

Testimony of Leah Lotto, National Center for Law and Economic Justice

Assembly Standing Committee On Labor Hearing on the New York State Workers' Compensation Permanency Impairment Guidelines September 26, 2017

Introduction

Good afternoon. Thank you for this opportunity to testify about these important issues for New York's workers. My name is Leah Lotto and I'm an attorney with the National Center for Law and Economic Justice.

NCLEJ has worked with low-income families, individuals, and communities for more than 50 years to fight the systemic causes of poverty. In our work, we often combat injustice and fundamental unfairness in government benefit programs. Unfortunately, New York's Workers' Compensation System is already failing low-wage workers, and the Board's proposals would further harm the workers who most need benefits that are fairly administered and compensation that is adequate for lost wages. My testimony today will focus on the impact of the Board's proposals on New York's low-wage workers.

Low-Wage Workers and the 2007 Reforms

Low-wage workers were unambiguously harmed in the 2007 overhaul of the comp system. The core compromise of increasing the maximum weekly benefit amount while introducing absolute caps of four to ten years for permanent partial disability awards had only negative consequences for low-wage workers. Low-wage workers are often defined as workers whose income would not raise a family of four above the poverty line¹, in the last few years that means an hourly wage of between \$11 and \$12 an hour for a 40 hour work week, and in 2017, an annual income of \$24,600. For my testimony today, I'm defining low-wage workers as those who earn under \$15 an hour for a 40 hours work week, or \$600 per week. \$600 is the wage line below which workers saw no benefit from the 2007 compromise. Because the weekly benefit amount is two-thirds of a worker's average weekly wage, and that maximum had been stagnant at \$400 from 1992 to 2007, only workers making more than \$600 a week saw an increase in benefits from the 2007 legislation. Low-wage workers did, however, suffer from the imposition of caps on permanent partial disability benefits, which prior to 2007 were permanent awards, consistent with the reality of permanent disability.

Listening to Workers

In deciding whether to implement changes to the comp system, I encourage each member of the committee to read the comments of people who will be affected by the proposals: injured and ill workers. The Workers' Compensation Alliance conducted a survey and received over 1,500 responses from injured workers, 847 of whom had a workers' compensation case that involved a

¹ In 2017, a family of four is at the poverty line with an annual income of \$24,600.
<https://www.federalregister.gov/documents/2017/01/31/2017-02076/annual-update-of-the-hhs-poverty-guidelines>.

schedule loss award in the last five years. The results show workers found the process and outcome of their workers' comp claim to be profoundly unjust. Low-wage workers were more dissatisfied than their middle- and high-wage counterparts. 76% of low-wage workers believed their schedule loss evaluation was inadequate; 81% believed that the money award they received was inadequate; 82% believed that the award did not represent adequate compensation for their injury; and 88% of low-wage workers believed that the award did not adequately compensate them for wage loss. Beyond these numbers, which are deeply disturbing, the survey collected open-ended comments on workers' experiences in the comp system. Please read these workers' comments, to hear in their own words how the failures of the current comp system have negatively impacted their lives. They describe being unable to provide for their families; barely staving off foreclosure or losing their homes they were able to afford before their injuries; applying for food stamps to keep their family afloat; living off of credit cards and accruing massive debt; losing lifetime savings and the ability to pay for children's education; and depending on the kindness of family and friends to survive. Workers report that they had to choose whether to heal properly or work through pain to earn enough for basic needs. Workers proud of their profession are no longer able to: tie bows as a florist because of nerve damage in a hand; lift ten pounds overhead to stock a store shelf after years of retail work; or swing a hammer for 8 hours a day as the job requires. Worker after worker states that the inadequate response from the comp system has ruined the person's life.

Low-wage Workers in Context

These are problems that all injured and ill workers face, but are particularly egregious for low-wage workers, who perform physically demanding and dangerous jobs and disproportionately bear the burden of occupational injuries and illnesses. Many low-wage jobs are also high-hazard jobs, and low-wage workers are injured on the job at a disproportionate rate.²

One example are workers I collaborate closely with: dairy workers in New York's farms upstate. Dairy work is incredibly dangerous, with high rates of injury, most significantly from working with cows and bulls weighing between 1,000 and 1,500 pounds.³ In the decade between 2006 and 2016, sixty-nine farmworkers were killed on the job in New York State.⁴ These workers deserve a comp system that responds to their needs and adequately replaces wages lost from workplace injuries and compensates families in the tragic event of a fatal loss.

2017 Schedule Loss Proposals

Unfortunately, the Board's current proposals will result in significant lowering of benefits, instead of addressing already inadequate wage replacement. The proposals will drastically lower schedule loss awards, make no sense for low-wage workers, whose inability to perform job functions will be the same under the new guidelines as under the old. Schedule loss awards are the benefits a worker

² OSHA, Adding Inequality to Injury: The Costs of Failing to Protect Workers on the Job, June 2015, available at <https://www.dol.gov/osha/report/20150304-inequality.pdf> (defining low-wage jobs as those whose median wages do not raise a family of four above the poverty line).

³ Carly Fox, Rebecca Fuentes, Fabiola Ortiz Valdez, Gretchen Purser, and Kathleen Sexsmith. 2017. "Milked: Immigrant Dairy Farmworkers in New York State," at 41-51. A report by the Workers' Center of Central New York and the Worker Justice Center of New York.

⁴ *Id.* at 42.

receives when the workplace injury or illness results in a permanent impairment of an extremity, loss to vision or hearing, or facial disfigurement.

A core problem with the Board's proposal is the provision⁵ that requires the examining physician to use the lowest end of the scale in the proposed impairment guidelines to assess schedule loss of use. The vast majority of injuries identified in the proposed impairment guidelines fall in the newly-created "Category A," and the low end of the scale in that category is zero. This means that a great number of work-related injuries, confirmed to be permanent, will result in zero compensation for workers. These regulations will result in the drastic reduction of most schedule loss evaluations from current practice.

In addition to reducing scores of schedule loss awards to zero, the proposed regulations create additional hurdles that make no sense and can only be understood as efforts to delay and deny benefits. For example, proposed 12 NYCRR 300.39(c) provides that the injured worker may not receive an award for schedule loss of use of a limb if the worker also has an injury to another body part that has not resolved. So if a worker sustains injuries to both her arm and her back, her award is delayed more than if her injury had been contained to one body part. That is nonsensical and harmful to workers.

The Board's proposals will result in lower schedule benefits for all workers, but since low-wage workers also did not see any increase in benefits from the 2007 maximum rate increase, low-wage workers will receive a lower benefit amount than they would have received for an identical injury in 1992. That's lower in nominal dollars, not adjusted for inflation over the last 25 years.

To once again "reform" the comp system by ignoring the rights of low-wage workers is unacceptable.

2017 Medical Evidence Proposals

In addition to the financial harm to low-wage workers and their families, the proposed regulations limit a worker's ability to submit medical evidence from a doctor of her own choosing, and impose no such restriction on the employer or insurance carrier. This is a fundamental violation of the due process rights of workers to present evidence in support of their claim. Additionally, the regulations allow doctors to suspend or cancel benefits if the doctor determines the worker has not "complied" with the medical exam. These provisions are condescending and offensive to workers. The two-page text of the regulation grants this draconian power to doctors in not one, not two, but three separate provisions.⁶ These provisions are particularly harmful to low-wage workers who may have cultural or language barriers in interacting with doctors, especially a doctor whom the worker is meeting for the first time after an injury or illness, which may have been traumatic for the worker and her family.

Conclusion

⁵ 12 NYCRR 325-1.6(d)(7)

⁶ Proposed 12 NYCRR 300.39; 12 NYCRR 325-1.6(d)(7); and 12 NYCRR 300.39(g).

Instead of working to solve the system's current inadequacies for our working families, the proposed changes before the Committee today would exacerbate these problems and create new ones, putting working people at risk of losing their health, well-being and even their homes as the result of a workplace injury or illness.

In closing, we should remember that New York State enacted our Worker's Compensation System as a response to the tragic fire at the Triangle Shirtwaist Factory. 146 workers died in that fire, most of whom were young, immigrant women, and all of whom were low-wage workers. The rights of workers who labor in our most physically demanding and dangerous occupations should be primary in considering any change to our comp system, not an afterthought bargained away by more powerful interests.

On behalf of the National Center for Law and Economic Justice, I urge the Board to withdraw these proposals in their entirety and propose guidelines that respect the dignity and value of our state's workers. Thank you.