

**NATIONAL CENTER FOR LAW AND
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December 19, 2017

Heather M. MacMaster
Deputy General Counsel
Workers' Compensation Board
328 State Street
Schenectady, New York 12305-2318

VIA EMAIL TO regulations@wcb.ny.gov AND VIA WEB FORM AT
<https://www.surveymonkey.com/r/ImpairGuideComments2>

Re: Comments in Response to New Proposed Regulation 12 NYCRR 325-1.6, and Proposed
“Guidelines for Determining Impairment” issued November 22, 2017.

Dear Ms. MacMaster:

We write to submit comments on the proposed revised regulations and guidelines released by the Workers' Compensation Board on November 22, 2017. We thank you for taking suggestions from a wide range of stakeholders, including low wage workers and their advocates, into account. As a result, the proposed revisions come far closer to following the Board's legislative mandate, avoid significant cuts to compensation for most injured workers, and respect the due process rights of workers. However, under the amended regulations and guidelines, some workers will still face benefit cuts. We urge you to amend the revised proposed regulations to eliminate benefit reductions for certain injuries, and adopt the remainder of the amended proposed regulations and guidelines.

For more than fifty years, the National Center for Law and Economic Justice has fought for the rights of low-income people, both in New York and across the United States through litigation, policy advocacy, and support for low-income organizing.

I. The Amended Proposed Regulations and Guidelines Should Be Adopted With Minor Changes.

On April 10, 2017, the New York State Legislature directed the Workers' Compensation Board to issue revised permanency impairment guidelines, to be adopted by the Chair of the Board by January 1, 2018.

On September 1, 2017, the Workers' Compensation Board issued a proposed amendment to 12 NYCRR 300.2, proposed two new regulations (12 NYCRR 300.39 and 12 NYCRR 325-1.6), and issued a draft of new impairment guidelines for schedule loss of use, which were incorporated by

reference into the regulations. A public comment period was provided, which expired on October 23, 2017. More than 50,000 New Yorkers submitted comments opposing the proposed regulations.

On November 22, 2017, the Board issued a second set of proposed regulations and guidelines. The November 22, 2017 set of proposals: (1) rescinded the September proposed regulations; (2) rescinded the September proposed guidelines; and (3) carried forward the existing schedule loss guidelines, with several exceptions.

We are encouraged that the Board has taken seriously concerns, expressed by more than 50,000 New Yorkers, that the proposed regulations and impairment guidelines threatened to harm injured workers. The revised proposed regulations and guidelines are a significant improvement on the original draft. The Board should adopt the revised proposed regulations, albeit with minor changes, discussed in Section IV, below, to ensure that injured workers do not face additional economic hardship after suffering a serious injury.

II. The Amended Proposed Guidelines and Regulations Protect Most Ill and Injured Workers from Benefit Cuts.

Unlike the proposed guidelines released on September 1, the revised proposed guidelines maintain current benefit payment levels for most workers. We strongly support this change. The new guidelines reject the inflexible categorization system mandated by the September proposal; abandon, for most injuries, the fiction that a worker who has not recovered their pre-injury range of motion has recovered from her injury; and eliminate a proposed regulation that would have required the examining physician to use the lowest possible figure in the proposed impairment guidelines to assess schedule loss of use. These changes eliminate the risk that the vast majority of injuries would legally be required to be assessed at zero loss of use, resulting in zero dollars in benefits, and protect workers from receiving no compensation for an injury impacting their range of motion from which they will not recover.

III. The Elimination of Proposed Limits on Workers' Ability to Present Medical Evidence and Requirements to "Cooperate" Protects Workers.

We strongly support the elimination of a proposed amendment to 12 NYCRR 300.2(b)(4)(ii) which would have restricted a worker's ability to submit medical evidence from an independent medical examiner. Additionally, the revised proposed regulations eliminate provisions that would have allowed doctors to suspend or cancel benefits if the doctor determined the worker had not "cooperated" with the medical exam, placing a worker, who may face linguistic or cultural barriers, wholly at the mercy of a doctor she did not choose and may not trust.

The Board's decision to eliminate these provisions in the revised proposed regulations is a vast improvement. It eliminates our concern that the regulations would inappropriately vest significant power with the medical professional over the Board. It also protects low-wage workers who may have cultural or language barriers in interacting with doctors and avoids placing additional burdens on workers and families already facing a time of instability and stress.¹

¹ For further information on how the New York State Worker's Compensation System is failing limited English proficient workers, please see NCLEJ's Report, "Compensation not Open to Interpretation: Language Access in New

IV. The Board Should Abandon the Revised Guidelines That Would Cut Benefits for Workers.

While the amended proposals are a vast improvement on the September regulations and guidelines, some workers will still face cuts to compensation for long term injuries if the current package is adopted as-is. Most workers who require a total joint replacement in order to recover from a workplace injury will see an award reduction of one-third over the current benefit level. A worker who suffers a tear to the meniscus or rotator cuff would see an effective benefit reduction of at least one-half. Workers who suffer a loss of range of motion in the radial abduction of the thumb will see an award reduction because the current proposal redefines what constitutes the “normal” range of motion for the thumb. All of these proposals will reduce benefits for workers who are already struggling, and the Board’s redefinition of the “normal” range of motion for a particular body part sets a troubling precedent of reducing benefits without regard for medical science and workers’ lived realities.

Low-wage workers perform physically demanding and dangerous jobs and disproportionately bear the burden of occupational injuries and illnesses. 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.

Legislative changes in 2007 resulted no increase in compensation levels for low-wage workers. Since then, low-wage workers have seen no increase in benefits paid out for lost wages, and have suffered under caps on permanent partial disability benefits. Any further cuts are unconscionable. The Board should reject the proposed benefit reductions for workers who undergo a total joint replacement, suffer a tear to the meniscus or rotator cuff, or suffer a loss of range of motion in the radial abduction of the thumb and leave these scheduled loss of use awards at their current level.

V. Conclusion

The Board’s revised proposals do not remedy the losses faced by low-wage workers ten years ago, but they do avoid making the situation even more dire for most workers.

On behalf of NCLEJ, I urge the Board to amend the revised proposed regulations to eliminate benefit reductions for certain injuries, and adopt the remainder of the amended proposed regulations and guidelines.

Sincerely,

Katharine Deabler-Meadows

York State Workers’ Compensation Hearings,” available at http://nclej.org/wp-content/uploads/2017/03/WCB_Report.pdf.