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MEMORANDUM

TO: LeadingAge New York

FROM: Hinman Straub P.C.

RE: **2017-18 Enacted State Budget Workers' Compensation Reforms**

DATE: May 15, 2017

As part of the 2017-2018 enacted budget, effective April 10, 2017, there were several significant pieces of reform that effect the New York State Workers' Compensation System (Part NNN of Chapter 59, Laws of 2017) ("Enacted Budget").

Permanent Partial Disability (PPD) (Non-Schedule)

Under the New York State Workers' Compensation Law, a Permanent Partial Disability (PPD) occurs when an employee's wage-earning capacity has been permanently lost.

There are two types of PPD benefits, depending on the body part affected and the nature of the permanent disability: schedule loss of use (SLU) and non-schedule.

Schedule Loss of Use

A SLU occurs when an employee has permanently lost use of an upper extremity (shoulder, arm, hand, wrist, finger), lower extremity (hip, leg, knee, ankle, foot, toe), or eyesight or hearing.

Compensation is limited to a certain number of weeks based on the body part and severity of the disability, according to a schedule set by law. Temporary benefits that have been paid are deducted from the total SLU award.

Non-Schedule

Non-Schedule is a permanent disability involving a part of the body or condition that is not covered by a SLU award (e.g. spine, pelvis, lungs, heart, brain, etc.). Non-Schedule benefits are based on the employee's permanent loss of earning capacity. If the work related accident or date of disablement occurred before March 13, 2007, benefits are payable as long as the partial disability exists and results in wage loss.

If the work related accident or date of disablement occurred on or after March 13, 2007, benefits are payable for a maximum number of weeks as determined by the Claimant's Loss of Wage-Earning Capacity ("LWEC").

The maximum number of weeks is set forth in statute as follows ("LWEC Cap"):

525 weeks for loss of wage earning capacity of greater than 95%
500 weeks for loss of wage earning capacity of greater than 90% thru 95%
475 weeks for loss of wage earning capacity of greater than 85% thru 90%
450 weeks for loss of wage earning capacity of greater than 80% thru 85%
425 weeks for loss of wage earning capacity of greater than 75% thru 80%
400 weeks for loss of wage earning capacity of greater than 70% thru 75%
375 weeks for loss of wage earning capacity of greater than 60% thru 70%
350 weeks for loss of wage earning capacity of greater than 50% thru 60%
300 weeks for loss of wage earning capacity of greater than 40% thru 50%
275 weeks for loss of wage earning capacity of greater than 30% thru 40%
250 weeks for loss of wage earning capacity of greater than 15% thru 30%
225 weeks for loss of wage earning capacity of 15% or less

The Enacted Budget made several changes to Non-Schedule PPD awards including:

- *Credit for Temporary Disability benefits beyond 2.5 years.* The Enacted Budget amended Workers' Compensation Law (WCL) § 15(3)(w) to create a credit for Temporary Disability ("TD") benefits paid beyond 2.5 years (130 weeks) for dates of injury on or after April 10, 2017 from the date of injury to be applied against the LWEC Cap.

  For example, if a Claimant was injured May 1, 2017 and is classified PPD on May 1, 2020. Such Claimant would have received temporary disability for periods that occurred after November 1, 2019 (2.5 years or 130 weeks beyond date of injury). Specifically, the Claimant would receive 26 weeks of TD benefits beyond the threshold (November 1, 2019, and May 1, 2020). If the Claimant were to receive a 400-week LWEC determination, such award would be reduced to 374 weeks through the application of a 26-week credit.

- *Safety Valve*: The Enacted Budget also created a "Safety Valve" that extends the period of TD benefits beyond 2.5 years (130 weeks) when the Workers' Compensation Board ("WCB") makes a determination that a Claimant has not yet reached Maximum Medical Improvement ("MMI") on that date. Additional guidance is expected to be issued by the WCB regarding the application of the Safety Valve.

- *Post-PPD Labor Market Attachment:* The Enacted Budget provides that after the WCB makes a determination of PPD, a Claimant who is entitled to benefits at the time of such classification will no longer be required to demonstrate an ongoing attachment to the labor market. This amendment does not affect the question of attachment during periods of temporary disability prior to classification.

- *Extreme Hardship Determination Safety Net Threshold*: The Enacted Budget lowered the safety net threshold for determining when a claimant with a PPD may apply to the WCB for a redetermination due to extreme hardship. Claimants who are found to have a LWEC of greater than 75% may now apply for such a determination (formerly the safety net threshold was greater than 80%). The new safety net threshold also applies retroactively and the WCB will be issuing guidelines regarding applications for extreme hardship redeterminations.

  Claimants seeking extreme hardship redeterminations are requesting that the WCB determine that the Claimant is Permanently Totally Disabled or Totally Industrially Disabled. These two classifications do not have a LWEC Cap.

- *Mandatory Full Board Review*: The Enacted Budget provides that when a WCB Appeal Panel reduces a LWEC finding that is above the safety net threshold by a Workers' Compensation Law Judge to a LWEC finding that is below the safety net threshold, any request for Full WCB Board Review will be considered a request for Mandatory Full Board Review.

Permanent Impairment Guidelines

The Enacted Budget requires that new Permanent Impairment Guidelines be adopted by the WCB by January 1, 2018. The new guidelines will incorporate advances in medicine that result in better healing and outcomes for injured workers to use in evaluations and determinations for schedule loss of use awards.

The Permanent Impairment Guidelines will be published after consultation with labor, business, medical providers, insurance carriers and self-insured employers. The Enacted Budget requires the WCB to publish the Impairment Guidelines for public comment on or before September 1, 2017. In the event the WCB does not adopt guidelines by January 1, 2018, the Enacted Budget requires the WCB to adopt interim regulations.

Drug Formulary

The Enacted Budget requires the WCB to adopt a comprehensive pharmacy prescription drug formulary by December 31, 2017. Under the formulary, drugs listed in the formulary may be prescribed for a causally-related condition. Any non-preferred drugs may only be prescribed when a variance has been granted. There will also be a method to review requests to add pharmaceuticals to the preferred list, which will be handled through the Medical Director's Office (MDO). This change will be effective on December 31, 2017.

Mandatory 45-Day Hearing

The Enacted Budget provides that where there is medical evidence of a work-related disability, the Claimant is not working, and not receiving benefits, and the claim is not controverted, the Claimant may request a hearing, which shall occur within 45 days of the WCB's receipt of the RFA-1 (Claimants Request for Further Action).

The Board is in the process of revising the RFA-1 to accommodate this change.

Penalties

- The Enacted Budget provides that penalties issued pursuant to WCL 25(2)(a) may now be imposed without a hearing. These $300 penalties may be imposed against a carrier who has failed to pay or controvert a claim within the 18 days.

- The Enacted Budget authorizes the WCB to establish performance standards, by regulation, and issue aggregate penalties against carriers or self-insured employers to more effectively regulate carrier behavior with respect to timely filing, payment, and controversy.

First Responder Stress Claims

The Enacted Budget provides that First responders (police officers and firefighters, EMTs, paramedics, certified emergency medical providers, emergency dispatchers, and those with similar titles) who encounter extraordinary stress in a work-related emergency who file a claim for mental injury will not be barred from a compensable work-related stress claim because the stress they encountered in dealing with an extraordinary work-related emergency is "no-greater-than" the stress encountered by other similarly situated first responders.

For police and firefighters, WCL § 30 remains fully in effect, i.e., if a municipal entity provided workers compensation coverage, there is a full credit for any General Municipal Law (GML) §§ 207-a or 207-c benefits received. This provision takes effect immediately.

Workers' Compensation Board Assessments and Assumption of Liability Policies

The Enacted Budget provides that the WCB may continue to use its existing bond authority to execute Assumption of workers' compensation Liability Policies (ALPs) for any claims the Board is responsible to administer, including WCL §§ 15(8), 25-a, and Uninsured Employer Fund (UEF) claims.

In addition, the Enacted Budget extends the WCB's bonding authority to include inactive group self-insured trusts that are winding down but remain solvent to execute an ALP by borrowing from the self-insurance bond funds with a pledge to repay, prior to actually becoming insolvent.

Provisions Related to Insurance

The Enacted Budget amends the Insurance Law to:

- Extend the Compensation Insurance Rating Board (CIRB) tenure as a Rate Service Organization until 2028;

- Require a public actuary to release an annual report on the savings to the industry related to the 2017 Reforms in each of the next 10 years;

- Require carriers to refund current year savings due to the caps on injuries no later than December 31, 2018; and

- Require that Workers' Compensation rate filings with 5% or greater increase over prior year's loss costs would require a public hearing.

The Enacted Budget reduces the WCB's assessment fund balance allowance is reduced from up to 10% to no more than 5%.

Independent Medical Examination (IME) Study

The Enacted Budget requires the WCB to conduct a study on IMEs in 2018. A new IME Advisory Committee will convene in 2019 to review the WCB's findings and make recommendations to improve the overall IME system.

If you have any questions regarding the changes outlined above, please contact Joseph M. Dougherty at jdougherty@hinmanstraub.com.

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