

NYSIA NEWS

November 2022

CHAIR CORNER

Dear NYSIA Members,

It is hard to believe that two years have passed and my term as the Chair of NYSIA will end on January 12, 2023. The past two years were marred by the COVID-19 pandemic cancelling a couple of our conferences, along with just about everything else. In 2022, we were able to host the conference in January and June with attendees glad to get out and get back to seeing old friends and creating new relationships.

The status of Workers' Compensation in New York State continues to be challenging. In June 2022, several bills were passed at the last moment that would be very detrimental, not only to Self-Insurers, but to all businesses in New York. While several of these bills have not been presented to the Governor as yet, the bills must be presented prior to the end of the year. An analysis of three of the pending bills will be discussed in the Special Counsel's Report. NYSIA continues to strive to provide you with information that you seek.

As my term as Chair of NYSIA comes to an end, I want to take the time to thank you for your continued support of NYSIA and your active participation at our meetings. It has been an honor to serve as your Chair for the past two years. We have built friendships and support as an organization to assist in navigating our way through a changing and challenging regulatory environment. The challenges to NYSIA, our respective businesses, and the self-insurance community continue to evolve, yet we continue to meet these challenges through our work together. I am confident that the NYSIA Board of Managers, will continue to represent the interest of all Self-Insurers. Our

strength as a group relies on our members' full support of the NYSIA Board and our programs.

My last important duty as your Chair, is to announce the new Chair and Vice-Chair. Erika Graham of the Port Authority of New York & New Jersey will serve as Chair and Suzanne Oommen of New York University will service as Vice-Chair. Many of you already know Erika and Suzanne, and I am confident that you will provide them with the support that you bestowed me throughout my term. I have full confidence that Erika and Suzanne will represent NYSIA with honor and continue the excellence that defines the New York Self-Insurers Association.

I also want to welcome Annette Malpica back to our Board as NYSIA's Special Counsel.

On behalf of the NYSIA Board, thank you again for your continued support. Enjoy the holidays and I look forward to seeing you at our Annual Meeting on January 11-13, 2023, at the Marriott Marquis.

Timothy Kemperle, Chair



PROGRAM COMMITTEE REPORT

Can you believe we are back in NYC again? This time, no restrictions, with a lot of fun, learning and collaborating to be had. The program in June at The Sagamore was just fabulous. All the speakers were engaging, energetic and full of knowledge. Do we remember the weather? It was perfect; a better day could not have been wished for. The feedback we received were “Great location, as always” and Excellent Topics”. Of course, that was the first conference in two years, so the best part was seeing and reconnecting with all of you. Our vendors did a great job, and we thank them as well as our wonderful sponsors.

The program committee has been hard at work getting ready for the Winter Conference, which will be held on January 11-13, 2023, at the NYC Marriott Marquis. As always, we strive to make it as interesting and educational as possible, so be on the look out for some new topics or games!

Have a safe and wonderful holiday season. We look forward to seeing our old colleagues as well as new ones.

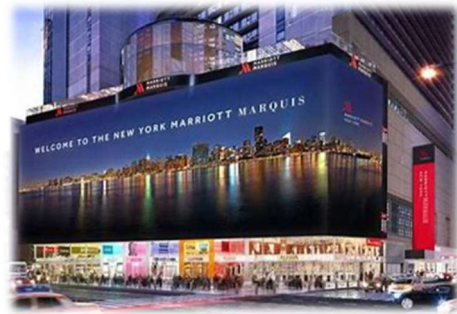
Erika Graham, Vice Chair



ANNUAL MEETING

Our Annual Meeting is just around the corner - January 11-13, 2023 at the Marriott Marquis in NYC. All seminar information can be found on our website at www.nysselfinsurance.com.

If you have any questions regarding the Annual Meeting Registration, please contact Heidi Mahoney at secretary@nysselfinsurance.com. Our updated Annual Meeting program is attached.



WIN A STAY AT THE MARRIOTT MARQUIS IN NYC!

You ask how is this possible? Well, all you have to do is refer the most new members in 2022 and you will win the a future two night stay at the Marriott Marquis in NYC. There is still time to participate! Membership application information can be found on our website at www.nysselfinsurance.com
[Join NYSIA – NYSIA \(nysselfinsurance.com\)](http://www.nysselfinsurance.com)

SURVIVOR RAFFLE



Our many thanks to the companies who donated prizes for our June “Survivor” raffle. Once again, the raffle was a great success, so we will be holding a “survivor” raffle on the Friday morning session in New York City. You must be present in the room at the time of the raffle to win a prize. Any company who can donate to this raffle should contact Heidi Mahoney or drop off your donation at the registration desk in January. Thank you!



DUES ARE DUE

NYSIA Annual Dues are due December 1st. Past Due reminders will be sent out shortly to those who still have not paid their 2023 dues. In order to register for the 2023 Annual Meeting and Spring Workshop under the member category, your company’s dues needs to be up-to-date. Check with Heidi Mahoney if you are unsure of your status.



NEW MEMBERS

We would like to welcome our new members for 2022 to date:

Phy
Representative: Adam Goldberg

The Long Firm LLP
Representative: William Long

VitalCheck Wellness Inc.
Representative: Scott Brendamour

DW Advisors LLC
Representative: David Wehner

CityMD – Summit Health
Representative: Joseph Lewicki

Presque Isle Rehabilitation
Representative: Michelle Repman-Pifer

Helmsman Management Services
Representative: Brad Tangorra

Unity Surveillance
Representative: Paul McCarthy

Bardavon Health Innovations
Representative: Monica Mohring

The JM Smucker Company
Representative: Kathy Talabac

Gottlieb Ostrager LLP
Representative: Eric Ostrager

Imedview Inc.
Representative: Kim Carpino

Allied Universal Compliance & Investigations
Representative: Nicole Hafner

J. Moreland Consulting
Representative: Jennifer Moreland

CoventBridge Group
Representative: Andrea Thomas

PATTERNS AND PRACTICE:

PERMANENT PARTIAL AWARDS UNDER WCL 15(3)(w) ARE NOT PAYABLE TO THE ESTATE AFTER THE DEATH OF THE EMPLOYEE

Eric Watson was employed by Dutchess County BOCES when he sustained a work-related injury to his right leg on November 19, 2007. In 2012, he was classified with a permanent partial disability and found to have a 51% loss of earning capacity, which entitled him to wage loss benefits of 350 weeks. Watson received reduced earning at \$500 a week until March 2018, when he died for reasons unrelated to his work injury after accruing 311.2 weeks of benefits. After his death, the decedent's attorney requested the remaining cap benefits of 38.8 weeks be issued to Watson's surviving thirteen-year-old son ("claimant") arguing that the weeks under the cap were similar to a schedule loss of use award pursuant to WCL §15(4). The statute provides, "An award made to a claimant under subdivision three [WCL §15] shall in case of death arising from causes other than the injury be payable to" certain enumerated beneficiaries, including a surviving spouse or children under the age of 18 years.

The WCLJ determined the claimant was not entitled to a posthumous award for the remaining 38.8 weeks of the non-schedule award because the claim abated upon Watson's death. The WCB affirmed the Law Judge, finding that non-schedule awards are payable during the "continuance of such permanent partial disability" and only to the extent it impairs the claimant's "wage earning capacity" and since neither condition continues after death, no posthumous award is payable to the decedent's surviving child.

The Appellate Division reversed the WCB and held that the claimant is entitled to the posthumous award for the remaining 38.8 cap weeks. The Appellate Court reviewed the statutory language and legislative intent under WCL §§15,15(4) and based on their analysis determined that there was no basis to distinguish a SLU award and non-schedule awards where the plain language of §15(4) applies to any and all awards made under WCL§ 15(3). The matter was remitted to the WCB who was "constrained to find" claimant was entitled to the remaining 38.8 weeks of benefits (\$19,400).*

On October 27, 2022, the Court of Appeals reversed holding that there is no entitlement under the statutory language or, the legislative history differentiating schedule and non-schedule awards and the intended purposes of each type of award that would make it permissible to issue non-schedule permanent partial award beyond the date of death.

The citation for this case is *Green v. Dutchess County BOCES* __NE3d__ (2022) WL 14912696, 2022 N.Y. Slip Op. 06028

*Annette Malpica
Special Counsel to NYSIA
Lovell Safety Management*

*Note: When the Appellate Court reversed the WCB in *Green*, they did so under the misunderstanding that the intent of the 2007 Reform to cap PPD non-schedule cases was also an attempt to bring parity between schedule and non-schedule awards. It is important for practitioners to understand that there was no such legislative intent. The main purpose of the 2007 Reform was to cap awards under 15 (3)(w)... period.



SPECIAL COUNSEL'S REPORT

LEGISLATIVE SESSION 2022 – WORKERS' COMPENSATION UPDATE

With increasing crime, inflation, redistricting fiasco, recent Supreme Court decisions overturning Roe v. Wade and the NY Gun Control Laws, the New York legislature managed to pass seven workers' compensation bills. Below we discuss three of the bills pending before the Governor. As of the date of this article, these bills have not yet been presented to Governor Hochul for veto, chapter amendment, or signature into law. If enacted, these bills will increase benefits by millions of dollars, resulting in higher costs for all NYS employers. Further, these bills will decrease the incentives to return to work, and radically change the landscape of the workers' compensation law.

Bill A1118/S.768 – Amends WCL §15(2) to define temporary total disability as:

“[t]he 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”

The most radical and dangerous of all the bills is A1118/S.768. The bill’s sponsors state that A1118/S.768 will encourage employers to establish return to work programs and will ensure that permanently disabled workers with serious injuries are given the opportunity to return to work. In addition, the sponsors opined that current wage replacement for workers receiving temporary benefits is insufficient. This legislation would mark a fundamental shift in the definition of disability and the way in which wage replacement amounts are determined in New York State.

- The bill upends the case law definition of a temporary total disability by allowing for unlimited awards at the temporary total rate for employees with mild or moderate partial disabilities. A1118/S.768 eliminates the longstanding tenet of the WCL that defines temporary total disability based on medical standards and creates a new legal standard. Under the current system, when a doctor finds that an employee has partially recovered from an injury, that employee must either seek out work that is commensurate with their degree of disability, or risk losing their indemnity benefits. The language of A1118/S.768 would make it so that if the injured employees could not return to their pre-injury employment or to a modified job, they would automatically receive benefits at the higher total disability rate. This change shifts the burden to the employer-carrier to either provide a light duty program or face paying lifetime total disability awards until such time as the employee returns to work. The majority of employers don’t have the financial or practical ability to accommodate light duty. Since the inception of the WCL, the responsibility was placed on the partially disabled employee to seek work within the medical restrictions in any occupation to receive benefits at the partial rate.

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- This bill would eliminate the labor market attachment requirements for employees with partial disabilities. Longstanding court precedents require that a partially disabled employee demonstrate attachment to the labor market by seeking work within their physical restrictions in order to receive ongoing indemnity benefits. Employees who are deemed to have a temporary total disability are naturally precluded from the requirement due to their designated “total” disability. Additionally, a yet unknown consequence presented by this bill is whether the employer-carrier would be mandated to continue total disability payments when a partially disabled employee, who is separated from employment, decides not to search for other employment within their physical restrictions.
 - We are also concerned that this new definition of temporary total disability would undermine the durational caps of the 2007 reform legislation. The historic 2007 reform capped indemnity benefits under WCL §15 3(w) to a maximum of 525 weeks for employees who sustained partial loss of earning capacity based on the medical evidence and determinations of other industrial factors. Should this bill be signed, the door is opened for those employees who have medical evidence of a partial disability and are capable of gainful employment to continue to receive lifetime, tax-free, total disability awards. Ending durational limits on payment of partial disability benefits would result in very significant cost increases.
 - This bill could also increase the protracted healing periods for employees with partial disabilities subject to schedule loss of use awards. The statute provides for additional weeks of compensation when the number of weeks of total disability exceeds the statute’s protracted healing period noted in WCL 15(4-a). Therefore, a partially disabled employee, who is unable to be accommodated in a light duty position will continue to receive total disability benefits, which in many instances will exceed the normal healing periods resulting in additional weeks of compensation added to the schedule award.

If signed into law, this bill would be effective immediately. The New York Compensation Insurance Rating Board hired Bickmore Actuarial to evaluate the impact of A1118/S.768. The Bickmore report, which was issued on October 18, 2022, found that the impact of the bill would add 3.5% to 10.1% annual costs to workers’ compensation system or approximately \$550M. The study did not include the impact of the bill to self-insured employers.

Bill A2020-A/S.6373-B – Amends WCL §10(3)(b) to eliminate the case law requirement that mental stress injuries be based on work-related stress that is materially and substantially greater than that experienced by similarly situated workers.

“Where a worker files a claim for mental injury premised upon extraordinary work-related stress incurred at work, the board may not disallow the claim upon a factual finding that the stress was not greater than that which usually occurs in the normal work environment.”

Bill A2020-A/S.6373-B would expand the statutory carve out that applies to police officers, firefighters, and emergency medical technician who filed a claim for mental injury premised upon extraordinary work-related stress to include all employees. The 2017 legislature, in recognition of the high standard required by the statute for mental stress claims, and the occupational hazards/exposure experienced by first responders during emergencies, removed the restriction that a mental stress claim had to be greater than the stress sustained by a similar worker. This bill will permit all employees who allege an extraordinary work-related stress to file a mental stress claim irrespective of a work-related emergency. The onus to determine what qualifies as “extraordinary,” a standard that is not defined by statute, will be placed on Law Judges. If passed, this bill will result in extensive litigation on the issue of what constitutes “extraordinary” stress, increase administrative expenses (IMEs, witness and medical testimony) and result in compensability determinations on minor/transient stress events.

If signed into law, this bill would be effective January 1, 2023. The New York Compensation Insurance Rating Board hired Bickmore Actuarial to evaluate the impact of A2020/S.6373-B. The Bickmore report, which was issued on October 18, 2022, found that the impact of the mental stress bill would add minimal costs to the workers’ compensation system. We believe otherwise. In addition to increasing the cost of litigation, this bill would transfer the cost of treatment and disability for psychological conditions that are now not considered work-related to the workers’ compensation system. Given the fact that close to half of all Americans in surveys complain of stress, the cost could be substantial.

Bill A7178-A/S.8271A – Amends WCL §15 (6) by increasing the minimum amount of compensation from \$150 to not less than 1/5 of Statewide Average Weekly Wage (SAWW) or employee’s full wages if equal to or less than 1/5 of SAWW.

“[C]ompensation for permanent or temporary partial disability, or for permanent or temporary total disability due to an accident or disablement resulting from an occupational disease that occurs on or after the effective date...of two thousand twenty-two ...shall not be less than one-fifth of the New York state average weekly wage except that if the employee’s weekly wages are equal to or less than one-fifth of the New York state average weekly wage, the employee shall receive his or her full wages.”

This bill would establish a new *minimum* weekly indemnity benefit for employees who sustained new accidents (on or after the date the bill is signed) and index future weekly minimum indemnity to the State Average Weekly Wage (“SAWW”). According to the sponsor’s justification memo, the “legislation would provide equity and fairness to low-wage workers injured on the job and ensure that future benefits are adjusted automatically with inflation.”

The current minimum weekly indemnity rate for employees who earn more than \$150/week is \$150. This bill would establish an increased minimum weekly benefit rate for new injuries at 1/5 of the SAWW. As of July 1, 2022, the SAWW increased to \$1,688 for injuries occurring on or after 7/1/2022 through 6/30/2023. Employees who sustain accidents after June 30, 2022, would be entitled to weekly indemnity benefits of no less than \$338 (1/5 of \$1,688) an increase of double the current minimum indemnity rate of \$150/week. Employees with wages less than, or equal to \$338/week would receive full salaries.

The impact of this bill will be felt by all employers as rates for mild disabilities will increase for many employees who earn wages of \$1,500-\$2000 a week. Employers who hire large populations of low-wage earners and part-time workers will also face significant increases in costs and premiums. The significant increase in the minimum weekly indemnity rate, which is tax-free, may deter certain employees from returning to work. The New York Compensation Insurance Rating Board has not priced the cost of this bill.

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**This article is a reprint of Legislative Action paper presented to Lovell Safety Management Co. clients.*



**BEST WISHES TO OUR MEMBERS & THEIR FAMILIES
FOR A HAPPY AND HEALTHY HOLIDAY SEASON
FROM THE NYSIA BOARD OF MANAGERS!**



Timothy Kemperle, Chair
UPS



Erika Graham, Vice Chair
Port Authority of NY & NJ



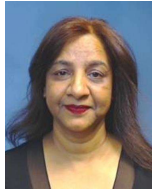
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Heidi Mahoney
Secretary

Happy
New
Year