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July 13, 2022

THE EFFECT OF BILL S768/A1118 ON N.Y. WORKERS COMPENSATION COSTS

In June 2022, both the Assembly and the Senate passed a bill, (S768/A1118) that, for the first time in the history of the New York Workers' Compensation Law, defines temporary total disability. This definition overturns well-established precedent and Board policy that defined temporary total disability in New York as the inability to do any work in the economy. We believe that this bill, if signed into law by the governor, would significantly increase workers' compensation costs to businesses through higher premiums and litigation costs. We believe that underwriters will have little choice but to increase premiums for workers' compensation insurance in New York because the bill allows injured workers assessed with a partial disability by their physicians to receive total disability benefits without any time limitation.

The bill modifies §15(2) of the Workers' Compensation Law to define temporary total disability as "the injured employee's inability to perform his or her pre-injury employment duties or any modified employment offered by the employer that is consistent with the employee's disability." Temporary total disability is one of the four classes of wage loss benefits available to injured workers under the statute. The other three are: temporary partial disability, permanent total disability, and permanent partial disability. Total disability benefits, whether temporary or permanent, are awarded at the maximum rate permitted under the statute. That maximum rate is two-thirds of the injured worker's average weekly wage, subject to the statutory maximum under WCL §15(6).[1] Presently, to qualify for total disability benefits a claimant must have medical evidence showing an inability to perform any type of employment, not just the claimant's pre-injury or at-injury job.[2] Injured workers with any remaining residual work capacity can still receive lost wage benefits at temporary partial disability rates, depending on their wage-earning capacity. Temporary disability benefits (whether total or partial) are awarded to an injured worker during the immediate period following their work injury, while the worker is convalescing from the injury. Although this bill only provides a definition for temporary total disability, as will be discussed below, current law allows this definition to apply to permanently partially disabled claimants, potentially allowing for lifetime total disability benefits.

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[1] The maximum compensation rate for injuries occurring on or after 7/1/2010 is two-thirds of the New York State average weekly wage. Thus, for injuries occurring on or after 7/1/2022, the maximum compensation rate is $1,125.46 per week, based on the 2021 New York State average weekly wage of $1,688.19.

[2] *See, e.g., Meyers v. Robeson Industries*, 210 A.D.2d 548 (3d Dep't 1994) (holding that substantial evidence supported Board conclusion that claimant had total, rather than marked, disability; although claimant was able to walk, drive, sit and stand for short periods of time, treating physician testified that the claimant had a "total", "extensive" and "real severe" disability and that he knew of no job category in which he could place claimant).

S768/A1118 Will Dramatically Increase Costs to Businesses in New York by Changing Partial Disability to Total Disability

This bill would effectively eliminate partial disability classifications in New York because it allows any injured worker unable to fully perform their at-injury job to receive the maximum benefit rate, no matter how much residual work capacity their own physician believes them to have. This substitutes the long-standing medical standard for what constitutes a temporary total disability with an ambiguous legal standard that varies from worker-to-worker and from job-to-job. There is no limitation in the bill for the length of time that a claimant can receive such temporary total disability benefits. The temporary total disability award can last for the lifetime of the claimant because temporary total disability awards would be permitted until the claimant returned to the at-injury job or is provided a modified job enabling the claimant to return to work. The bill provides injured workers with no incentive to return to work, because even a claimant who has as little as a 5% degree of disability will be allowed to receive temporary total disability awards so long as they are unable to perform all of their pre-injury employment duties or modified duties offered by the at-injury employer. This will have a drastic impact on those businesses with minimal or non-existent light duty opportunities available. We believe that small businesses will be disproportionately impacted not only due to increased workers' compensation insurance premium costs, but because of the need to hire replacement workers for those workers remaining out of work under this new expanded definition of temporary total disability.

Although this bill purports to modify only the definition of temporary total disability under WCL §15(2), the Appellate Division in *Sanchez v. Jacobi Medical Center*[3] ruled that in the case of a claimant who is classified with a permanent partial disability and is later found to have a temporary total disability, the earlier permanent partial disability classification is set aside and the durational limit (or "cap") of that permanent partial disability is tolled while the claimant is receiving temporary total disability benefits. Thus, under this new definition of temporary total disability, permanently partially disabled claimants could potentially receive temporary total disability benefits indefinitely. Such claimants would only need to prove that they are unable to return to their at-injury job or modified work offered by their employer.

S768/A1118 Will Eliminate the Attachment to the Labor Market Defense

The bill will eliminate the requirement that injured workers with a partial disability seek work within their medically designated work restrictions or retrain for new work for which they are suited post-injury. This requirement is known as "labor market attachment" and its origins are in the Appellate Division's decision in *Dzink v. United States Railroad Administration*.[4] In that case, the Appellate Division ruled that a claimant has a "duty to search for work of the kind for which he is fitted, and in that search he must not confine himself to applying only to his previous employer." Due to a 4/10/17 amendment to the workers' compensation law, the labor market attachment requirement applies only to those claimants receiving temporary partial disability

[3] 182 A.D.3d 121 (3d Dep't 2020)

[4] 204 A.D. 164 (3d Dep't 1923)

benefits. Those claimants classified with a *permanent* partial disability need not demonstrate labor market attachment.[5] Claimants with a total disability need not look for work, engage in vocational retraining, or return to school. New York State provides free vocational retraining to injured workers through the Education Department (ACCES-VR). Because this bill redefines what were previously partial disabilities into total disabilities, the long-standing requirement to look for work is eliminated. The justification section of the bill summary purports to "establish a requirement for return-to-work programs" but the revision to the statute contains no such requirement. Under current law, injured workers with a partial disability who are no longer employed by their at-injury employer are required to make an earnest search for work in the marketplace, engage in vocational retraining, or return to school. Returning injured workers to gainful employment is a laudable goal and has been achieved via the labor market attachment requirement which this bill would eliminate. Even if a claimant's own physician opines that the claimant has a significant work capacity, so long as the claimant is unable to perform his or her pre-injury employment duties or modified work offered by his employer, the claimant will still be deemed temporarily totally disabled and will not be required to look for work, engage in vocational retraining, or further their education. Rather than assisting injured workers, this bill will create a class of people dependent on workers' compensation benefits, without any incentive to seek or retrain for new work for which they are suited post-injury.

S768/A1118 Will Significantly Increase the Cost of Permanent Partial Disability Awards

Another consequence of the bill is that it will increase the cost of both schedule loss of use and classification permanent partial disability awards. In the case of schedule loss of use awards, WCL §15(4-a) provides that the number of weeks of total disability in excess of the statute's "protracted healing" period will be added to schedule loss of use awards.[6] Thus, even an employee with a minimal medical partial disability that prevents them from performing all of the tasks of the at-injury job or modified work offered by the employer will be deemed to have a temporary total disability, and the period of this temporary total disability will be included in the calculation of the protracted healing period. This will result in significant increases in schedule loss of use awards, due to the additional award for protracted healing.

SLU Cost Increase Example

Here is an example to illustrate the increase in costs on these types of awards due to a lengthened protracted healing period. Assume that an injured worker has an average weekly wage that entitles them to the current maximum compensation rate of $1,125.46 and has been assessed with a 20% schedule loss of use of the arm. Assume further that the claimant had 52 weeks of disability, half of which were awarded at temporary total disability and half of which at temporary partial

[5] *See*, WCL §15(3)(w)

[6] Schedule loss of use awards are those permanent partial disability awards to certain body parts (primarily the extremities) under WCL §15(a) through WCL §15(l). These awards are typically awarded to the claimant in a lump sum at the time of permanency. The value of these awards are based on a medical examination of the claimant, in consultation with the Board's Impairment Guidelines.

disability. This would entitle the claimant to a total 62.4 weeks of compensation, which is 20% of the 312 weeks allotted to an arm under WCL §15(3)(a), or $70,228.70. However, should this bill become law, the entirety of those 52 weeks of disability could easily become temporary total disability, converting the 26 weeks of medical partial disability to total disability, which would result in an additional 20 weeks of compensation at the claimant's maximum compensation rate. **This would create an extra $22,509.20 awarded to the claimant**, bringing the total award to $92,737.90 - **an increase of 32%!**

Cost Increases on Classification Awards Under WCL §15(3)(w)

Most concerning is this bill's potential to eliminate the durational limits on classification awards, that is, permanent partial disability awards under WCL §15(3)(w). These durational limits (or "caps") were the heart of the compromise between labor and business interests in the 2007 workers' compensation reform legislation. Prior to 2007, permanent partial disability benefits could be payable for life under WCL §15(3)(w), even after old age retirement. In return for labor interests agreeing to durational limits between 225 and 500 weeks of benefits, depending on the claimant's loss of wage-earning capacity, employers agreed to the annual indexing of the workers' compensation benefit rate to the New York State average weekly wage. That tradeoff resulted in increasing the weekly benefit rate from $400 per week (which had been the maximum rate since 1992) to $739.83 in 2010, and gradual increases thereafter to what is now the current weekly rate of $1,125.46. S768/A1118 will eliminate the durational cap in countless cases because the cap applies only to permanent partial disability benefits, not total disability benefits. The new definition of temporary total disability proposed by this bill allows permanently partially disabled claimants to potentially receive temporary total disability benefits indefinitely so long as they are unable to return to their at-injury job, or modified work offered by their at-injury employer, regardless of their current wage-earning capacity. As discussed above, *Sanchez v. Jacobi* allows a claimant who is classified with a permanent partial disability but later found to have a temporary total disability to set aside and the durational limit of his or her permanent partial disability while receiving temporary total disability benefits.

PPD Classification Cost Increase Example

The increase in costs on such permanent partial disability cases under WCL §15(3)(w) are enormous. For example, a 54 year old claimant with a life expectancy of 28.4 years classified by the Board with a 50% loss of wage earning capacity with an average weekly wage that entitles her to the current maximum compensation rate of $1,125.46 would be entitled to a permanent partial disability award of $562.73 per week for 300 weeks - a total award of $168,819.00. Under this bill, for the reasons described above, the claimant would have the potential to receive lifetime benefits at the total disability rate. **This would total $1,662,079.33 - nearly 10 times higher!**

We believe that insurance underwriters will have no option but to insist on significantly higher insurance premiums to account for these potential increased costs. The bill, as written, contains no limitation on the period of temporary total disability that can be awarded to a claimant.

Existing Laws, Programs, and Policies Already Protect Injured Workers Unable to Return to Their At-Injury Job

The alleged justification for this bill is that it will "ensure that permanently disabled workers with significant injuries are provided with every opportunity to return to gainful employment, and adequate wage-replacement benefits if they are unable to do so." Initially, we note that the reference to "permanently disabled workers" is misplaced in a bill that modifies the definition of *temporary* total disability and invites the question of whether the author of the justification section of the bill's sponsor memo even read the bill text. However, the reference to permanently disabled workers is not entirely misplaced given the impact that this bill could have on permanently partially disabled claimants that we outlined in the previous section. In any event, the bill text contains no provision requiring return to work programs.

Returning injured workers to the workforce has long been a goal of the workers compensation system, arguably beginning in 1923 with the *Dzink* decision that required partially disabled workers to seek work within their restrictions. The 2007 workers compensation reform legislation contained a provision creating a "return to work taskforce" that was to report to the governor and members of the legislature with findings and recommendations to promote the return of permanently partially disabled workers to gainful employment.[7]

The alleged protections to injured workers alluded to in this justification do not take into account the significant wage replacement benefits already available to workers under current law. An injured worker with a medical partial disability can receive reduced earnings compensation benefits to supplement lower weekly pay that they are receiving for limited duty work, whether with the at-injury employer or some other employer, up to the maximum compensation rate. For example, an injured worker who earned $1,200.00 per week at the time of her injury, who now earns $800.00 per week after her injury at a light-duty position, is entitled to a tax-free reduced earnings benefit of two-thirds of the $400.00 difference. Even if the at-injury employer doesn't have light duty work available, the partially disabled worker can find light duty work with another employer, receive a weekly paycheck, and receive reduced earning benefits to bring her up to her pre-injury earnings.

Also, while an injured worker remains "on the books" and technically employed by the at-injury employer, the injured worker is not required to maintain labor market attachment (i.e., look for work, retrain, or return to school) under current Workers' Compensation Board case law.[8] Additionally, injured workers who are partially disabled and who are "ready, willing, and able" to work are also entitled to Unemployment Insurance benefits on top of workers' compensation benefits. Labor Law §591(5) provides that an injured worker receiving workers' compensation benefits may also receive unemployment benefits, limited to the difference between the amount of workers' compensation benefits that worker is receiving and 100% of their average weekly wage for up to 26 weeks. Those injured workers who are ready, willing, and able to work but are unable

[7] WCL §35(1)

[8] *Barbella Environmental Tech.*, N.Y.Work.Comp. G0796969 (4/19/18)

to return to their at-injury employer due to their medical restrictions or because the employer does not have light duty work available can be made whole through a combination of workers' compensation benefits and unemployment insurance benefits for up to 26 weeks. Thus, between reduced earnings benefits, unemployment insurance, and the vocational rehabilitation services already available, existing law already provides adequate protections for injured workers unable to return to their at-injury jobs.

Litigation Costs May Increase as a Result of S768/A1118

Since the determination of total disability is no longer solely a medical question, parties will want to take testimony from the claimant and employer witnesses to determine the claimant's at-injury job duties and the claimant's ability to perform them, not to mention whether an offer of modified duties is consistent with the disability. Because the question of total disability is now specific to each claimant's unique circumstances, this bill will also increase the need for physician depositions. Parties to a case will want to cross-examine the physicians on the claimant's ability to return to work to that claimant's specific job, or to any modified job offered by the employer.

Additionally, those claimants with previously closed claims who have been receiving partial disability benefits will likely want to reopen their claims to apply for temporary total disability benefits if they are unable to return to their at-injury job or modified work offered by their employers. This will result in additional hearings and litigation to resolve these issues.

Conclusion

Should S768/A1118 be signed into law by the governor, we expect insurance premiums for insured employers and costs for self-insured employers will increase. The primary reason for this is because the bill makes it very easy for injured workers to receive indemnity benefits at the higher total disability rate, despite being assessed a partial disability according to the medical evidence in their case. Given the lack of any time limitation in the bill, claimants in every existing and future workers' compensation case will be able to apply for this increase in benefits, so long as they are unable to return to the job they had when they were injured or unable to return to any modified work offered by their employer that is consistent with their work injury.

Defenses to indemnity benefits, specifically the labor market attachment defense will be set aside given the marked increase in claimants found to have temporary total disability. This will result in a decrease in claimants returning to the workforce post-injury. By practically eliminating the labor market attachment defense and by providing no incentive for injured workers to apply for unemployment insurance benefits (which are premised on a person being "ready, willing, and able" to return to work), injured workers will be incentivized to remain on workers' compensation rather than retrain, reeducate, or look for work for which they are suited post-injury.

Injured workers need and deserve to be protected by the Workers' Compensation Law. Current law provides these protections. The economic challenges and labor force issues currently faced by New York employers, large and small, should not be ignored. With a record low unemployment

rate, businesses are struggling to find workers. This bill creates a disincentive for injured workers to seek work within their restrictions and will exacerbate an already challenging work force problem for New York employers.

Very truly yours,

HAMBERGER & WEISS LLP