a way they did not ask for, nor anticipate. Lastly, the Injured Worker expects a resolution that is just and has been reached after due consideration of all the facts and circumstances. Often, the Workers' Compensation Board is the only contact an Injured Worker has with our judicial system. Regardless of the decision, the experience should reinforce the conclusion that our judicial system works.

For many years I have watched as the Board has minimized the Injured Worker's right to be heard. I've watched as the adjudication of the Injured Worker's case has moved from a set of decisions of a Judge, to a system concerned more with efficiency than justice. I've watched as accountants and administrators, whom have never handled a case or appeared before a Judge, decide not only how the system should be structured, but also how the case should be decided!

I am here today to urge you to exercise your strong oversight of the Department of Labor and the Workers' Compensation Board budgets, to ensure that justice returns to the Injured Worker and the Employers of the Empire State.

What is Workers' Compensation?

Simply stated, the Workers' Compensation statute represents a substitution of the Injured Worker's common law right to seek medical care and lost wages from the employer. Indeed, in exchange for the Workers' Compensation Law, the Injured Worker gave up their Common Law rights for a prompt delivery of medical care and lost wages. Since its inception, at the turn of the last century, the legislation has charged the Workers' Compensation Board (the Board) with ensuring that the law is promptly and fairly administered. The statute anticipates that benefits, medical care and lost wages, will be paid, without judicial intervention, in all cases that are not disputed within 18 days of notice of an injury. In disputed cases, commonly know as controverted cases, the statute requires that a hearing be held to adjudicate the dispute.

Once a case is either accepted, voluntary payment of benefits begun, or established after adjudication in a controverted case, disputes often arise with regard to the proper amount of lost wages to be paid, medical treatment to be afforded or the ultimate outcome of a case. Over the years, the Board has recognized that certain issues lend themselves to relatively easy adjudication, if certain information is made available. The best example is the calculation of the Average Weekly Wage (AWW).

The statute provides that the amount of lost wages to be paid, in cases of total disability, is equal to two-thirds of the AWW, up to maximum amounts, depending on the date of the injury.

Expecting that every Injured Worker would have been paid wages, the Board adopted a form (C-240) that requires the employer to set forth the number of days worked in a week and the amount paid in the fifty-two weeks preceding the injury. With this information, the AWW can be calculated. Sounds simple, and in most cases all parties can agree. But often, because the Injured Worker may not have worked fifty-two weeks before the injury, worked more or less than five days a week, or had other covered employment, such as a part-time job, the calculation becomes more difficult and subject to dispute. Even though the difference may only amount to a few dollars a week, those dollars are important to both the Injured Worker and the Employer, over the life of a case.

Other more complex and difficult issues also arise in almost every case. The issue most often disputed and litigated is "Degree of Disability". New York Workers' Compensation Law, while premised on replacing the Injured Worker's earning capacity, provides for four kinds of disability; Temporary Total (TT), Temporary Partial (TP), Permanent Total (PT) or Permanent Partial Disability (PPD). In addition, a subset of the permanent disability is the Schedule Loss of Use (SLU), which is commonly awarded in cases of an injury to extremities. For all cases occurring after March 10, 2007, the Board must decide the Percentage of Loss of Wage Earning Capacity, to compute the duration of the lost wage payment to an Injured Worker with a PPD.

The Board has endeavored to promulgate forms and guidelines, primarily for the use of medical providers, which purport to contain the information necessary to make the determinations the statute requires. The most useful, was the Doctors Report of Injury/Treatment, labeled and commonly known as the C-4. The C-4 was a one-page form, often accompanied by a narrative from the medical provider, which

all parties used in determining an Injured Worker's degree of disability. In 2009, the Board replaced the (C-4) with a new family of forms consisting of 6 separate multiple-page documents, which have proven to be ineffective and costly, resulting in many medical providers, especially primary care doctors, to decline to treat Injured Workers. Recently, the Chair has suspended the use of the forms in the Rochester area and has been asked to consider similar action in the Syracuse District.

Lastly, the 2007 amendments to the statute provided for a number of task forces to assist the Board in its mission. Of note, was the task force charged with creating Return to Work programs. Another, is the task force charged with creating guidelines for both the treatment of Injured Workers and determination of Loss of Wage Earning Capacity. The guidelines and programs were to be submitted in December of 2007. As of the writing, neither has been submitted and the process is less than transparent.

So, How Does it All Work?

Adjudication by Hearing

Before 1999, the Board would schedule a hearing, within a reasonable time of the injury, when evidence/medical reports, indicated that the Injured Worker remained out of work. At the initial hearing, the Judge would formally establish the case for the conditions accepted, and entertain arguments that the case should include other body parts or injuries. Additionally, the Board would establish the AWW and made awards (weekly payments of lost wages) consistent with the evidence, after hearing the arguments of the Injured Worker and the Employer. Sometimes, further hearings were required, to obtain necessary evidence, or to hear the testimony of medical witness, or simply to find out how the Injured Worker was doing in the quest to return to work. Both the Injured Worker and the Employer were bound by

the decision and could not, absent an appeal, change the Judge's direction, until further order of the Judge, or the Injured Worker returned to work.

At each hearing, the parties had an opportunity to orally set forth their relative positions, address errors in medical reports, or otherwise set forth facts that were specific to their case. The Judge, after entertaining the arguments, would in most cases, make a decision from the bench, thereby affording the parties an immediate decision to the issue at hand.

Changes to Adjudication by Hearing

Some time in 1998, the Board decided that the hearing process was unnecessary and not efficient. These conclusions were reached, after the Board hired accountants to analyze the system and suggest better ways to administer the number of cases and the perceived delays in concluding a case. At the time, vigorous debate ensued over the question of efficiency at the cost of justice. Some of the arguments made were: that the system was clogged with too many cases; that often, the hearing did nothing more than affirm what the parties worked out; that the Board did not have enough judges; that the cost of the system was too high and was chasing employers from the State of New York. Many voices participated in the debate, including the New York State Bar, who issued a special report in 2001, voicing concerns, but pledging to work with the Board toward achieving efficiency with justice.

The Current Process

As a result of the changes made in late 1998, the hearing process has changed in two fundamental manners. The first, is that the Board DOES NOT hold a hearing in every accepted case. Indeed, the Board now issues either an Administrative Decision (AD) or a Proposed Decision (PD), without notice to the parties. Both the AD and PD are subject to objection within thirty days, which is supposedly to result in a

timely hearing. It often results in an Amended AD or PD and the thirty days process begins again.

In a controverted case, the Board has an all-together different process. The Board, being acutely sensitive to the criticism that controverted cases took too long to resolve, implemented a streamlined adjudication process. Commonly referred to as "The Rocket Docket", the process is set up to resolve cases within 90 days of indexing. While a laudable goal, the percentage of cases controverted hardly warranted the wholesale changes to the initial process of making a claim, or redesign and implementation of many new forms. Further, the perceived problem with controverted cases is not justification to resolve substantive issues off-calendar.

The Rocket Docket

As a result of the Rocket Docket, the Board has amended each form required in a new case. It required that the parties complete forms, with each and every defense that can be remotely justified, so as not to preclude them. It requires significantly more investigation, before an attorney can accept the case of an Injured Worker or the Employer. Additionally, to meet the criteria, the Board has had to change the numbering system of cases, as well as change the process for assigning a case the numbers necessary to obtain medical care. All of which has led to significant changes in the action that starts the clock running, the indexing of a case.

In effect, the Board has created two classes of Injured Workers, who have different rights, depending on how the Employer decides to handle the case. In some instances, the Injured Worker with a controverted case, will have a greater protection to ongoing awards than an Injured Worker whose case was accepted. If successful, the Injured Worker with the controverted case will have a decision directing ongoing payments, until there is a return to work, or further court order, whereas the Injured Worker, with an accepted case, does not have such a decision,

thereby allowing the Employer/Carrier to change or suspend payments, unilaterally and without notice, if they have evidence contrary to the treating doctor.

Conciliation

A component of the Board's procedure to decide issues without a hearing, is the process of conciliation. Conciliation was created before both the 1996 and 2007 statutory changes, in an effort to provide a vehicle to decide cases that involved less than 8 weeks of lost time. After the 1996 changes, conciliation was allowed to apply in every instance where less than 52 weeks of lost time was at stake, virtually every case at some point. The idea sounded great, but in practice, did not work, nor satisfy the goal of speeding the adjudication of cases.

The idea was that if you could get all the parties in one place, the parties could work out the issue or issues. The conciliator, a senior attorney employed by the Board, would issue a PD and all parties would have 30 more days to object. The same period parties had to appeal a Judicial Decision, but with much different consequences. No official record was made and the conciliator, unlike a Judge, could not make a decision. This Process allows a party who wanted to drag a matter out, to do so with out consequences. The deficiencies of Conciliation were the subject of discussion and debate. Improvements and amendments to the process were suggested and tried. Finally, in January of 2009, the then Chair of the Board informed the Workers' Compensation Committee of the New York State Bar Association that conciliation meetings would end, as they did not add to the timely adjudication of cases.

Request for Further Action

To quell the outcry of the Board's decision to discontinue scheduling hearings in every case, the Board created the process of a "Request for Further Action" (RFA). The RFA procedure provides that if the Injured Worker wishes further action,

which may or may not mean a hearing, then the Injured Worker, or more likely the attorney, files a form titled Request for Further Action (RFA-1). The Employer, or more likely the insurance carrier, may file an RFA-2. The only real difference in the forms is that the carrier, unlike the Injured Worker, is statutorily entitled to a hearing in certain issues, within a certain period of days. The RFA procedure is supposed to cause an AD, PD or a hearing, addressing the issues raised.

Over the last few years, the parties have embraced the RFA process. The process makes sense, when implemented as promised. The process is consistent with request for relief in other judicial systems, as it gives notice of the issues in contest, and provides for an orderly resolution.

Medical Testimony

The second fundamental change, is that most medical testimony is taken outside of the hearing, by deposition that is, if a resolution cannot be reached and the record needs to be developed with medical testimony. The Board directs that the doctors be deposed, the testimony reduced to writing and in most cases, that the parties submit a Memorandum of Law, from which the Judge will issue a written Reserved Decision. Oftentimes, much of the testimony is taken by phone, as the employer's medical witnesses are not local, but rather, located out of the hearing area, or even out of state. Not only does this process deprive the judge of an opportunity to observe the doctor's demeanor and other non-verbal communication while testifying, it also removes the Judge's ability to pose queries to the doctors, prevents the Injured Worker and the Employer from hearing and witnessing the testimony. All resulting in additional judicial time to read the medical testimony and write a Reserved Decision, instead of listening, hearing arguments and ruling from the Bench, a far faster process.

Where We Are Today

Setting aside the problems with medical testimony and the entire issue of access to medical treatment, the RFA procedure is a generally acceptable compromise. Indeed, such a procedure is not unlike other courts, where an action is commenced and the court does not become involved, unless and until one of the parties request judicial intervention. The Injured Worker or Employer must be afforded the same relief. In the language of Workers' Compensation that is a hearing

Today, the parties, typically the Injured Worker's attorney and either the Employers Insurance carrier and/or their attorneys, work out whatever issues they can. The Board has the procedures in place that allow the parties to schedule a Walk In Stipulation Calendar (WISC). The parties merely advise the Board that they have worked out a resolution and wish to present it to the Judge for approval, so that a legally enforceable decision may issue. In addition, the Board's current procedures allow the parties to request an AD or PD, in the appropriate circumstances. When the efforts of the parties fail, for whatever reason, a hearing must be granted on a filing of a properly documented RFA form.

What The Board Wants to do Now

The Board may call it Business Process Improvement (BPI) or Managed Adjudication Path (MAP), but essentially it is a modification of the conciliation process, a process that has already been proven not to work. The Board is now spinning the failed conciliation process, asserting that the Board personnel will work in conjunction with the senior attorneys and Judges, to decide issues off-calendar, without notice, deciding alone what, if any, cases warrant an opportunity for the parties to be heard. As a deterrent to the shortcomings of conciliation, the Board proposes that the Judge will consider assessing costs, if an objection to a PD is deemed unreasonable. Will a Hearing be held to determine what are reasonable grounds to object?

Again, the Board rolls out the same old tired arguments, as to why they need to implement BPI/MAP: that the system is clogged with too many cases, that the hearing did nothing more than affirm what the parties worked out, that the Board does not have enough judges, that the cost of the system was too high and is chasing employers from the State of New York. The same arguments, despite the fact that the Board's own numbers show that they are conducting about half as many hearings as prior to 1999, with at least 20 more Judges.

The Board takes the position that the statute does not guarantee a right to a hearing, a position unsupported by legislative history, almost one hundred years of practice, and numerous statutory and regulatory provisions. Most importantly, it is a position foreign to New York's concept of Due Process.

I urge this committee to carefully and completely scrutinize the Budget of the Workers Compensation Board, to ask them how the BPI/MAP program saves money, while protecting the Injured Worker's and Employer's right to be heard in a Workers' Compensation case. Ask them how this new process is different from the failed Conciliation Process. Ask them how deciding cases, without hearing from the Injured Worker and their Employer, serve Justice. Ask them how this process makes our State more attractive to business. Ask them if this process is the right thing for the State of New York.

I urge this committee to reject the self-serving and disingenuous statistical examples offered by the Board; to reject the empty and tired arguments that have been used to justify the minimization of the Injured Worker and their Employer's right to be heard; and to reject the notion that a Judicial System should be run by accountants and business principals, instead of laws and Judicial Adjudication.

Lastly, I urge this committee to protect the Injured Worker and their Employer's right to a Hearing.

Respectfully submitted,

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