

THE RISE AND FALL OF WORKERS' COMPENSATION IN NEW YORK

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INTRODUCTION

This Article traces the history of the New York Workers' Compensation Law from its origin to the present day. The law was originally conceived as a grand bargain between business and labor in which business was shielded from tort liability in exchange for the creation of a social benefit program that provided wage loss, medical treatment, and other benefits to workers who were injured on the job.¹

Early judicial decisions established that the benefit employers received from this grand bargain (immunity from lawsuits) was external to the system, and that decisions and policies within the system should be geared toward the benefit of injured workers.² This interpretation was followed and reinforced by both legislative and judicial expansion of benefits for over eighty years, from 1914 until 1996.³

Although judicial interpretation of the law has remained consistent, the Legislature's approach began to change in 1990, when, for the first time, an increase in benefits was accompanied by changes in the law that diminished coverage and reduced worker access to the system.⁴ This was followed by additional legislative reforms in 1996, 2007, and 2017 that either diminished benefits or paired increases with reductions, to the detriment of most injured workers.⁵

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¹ See *infra* Part I.

² See *infra* Part II.

³ See *infra* Part III.

⁴ See *infra* Part IV.

⁵ See *infra* Part IV.

The impact of these statutory reforms has been vastly accelerated by innumerable formal and informal administrative initiatives that have sharply reduced the ability of injured workers to obtain benefits as well as the substance of the benefits they receive.⁶ These initiatives are incompatible with the purpose of the law as it was originally drafted and consistently interpreted by the courts. Disregarding the foundational principle that the balance offered by the system was the exchange of an external benefit (tort immunity) for an internal one (worker benefits), the administrative initiatives instead seek to balance the system internally by reducing its availability and favorability to workers in order to reduce costs for employers.

Not only do these administrative initiatives disrupt the basic nature of the workers' compensation bargain to the detriment of workers and the benefit of employers, but they also raise a variety of constitutional concerns, including unconstitutional agency rulemaking, procedural due process violations, and substantive due process violations.⁷ Taken as a whole, these trends have had a devastating impact on the adequacy of worker benefits.⁸ In conclusion, the Article suggests steps that could be taken to correct the current system imbalance and restore the grand bargain to its intended state.⁹

I. ORIGINS OF THE NEW YORK WORKERS' COMPENSATION LAW

In 1909, the New York State Legislature established the Wainwright Commission for the following purpose:

[T]o make inquiry, examination and investigation into the working of the law in the state of New York relative to the liability of employers to employees for industrial accidents, and into the comparative efficiency, cost, justice, merits and defects of the laws of other industrial states and countries, relative to the same subject, and as to the causes of accidents to employees.¹⁰

⁶ See *infra* Part V.

⁷ See *infra* Part VI.

⁸ See *infra* Part VII.

⁹ See *infra* Part VIII.

¹⁰ Act of May 27, 1909, ch. 518, § 1, 1909 N.Y. Laws 1310; see also *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431, 435–36 (N.Y. 1911).

The Commission ultimately recommended the adoption of a Workers' Compensation Law, citing the following reasons:

First, that the present system in New York rests on a basis that is economically unwise and unfair, and that in operation it is wasteful, uncertain and productive of antagonism between workmen and employers.

Second, that it is satisfactory to none and tolerable only to those employers and workmen who practically disregard their legal rights and obligations, and fairly share the burden of accidents in industries.

Third, that the evils of the system are most marked in hazardous employments, where the trade risk is high and serious accidents frequent.

Fourth, that, as matter of fact, workmen in the dangerous trades do not, and practically cannot, provide for themselves adequate accident insurance, and, therefore, the burden of serious accidents falls on the workmen least able to bear it, and brings many of them and their families to want.

This indictment of the old system is followed by a statement of the anticipated benefits under the new statute as follows: "These results can, we think, be best avoided by compelling the employer to share the accident burden in intrinsically dangerous trades, since by fixing the price of his product the shock of the accident may be borne by the community."¹¹

Adopting these recommendations, the Legislature thereafter enacted Article 14-a of the Labor Law as New York's first Workers' Compensation Law.¹² However the statute—despite its acknowledged societal benefits—was found to be unconstitutional by the Court of Appeals on March 24, 1911.¹³

The following day, on March 25, 1911,

¹¹ *Ives*, 94 N.E. at 436.

¹² Act of June 25, 1910, ch. 674, 1910 N.Y. Laws 1945, *invalidated by Ives*, 94 N.E. at 448.

¹³ *See Ives*, 94 N.E. at 448.

a fire broke out on the top floors of the Asch Building in the Triangle Waist Company. Within minutes, the quiet spring afternoon erupted into madness, a terrifying moment in time, disrupting forever the lives of young workers. By the time the fire was over, 146 of the 500 employees had died. The survivors were left to live and relive those agonizing moments. The victims and their families, the people passing by who witnessed the desperate leaps from ninth floor windows, and the City of New York would never be the same.

Survivors recounted the horrors they had to endure, and passers-by and reporters also told stories of pain and terror they had witnessed. The images of death were seared deeply in their mind's eye.¹⁴

By the end of 1913, the New York State Constitution had been amended to permit

the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault.¹⁵

The Legislature then re-enacted the Workers' Compensation Law effective July 1, 1914.¹⁶ The validity of the new statute was promptly challenged, and the issue returned to the Court of Appeals one year later.¹⁷ In upholding the constitutionality of the law, the court observed that "against [the] justice or economic soundness [of the act] nothing . . . can be said," noting that the "act protects both employer

¹⁴ *Remembering the 1911 Triangle Factory Fire*, CORNELL UNIV., <https://trianglefire.ilr.cornell.edu/story/fire.html> [<https://perma.cc/48XB-X4JB>].

¹⁵ N.Y. CONST. art. 1, § 18; see Kenneth L. Gartner, Jeffrey A. Human, David W. Reitz, David Saleh & Philip John Szable, *New York's Workmen's Compensation Law: Problems and Perspectives*, 26 BUFF L. REV. 637, 656 n.100 (1977).

¹⁶ Act of Mar. 16, 1914, ch. 41, 1914 N.Y. Laws 216; N.Y. WORKERS' COMP. BD., CENTENNIAL: CELEBRATING 100 YEARS OF NEW YORK STATE WORKERS' COMPENSATION AND LEADING THE WAY FORWARD FOR THE NEXT CENTURY 2 (2014), http://www.wcb.ny.gov/WCB_Centennial_Booklet.pdf [<https://perma.cc/GPS5-AR6B>] [hereinafter CENTENNIAL].

¹⁷ See *Jensen v. S. Pac. Co.*, 109 N.E. 600, 601 (N.Y. 1915), *rev'd in part*, 244 U.S. 205 (1917).

and employee, the former from wasteful suits and extravagant verdicts, the latter from the expense, uncertainties, and delays of litigation in all cases, and from the certainty of defeat if unable to establish a case of actionable negligence.”¹⁸ In addition, the court found that “[a] compulsory scheme of insurance to secure injured workmen in hazardous employments and their dependents from becoming objects of charity certainly promotes the public welfare as directly as does an insurance of bank depositors from loss.”¹⁹

The 1914 Workers' Compensation Law also survived challenges based on the United States Constitution.²⁰ The Supreme Court observed that:

[I]t perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion upon it. The statute under consideration sets aside one body of rules only to establish another system in its place. If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages. Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumes the consequences, in excess of the scheduled compensation, of risks ordinary and extraordinary. On the other hand, if the employer is left without defense respecting the question of fault, he at the same time is assured that the recovery is limited, and that it goes directly to the relief of the designated beneficiary. And just as the employee's assumption of ordinary risks at common law presumably was taken into account in fixing the rate of wages, so the fixed responsibility of the employer, and the modified assumption of risk by the employee under the new system, presumably will be reflected in the wage scale. The act evidently is intended as a just settlement of a difficult problem, affecting one of the most

¹⁸ *Id.* at 601–02.

¹⁹ *Id.* at 603.

²⁰ *See* N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 255 (1917).

important of social relations, and it is to be judged in its entirety.²¹

Thus, at its inception, the Workers' Compensation Law was designed to provide meaningful benefits to injured workers, while insulating employers from tort liability.

II. EARLY JUDICIAL CONSTRUCTION OF THE LAW

With the constitutionality of the act firmly established, it fell to the courts to apply the new law to the facts of claims filed under it. The first case to reach the appellate division concerned a railway conductor who was alleged to have made false statements to the employer in order to secure employment.²² In upholding an award of compensation, the court held:

The plain purpose of the statute was to provide compensation to an employee for an accidental personal injury and to the family of an employee who has suffered death as the result of such injury sustained by the employee arising out of and in the course of such employment "without regard to fault as a cause of such injury," . . .²³

The court thus found the employee's misrepresentation to be irrelevant to the claim for compensation.²⁴

The court went on to hold more broadly:

The action of the Commission in this case is consistent with the general scope of the Workmen's Compensation Law as recommended in the able and exhaustive report of the Wainwright Commission made to the Legislature of 1910, upon which the act was founded. The plain purpose of the statute was to make the risk of accident one of the industry itself, to follow from the fact of the injury, and hence that compensation on account thereof should be treated as an element in the cost of production, added to the cost of the article, and borne by the community in general. That the statute might be general in its scope, provision was made

²¹ *Id.* at 201.

²² *See* *Kenny v. Union Ry. Co.*, 152 N.Y.S. 117, 118–19 (App. Div. 1915).

²³ *Id.* at 120.

²⁴ *Id.*

(§ 10) to provide compensation for every accidental personal injury to an employee arising out of and in the course of such employment with the two exceptions before specified.²⁵

The Court of Appeals endorsed this view three months later in its first decision under the new law:

The Workmen's Compensation Law was adopted in deference to a widespread belief and demand that compensation should be awarded to workmen who were injured and disabled temporarily or permanently in the course of their employment, even though sometimes the accident might occur under such circumstances as would not permit a recovery in an ordinary action at law. The underlying thought was that such a system of compensation would be in the interest of the general welfare by preventing a workman from being deprived of means of support as the result of an injury received in the course of his employment. The statute was the expression of what was regarded by the legislature as a wise public policy concerning injured employees.

Under such circumstances we think that it is to be interpreted with fair liberality, to the end of securing the benefits which it was intended to accomplish. Applying these rules to what happens to be in this case an accident of minor importance, we think we should hold that the provisions of the statute providing compensation for the loss of a certain portion of the finger become operative and applicable when it appears that substantially all of the portion of the finger so designated has been lost, and that we should not interpret such provisions too narrowly for the purpose of defeating a recovery.²⁶

Within a decade, this concept became firmly entrenched as a bedrock principle guiding judicial decisions: the Workers' Compensation Law was to be liberally construed in favor of providing benefits to injured workers and their dependents at the expense of the employer, which was in turn able to incorporate the cost of benefits in the price of goods or services.

²⁵ *Id.* at 121.

²⁶ *In re Petrie*, 109 N.E. 549, 550 (N.Y. 1915).

Deciding that the law protected a New York worker who was injured in New Jersey, the Court of Appeals held that:

The act was passed pursuant to a widespread belief in its value as a means of protecting workmen and their dependents from want in case of injury when engaged in certain specified hazardous employments. It was the intention of the legislature to secure such injured workmen and their dependents from becoming objects of charity, and to make reasonable compensation for injuries sustained or death incurred by reason of such employment a part of the expense of the lines of business included within the definition of hazardous employments as stated in the act. It was also the intention of the legislature to make such compensation not only a part of the expense of the business and a part of the cost of the things manufactured and of transportation as defined by the act, but ultimately to require such compensation to be paid by the consumer of the manufactured goods and by those securing transportation. The danger of injured workmen and their dependents becoming objects of charity is just as great when an accident occurs outside the boundaries of the state as it is when it occurs within the state. The interests of the state in its citizens is just as great in one case as in the other.²⁷

Upholding an award of compensation to a worker who lost his eye following a dispute with a co-worker, the court established that that the standard for judicial reversal of an award was “when the undisputed facts in connection with the testimony of the claimant supported by every favorable inference that can be drawn therefrom do not warrant an award.”²⁸

Establishing that the workers’ compensation system was intended to deliver benefits to injured workers without the obstacle of forms and formalities, the court held that:

There is no reason . . . why the notice of injury served upon the Commissioner may not also contain a claim for compensation. There is nothing in the law that requires them

²⁷ *Post v. Burger & Gohlke*, 111 N.E. 351, 353 (N.Y. 1916).

²⁸ *In re Heitz*, 112 N.E. 750, 750 (N.Y. 1916) (citing *Jerome v. Queen City Cycle Co.*, 57 N.E. 485, 486 (N.Y. 1900)).

to be two separate and distinct papers, or that they shall be phrased in any particular language. The Workmen's Compensation Law was particularly framed to avoid legal terminology and the technicalities of law pleading. It was intended that the working people themselves could make and file these claims and give the notice of injury. The cost and expense of employing attorneys were to be avoided if possible. The act was for the benefit of the workman and his family, not for the profession. The notice, therefore, of injury and the claim for compensation are sufficient when the facts of the injury are stated with reasonable certainty, and it is also reasonably to be inferred that a claim for compensation is being made.²⁹

Holding that the proceeds of a workers' compensation award could not be attached by an injured worker's creditors, Judge Cardozo wrote:

So narrow a construction thwarts the purpose of the statute. The Workmen's Compensation Law was framed to supply an injured workman with a substitute for wages during the whole or at least a part of the term of disability. He was to be saved from becoming one of the derelicts of society, a fragment of human wreckage. He was to have enough to sustain him in a fashion measurably consistent with his former habits of life during the trying days of readjustment. The cost of such support becomes a charge upon the industry without regard to fault. Rehabilitation of the man, not payment of his ancient debts, is the theme of the statute, and its animating motive. . . . The strength of the desire to give protection to the workman is accentuated also by the final words of the section, "which exemption may not be waived." The claimant is to be protected against his own improvidence or folly (cf. the cognate sections 24 and 32). We are blind to the policy of workmen's compensation if we say that the purpose of the exemption, thus emphatically guarded, is to promote the convenience of the State by withdrawing the occasion for conflicting claims of ownership. There shines through the statute, both here and in related sections, a worthier conception of the duty of the State to the helpless and hapless

²⁹ Kaplan v. Kaplan Knitting Mills, Inc., 161 N.E. 204, 205 (N.Y. 1928).

in an industrial society. . . . At the root of the exemption is something more benignant than bureaucratic formalism, a dislike of complicating documents. The exemption like the compensation is for the protection of the man.³⁰

III. 1914–1990: BENEFITS EXPAND

From 1914 until 1990, the Legislature regularly amended the law to expand coverage and improve benefits for injured workers.³¹ Judicial application of the statute kept pace, establishing liberal interpretations of the law intended to ensure broad coverage and access to benefits.³²

A. *Legislative Changes to the Workers' Compensation Law*

Legislative changes included, inter alia, increasing benefits for periods of temporary disability, removing technical obstacles to awards for permanent injuries, creating coverage for occupational diseases, and providing the Workers' Compensation Board (the "Board") with the authority to reclassify a disability in order to provide appropriate compensation to the injured worker as justified by his or her medical condition.

1. Increased Benefits for Periods of Temporary Disability

When originally enacted in 1914, the statute provided a minimum weekly benefit of \$5 and a maximum weekly benefit of \$15.³³ In 1920, the Legislature increased the minimum benefit by sixty percent, from \$5 to \$8, and the maximum benefit by one-third, from \$15 to \$20.³⁴ Further increases followed until 1965, by which time the minimum weekly benefit had reached \$20 and the maximum had reached \$60.³⁵

From 1968 until 1990, the Legislature continued to increase both the minimum and maximum weekly benefits, but bifurcated the maximum weekly benefit depending on whether the worker's disability was "total" or "partial."³⁶ The Legislature then reunified the maximum benefit in 1991 at \$350 per week and increased it

³⁰ *Surace v. Danna*, 161 N.E. 315, 315–16 (N.Y. 1928) (citing *Post*, 111 N.E. at 353; N.Y. Cent. R.R. Co. v. *White*, 243 U.S. 188, 197 (1917)).

³¹ See CENTENNIAL, *supra* note 16, at 5–8.

³² See *id.* at 10–12.

³³ CENTENNIAL, *supra* note 16, at 21.

³⁴ See *id.*

³⁵ *Id.*

³⁶ See *infra* Table 1.

further in 1992 to \$400 per week, with a minimum weekly benefit rate of \$40.³⁷

Overall, the Legislature increased benefits twenty times between 1920 and 1992, an average of once every three and one-half years.³⁸ If calculated from 1944, in order to exclude a seventeen-year gap that began in 1927 due to the Great Depression, there were eighteen benefit increases in forty-eight years, which is an average of once every two and two-thirds years.³⁹

After 1992, however, weekly benefit rates remained stagnant for fifteen years until they were significantly increased as part of the 2007 Workers' Compensation reform legislation.⁴⁰ Unlike the previous twenty benefit increases, however, the 2007 benefit changes were paired with corresponding reductions in other benefits that were designed to result in overall significant reductions in employer costs and injured worker benefits.⁴¹ The 2007 reform legislation is discussed in Part IV.C.

³⁷ See *infra* Table 1; see also CENTENNIAL, *supra* note 16, at 21.

³⁸ See CENTENNIAL, *supra* note 16, at 21.

³⁹ See *id.*; see also *infra* Table 1. It is worth noting, however, that while the dollar value of benefits rose over this period, the increases did not always keep pace with inflation. For example, the value of benefits fell precipitously between 1914 and 1920 (for maximum weekly benefits, from \$450 to \$300 measured in 2023 dollars). See \$15 in 1914, CPI INFLATION CALCULATOR, <https://www.officialdata.org/us/inflation/1914?amount=15> [https://perma.cc/S7B7-4R88]; \$20 in 1920, CPI INFLATION CALCULATOR, <https://www.officialdata.org/us/inflation/1920?amount=20> [https://perma.cc/F45S-VH9B]. Between 1965 and 1992, the minimum weekly benefit doubled, from \$20 to \$40; however, the value of that benefit was cut in half and then some, falling from \$191 to \$85 in 2023 dollars. See \$20 in 1965, CPI INFLATION CALCULATOR, <https://www.officialdata.org/us/inflation/1965?amount=20> [https://perma.cc/6XRG-NK5S]; \$40 in 1992, CPI INFLATION CALCULATOR, <https://www.officialdata.org/us/inflation/1992?amount=40> [https://perma.cc/B9H2-JY6V].

⁴⁰ See CENTENNIAL, *supra* note 16, at 8, 21.

⁴¹ See generally N.Y. STATE WORKERS' COMP. BD., THE SUCCESS OF NEW YORK'S 2007 WORKERS' COMPENSATION REFORM (2012), <http://www.wcb.ny.gov/content/main/TheBoard/Post2007Reform.pdf> [https://perma.cc/J4JX-9FW9].

Table 1. Weekly Benefit Changes 1914–2019⁴²

Date	Minimum Weekly Benefit ⁴³	Maximum Weekly Benefit (Total Disability)	Maximum Weekly Benefit (Partial Disability)
7/1/1914	\$5	\$15	\$15
5/5/1920	\$8	\$20	\$20
10/1/1927	\$8	\$25	\$25
6/1/1944	\$12	\$28	\$28
7/1/1948	\$12	\$32	\$32
7/1/1954	\$12	\$36	\$36
7/1/1958	\$20	\$45	\$45
7/1/1960	\$20	\$50	\$50
7/1/1962	\$20	\$55	\$55
7/1/1965	\$20	\$60	\$60
7/1/1968	\$20	\$85	\$70
7/1/1970	\$20	\$95	\$80
7/1/1974	\$20	\$125	\$95
7/1/1978	\$20	\$180	\$105
7/1/1979	\$20	\$215	\$105
7/1/1983	\$20	\$255	\$125
7/1/1984	\$20	\$275	\$135
7/1/1985	\$20	\$300	\$150
7/1/1990	\$20	\$340	\$280
7/1/1991	\$40	\$350	\$350
7/1/1992	\$40	\$400	\$400
7/1/2007	\$100	\$500	\$500
7/1/2008	\$100	\$550	\$550
7/1/2009	\$100	\$600	\$600

⁴² See N.Y. WORKERS' COMP. LAW § 15(6) (Consol. 2023); CENTENNIAL, *supra* note 16, at 21; *Workers' Compensation Schedule of Maximum Weekly Benefit*, N.Y. WORKERS' COMP. BD., <http://www.wcb.ny.gov/content/main/Workers/ScheduleMaxWeeklyBenefit.jsp> [<https://perma.cc/5XZG-NAJ7>].

⁴³ At all times, if the worker's wages were less than the statutory minimum benefit rate, the worker received instead his or her full wages. See Act of Mar. 16, 1914, ch. 41, § 15, 1914 N.Y. Laws 216, 225–26 (codified as amended at N.Y. WORKERS' COMP. LAW § 15(6) (Consol. 2023)). From 1968 through 1990, the years of bifurcated rates, the minimum benefit for temporary total disability was \$30, while the minimum benefit for permanent total disability, or for permanent or temporary partial disability, was \$20. N.Y. WORKERS' COMP. LAW § 15(6) (Consol. 2023).

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7/1/2010	\$100	\$739.83	\$739.83
7/1/2011	\$100	\$772.96	\$772.96
7/1/2012	\$100	\$792.07	\$792.07
5/1/2013	\$150	\$792.07	\$792.07
7/1/2013	\$150	\$803.21	\$803.21
7/1/2014	\$150	\$808.65	\$808.65
7/1/2015	\$150	\$844.29	\$844.29
7/1/2016	\$150	\$864.32	\$864.32
7/1/2017	\$150	\$870.61	\$870.61
7/1/2018	\$150	\$904.74	\$904.74
7/1/2019	\$150	\$934.11	\$934.11
7/1/2020	\$150	\$966.78	\$966.78
7/1/2021	\$150	\$1,063.05	\$1063.05
7/1/2022	\$150	\$1,125.46	\$1,125.46

The original Workers' Compensation Law also included a \$3,500 limitation on the maximum payment that could be made for a period of temporary disability, whether total or partial.⁴⁴ By 1922, the Legislature had doubled this cap by creating separate maximum payment amounts of \$3,500 each for temporary total and temporary partial disability.⁴⁵ Ultimately, these caps were eliminated entirely, permitting temporary disability payments to continue without limitation for the duration of the temporary disability.⁴⁶

In addition to the limitations on both the maximum weekly benefit and the maximum amount that could be paid for temporary disability, the original statute also contained a two-week waiting period in which no indemnity benefits were payable for the first fourteen days of the disability.⁴⁷ By 1917, the Legislature had modified this rule to permit payment of compensation for the first fourteen days if the period of temporary disability exceeded forty-nine days.⁴⁸ In 1935, the Legislature again reduced the waiting period to exclude compensation for the first seven days unless the

⁴⁴ See Act of Dec. 16, 1913, ch. 816, § 15(2), 1913 N.Y. Laws 2277, 2285.

⁴⁵ See Act of Apr. 13, 1922, ch. 615, § 15(2), (5), 1922 N.Y. Laws 1623, 1635, 1637; *Kiriloff v. A. G. W. Wet Wash Laundry, Inc.*, 56 N.E.2d 559, 560 (N.Y. 1944).

⁴⁶ See N.Y. WORKERS' COMP. LAW §§ 15(2), (5) (Consol. 2023).

⁴⁷ § 12, 1913 N.Y. Laws at 2284; see also *Marhoffer v. Marhoffer*, 116 N.E. 379, 379 (N.Y. 1917).

⁴⁸ See Act of June 1, 1917, ch. 705, 1917 N.Y. Laws 2267; see also *Gorle v. Alfred E. Joy Co.*, 130 N.E. 908, 908 (N.Y. 1921).

disability exceeded thirty-five days.⁴⁹ In 1960, the Legislature *again* reduced the waiting period to exclude compensation for the first seven days unless the disability exceeded twenty-eight days.⁵⁰ The statute ultimately took its present form in 1965, when the Legislature amended the waiting period to exclude compensation for the first seven days unless the disability exceeds fourteen days.⁵¹

An injured worker's benefits depend on his or her "average weekly wages" and are limited to a maximum of two-thirds of that figure or the statutory weekly maximum, whichever is less.⁵² The Workers' Compensation Law provides that the average weekly wage should be based on the wages earned in the employment in which the worker was injured.⁵³ If the worker had multiple jobs, the law originally permitted consideration of wages earned in "similar" employment to calculate the average weekly wage.⁵⁴

It fell to the Board and the courts to decide whether the second job was "similar" or "dissimilar" to the employment in which the worker was injured, with wages from the former being included and wages from the latter excluded from an injured worker's average weekly wage.⁵⁵ In many cases, the doctrine of dual and dissimilar employment resulted in a significant loss of benefits for workers who were disabled from both pre-accident jobs as a result of the injury, but whose compensation was based on only part of their pre-accident wages.⁵⁶

The Legislature ultimately remedied this situation by amending the law in 1985 to create coverage for employees with "concurrent employments."⁵⁷ Under the new statute, all pre-accident employment in which the worker was engaged at the time of the accident was included as part of the average weekly wage, without

⁴⁹ See Act of May 2, 1935, ch. 660, 1935 N.Y. Laws 1336; *see also* *Del Busto v. E.I. Dupont De Nemours & Co.*, 5 N.Y.S.2d 174, 176–77 (Sup. Ct. 1938).

⁵⁰ See Act of Apr. 25, 1960, ch. 789, 1960 N.Y. Laws 2126.

⁵¹ See Act of June 12, 1965, ch. 500, 1965 N.Y. Laws 1404 (codified at N.Y. WORKERS' COMP. LAW § 12 (Consol. 2023)).

⁵² See N.Y. WORKERS' COMP. LAW § 15(1), (2) (Consol. 2023).

⁵³ See *id.* § 14(1).

⁵⁴ See Act of Dec. 16, 1913, ch. 816, § 14(3), 1913 N.Y. Laws 2277, 2284–85.

⁵⁵ See, e.g., *In re Hafner*, 57 N.Y.S.2d 514, 514 (App. Div. 1945); *Brandfon v. Beacon Theatre Corp.*, 89 N.E.2d 617, 617 (N.Y. 1949).

⁵⁶ See *Will Workers' Compensation Cover Income Lost from My Second Job?*, WORKERS' COMP PERSPS., <https://workerscomperspectives.wordpress.com/2015/06/08/will-workers-compensation-cover-income-lost-from-my-second-job/> [https://perma.cc/LFZ4-XY5M].

⁵⁷ Act of July 19, 1985, ch. 416, § 1, 1985 N.Y. Laws 2449, 2449.

regard to whether it was similar or dissimilar to the at-injury employment.⁵⁸

2. Removing Technical Obstacles to Awards for Permanent Disability

From its inception, the Workers' Compensation Law provided compensation for the permanent loss or loss of use of a limb.⁵⁹ The statute included a schedule under which each member was assigned a number of weeks (for example, the hand was assigned 244 weeks).⁶⁰ If the worker lost the entire member, the full number of weeks were payable, inclusive of any period of temporary disability.⁶¹ If there was a partial loss or loss of use, then the proportional number of weeks was payable.⁶²

On their face, these awards for "schedule loss of use" provided compensation for certain permanent injuries without regard to time lost from work; they were given by employers as part of the fundamental workers' compensation bargain in which workers gave up their right to sue the employer for personal injury.⁶³ In order to place them into the overall scheme of the law, however, the Court of Appeals characterized the portion of a schedule loss award that was not attributable to lost time as payment for presumed loss of wage-earning capacity.⁶⁴ Following this to its logical conclusion, the courts went on to hold that when a worker suffered injury to multiple limbs, only one award was payable because there could only be one period of (presumed) permanent disability.⁶⁵

Unwilling to countenance a situation in which a worker could sustain permanent injuries to multiple limbs, with all but the most

⁵⁸ See *Lashlee v. Pepsi-Cola Newburgh Bottling*, 754 N.Y.S.2d 102, 103–04 (App. Div. 2003). Liability for the "concurrent" employment was placed with the Special Fund under Workers' Compensation Law section 15(8), thus spreading the cost among all employers rather than the at-injury employer. See *infra* Section III.A.5.

⁵⁹ See § 15(3) 1913 N.Y. Laws at 2286 (codified as amended at N.Y. WORKERS' COMP. LAW § 15(3) (Consol. 2023)).

⁶⁰ See *id.*

⁶¹ See *id.*; *Marhoffer v. Marhoffer*, 116 N.E. 379, 379–80 (N.Y. 1917).

⁶² See § 15(3), 1913 N.Y. Laws at 2285–86 (codified as amended at N.Y. WORKERS' COMP. LAW § 15(3) (Consol. 2023)).

⁶³ Cf. *Understanding Your Schedule Loss of Use Award*, N.Y. WORKERS' COMP. BD., <http://www.wcb.ny.gov/content/main/Workers/ScheduledLossUse.jsp> [<https://perma.cc/QWH2-B54K>].

⁶⁴ See *Marhoffer*, 116 N.E. at 379–80 (citing *Winfield v. N.Y. Cent. & Hudson River R.R. Co.*, 110 N.E. 614, 616 (N.Y. 1915), *rev'd on other grounds*, 244 U.S. 147).

⁶⁵ See *Hoffman v. Chatham Elec. Light, Heat & Power Co.*, 164 N.E. 341, 341–42 (N.Y. 1928), *aff'g sub. nom. Rubenstein v. Pechter Baking Co.*, 230 N.Y.S. 577 (App. Div. 1928).

grievous going uncompensated, the Legislature amended the law in 1929 by adding a new provision:

In any case in which there shall be a loss or loss of use of more than one member or parts of more than one member . . . , but not amounting to permanent total disability, the board shall award compensation for the loss or loss of use of each such member or part thereof, which awards shall run consecutively.⁶⁶

The Legislature also expanded payments for work-related deaths. Before 1990, death benefits were payable only to dependents of a worker who was killed on the job,⁶⁷ usually a surviving spouse, children under the age of eighteen (up to twenty-three provided that they were enrolled in school), and blind or disabled dependents of any age. Moreover, if the dependent died before the claim was found to be compensable, the claim was held to have “abated,” leaving no benefits due at all.⁶⁸

In 1990, the Legislature addressed this inequity by providing additional death benefits in the form of a \$50,000 “no dependency” award, payable to the deceased worker’s parents if alive, and otherwise to his or her estate.⁶⁹

3. Creating Coverage for Occupational Disease

The Workers’ Compensation Law did not initially provide coverage for occupational diseases, but only accidental personal injury.⁷⁰ The Legislature soon amended the act to remedy this oversight.⁷¹ Although coverage was initially quite narrow, the Legislature expanded it significantly in the following decades in order to create liberal coverage of “slow-starting” work-related illness.⁷²

⁶⁶ Act of Apr. 5, 1929, ch. 301, 1929 N.Y. Laws 754; *see also* *Knights v. Morris*, 193 N.E. 304, 304 (N.Y. 1934).

⁶⁷ *Bopp v. Weist*, 654 N.Y.S.2d 927, 929 (App. Div. 1997) (citing *Estate of Allen v. Colgan*, 593 N.Y.S.2d 614, 615 (App. Div. 1993)).

⁶⁸ *See, e.g., Harris v. Celbert Garage Corp.*, 285 N.Y.S.2d 665, 666–67 (App. Div. 1967).

⁶⁹ *See* Act of June 26, 1990, ch. 296, 1990 N.Y. Laws 2886 (codified at N.Y. WORKERS’ COMP. LAW § 16(4-b) (Consol. 2023)).

⁷⁰ Act of Dec. 16, 1913, ch. 816, 1913 N.Y. Laws 2277.

⁷¹ *See* Act of May 5, 1920, ch. 538, 1920 N.Y. Laws 1365; *see also* *Muniak v. ACF Indus., Inc.*, 182 N.Y.S.2d 539 (App. Div. 1959) (discussing disablement vis a vis occupational disease as opposed to accident).

⁷² *See McCann v. Walsh Constr. Co.*, 123 N.Y.2d 509, 511–12 (App. Div. 1953).

At the outset, the statute required the injured worker to file a claim for occupational disease within twelve months after leaving the employer in whose service he or she had contracted the illness.⁷³ Thus, if “disablement” did not occur until over a year had passed since the worker left the employment, the law barred the claim entirely.⁷⁴

However, in 1946, the Legislature recognized that it was unjust to apply this general rule to a disease like caisson disease which was of a slow-starting or insidious nature; very often, more than twelve months elapsed after the contraction of the disease before its presence was known or apparent. The Legislature therefore amended section 40 of the Workmen's Compensation Law in 1946 to exclude “compressed air illness” from the twelve months' provision of the statute. The pertinent portion of the statute as amended read: “The time limit for contraction of the disease prescribed by this section shall not bar compensation in the case of an employee *who contracted compressed air illness, or its sequelae*”. Section 28 of the Workmen's Compensation Law fixing a time limit of one year for the filing of claims for compensation remained unchanged, notwithstanding the 1946 amendment to section 40. This created an unsatisfactory situation since the purpose of the amendment might be defeated by the claimant's ignorance of the nature of the disease from which he suffered and his failure to file a claim within one year (as section 28 then read) after disablement.

In 1947, both sections 28 and 40 were comprehensively amended. The amendment to section 40, adopted in 1946, was retained, although its position in the text was changed and certain other slow-starting diseases causing latent or delayed pathological changes were also excluded from the time limit provided by section 40, and the following sentence was added at the end of the section: “Neither shall the right to compensation in such cases be barred by the failure of the employee or his dependents to file a claim within the two-year period prescribed by section twenty-eight, provided such claim shall be filed after such period of two years, within ninety days

⁷³ *Id.* at 511.

⁷⁴ *Id.*

after disablement and after knowledge that the disease is or was due to the nature of the employment.”

A similar provision was inserted in section 28, by the same chapter of the Laws of 1947. (The one-year period for filing claims generally had been extended to two years by L. 1947, ch. 77.) Section 45, dealing with notice to the employer, was also amended by chapter 624 of the Laws of 1947, so as to provide that the notice could be given “within ninety days after the disablement or after knowledge that the disease is due to the nature of the employment, whichever is the later date.”⁷⁵

In 1958, the Legislature created additional coverage for occupational hearing loss.⁷⁶ The 1958 occupational hearing loss statute measured the filing of a timely claim against a “date of disablement” defined as “the last day of [a six-month] period of separation” from “the last employer in whose employment the employee was at any time during such employment exposed to harmful noise.”⁷⁷ In 1987, the Legislature provided the worker with the option of filing the claim either when he or she was removed from the occupational noise exposure or when he or she left the employer’s service entirely.⁷⁸

4. Providing the Workers’ Compensation Board with the Authority to Reclassify a Disability

From its inception, the Workers’ Compensation Law provided the Board with continuing jurisdiction over claims and the authority to modify awards.⁷⁹ However, the courts did not interpret these provisions to permit it to “reclassify” a period of disability from one “class” (permanent total disability, permanent partial disability, temporary total disability, temporary partial disability) to another after an award had been made.⁸⁰

⁷⁵ *Id.* at 511–512 (first quoting Act of Apr. 9, 1946, ch. 642, 1946 N.Y. Laws 1295; then citing Act of Apr. 5, 1947, ch. 624, 1947 N.Y. Laws 1198) (emphasis added).

⁷⁶ See Act of Apr. 23, 1958, ch. 974, § 3, 1958 N.Y. Laws 2337, 2339–42 (codified as amended at N.Y. WORKERS’ COMP. LAW §§ 49-aa–49-hh (Consol. 2023)).

⁷⁷ §3, 1958 N.Y. Laws at 2339 (codified as amended at N.Y. WORKERS’ COMP. LAW §§ 49-bb (Consol. 2023)); see *Di Matteo v. T. M. Duche & Son*, 307 N.Y.2d 955, 956 (App. Div. 1970).

⁷⁸ Act of June 29, 1987, ch. 167, 1987 N.Y. Laws 1916.

⁷⁹ Act of Dec. 16, 1913, ch. 816, §§ 22, 74, 1913 N.Y. Laws 2277, 2290, 2302 (codified as amended at N.Y. WORKERS’ COMP. LAW §§ 22, 123 (Consol. 2023)).

⁸⁰ See, e.g., *Schaefer v. Buffalo Steel Car Co.*, 166 N.E. 183, 185 (N.Y. 1929).

As a result, the Legislature amended the statute in 1927 to provide:

The Board may, within one year from the date of accident, upon its own motion, or on application of any party in interest, reclassify a disability upon proof that there has been a change in condition, or that the previous classification was erroneous and not in the interest of justice.⁸¹

When a one-year time restriction on the time for reclassification proved inadequate to provide proper compensation to injured workers whose medical condition changed, the Legislature promptly extended it to three years in 1931.⁸² Two years after that, the Legislature eliminated the restriction entirely, authorizing the Board to reclassify a disability “at any time.”⁸³

The Legislature took additional steps to ensure compensation for injured workers with the 1959 creation of the Uninsured Employers Fund, which guaranteed payment of compensation in cases where the employer had failed to secure insurance or provide security for payment of compensation as required by the law.⁸⁴

5. Encouraging Employment of Disabled Workers

In *Schwab v. Emporium Forestry Co.*,⁸⁵ the Court of Appeals upheld a Board decision finding that the combination of a pre-existing hand amputation and the work-related loss of the contralateral hand resulted in a permanent total disability.⁸⁶ Concerned that this ruling would discourage employers from hiring disabled workers, the Legislature enacted what is now Workers' Compensation Law section 15(7), providing that “an employee who is suffering from a previous disability shall not receive compensation for a later injury when considered by itself and not in conjunction with the previous disability.”⁸⁷

⁸¹ Act of Mar. 31, 1927, ch. 557, sec. 1, § 15(6-a), 1927 N.Y. Laws 1336, 1337 (codified as amended at N.Y. WORKERS' COMP. LAW § 15(6-a) (Consol. 2023)).

⁸² See Act of Apr. 6, 1931, ch. 292, sec. 1, § 15(6-a), 1931 N.Y. Laws 704, 704–05; see also *Montgomery v. Seneca Iron & Steel Co.*, 257 N.Y.S. 556, 558 (App. Div. 1932).

⁸³ Act of Apr. 24, 1933, ch. 384, sec. 1, § 15(6-a), 1933 N.Y. Laws 911, 912–13; see also *Ryan v. Am. Bridge Co.*, 278 N.Y.S. 612, 615 (App. Div. 1935).

⁸⁴ Act of Apr. 20, 1959, ch. 578, sec. 1, § 26-a, 1959 N.Y. Laws 1417, 1418 (codified as amended at N.Y. WORKERS' COMP. LAW § 26-a (Consol. 2023)).

⁸⁵ *Schwab v. Emporium Forestry Co.*, 111 N.E. 1099 (N.Y. 1915).

⁸⁶ *Id.*, *aff'g* 153 N.Y.S. 234, 235–36 (App. Div. 1915).

⁸⁷ See *State Indus. Comm'n v. Newman*, 118 N.E. 794, 795 (1918). The Legislature amended the law one year later to limit application of the provision to workers suffering “the loss of one

In 1945, confronted with the return of disabled veterans from the battlefields of World War II, the Legislature developed a different means of encouraging employers to hire workers with preexisting disabilities—without limiting their benefits. It first amended Workers' Compensation Law section 15(7) to include an additional clause: "except as hereinafter provided in subdivision eight of this section."⁸⁸ At the same time, it added Workers' Compensation Law section 15(8), creating a Special Fund (also known as the Second Injury Fund) to reimburse employers who hired disabled workers.⁸⁹ Under the new statute, if the employer could demonstrate that the worker had a permanent impairment prior to the work-related injury, and if the worker's post-injury loss of wage-earning capacity was "materially and substantially greater" as a result of the pre-existing condition, then the worker was to receive full compensation for the entire loss of wage-earning capacity—but the employer was to be reimbursed by the Special Fund for any compensation paid beyond one hundred and four weeks.⁹⁰ The Special Fund was, in turn, funded by assessments on all employers⁹¹—in effect socializing the cost of hiring disabled workers.

As the court noted in *Adamsbaum v. Broadway Health Club*,⁹² "[o]bviously it was designed to assist and encourage the employment of servicemen who returned suffering from various disabilities."⁹³ The Legislature sought to induce the employment of disabled veterans, and others, by limiting the liability of employers in certain cases.⁹⁴ Four years later, it expressed a broader view of the purpose of the law, holding that "[t]his statute declared it the public policy of the State to encourage the employment of persons suffering permanent physical impairment, which it expressly defined as a permanent

hand, one arm, one foot, one leg, or one eye." *Schurick v. Bayer Co.*, 5 N.E.2d 713, 714 (1936). The courts, for their part, interpreted the statute as applying only to the specific situation presented in *Schwab*: the combination of a pre-existing non-work-related disability and a later work-related disability resulting in permanent total disability. *Id.*; see also, *Bechler v. Hecht's*, 130 N.Y.S.2d 26, 26–27 (App. Div. 1954); *Worden v. Gen. Drop Forge Corp.*, 137 N.Y.S.2d 671, 672 (App. Div. 1955).

⁸⁸ Act of Apr. 19, 1945, ch. 872, sec. 1, § 15(7), 1945 N.Y. Laws 1982, 1983.

⁸⁹ See *id.* § 2, at 1985–86.

⁹⁰ See *id.* § 2, at 1984. In 1996, the period was enlarged to two hundred and sixty weeks in order to better preserve the Special Fund. Act of Sept. 10, 1996, ch. 635, sec. 39, § 15(8)(d), 1996 N.Y. Laws 3194, 3211. The Fund was eventually closed, with no claims allowable in which the date of disablement occurred on or after July 1, 2007. See Act of Mar. 13, 2007, ch. 6, sec. 76, § 15(8)(h), 2007 N.Y. Laws 54, 95; *infra* Part IV.C.3.

⁹¹ § 2, 1945 N.Y. Laws at 1986.

⁹² *Adamsbaum v. Broadway Health Club*, 67 N.Y.S.2d 254 (App. Div. 1946).

⁹³ *Id.* at 256.

⁹⁴ *Id.* at 256–57.

condition due, among other things, to disease which may be likely to be a hindrance or obstacle to employment.”⁹⁵

B. Judicial Decisions Expanding Coverage

Consistent with the Legislature’s ongoing expansion of statutory coverage and benefits—and building on the early conclusion that the Workers’ Compensation Law was enacted as “a means of protecting workingmen and their dependents from want in case of injury,”⁹⁶ which must be liberally construed to accomplish that goal—the courts regularly interpreted the law to protect the injured worker.

In *Litts v. Risley Lumber Co.*⁹⁷ and *Beach v. Velzy*,⁹⁸ the Court of Appeals laid out a broad test for whether a worker was an employee covered by the act as opposed to an independent contractor. In *Litts*, the court held that the test is whether the employer “has control and direction . . . of the work,” as well as the right to “discharge the employee [for] disobeying such control and direction.”⁹⁹ In *Beach*, the court elaborated:

The independent contractor is one who agrees to do a specific piece of work for another for a lump sum or its equivalent who has control of himself and his helpers, as to when, within a reasonable time, he shall begin and finish the work; as to the method, means or procedure of accomplishing it; and who is not subject to discharge because he does the work as to method and detail in one way rather than another. In the relation of employer and employee the employer has control and direction not only of the work as to its result but as to the details and method of doing the work and may discharge the employee for disobeying such control and direction.¹⁰⁰

In *Roberts v. J.F. Newcomb & Co.*,¹⁰¹ the worker was injured in an explosion on Wall Street while traveling from one work location to another.¹⁰² While there was no question that the accident arose “in the course of his employment,” the court was required to decide

⁹⁵ *Zyla v. A.D. Juilliard & Co.*, 102 N.Y.S.2d 255, 257 (App. Div. 1951).

⁹⁶ *Post v. Burger & Gohlke*, 111 N.E. 351, 353 (N.Y. 1916).

⁹⁷ *Litts v. Risley Lumber Co.*, 120 N.E. 730 (N.Y. 1918).

⁹⁸ *Beach v. Velzy*, 143 N.E. 805 (N.Y. 1924).

⁹⁹ *Litts*, 120 N.E. at 731 (citing *Uppington v. City of New York*, 59 N.E. 91, 94 (N.Y. 1901)).

¹⁰⁰ *Beach*, 143 N.E. at 806.

¹⁰¹ *Roberts v. J.F. Newcomb & Co.*, 195 N.Y.S. 405 (App. Div. 1922).

¹⁰² *See id.* at 405–06.

whether it “arose out of his employment.”¹⁰³ The court held that although the injury was caused by a “street risk,” the accident was covered by the law because “claimant was in this place, zone of danger, because of his employment and while actually engaged in his employment.”¹⁰⁴ The court further expounded that “it conforms best with the spirit and purpose of the Workmen’s Compensation Law to hold that, when a man is injured by an accident in the street, while he actually is performing the services he is employed to perform by his employer, he is covered by the statute.”¹⁰⁵ The court thus expanded the definition of the requirement that an accident “arise out of the employment” to include “street risk[s]” encountered while a worker is traveling in the course of his or her employment.¹⁰⁶

In *Jaabeck v. Theodore A. Crane’s Sons Co.*,¹⁰⁷ the worker sustained injuries from which he died six months later.¹⁰⁸ The court rejected the insurer’s contention that its policy did not cover the accident, holding:

The policy was to cover the employer’s liability under the Workman’s Compensation Law. The employer in this case was liable for Jaabeck’s death as he was on the payroll of the company at the time, was its general employee, and was doing work by the direction of the company’s foreman.¹⁰⁹

Thus, if the employer was liable under the law, the insurer was obligated to provide benefits to the worker or his dependents.¹¹⁰

In *Goldberg v. 954 Marcy Corp.*,¹¹¹ the worker was employed as a cashier at a movie theater, where she worked outside the lobby in a booth, which was heated by an electric heater.¹¹² As a result of alternating hot and cold temperatures, she developed numbness in her legs and ultimately fell, fracturing her ankle.¹¹³ Finding that her injuries could not be compensated as an occupational disease because they were not “peculiar to” the occupation, the court went on to find that “[t]he award, however, can be sustained on the ground of

¹⁰³ *Id.* at 406.

¹⁰⁴ *Id.* at 407–08.

¹⁰⁵ *Id.* at 408.

¹⁰⁶ *Id.* at 407–08.

¹⁰⁷ *Jaabeck v. Theodore A. Crane’s Sons Co.*, 144 N.E. 625 (N.Y. 1924).

¹⁰⁸ *See id.* at 625.

¹⁰⁹ *Id.* at 627.

¹¹⁰ *Id.*

¹¹¹ *Goldberg v. 954 Marcy Corp.*, 12 N.E.2d 311 (N.Y. 1938).

¹¹² *Id.* at 312.

¹¹³ *Id.*

accidental injury arising out of and in the course of her employment” because the worker was on her way to the doctor, “pursuant to the directions of her employer,” when she fell.”¹¹⁴

Almost sixty years later, the Court of Appeals revisited this issue in *Johannesen v. New York City Department of Housing Preservation & Development*.¹¹⁵ In *Johannesen*, the worker was an office assistant who worked in an area in which she was exposed to secondhand cigarette smoke and eventually began to suffer from asthmatic episodes.¹¹⁶ As in *Goldberg*, this could not constitute an occupational disease within the meaning of the law because the condition was not peculiar to the occupation in general, but instead resulted from a specific workplace environment.¹¹⁷ The court held, however, that “[a]n accidental injury need not result suddenly or from the immediate application of some external force but may accrue gradually over a reasonably definite period of time.”¹¹⁸ It further held that although exposure to secondhand cigarette smoke has “been and still is relatively endemic,” Johannesen’s exposure “demonstrate[d] an exacerbative and excessive quality” sufficient to qualify as an accident within the meaning of the law.¹¹⁹ Finally, the court found that the end result of “two on-the-job asthma episodes, requiring immediate emergency medical attention, met the time-definite component of the accidental injury rule.”¹²⁰

In *Nashko v. Standard Water Proofing Co.*,¹²¹ the court upheld New York jurisdiction over an accidental death that occurred in New Jersey involving a New York worker and employer.¹²² In so doing, the court established that jurisdiction would apply if there are “sufficient significant contacts with this State,” including “a hiring in New York, control of employment from an office located in New York, payment of out-of-State expenses by the employer and an understanding that the employee is to return to New York after out-of-State assignments,” as well as the employee’s residence, and whether there is a policy of New York workers’ compensation insurance.¹²³

¹¹⁴ *Id.* at 312–13.

¹¹⁵ *Johannesen v. N.Y.C. Dep’t of Hous. Pres. & Dev.*, 638 N.E.2d 981 (N.Y. 1994).

¹¹⁶ *Id.* at 982.

¹¹⁷ *See id.* at 985.

¹¹⁸ *Id.* at 984 (citing *Middleton v. Cocksackie Corr. Facility*, 341 N.E.2d 527, 530 (N.Y. 1975)).

¹¹⁹ *Johannesen*, 638 N.E.2d at 984–85.

¹²⁰ *Id.* at 985 (citing *Middleton*, 341 N.E.2d at 530).

¹²¹ *Nashko v. Standard Water Proofing Co.*, 149 N.E.2d 859 (N.Y. 1958).

¹²² *Id.* at 861–62.

¹²³ *Id.* (citing *Cameron v. Ellis Constr. Co.*, 169 N.E. 622, 623 (N.Y. 1930); then citing *Klein v. Stoller & Cook Co.*, 116 N.E. 1055 (N.Y. 1917); then citing *Post v. Burger & Gohlke*, 111 N.E.

In *Papkoff v. Feldman*,¹²⁴ the worker was classified permanently partially disabled and a continuing award was directed.¹²⁵ When the worker was later confined to a mental institution for unrelated reasons, the employer and carrier objected to payment of the award during the period of confinement.¹²⁶ The court rejected these objections, finding:

The fortuitous circumstance that a claimant who has sustained a permanent partial disability is subsequently hospitalized, for a long or a short period, or for different periods, should not inure to the benefit of the carrier while the physical and industrial disability and the loss of wage-earning capacity on which the award was bottomed still continue.¹²⁷

Similarly, in *Tallini v. Martino & Son*,¹²⁸ the court held that the worker's confinement to a "psychiatric ward for the criminally insane" after "fatally shooting two persons and wounding a third" did not relieve the carrier from its obligation to pay continued benefits due to "a prior work-related permanent partial disability."¹²⁹ The court held:

To penalize a worker who has suffered a permanent disability solely because he or she has subsequently been afflicted by mental illness would in no way further the goals behind the Workers' Compensation Law. Indeed, the new malady most often will increase the importance of these benefits to the worker and his or her family.¹³⁰

This would render suspension of payments contrary to the fundamental purpose of the law.¹³¹

In *Wolfe v. Sibley, Lindsay & Curr Co.*,¹³² the worker suffered "an acute depressive reaction" after finding the body of her supervisor,

351, 354-55 (N.Y. 1916); and then citing *Hawco v. William Neil Constructors, Inc.*, 88 N.Y.S.2d 640, 640 (App. Div. 1949)).

¹²⁴ *Papkoff v. Feldman*, 271 N.Y.S.2d 812 (App. Div. 1966).

¹²⁵ *See id.* at 812.

¹²⁶ *See id.* at 813.

¹²⁷ *Id.*

¹²⁸ *Tallini v. Martino & Son*, 448 N.E.2d 421 (N.Y. 1983).

¹²⁹ *Id.* at 421.

¹³⁰ *Id.* at 422 (citing *In re Walsh*, 116 N.E. 496, 496 (Mass. 1917); *Ward v. Heth Bros.*, 180 N.W. 245, 251 (Mich. 1920)).

¹³¹ *See Tallini*, 448 N.E.2d at 422.

¹³² *Wolfe v. Sibley, Lindsay & Curr Co.*, 330 N.E.2d 603 (N.Y. 1975).

who had committed suicide by gunshot to the head.¹³³ The Court of Appeals reversed the appellate division's holding "that mental injury precipitated solely by psychic trauma is not compensable as a matter of law."¹³⁴ The court held that instead, "psychological or nervous injury precipitated by psychic trauma is compensable to the same extent as physical injury."¹³⁵

In *Husted v. Seneca Steel Service, Inc.*,¹³⁶ the worker was injured in a motor vehicle accident on a public street while attempting to make a left turn into the employer's parking lot.¹³⁷ The accident was close enough to the premises that the impact propelled the worker's car into the employer's parking lot.¹³⁸ The Court of Appeals held:

While the general rule is that accidents occurring on the public highway, away from the place of employment and outside regular working hours, do not arise out of and in the course of employment, it is equally true that, as the employee comes in closer proximity with his employment situs, there develops "a gray area" where the risks of street travel merge with the risks attendant with employment and where the mere fact that the accident took place on a public road or sidewalk may not *ipso facto* negate the right to compensation.¹³⁹

The court thus held that the claim was compensable because the left turn was in proximity to the employer's premises and was occasioned by the employment, and that the extension of coverage to this situation was "in keeping with the fundamental concept that the Workmen's Compensation Law, being remedial in character, . . . be construed liberally to accomplish the economic and humanitarian objects of the act."¹⁴⁰

More recently, the court applied this doctrine (as well as the rule in *Roberts*¹⁴¹) to uphold the compensability of a claim made by a

¹³³ *Id.* at 604.

¹³⁴ *Id.* at 605.

¹³⁵ *Id.* at 606.

¹³⁶ *Husted v. Seneca Steel Serv., Inc.*, 359 N.E.2d 673 (N.Y. 1976).

¹³⁷ *Id.* at 674.

¹³⁸ *Id.*

¹³⁹ *Id.* at 676 (citing *Patti v. Republic Aviation Corp.*, 248 N.Y.S.2d 978, 979 (App. Div. 1964); *Brienza v. Le Chase Constr. Co.*, 230 N.Y.S.2d 362, 363-64 (App. Div. 1962); *Bountiful Brick Co. v. Giles*, 276 U.S. 154, 158 (1928)).

¹⁴⁰ *Husted*, 359 N.E.2d at 677 (citing *Waters v. William J. Taylor Co.*, 112 N.E. 727, 728 (N.Y. 1916)).

¹⁴¹ *Roberts v. J.F. Newcomb & Co.*, 195 N.Y.S. 405, 408 (App. Div. 1922).

worker who was struck by debris from the September 11, 2001, terrorist attack while on his way to work as a data analyst at the World Trade Center.¹⁴²

The courts have also continued to expand the role of the statutory presumptions. In *Keevins v. Farmingdale UFSD*,¹⁴³ the worker was a teacher who twisted her knee when walking around a desk.¹⁴⁴ The court held that the statute presumes that an accident occurring in the course of employment also arises out of the employment, and that a “claimant is not required to prove that something directly related to job duties caused the injury.”¹⁴⁵ Similarly, in *Koenig v. State Insurance Fund*,¹⁴⁶ the worker was an accountant who collapsed in his office and died a week later in the hospital.¹⁴⁷ Although it was by then well-established that unwitnessed accidents occurring in the course of employment were presumed to have arisen out of the employment, the employer and carrier contended that the widow was not entitled to the benefit of the presumption because a co-worker was present when the worker collapsed.¹⁴⁸ The court rejected this argument, holding that the

presumption also applies to accidents that, although witnessed, are unexplained. Thus, the presumption applies and it was the Fund’s burden, clearly not met here, to present “substantial evidence to the contrary which, as a matter of law, precludes the Board from crediting any explanation of the accident except that offered by the employer.”¹⁴⁹

The foregoing cases illustrate the judiciary’s consistent approach over the decades of liberally interpreting and applying the Workers’ Compensation Law in order to achieve its goal of delivering benefits to injured workers.

¹⁴² See *Tompkins v. Morgan Stanley Dean Witter*, 766 N.Y.S.2d 923, 923–24 (App. Div. 2003).

¹⁴³ *Keevins v. Farmingdale UFSD*, 759 N.Y.S.2d 213 (App. Div. 2003).

¹⁴⁴ *Id.* at 214.

¹⁴⁵ *Id.*

¹⁴⁶ *Koenig v. State Ins. Fund*, 772 N.Y.S.2d 392 (App. Div. 2004).

¹⁴⁷ *Id.* at 392.

¹⁴⁸ See *id.* at 392–93.

¹⁴⁹ *Id.* at 393 (first citing *Cartwright v. Onondaga News Agency*, 728 N.Y.S.2d 105, 105–06 (App. Div. 2001); then quoting *Scalzo v. St. Joseph’s Hosp.*, 747 N.Y.S.2d 266, 268 (App. Div. 2002)).

IV. LEGISLATIVE ACTION 1990–2017

A. *The 1990 Amendments*

In 1990, the Legislature increased the maximum weekly benefit, from \$300 per week for total disability and \$150 per week for partial disability to a unitary maximum of \$400 per week, in three annual steps beginning on July 1, 1990, and ending on July 1, 1992.¹⁵⁰ This was the last time the Legislature would increase benefits for seventeen years, until 2007¹⁵¹—an extraordinary deviation from the pattern of the previous half-century during which benefits were increased, on average, once every two and one-half years.¹⁵²

The 1990 legislation also marked the first time that an increase in the amount of weekly benefits was paired with a contraction of worker rights and remedies.¹⁵³ From a substantive standpoint, the 1990 act amended Workers' Compensation Law section 2(7) to exclude coverage for “solely mental” injuries that were “a direct consequence of a lawful personnel decision involving a disciplinary action, work evaluation, job transfer, demotion, or termination taken in good faith by the employer.”¹⁵⁴ This amendment marked the beginning of a trend limiting coverage for psychological injury that would continue throughout the following decades.¹⁵⁵

The 1990 legislation also created a new procedure that would ultimately be administratively employed to significantly reduce worker access to benefits: the “conciliation” process in Workers' Compensation Law section 25(2-b).¹⁵⁶ The conciliation statute permitted the Workers' Compensation Board to schedule an informal meeting between the injured worker and the employer or insurer, with the stated goal being the creation of a process that would “permit . . . claims to be handled on a more expeditious and informal

¹⁵⁰ See Act of July 31, 1990, ch. 924, sec. 6, § 15(6)(a), 1990 N.Y. Laws 3965, 3967.

¹⁵¹ See Act of Mar. 13, 2007, ch. 6, sec. 2, § 15(6)(a), 2007 N.Y. Laws 54, 55–56.

¹⁵² See *supra* Part III.A.1.

¹⁵³ Julia Ostrov, *An Examination of the New York State Workers' Compensation Reform Act of 2007*, 42 J. SOCIO. & SOC. WELFARE 3, 3, 6 (2015).

¹⁵⁴ Act of July 31, 1990, ch. 924, sec. 1, § 2(7), 1990 N.Y. Laws 3965, 3965 (codified at N.Y. WORKERS' COMP. LAW § 2(7) (Consol. 2023)).

¹⁵⁵ See, e.g., *Troy v. Prudential Ins. Co.*, 649 N.Y.S.2d 746 (App. Div. 1996); *Dockum v. Syroco, Inc.*, 687 N.Y.S.2d 759 (App. Div. 1999); *Duff v. Port Auth. of N.Y. & N. J.*, 787 N.Y.S.2d 175 (App. Div. 2004); *Pecora v. County of Westchester*, 786 N.Y.S.2d (App. Div. 2004); *Clark v. Oswego Cnty. Self Ins. Plan*, 793 N.Y.S.2d 258 (App. Div. 2005); *Veeder v. N.Y. Police Dep't.*, 928 N.Y.S.2d 89 (App. Div. 2011).

¹⁵⁶ See Act of July 31, 1990, ch. 924, sec. 12, § 25(2-b), 1990 N.Y. Laws 3965, 3971 (codified as amended at N.Y. WORKERS' COMP. LAW § 25(2-b) (Consol. 2023)). Administrative trends are discussed in Part V.

basis and provide a mechanism for claims to be addressed without undue controversy.”¹⁵⁷ The process was limited to cases in which the duration of the disability was not expected to exceed eight weeks; a few years later, that duration was changed to sixteen weeks.¹⁵⁸ In practice, however, the time frames associated with the process (scheduling a meeting, issuing a proposed decision, giving the parties an opportunity to withdraw from their agreement, and ultimately finalizing the decision) did not prove to be more expeditious. Much to the contrary, they greatly extended the length of time that was required for the injured worker to obtain a resolution as compared to the long-established formal hearing process.¹⁵⁹

Moreover, the process generated significant frustration for injured workers who attended a conciliation meeting and left under the impression that their claim had been resolved, only to wait a month to learn whether the insurer had decided to adhere to the agreement, followed by either a cancellation of the decision or a delay of up to another month for payment. Compared to the formal hearing process, under which payment is required within ten days¹⁶⁰ or an appeal within thirty days,¹⁶¹ it quickly became clear that the process was wholly inadequate to meet its intended goal, and instead tended to substantially frustrate it.

The Board soon abandoned the statutory conciliation process, and instead employed it as the basis for the issuance of proposed decisions without meetings, often involving cases for which the statute does not authorize the use of conciliation. These issues—which further eroded the ability of injured workers to understand and access their benefits—are discussed further in Part V.C.2.

B. The New York Employment, Safety and Security Act of 1996

In 1996, consistent with the pattern that had been established since the end of World War II, organized labor and its allies petitioned for an increase in the maximum weekly benefit rate.¹⁶² This effort was stymied by newly elected Governor George Pataki, who sought to pair an increase in weekly benefits sought by

¹⁵⁷ *See id.*

¹⁵⁸ *Id.*; Act of Dec. 27, 1993, sec. 13, § 25(2-b), 1993 N.Y. Laws 4031, 4035–36.

¹⁵⁹ *See* N.Y. WORKERS’ COMP. LAW § 20 (Consol. 2023) (describing the current hearing process).

¹⁶⁰ N.Y. WORKERS’ COMP. LAW § 25(3)(f) (Consol. 2023).

¹⁶¹ N.Y. WORKERS’ COMP. LAW § 23 (Consol. 2023).

¹⁶² *See* Greg Tarpinian, Dom Tuminaro & Joel Shufro, *The Politics of Workers’ Compensation in New York State: Developing a Pro-Labor Strategy to Defeat Business-Sponsored ‘Reform’ and Win Increased Protection for Workers*, 7 NEW SOLS. 35, 35, 37 (1998).

Democrats in the Assembly with a time limit, or cap, on payments for permanent disability.¹⁶³ Instead, the Legislature passed a group of amendments that did little or nothing to aid injured workers.¹⁶⁴

The Legislature framed its action as follows:

When New York's workers' compensation law was enacted in 1914 it signified the culmination of agreement between labor and management designed to provide timely payment of disability and medical benefits to injured workers at a reasonable cost to employers.

It is the intent of the legislature that the workers' compensation law be interpreted and implemented in the spirit in which it was first enacted so that a safe workplace is ensured, workers obtain necessary medical care benefits and compensation for workplace injuries, and employers obtain a degree of economic protection from devastating lawsuits. It is the specific intent of this legislature to enact a package of statutory provisions that are balanced and which seek to affirm the spirit of cooperation between labor and management that distinguished the workers' compensation law's enactment. It is the further intent of the legislature to create a system which protects injured workers and delivers wage replacement benefits in a fair, equitable and efficient manner, while reducing time-consuming bureaucratic delays, and repealing *Dole* liability except in cases of grave injury.¹⁶⁵

As is evident from the foregoing, the primary concern of the 1996 legislation was not ensuring the liberal construction of the law in order to provide benefits to injured workers at the expense of employers, who could then socialize those costs by incorporating them into the costs of their goods and services. Instead, it was aimed at providing employers with "economic protection from devastating lawsuits" by "repealing *Dole* liability except in cases of grave injury."¹⁶⁶ That the gesture in the preamble to "workers obtain[ing]

¹⁶³ See *id.* at 35–45; Raymond Hernandez, *An Overhaul of Workers' Compensation Is Major Obstacle in Albany Budget Talks*, N.Y. TIMES (Jun. 26, 1996), <https://www.nytimes.com/1996/06/26/nyregion/an-overhaul-of-workers-compensation-is-major-obstacle-in-albanybudget-talks.html> [<https://perma.cc/R3N8-UJSX>].

¹⁶⁴ See Act of Sept. 10, 1996, ch. 635, 1996 N.Y. Laws 3194.

¹⁶⁵ *Id.*

¹⁶⁶ See *id.*

necessary medical care benefits and compensation for workplace injuries” was fundamentally empty is evident from the substance of the legislation.¹⁶⁷

The bill’s reference to “*Dole* liability” was directed at the landmark 1972 Court of Appeals decision in *Dole v. Dow Chemical Co.*¹⁶⁸ In *Dole*, the plaintiff’s husband died of exposure to methyl bromide that was manufactured by Dow Chemical as a cleaning solution and which his employer had used to fumigate a grain storage bin before directing him to enter and clean that enclosed area.¹⁶⁹ Unable to sue her husband’s employer because of the exclusive remedy provision of Workers’ Compensation Law, the plaintiff sued Dow Chemical on the basis that it had failed to provide adequate warnings concerning the dangers of its product.¹⁷⁰ Dow in turn filed a third-party complaint against the decedent’s employer, contending that it had failed to instruct the decedent how to use the product safely.¹⁷¹

The employer’s motion to dismiss Dow’s complaint against it was denied by the trial court, but granted on appeal to the appellate division.¹⁷² The Court of Appeals reinstated the complaint, holding that the distinction between “active” and “passive” negligence should be abandoned in favor of apportionment of liability among all potential tortfeasors.¹⁷³ From the standpoint of workers’ compensation, however, the significance of the court’s decision was its holding that while the Workers’ Compensation Law insulated the employer from liability in tort to the injured worker or his dependents, it did not shield the employer from liability to another tortfeasor who sought indemnification based on the employer’s negligence.¹⁷⁴

A quarter-century later in the 1996 bill, the Legislature modified the *Dole* rule to end an employer’s liability to a third-party tortfeasor unless (1) the employer had agreed to such indemnification as a matter of contract; or (2) the injured worker had suffered a “grave injury,” defined as:

[D]eath, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple

¹⁶⁷ *See id.*

¹⁶⁸ *Id.*; *Dole v. Dow Chem. Co.*, 282 N.E.2d 288 (N.Y. 1972).

¹⁶⁹ *Dole*, 282 N.E.2d at 290.

¹⁷⁰ *Id.* at 290, 294.

¹⁷¹ *Id.* at 290.

¹⁷² *Id.*

¹⁷³ *Id.* at 291–92, 295.

¹⁷⁴ *Id.* at 295.

toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.¹⁷⁵

This statutory amendment had two immediate consequences: in cases where there was a contractual indemnification agreement (primarily construction accidents), it transferred responsibility for the employer's liability from the workers' compensation carrier to the employer's general liability insurer; and, except in cases of contractual indemnity or grave injury, it limited the injured worker's personal injury recovery to the funds available from the third-party tortfeasor. Its secondary impact was to increase the ability of workers' compensation insurers to recover their payments through the exercise of their lien rights against the injured worker's third-party recovery.¹⁷⁶ In short, the amendment was entirely to the benefit of workers' compensation insurers while providing no benefit to injured workers, and to the contrary in some instances limited their ability to recover for personal injury.¹⁷⁷

After the seven sections abrogating the employer's liability under *Dole*, the bill went on to devote over twenty sections to data collection, enforcement, and penalties for workers' compensation fraud.¹⁷⁸ These provisions concerned both workers and employers, and sought, inter alia, to address employers who misclassified workers, failed to carry the required insurance, or misreported payroll.¹⁷⁹ While salutary from a system standpoint and potentially offering some benefit to law-abiding employers whose premiums were in part

¹⁷⁵ Act of Sept. 10, 1996, ch. 635, sec. 2, § 11, 1996 N.Y. Laws 3194, 3194–95.

¹⁷⁶ Prior to the 1996 amendment, if an employer was impleaded by a third-party tortfeasor and the workers' compensation carrier provided the employer's defense and indemnity, it would often waive some or all of its lien and credit rights pursuant to Workers' Compensation Law section 29 as its contribution to the third-party settlement. *See, e.g., Kelly v. State Ins. Fund*, 456 N.E.2d 791, 792–94 (N.Y. 1983). Following the 1996 amendment, except in cases of grave injury, the employer's defense and indemnity was provided by its general liability insurer, eliminating the incentive for the workers' compensation insurer to reduce its lien or waive its credit beyond its statutory obligation for its equitable share of the third-party litigation expense. *See Burns v. Varriale*, 879 N.E.2d 140, 144–47 (N.Y. 2007).

¹⁷⁷ The impact on employers themselves is unclear, as the transfer of liability from workers' compensation insurance to general liability insurance was presumably reflected in the decrease in the former premium being offset by an increase in the latter.

¹⁷⁸ *See* §§ 13–29, 77–82, 1996 N.Y. Laws at 3201–06, 3228–29.

¹⁷⁹ *See id.*

subsidizing bad actors, they again provided no benefit to injured workers.

Indeed, benefits for the system and the employer, not the worker, was the theme of the 1996 bill. The threshold for reimbursement from the Second Injury Fund under Workers' Compensation Law section 15(8) was increased from 104 weeks to 260 weeks in an effort to reduce assessments paid by employers and to preserve the viability of the Fund.¹⁸⁰ A program was established to provide employers with premium credits for establishing workplace safety programs.¹⁸¹ Employers were exempted from premium increases where the injury did not qualify for reporting under the statute (providing employers with a disincentive to report injuries).¹⁸² The conciliation program that had been established in 1990 was expanded again from eight weeks to fifty-two weeks.¹⁸³ This approach is difficult to reconcile with Judge Cardozo's view that "[w]e are blind to the policy of workmen's compensation if we say that the purpose of the exemption, thus emphatically guarded, is to promote the convenience of the State" as opposed to the injured worker whom the law was intended to protect.¹⁸⁴

Several provisions of the 1996 bill directly reduced benefits (or access to benefits) for workers. The bill expanded and made permanent what had been a "pilot program" in which employers and unions could collectively bargain for the mandatory use of "[p]referred provider organizations"—essentially a managed care program in which the worker could be obligated to utilize an employer-selected physician for a period of time after the injury.¹⁸⁵

The bill created a "[t]emporary payment" statute permitting an employer or carrier to make payments for up to one year "without prejudice and without admitting liability" if it was "unsure of the extent of its liability for a claim."¹⁸⁶ Like the conciliation statute, the provision proved to be—at least for its intended purpose—unworkable in practice. With few exceptions, insurers preferred to either accept or contest a claim for benefits, and this clarity about the status of their case benefited the injured worker and his or her physicians, who could proceed accordingly. As a result, the statute

¹⁸⁰ See § 39, 1996 N.Y. Laws at 3210–11.

¹⁸¹ *Id.* §§ 10–11, at 3197–201.

¹⁸² See *id.* § 58, at 3220–21.

¹⁸³ *Id.* § 70, at 3224; see *supra* notes 155–56 and accompanying text.

¹⁸⁴ *Surace v. Danna*, 161 N.E. 315, 316 (N.Y. 1928).

¹⁸⁵ §§ 30–37, 1996 N.Y. Laws at 3206–10; see also Act of Dec. 27, 1993, ch. 729, sec. 16, 1993 N.Y. Laws 4031, 4037–45.

¹⁸⁶ § 42, 1996 N.Y. Laws at 3214–15.

went largely unused for nearly thirty years until recently, when the Board began to encourage its use as a means of avoiding its adjudicative responsibilities.¹⁸⁷

Perhaps most notably, the statute amended Workers' Compensation Law section 32.¹⁸⁸ Prior to the amendment, the statute in its entirety read as follows: "Waiver agreements void. No agreement by an employee to waive his right to compensation under this chapter shall be valid."¹⁸⁹ Construing the statute as it then existed, the Court of Appeals held "that there can be no valid compromise of the amounts due a claimant under this law," and that any purported "lump sum settlement" remained subject to the Board's jurisdiction and could be rescinded if it was found to be less than the injured workers' entitlement under the statute.¹⁹⁰

The 1996 Act amended section 32 to permit the injured worker to enter into a final release of all or any part of his or her claim, subject to the Board's approval of the agreement.¹⁹¹ The Board was obligated to approve the agreement as long as it was not "unfair, unconscionable, or improper . . . [or] the result of an intentional misrepresentation of material fact."¹⁹² The statute provided a process for the Board's approval of what became known as Section 32 settlements.¹⁹³

This amendment represented a fundamental departure from the *Surace* principle that the Board was obligated to maintain jurisdiction over the claim and to ensure that the full measure of benefits under the statute was delivered to the injured worker, regardless of the worker's "improvidence or folly."¹⁹⁴ Although the statute still required the Board to supervise and approve these agreements, the amendment represented a significant shift from a system in which the Board could not abdicate its responsibility to

¹⁸⁷ See *infra* Part V.C.1.

¹⁸⁸ See § 73, 1996 N.Y. Laws at 3226–27.

¹⁸⁹ Act of Apr. 13, 1922, ch. 615, § 32, 1922 N.Y. Laws 1623, 1647.

¹⁹⁰ See *Cretella v. N.Y. Dock Co.*, 45 N.E.2d 429, 430–31 (N.Y. 1942); see also, *Surace v. Danna*, 161 N.E. 315, 316 (N.Y. 1928) ("The claimant is to be protected against his own improvidence or folly."). Workers' Compensation Law section 15(5-b) currently provides authority for "non-schedule adjustments" in order to commute future payments into a lump sum. N.Y. WORKERS' COMP. LAW § 15(5-b) (Consol. 2023). However, such lump sum settlements are subject to approval by the Board and do not preclude reopening of the claim "upon proof that there has been a change in condition or in the degree of disability of claimant not found in the medical evidence and, therefore, not contemplated at the time of the adjustment." *Id.*

¹⁹¹ See § 73, 1996 N.Y. Laws at 3226.

¹⁹² *Id.* (codified as amended at N.Y. WORKERS' COMP. LAW § 32 (Consol. 2023)).

¹⁹³ See *id.*

¹⁹⁴ *Surace*, 161 N.E. at 316.

provide benefits to one in which it could, albeit in limited circumstances.

C. The New York State Workers' Compensation Reform Act of 2007

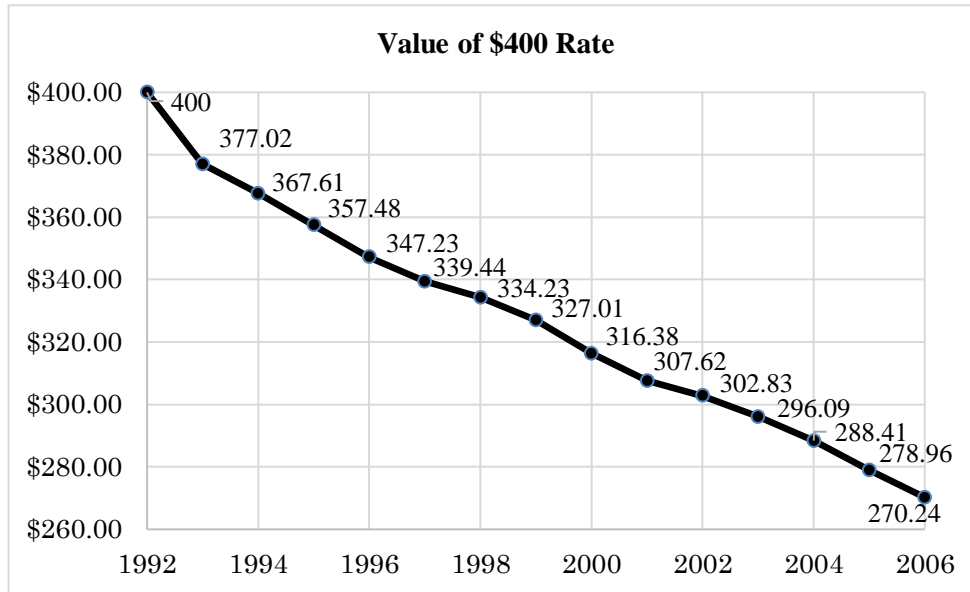
As discussed above, the 1990 legislation increased worker benefits and made several procedural changes. By contrast, the 1996 legislation failed to increase worker benefits while continuing to make procedural changes that ultimately eroded the ability of injured workers to access benefits as well as the quality of the benefits they received. After 1996, the stalemate between business and labor continued for another decade, during which the maximum weekly benefit rate remained unchanged at \$400 per week.¹⁹⁵ Factoring in the impact of inflation, its actual value declined to \$270 per week by 2006.¹⁹⁶ By most measures, New York's benefits were ranked among the lowest in the country by 2007.¹⁹⁷

¹⁹⁵ See *supra* Table 1; see also N.Y. WORKERS' COMP. BD., *supra* note 41, at 4.

¹⁹⁶ See *infra* Table 2.

¹⁹⁷ See, e.g., N.Y. WORKERS' COMP. BD., *supra* note 41, at 4.

Table 2. Decline in the Value of Maximum NYS Workers' Compensation Rate¹⁹⁸



Against this backdrop, in 2006 newly elected Governor Eliot Spitzer made workers' compensation reform legislation a priority for his administration.¹⁹⁹ The result was the New York State Workers' Compensation Reform Act of 2007 (the "2007 Act").²⁰⁰ The 2007 Act significantly increased the maximum weekly benefit rate;²⁰¹ imposed new time limits on permanent partial disability benefits (the "PPD caps");²⁰² granted the Board, employers, and insurers sweeping new authority over the medical care and treatment of injured workers;²⁰³ and included a host of other major changes to the system.²⁰⁴ It was originally estimated to save employers \$1 billion.²⁰⁵ This was to be

¹⁹⁸ Calculated using the CPI Inflation Calculator at <https://www.in2013dollars.com/us/inflation/1992?endYear=2007&amount=400> [<https://perma.cc/MHP3-5CYR>].

¹⁹⁹ *N.Y. Gov. Spitzer Cites Workers' Comp Reform as Legislative Priority*, INS. J. (Jan. 4, 2007), <https://www.insurancejournal.com/news/east/2007/01/04/75611.htm> [<https://perma.cc/2TBP-UMAG>].

²⁰⁰ Act of Mar. 13, 2007, ch. 6, 2007 N.Y. Laws 54.

²⁰¹ See N.Y. WORKERS' COMP. BD., *supra* note 41, at 4–5.

²⁰² *Id.* at 8.

²⁰³ See *id.* at 6–7.

²⁰⁴ See generally ch. 6, 2007 N.Y. Laws at 54–106.

²⁰⁵ See N.Y. WORKERS' COMP. BD., *supra* note 41, at 5.

achieved by slashing permanent disability benefits and medical costs while increasing temporary disability benefits and schedule loss awards for high-wage workers.²⁰⁶

1. Benefits

The 2007 Act increased the maximum weekly benefit rate in three stages from \$400 to \$500 (2007), \$550 (2008), and \$600 (2009).²⁰⁷ It also provided that, as of July 1, 2010, the maximum weekly workers' compensation benefit was indexed at two-thirds of the New York State average weekly wage.²⁰⁸ The results of this indexing are shown in Table 1, which shows that the maximum weekly benefit more than doubled from \$400 in 2006 to \$803.21 in 2013 and continued to rise to \$1,125.46 as of July 1, 2022.²⁰⁹

Increases in the maximum weekly benefit rate did not affect all injured workers equally. The maximum benefit rate for an injured worker was (and still is) two-thirds of his or her average weekly wage.²¹⁰ As a result, increases in the maximum weekly benefit rate had no impact on workers who earned \$600 per week or less. Table 3 is drawn from the Board's 2018 annual report, which was the last report the Board published that includes this data.²¹¹ Over thirty percent of injured workers were receiving no advantage at all from the 2007 increases in the maximum benefit rate, while fewer than a quarter have wages that permit them to access that rate.²¹²

²⁰⁶ See *id.* at 5–8.

²⁰⁷ § 2, 2007 N.Y. Laws at 55–56. It is important to note that benefit rates apply only to dates of accident or disablement on or after the effective date—increases in the maximum weekly benefit do not affect previous cases. *Id.* § 3.

²⁰⁸ *Id.* § 2.

²⁰⁹ *Supra* Table 1.

²¹⁰ § 2, 2007 N.Y. Laws at 55–56 (codified as amended at N.Y. WORKERS' COMP. LAW § 15(6)(a) (Consol. 2023)).

²¹¹ See N.Y. WORKERS' COMP. BD., 2018 ANNUAL REPORT 5 (2018), <http://www.wcb.ny.gov/content/main/TheBoard/2018AnnualReport.pdf> [<https://perma.cc/7SMB-CL63>].

²¹² See *infra* Table 3.

Table 3. Wage Distribution of Injured Workers for Claims Filed in 2018²¹³

Average Weekly Wage	# of Injured Workers	% of Injured Workers
under \$600	24,625	30.70%
\$600–\$899	16,902	21.10%
\$900–\$1,199	13,263	16.60%
\$1,200–\$1,357.10	5,786	7.20%
\$1,357.11 or more	19,549	24.40%
	80,125	100%

However, the 2007 Act also increased the minimum benefit rate from \$40 to \$100 as of July 1, 2007, which did provide some benefit to low-wage workers.²¹⁴

Increases in the maximum weekly benefit rate that improved temporary disability compensation for high-wage workers were offset by a substantial reduction in benefits for all permanently partially disabled workers throughout the spectrum of wage distribution. Prior to the 2007 legislation, a worker with a “non-schedule permanent partial disability” was entitled to compensation benefits for the duration of the disability.²¹⁵ In most cases, given that the disability was by definition permanent, the duration was the rest of the injured worker’s life.

The 2007 Act abrogated this rule, replacing it with an arbitrary schedule of weeks ranging from 225 to 525, depending on the extent of the injured worker’s loss of wage-earning capacity.²¹⁶ This schedule is shown in Table 4.

²¹³ N.Y. WORKERS’ COMP. BD., *supra* note 211, at 5.

²¹⁴ § 2, 2007 N.Y. Laws 54 at 55–56.

²¹⁵ N.Y. WORKERS’ COMP. BD., *supra* note 41, at 8.

²¹⁶ § 4, 2007 N.Y. Laws at 57–58 (codified at N.Y. WORKERS’ COMP. LAW § 15(3)(w) (Consol. 2023)).

Table 4. Loss of Wage-Earning Capacity²¹⁷

Loss of Wage-Earning Capacity	PPD Benefit: Maximum Weeks
96–99%	525
91–95%	500
86–90%	475
81–85%	450
76–80%	425
71–75%	400
61–70%	375
51–60%	350
41–50%	300
31–40%	275
16–30%	250
1–15%	225

The 2007 Act included a mechanism to potentially offset the harsh impact of the PPD caps for the most disabled workers by creating a “safety net” applicable to cases in which the loss of wage-earning capacity was found to exceed eighty percent.²¹⁸ Under this provision, the injured worker was permitted to apply for relief from the PPD caps within one year prior to the expiration of benefits, with the eligibility criterion being that he or she would suffer “extreme

²¹⁷ *Id.*

²¹⁸ *See* § 5, 2007 N.Y. Laws at 58–59.

hardship” if compensation payments were terminated.²¹⁹ The Legislature did not, however, provide a definition of that term²²⁰—an oversight the Board has employed to provide its own, extraordinarily narrow, definition.²²¹

In order to provide workers who were subject to the PPD caps with some leverage to settle their cases through the section 32 mechanism that had been created in 1996,²²² the 2007 Act required private insurers to make settlement offers following permanent partial disability classification and, if settlement did not occur, to pay the present value of the future indemnity payments into the Aggregate Trust Fund.²²³ The constitutionality of this provision was later challenged by the insurers and unanimously upheld by the Court of Appeals in *Raynor v. Landmark Chrysler*.²²⁴

The net effect of the benefit changes incorporated into the 2007 Act was to improve benefits for temporary disability and schedule loss of use (the value of which is dependent in part on the injured workers' average weekly wage and benefit rate), while removing the long-term protection the law had afforded to permanently disabled workers since its enactment in 1914.²²⁵

2. Medical Care and Treatment

The 2007 Act fundamentally changed the delivery of medical care to injured workers. Employers and insurers were given direct control over some aspects of medical care through provisions that permitted them to contract with pharmacies and diagnostic test networks and

²¹⁹ *Id.*

²²⁰ *See id.* This section of the bill also required the annual production of a report tracking the income and return-to-work rates of injured workers who were subject to the PPD caps. *See id.* The report was produced for two years, but it has not been released publicly since 2009. *See Publication: Reports, N.Y. WORKERS' COMP. BD.*, <http://www.wcb.ny.gov/content/main/TheBoard/publications.jsp> [<https://perma.cc/PHS3-DYCB>] (linking to Workers' Comp. Data Report Final reports for the years 2008 and 2009 only, under Annual Reports). The Board's approach to the statutory safety net is discussed further in Part V.C.

²²¹ *See N.Y. WORKERS' COMP. BD. SUBJECT NO. 046-938 (2017)*, http://www.wcb.ny.gov/content/main/SubjectNos/sn046_938.jsp [<https://perma.cc/225K-BYFG>].

²²² *See supra* notes 188–194 and accompanying text; *see also* N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-119, (2003), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_119.jsp [<https://perma.cc/PN5Y-R8E8>].

²²³ *See* §§ 46, 57-a, 57-b, 73–74, 2007 N.Y. Laws at 80–81, 85–86, 91–93 (codified as amended at N.Y. WORKERS' COMP. LAW §§ 27, 32).

²²⁴ *Raynor v. Landmark Chrysler*, 959 N.E.2d 1011, 1013 (N.Y. 2011).

²²⁵ *See* N. R. Kleinfeld & Steven Greenhouse, *For Injured Workers, a Costly Legal Swamp*, N.Y. TIMES (Mar. 30, 2009), <https://www.nytimes.com/2009/03/31/nyregion/31comp.html> [<https://perma.cc/9Y7U-A3FX>].

to require injured workers to use the employer-selected network for prescription medication and diagnostic tests.²²⁶

It was, however, a less conspicuous provision in the 2007 Act that ultimately had the most significant impact on medical treatment. The act amended Workers' Compensation Law section 13-a(5) to increase the threshold for pre-authorization for a particular medical service from \$500 to \$1,000 and went on to direct the Board to "issue and maintain a list of pre-authorized procedures under this section."²²⁷

Three years later, in December of 2010, the Board relied on this clause as the basis for its promulgation of Medical Treatment Guidelines regulating the amount, type, and timing of treatment for most workplace injuries.²²⁸ These guidelines did not simply "pre-authorize" medical treatment, but also pre-denied any treatment that deviated from their recommendations.²²⁹ A procedure was established for health care providers to seek a "variance" from the guidelines under which the injured worker bore the burden of proof of establishing that the requested treatment plan was superior to that prescribed by the guidelines.²³⁰

Four years after their adoption, a sharply divided Court of Appeals found that the guidelines were consistent with the statutory amendment.²³¹ The majority found that the legislative directive to "preauthorize" could be reasonably interpreted to encompass "pre-den[ial]" of other medical care, and upheld the balance of the regulations as within the Board's regulatory authority and providing an acceptable level of due process.²³² The dissent would have found that "to the extent the Board's regulations establish a variance scheme that predetermines that all treatment not included on the pre-authorized list of services is presumptively not medically necessary, it imposed a burden on Kigin and other claimants inconsistent with the statute's language and underlying purpose."²³³

²²⁶ See §§ 25–27, 29–30, 2007 N.Y. Laws at 69–73.

²²⁷ § 28, 2007 N.Y. Laws at 71–72.

²²⁸ See N.Y. COMP. CODES R. & REGS. tit. 12, pt. 324.2(a) (2023). For the Medical Treatment Guidelines, see *Medical Treatment Guidelines*, N.Y. WORKERS' COMPENSATION BOARD, <http://www.wcb.ny.gov/content/main/hcpp/MedicalTreatmentGuidelines/MTGOverview.jsp> [<https://perma.cc/VE5A-2CCZ>].

²²⁹ See N.Y. COMP. CODES R. & REGS. tit. 12, § 324.2(d) (2023).

²³⁰ N.Y. COMP. CODES R. & REGS. tit. 12, § 324.3(a) (2023).

²³¹ *Kigin v. N.Y. Workers' Comp. Bd.*, 24 N.E.3d 1064, 1065 (N.Y. 2014).

²³² *Id.* at 1068–70.

²³³ *Id.* at 1071 (Rivera, J., dissenting).

Taken together, the provisions of the 2007 Act essentially transferred control of medical treatment from injured workers and their physicians to insurers and the Board.

3. Procedural Matters

The 2007 Act also included a host of other substantive and procedural changes that tended to increase the Board's authority and reduce costs for safety-conscious and law-abiding employers. The act added a provision to Workers' Compensation Law section 114-a(3) that permitted the Board to assess costs against parties for prosecuting claims, defenses, or appeals without reasonable ground.²³⁴ It created new penalties for alteration of "independent medical examination report[s]."²³⁵ It expressly disqualified injured workers from receiving benefits during periods of incarceration as the result of a felony conviction.²³⁶

A number of provisions were intended to improve identification and elimination of employer fraud. The act added subdivision 17 to Workers' Compensation Law section 2 in order to define a "substantially owned affiliated entity" and to extend jurisdiction and enforcement to such entities.²³⁷ It increased penalties for failure to obtain compensation, failure to accurately report payroll, and misclassification of employees.²³⁸ It provided the Board with authority to issue "stop-work" orders for violations of these various provisions.²³⁹ Data-sharing among state agencies for fraud identification and enforcement was authorized.²⁴⁰

Other provisions of the 2007 Act closed to new claims the Special Fund under Workers' Compensation Law section 15(8) (the Second Injury Fund) in order to reduce the assessments paid by employers that provided its liquidity.²⁴¹

In all, the 2007 Act made far-reaching changes to almost every aspect of the system: benefits, medical treatment, and process. While these changes resulted in a significant increase in statutory benefits for high-wage workers in cases of temporary disability, the net impact of the legislation was to reduce benefits for injured workers

²³⁴ Act of Mar. 13, 2007, ch. 6, sec. 10, § 114-a(3), 2007 N.Y. Laws 54, 61.

²³⁵ *Id.* § 36, at 78.

²³⁶ *Id.* § 37, at 78.

²³⁷ *Id.* §§ 1, 15, at 54–55, 63.

²³⁸ *Id.* §§ 7–9, 35, at 59–61, 77–78.

²³⁹ *Id.* §§ 11–13, at 61–63.

²⁴⁰ *Id.* §§ 14–24, at 63–69.

²⁴¹ *See id.* §§ 75–78, at 93–106.

and imbue the Workers' Compensation Board with a new set of perceived priorities—to implement and expand upon the legislative reforms.

D. The 2017 Amendments

The 2017 New York State budget bills included a number of provisions that made further substantive and procedural changes to the workers' compensation system.²⁴² A number of these provisions were beneficial to injured workers, but one further restricted benefits and several were left for further action by the Board, which (as discussed in Part V) has generally applied them in the direction of restriction, not expansion of benefits.

The 2017 legislation attempted to expand benefits by reducing the threshold for safety net eligibility for permanently partially disabled workers from an eighty percent loss of wage-earning capacity to seventy-five percent, while also granting the worker the right to mandatory full Board review of any decision by a Board panel that reduced a WCL judge's finding from a level that would provide eligibility to one that would not.²⁴³ In an effort to reduce bureaucratic obstacles to benefits, it also granted workers a right to a hearing within forty-five days if they were not working, not being paid, and had medical proof of disability.²⁴⁴

The 2017 act also amended Workers' Compensation Law section 10(3) to add subdivision (b) providing that “the board may not disallow the claim” of an emergency responder “for mental injury premised upon extraordinary work-related stress incurred in a work-related emergency.”²⁴⁵ The amendment specifically prohibited the Board from applying the standard “that the stress was not greater than that which usually occurs in the normal work environment,”²⁴⁶ which it had developed as part of the trend limiting mental injury

²⁴² See Act of Apr. 10, 2017, ch. 59, 2017 N.Y. Laws 253.

²⁴³ *Id.* pt. NNN, subpt. A, §§ 2–3, at 391–92. These provisions also transferred responsibility for production of the “safety net report” required by the statute from the Department of Labor to the Workers' Compensation Board. *Id.* § 2, at 391. This has failed to result in the public release of the reports; other than one released in 2016, they have been absent since 2010. JAMES A. PARROTT & NICHOLAS B. MARTIN, THE NEW SCH., CTR. FOR N.Y.C. AFFAIRS, TIME FOR A REAL LOOK AT HOW THE NEW YORK STATE WORKERS' COMPENSATION SYSTEM TREATS WORKERS 20 (2019),

https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5cceaeb7104c7b8e90ac03e8/1559146168690/Time+for+Real+Final+Merge_052419.pdf [<https://perma.cc/S64H-5B3D>].

²⁴⁴ Pt. NNN, subpt. D, § 1, 2017 N.Y. Laws at 393–94.

²⁴⁵ Pt. NNN, subpt. I, § 1, 2017 N.Y. Laws at 400 (codified at N.Y. WORKERS' COMP. LAW § 10(3)(b) (Consol. 2023)).

²⁴⁶ *Id.*

claims that began with the 1990 amendment of Workers' Compensation Law section 2(7) prohibiting coverage for mental injury claims that were the result of good faith employment determinations.²⁴⁷

The 2017 act also addressed and partially overruled the Court of Appeals decision in *Zamora v. New York Neurologic Associates*.²⁴⁸ Prior to *Zamora*, numerous cases had held that where the injured worker left employment as a result of the compensable injury, the statute provided an inference that the loss of wages was attributable to the work-related disability.²⁴⁹ The courts had further held that, in these circumstances, benefits were payable for the loss of wage-earning capacity without a requirement that the injured worker demonstrate "attachment to the labor market."²⁵⁰ Virtually all of the cases on this issue arose after 1990 (most after 1996), and all of them involved the injured worker's appeal from a decision of the Board denying benefits based on the absence of proof of attachment to the labor market.²⁵¹

In *Zamora*, the Board joined the insurer's appeal to the Court of Appeals from a decision of the Third Department, in favor of the injured worker.²⁵² The appellate division had found that the permanently partially disabled worker was entitled to the benefit of the inference because she had not "voluntarily removed herself from the labor market."²⁵³ A four-judge majority of the Court of Appeals found that "the Third Department has treated the inference as required, or presumed, rather than merely permitted," and that "the Board may, but need not, infer that the claimant cannot find a

²⁴⁷ See *supra* note 155 and accompanying text; see, e.g., *Guess v. Finger Lakes Ambulance*, 812 N.Y.S.2d 393, 394 (App. Div. 2006); *Cook v. E. Greenbush Police Dep't*, 979 N.Y.S.2d 880, 881 (App. Div. 2014).

²⁴⁸ *Zamora v. N.Y. Neurologic Assocs.*, 970 N.E.2d 823 (N.Y. 2012).

²⁴⁹ See, e.g., *Jiminez v. Waldbaums*, 780 N.Y.S.2d 799, 800 (App. Div. 2004); *Leeber v. LILCO*, 816 N.Y.S.2d 205, 206 (App. Div. 2006); *Pittman v. ABM Indus., Inc.*, 806 N.Y.S.2d 301, 302 (App. Div. 2005); *Tipping v. Nat'l Surface Cleaning Mgmt., Inc.*, 816 N.Y.S.2d 202, 203–04 (App. Div. 2006).

²⁵⁰ See *Zamora*, 970 N.E.2d at 827 (Lippman, C.J., dissenting).

²⁵¹ See, e.g., *Leeber*, 816 N.Y.S.2d at 205–06; *Pittman*, 806 N.Y.S.2d at 301; *Tipping*, 816 N.Y.S.2d at 203. If the injured worker left employment for reasons unrelated to the disability—generally referred to as a voluntary withdrawal from the labor market due to age-based retirement, layoff, termination for cause, etc.—then the worker was not entitled to the benefit of the inference, but could use a work search to prove that the compensable disability was adversely affecting his or her wage-earning capacity. See, e.g., *Holman v. Hyde Park Nursing Home*, 701 N.Y.S.2d 516, 517 (App. Div. 2000); *Peluso v. Fairview Fire Dist.*, 702 N.Y.S.2d 701, 702 (App. Div. 2000); *Topf v. Am. Character Doll & Toy Co.*, 404 N.Y.S.2d 451, 452 (App. Div. 1978); *Mazziotto v. Brookfield Constr. Co.*, 338 N.Y.S.2d 1001, 1002–03 (App. Div. 1972).

²⁵² *Zamora*, 970 N.E.2d at 825.

²⁵³ *Id.* at 824–25.

suitable job because of her disability.”²⁵⁴ The majority, therefore, held that where there was no voluntary withdrawal from the labor market, the Board could exercise its discretion to either infer that the subsequent loss of wages was due to the compensable disability or, if it chose, to require proof from the injured worker.²⁵⁵

Three judges dissented. In an opinion by Chief Judge Lippman, they observed that:

“Attachment to the labor market” is a concept that is conspicuously absent from the Workers’ Compensation Law. The majority’s formulation of the issue in this case distracts from the proper identification of the question before the Court, which is whether a worker who has involuntarily withdrawn from his or her employment due to a compensable disability must demonstrate “attachment to the labor market” in order to be eligible to receive benefits. Nothing in the statute suggests that this is a prerequisite to entitlement to workers’ compensation benefits.²⁵⁶

The dissent would have adhered to precedent, finding it

reasonable that a claimant suffering from a PPD who has left his or her job voluntarily—that is to say, for reasons unrelated to the disability—should not benefit from the inference that the loss in wage earning capacity is due to the disability, precisely because the claimant chose to leave his or her employment and was not forced to do so by reason of the compensable disability.²⁵⁷

However, the dissent found that denying the inference to an injured worker who did not voluntarily withdraw from the labor market

extends the rule regarding “attachment to the labor market” beyond the limits that can reasonably be imposed on the application of such a rule when considering the remedial and humanitarian roots of the critically important statute that we address today. Workers’ compensation benefits are intended

²⁵⁴ *Id.* at 826.

²⁵⁵ *See id.* at 825–26.

²⁵⁶ *Id.* at 827 (Lippman, C.J., dissenting).

²⁵⁷ *Id.* at 828.

to do what the name implies: compensate workers for losses in wage earning capacity incurred due to work-related injuries. To impose barriers to access to those benefits, where there is no basis for such prerequisites, contravenes the law and violates basic principles of fairness for debilitated workers injured in the course of their employment.²⁵⁸

After *Zamora* was decided, the Board adopted an administrative policy that it would require every injured worker to demonstrate attachment to the labor market if the issue was raised by the employer—without engaging in any analysis about whether the separation from employment was voluntary or involuntary, and without considering whether it could be inferred that any individual worker's loss of wages flowed from the compensable disability.²⁵⁹

The 2017 act amended the statute to provide that permanent partial disability benefits are payable “without the necessity for the claimant who is entitled to benefits at the time of classification to demonstrate ongoing attachment to the labor market.”²⁶⁰ This effectively overruled the authority the Court of Appeals had granted to the Board in *Zamora* to require permanently partially disabled workers to produce proof of labor market attachment as a condition of receiving benefits if they were entitled to benefits at the time of classification.²⁶¹

The 2017 bill also created a new set of time limitations on benefits, superimposed on the PPD caps that had been created in 2007. The Legislature now limited the duration of temporary partial disability benefits to 130 weeks, unless the injured worker made a successful application to the Board for a decision that he or she was not yet at “maximum medical improvement.”²⁶² Absent such a decision, any

²⁵⁸ *Id.*

²⁵⁹ See *O'Donnell v. Erie County*, 35 N.Y.3d 14, 21–22 (“According to the Board, its post-*Zamora* practice has been to infer continuing labor-market attachment from an involuntary retirement ‘only when the employer does not dispute labor-market attachment.’ If the employer does challenge the claimant’s labor-market attachment, the Board says it rejects the inference and demands a showing of evidence by the claimant that would satisfy the labor-market attachment requirement without the benefit of the inference, such as, for example, evidence that the claimant made ‘efforts to obtain or train for alternate employment,’ or that the claimant’s doctor ordered the claimant not to return to work.”)

²⁶⁰ Act of Apr. 10, 2017, ch. 59, pt. NNN, subpt. A, § 1, 2017 N.Y. Laws 253, 390.

²⁶¹ See *Labor Market Attachment—the Legal Obligation and the Proper Forms Used to Demonstrate Attachment*, N.Y. WORKERS’ COMPENSATION BOARD, <http://www.wcb.ny.gov/labor-market-attachment/> [https://perma.cc/YBH7-S4RJ].

²⁶² Pt. NNN, subpt. A, § 1, 2017 N.Y. Laws at 390.

periods of partial disability after 130 weeks are deemed periods of permanent partial disability and applied to the PPD cap period.²⁶³

The 2017 legislation delegated a number of issues to the Board. These included a study of the “independent medical examin[ers]” hired by employers and insurers to defend claims,²⁶⁴ the establishment of “performance standard[s]” for insurers,²⁶⁵ and the creation of a prescription drug formulary.²⁶⁶

Most significantly, however, the Legislature directed the Board to review and revise its guidelines for the evaluation of the permanent loss or loss of use of limbs, generally referred to as “schedule loss of use.”²⁶⁷ In particular, the Legislature directed that the revised “permanency impairment guidelines shall be reflective of advances in modern medicine that enhance healing and result in better outcomes.”²⁶⁸ The Board’s response to this direction—which thus far has been the most consequential result of the 2017 legislation, and is perhaps the most relevant evidence about the present state of the workers’ compensation system—is discussed in Part V.B.1.

V. ADMINISTRATIVE ACTION

As discussed in Part IV, the legislative expansion of benefits for injured workers reached its apogee in 1990, when the maximum weekly benefit rate was increased, accompanied by a minor retrenchment of substantive benefits (the amendment to Workers’ Compensation Law section 2(7)) and a new administrative procedure was created (conciliation). Thereafter, the 1996 legislation was focused almost entirely on reducing employer costs. The 2007 legislation improved some benefits but sacrificed others with the express goal of further reducing employer costs, while spawning a host of new administrative procedures. The 2017 legislation followed the same pattern as 2007, at first blush on a smaller scale.

Overall, the legislative trend from 1996 through 2017 was to preserve and improve some benefits for injured workers, while offsetting those improvements by reducing or limiting other benefits. These legislative trends were, however, accompanied by a distinct administrative trend that minimized the improvements and

²⁶³ *Id.*

²⁶⁴ *Id.* pt. NNN, subpt. G, § 1, at 399.

²⁶⁵ *Id.* pt. NNN, subpt. D, § 2, at 394.

²⁶⁶ *Id.* pt. NNN, subpt. C, § 1, at 393.

²⁶⁷ See Pt. NNN, subpt. B, § 1, 2017 N.Y. Laws at 393 (codified at N.Y. WORKERS’ COMP. LAW § 15(3)(x) (Consol. 2023)); see also *Understanding Your Schedule of Loss Award*, *supra* note 63.

²⁶⁸ Pt. NNN, subpt. B, § 1, 2017 N.Y. Laws at 393.

maximized the reductions. These administrative actions can generally be divided into three categories: regulatory, adjudicative, and procedural (both overt and de facto). Individually and collectively, the impact of these actions has made it more difficult for workers to gain access to the system, limited their ability to obtain the benefits provided by statute, and enhanced the agency's authority over the system and its participants.

A. Workers' Compensation Board Regulations

Following the 2007 legislation, the Board promulgated numerous regulations that reduced the visibility of the workers' compensation system to injured workers, significantly limited their access to benefits, and in some instances directly reduced benefits.

The Board first revised its "core forms"—the injured worker's claim form (C-3 form), the employer's accident report (C-2 form), and the physician's medical report (C-4 form).²⁶⁹ As a result of these revisions, the injured worker's claim form doubled in length from one page to two pages, questions were added concerning prior injuries, and a new requirement was created for the injured worker to identify prior similar injuries and, if any, to provide a medical release.²⁷⁰ This increased the complexity of the process for injured workers, particularly low-wage and immigrant workers among whom language and literacy issues are more prevalent.²⁷¹

The changes to the medical reports required from treating physicians were substantial. Instead of completing a one-page form for each examination, physicians were now required to complete a four-page initial report (C-4.0 form), followed by a two-page report (C-4.2 form) for subsequent examinations.²⁷² The Board thereafter

²⁶⁹ N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-250, CORE BOARD FORMS REVISED (2008), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_250.jsp [https://perma.cc/78ZM-TRH3].

²⁷⁰ See N.Y. WORKERS' COMP. BD., EMPLOYEE CLAIM (C-3), <http://www.wcb.ny.gov/content/main/forms/c3.pdf> [https://perma.cc/2YRH-HJK3]; N.Y. WORKERS' COMP. BD., LIMITED RELEASE OF HEALTH INFORMATION (HIPAA), (C-3.3), http://www.wcb.ny.gov/content/main/forms/c3_3.pdf [https://perma.cc/4S2F-R2MQ].

²⁷¹ See RANDY CAPPS, MICHAEL FIX, JEFFREY S. PASSEL, JASON OST, DAN PEREZ-LOPEZ, A PROFILE OF THE LOW-WAGE IMMIGRANT WORKFORCE, 1, 3 (2003), <https://www.urban.org/sites/default/files/publication/59111/310880-A-Profile-of-the-Low-Wage-Immigrant-Workforce.PDF> [https://perma.cc/EK3N-JBRC]; ANDREW SUM, LITERACY IN THE LABOR FORCE: RESULTS FROM THE NATIONAL ADULT LITERACY SURVEY 66–67, 113 (1999), <https://nces.ed.gov/pubs99/1999470.pdf> [https://perma.cc/5RWU-A9PN].

²⁷² See N.Y. WORKERS' COMP. BD., ATTENDING DOCTOR'S REQUEST FOR AUTHORIZATION AND INSURER'S RESPONSE (C-4), <http://www.wcb.ny.gov/content/main/forms/c4AUTH.pdf> [https://perma.cc/5H6E-YLH2]; see also *The New C-4 Family of Forms: Frequently Asked*

continued to create additional medical report forms, eventually posting more than thirty different forms for use by healthcare providers on its website.²⁷³ Then, in 2022, the Board abandoned most of the forms it had created in favor of the use of CMS-1500 forms, to which providers are required to append narrative reports meeting the Board's content requirements.²⁷⁴ In addition, it created a web portal for the submission of requests for approval of medical treatment and prescription medication to which the insurer and the provider have access, but not the injured worker and his or her attorney.²⁷⁵

In 2008, after revising its "core forms," the Board then adopted new regulations that fundamentally modified the manner in which it created files and processed claims.²⁷⁶ Prior to the enactment of these regulations, upon receipt of any document indicative of a work-related injury, the Board would "index" a claim.²⁷⁷ The act of indexing resulted in the assignment of a case number and a notice to the injured worker, the employer, and the insurer.²⁷⁸ Upon receipt of the notice, the employer or insurer was, and are, obligated to either accept the claim and institute payment or to file a notice of controversy within twenty-five days.²⁷⁹ If the employer or insurer fails to file a notice of controversy, the statute precludes it from raising certain defenses in order to expedite resolution of the claim for the injured worker.²⁸⁰

Questions, N.Y. WORKERS' COMP. BD., <http://www.wcb.ny.gov/content/main/hcpp/C4-FAQs.jsp> [<https://perma.cc/WKZ3-H37A>].

²⁷³ See *Workers' Compensation Forms: Health Care Providers*, N.Y. WORKERS' COMP. BD., http://www.wcb.ny.gov/content/main/forms/Forms_HEALTH_PROVIDER.jsp [<https://perma.cc/U5DE-HSSV>].

²⁷⁴ See *CMS-1500 Initiative Overview*, N.Y. WORKERS' COMP. BD., <http://www.wcb.ny.gov/CMS-1500/> [<https://perma.cc/4UHZ-W9JV>]; *Workers' Compensation Forms: Health Care Providers*, *supra* note 273.

²⁷⁵ See *Medical Portal*, N.Y. WORKERS' COMP. BD., <http://www.wcb.ny.gov/medicalportal/> [<https://perma.cc/ELX4-H8TF>].

²⁷⁶ See N.Y. COMP. CODES R. & REGS. tit. 12, §§ 300.37, 300.38 (2023).

²⁷⁷ See N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-254, NEW CASE ASSEMBLY, INDEXING, AND ADJUDICATION PROCESS (2008), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_254.jsp [<https://perma.cc/35US-SLRC>].

²⁷⁸ See *id.* Prior to the enactment of the conciliation statute, Workers' Compensation Law section 25(2-b), the Board would also schedule a hearing in every case. See *supra* Part IV.A. As discussed in Part V.C.2, the Board eventually converted the conciliation statute from its intended purpose (an informal meeting process to resolve minor cases) into a vehicle to generally eliminate an initial hearing in each claim (as well as many subsequent hearings).

²⁷⁹ N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-254, *supra* note 277; N.Y. WORKERS' COMP. LAW § 25(2)(b) (Consol. 2023).

²⁸⁰ See N.Y. WORKERS' COMP. LAW § 25(2)(b) (Consol. 2023).

The new regulations divided the Board's indexing process into different steps.²⁸¹ Under the new procedure, instead of indexing a case upon receipt of information about a work-related accident, the Board instead assembles the claim.²⁸² While "assembly" results in the assignment of a case number, it does not trigger the employer or insurer's obligation to respond to the claim.²⁸³ Instead, the regulation defers indexing until the Board receives either a C-3 form from the injured worker or a C-2 form from the employer, plus a C-4 form from the treating physician and a medical release from the injured worker if the C-3 form identified a prior injury.²⁸⁴ The regulation thus complicated and prolonged the claim creation process, while also significantly extending the time frame for an employer or insurer to contest a claim.

The Board then revised the form used by employers and insurers to contest a claim (C-7 form) and required both the employer and the injured worker to file a "Pre-Hearing Conference Statement" in such cases.²⁸⁵ These forms require disclosure of all evidence and witnesses that either party intends to produce at trial, as well as the relevant case law²⁸⁶—in essence a pre-trial disclosure and memorandum of law.

As discussed in Part IV.C.2, the 2007 legislation authorized the Board to create "a list of pre-authorized procedures" in order to expedite the delivery of medical treatment to injured workers.²⁸⁷ In December of 2010, the Board interpreted this directive as granting it authority to create a comprehensive set of Medical Treatment Guidelines that regulated all treatment for injured workers, pre-

²⁸¹ N.Y. COMP. CODES R. & REGS. tit. 12, § 300.37 (2023); *see* N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-254, *supra* note 277.

²⁸² N.Y. COMP. CODES R. & REGS. tit. 12, § 300.37(a) (2023); *see* N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-254, *supra* note 287.

²⁸³ N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-254, *supra* note 277.

²⁸⁴ *Id.*; N.Y. COMP. CODES R. & REGS. tit. 12, § 300.37(b) (2023). The C-2 form is now a "FROI" (first report of injury) form. *See* N.Y. WORKERS' COMP. BD., EMPLOYER'S FIRST REPORT OF WORK-RELATED INJURY/ILLNESS (C-2F), <http://www.wcb.ny.gov/content/main/forms/c2F.pdf> [<https://perma.cc/54MT-4CXX>]. The Board has also administratively disregarded the regulation and does not index any case in which the employer has filed a FROI.

²⁸⁵ *See* N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-253, REVISED FORMS C-7, NOTICE THAT RIGHT TO COMPENSATION IS CONTROVERTED, AND PH-16.2, PRE-HEARING CONFERENCE STATEMENT (2008), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_253.jsp [<https://perma.cc/VK22-WP7E>]; N.Y. WORKERS' COMP. BD., PRE-HEARING CONFERENCE STATEMENT (PH-16.2), http://www.wcb.ny.gov/content/main/forms/ph16_2.pdf [<https://perma.cc/HK7Y-QHMC>].

²⁸⁶ *See* N.Y. WORKERS' COMP. BD., PRE-HEARING CONFERENCE STATEMENT (PH-16.2), *supra* note 285.

²⁸⁷ *See* Act of Mar. 13, 2007, ch. 6, sec. 28, § 13(a), 2007 N.Y. Laws 54, 71–72.

denying all care that was not pre-authorized.²⁸⁸ It then successfully defended its guidelines in *Kigin*.²⁸⁹ The Board then extended the applicability of its guidelines to medical treatment outside of New York in *Gasparro v. Hospice of Dutchess County*.²⁹⁰ The Board has since expanded its guidelines beyond treatment for the neck, back, knee, shoulder, carpal tunnel syndrome, and non-acute pain to include the hip, elbow, foot and ankle, interstitial lung disease, post-traumatic stress disorder, depression, asthma, eye disorders, traumatic brain injury, and complex regional pain syndrome.²⁹¹

In 2016, the Board rescinded and replaced its regulations concerning administrative appeals pursuant to Workers' Compensation Law section 23.²⁹² Under the new regulations, a party was required to "specify the[ir] objection or exception" and the basis therefore at the underlying hearing,²⁹³ the Board's forms (RB-89 and RB-89.1) were deemed to be the substance of the appeal, full and complete compliance with the forms was required, and any attached memo or letter was limited to eight pages.²⁹⁴ The Board then decided that anything less than full compliance would result in the dismissal of the appeal without consideration of its merits.²⁹⁵

On June 5, 2019, the Board adopted a "formulary" for prescription medication, which instead of consisting of a list of medications and prices, regulated the entirety of the prescription medication process.²⁹⁶ The formulary was accompanied by a regulatory process

²⁸⁸ *SEE* N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-456, MEDICAL TREATMENT GUIDELINES GO LIVE (2010), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_456.jsp [<https://perma.cc/RVR8-FJT4>]; N.Y. COMP. CODES R. & REGS. tit. 12, § 324.2 (2023); *supra* Part IV.C.2.

²⁸⁹ *Kigin v. N.Y. Workers' Comp. Bd.*, 24 N.E.3d 1064, 1068–69 (N.Y. 2014).

²⁹⁰ *Gasparro v. Hospice of Dutchess Cnty.*, 86 N.Y.S.3d 670, 673–74 (App. Div. 2018).

²⁹¹ *See Medical Treatment Guidelines*, N.Y. WORKERS' COMP. BD., <http://www.wcb.ny.gov/content/main/hcgp/MedicalTreatmentGuidelines/2022TreatGuide.jsp> [<https://perma.cc/X9PA-BWDQ>].

²⁹² N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-878, BOARD ADOPTS NEW ADMINISTRATIVE REVIEW, FULL BOARD REVIEW, AND APPLICATIONS FOR BOARD RECONSIDERATION REGULATIONS (2016), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_878.jsp [<https://perma.cc/TE9G-YLZB>]; N.Y. COMP. CODES R. & REGS. tit. 12, § 300.13(b) (2023).

²⁹³ N.Y. COMP. CODES R. & REGS. tit. 12, § 300.13(b)(2)(ii).

²⁹⁴ *See* N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-878, *supra* note 292; N.Y. COMP. CODES R. & REGS. tit. 12, § 300.13(b)(1).

²⁹⁵ *See, e.g., Markolovic v. MTA Bus Eastchester Depot*, 106 N.Y.S.3d 416, 417 (App. Div. 2019); *Perry v. Main Bros. Oil Co.*, 106 N.Y.S.3d 228, 229 (App. Div. 2019); *Presida v. Health Quest Sys., Inc.*, 102 N.Y.S.3d 814, 814 (App. Div. 2019); *Jones v. Human Res. Admin.*, 103 N.Y.S.3d 193, 194 (App. Div. 2019); *Swiech v. City of Lackawanna*, 101 N.Y.S.3d 775, 777, (App. Div. 2019).

²⁹⁶ *See* N.Y. COMP. CODES R. & REGS. tit. 12, § 441.4 (2023).

within which the treating physician—but not the injured worker and his or her attorney—could address disputes with the insurer.²⁹⁷

On September 16, 2019, the Board issued proposed amendments to title 12, sections 300.13 and 300.14 of the New York Codes, Rules and Regulations concerning the reopening of closed cases.²⁹⁸ To reopen any case deemed closed, the amendments required that applications be directed to the Board's Office of Appeals, be submitted on the form that is used for appeals, include evidence to support the application, and include an affidavit that the application was made within thirty days of the date the evidence became available.²⁹⁹

Some of the many potential issues associated with these regulatory amendments were that the Board no longer identifies cases as open or closed, but instead identifies the majority of claims as having “no further action” status, while in fact additional proceedings are often contemplated.³⁰⁰ This lack of clarity leaves injured workers at risk of having a request for a hearing denied on the grounds that the Board has decided that the “no further action” marking in their case was indicative of a “true closing” requiring reopening, as opposed to an administrative abeyance of the claim, as well as being subject to denial of benefits if their application is deemed untimely.³⁰¹

The regulatory amendments additionally proposed that an injured worker who has been classified as having a non-schedule permanent partial disability could not apply to reopen his or her case after the expiration of the PPD cap weeks.³⁰² This relates to the Board's unsuccessful effort to create such a rule as a matter of administrative policy, which is discussed further in Section V.B.2.

Workers' compensation practitioners, who were already aggrieved by the Board's 2016 amendments to sections 300.13 and 300.14, opposed the 2019 proposal, and the Board did not adopt the additional changes prior to the onset of the COVID-19 pandemic in March of 2020.³⁰³ The Legislature then partially invalidated the

²⁹⁷ See *id.* § 441.5(d).

²⁹⁸ See N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-1208, PROPOSED AMENDMENTS TO §300.14 AND §300.13 (2019), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_1208.jsp [<https://perma.cc/T59C-6GQN>].

²⁹⁹ 41 N.Y. Reg. 9 (Sept. 11, 2019).

³⁰⁰ See *Using eCase*, N.Y. WORKERS' COMP. BD., <http://www.wcb.ny.gov/content/ebiz/ecase/using-ecase.jsp> [<https://perma.cc/24M5-E93N>].

³⁰¹ See, e.g., *King v. City of N.Y. Parks & Recreation*, 142 N.Y.S.3d 119, 120–21 (App. Div. 2021).

³⁰² See 41 N.Y. Reg. 9 (Sept. 11, 2019).

³⁰³ See, e.g., *New Statute Bars NYS Workers' Compensation Board from Dismissing Appeals on Technicalities*, MORRISON MAHONEY (Dec. 28, 2021), <https://www.morrisonmahoney.com/blog/580-new-statute-bars-nys-workers-compensation-board-from-dismissing-appeals-on-technicalities> [<https://perma.cc/EZS4-TVPP>].

Board's existing regulation and previous Subject Numbers in 2021 by adding section 23-a to the Workers' Compensation Law.³⁰⁴ The new statute prohibited the Board from using a "mistake, omission, defect and/or other irregularity" on a cover sheet to deny an appeal, and required the Board to provide the parties with an opportunity to correct ministerial mistakes instead of using them as a basis to deny review of the merits.³⁰⁵

It is difficult to reconcile the Board's regulatory activity with the holdings in *Kaplan* and *Surace*. From *Kaplan*:

There is no reason . . . why the notice of injury served upon the Commissioner may not also contain a claim for compensation. There is nothing in the law that requires them to be two separate and distinct papers, or that they shall be phrased in any particular language. The Workmen's Compensation Law was particularly framed to avoid legal terminology and the technicalities of law pleading. It was intended that the working people themselves could make and file these claims and give the notice of injury. The cost and expense of employing attorneys were to be avoided if possible. The act was for the benefit of the workingman and his family, not for the profession. The notice, therefore, of injury and the claim for compensation are sufficient when the facts of the injury are stated with reasonable certainty, and it is also reasonably to be inferred that a claim for compensation is being made.³⁰⁶

From *Surace*: "At the root of the exemption is something more benignant than bureaucratic formalism, a dislike of complicating documents. The exemption like the compensation is for the protection of the man."³⁰⁷ The *Surace* court also stated: "We are blind to the policy of workmen's compensation if we say that the purpose of the exemption, thus emphatically guarded, is to promote the convenience of the State . . ."³⁰⁸ Far from being accessible to "the working people themselves," and free of "bureaucratic formalism," the Board's regulatory activity has created a hyper-technical and

³⁰⁴ See Act of Dec. 22, 2021, ch. 718, 2021 N.Y. Laws 1677 (codified at N.Y. WORKERS' COMP. LAW § 23-a (Consol. 2023)).

³⁰⁵ *Id.*

³⁰⁶ *Kaplan v. Kaplan Knitting Mills, Inc.*, 161 N.E. 204, 205 (N.Y. 1928).

³⁰⁷ *Surace v. Danna*, 161 N.E. 315, 316 (N.Y. 1928).

³⁰⁸ *Id.*

formalistic system in which injured workers require not only the services of an attorney, but one who is intimately familiar with the minutest details of the administrative system.

B. Workers' Compensation Board Decisions

The regulatory process discussed above was preceded by a marked shift in the Board's decisions on administrative appeals from WCL judge decisions. The issues covered by this shift can be generally grouped into four broad areas: schedule loss of use, non-schedule permanent partial disability, labor market attachment, and expansion of administrative authority. The readily identifiable trends in each of these areas were accompanied by innumerable fact-specific decisions in which the Board increasingly departed from the idea that the employer or insurer should only be successful in defeating a claim "when the undisputed facts in connection with the testimony of the claimant supported by every favorable inference that can be drawn therefrom do not warrant an award."³⁰⁹

1. Schedule Loss of Use

The 2017 legislation directed the Board to prepare revised "permanency impairment guidelines [which] shall be reflective of advances in modern medicine that enhance healing and result in better outcomes."³¹⁰ This directive was intended to apply to the Board's evaluation of schedule loss of use for permanent loss or loss of use of limbs (the Board having revised its guidelines for non-schedule permanent partial disability and loss of wage-earning capacity in 2012).³¹¹ Under its then-existing guidelines, the Board generally assigned a percentage loss or range of percentage loss based on the nature of the injury or surgery, in many instances with addition for anatomic deficits (such as loss of range of motion).³¹²

³⁰⁹ *In re Heitz*, 112 N.E. 750, 750 (N.Y. 1916).

³¹⁰ Act of Apr. 10, 2017, ch. 59, pt. NNN, subpt. B, sec. 1, § 15(3)(x), 2017 N.Y. Laws 253, 393.

³¹¹ See N.Y. WORKERS' COMP. BD., WORKERS' COMPENSATION GUIDELINES FOR DETERMINING IMPAIRMENT 2 (2017), <http://www.wcb.ny.gov/2018-Impairment-Guidelines.pdf> [<https://perma.cc/84HP-CWWY>].

³¹² See N.Y. WORKERS' COMP. BD., MEDICAL GUIDELINES 4–5 (1996), <http://www.wcb.ny.gov/content/main/hcpp/mdguide.pdf> [<https://perma.cc/8NUL-EAK2>]; N.Y. WORKERS' COMP. BD., NEW YORK STATE GUIDELINES FOR DETERMINING PERMANENT IMPAIRMENT AND LOSS OF WAGE EARNING CAPACITY 10 (2012), <http://www.wcb.ny.gov/content/main/hcpp/ImpairmentGuidelines/2012ImpairmentGuide.pdf> [<https://perma.cc/SW8B-DWCV>] [hereinafter 2012 IMPAIRMENT GUIDELINES].

Within five months after the 2017 legislation was enacted, the Board issued a set of proposed guidelines that virtually eliminated compensation for schedule loss of use.³¹³ Under the proposed guidelines, compensation for most injuries and surgeries was eliminated entirely, the “normal” range of motion of most limbs was redefined downward, and the percentage loss of use assigned to deficits in the (administratively deflated) range of motion was slashed by ninety percent or more.³¹⁴

This effort to administratively eliminate the benefits that the statute had provided for over a century resulted in significant controversy.³¹⁵ It was obviously inconsistent with the rule “that we should not interpret such provisions too narrowly for the purpose of defeating a recovery” for scheduled loss of use.³¹⁶ Following a legislative hearing, which included correspondence from both the Senate and Assembly and its receipt of thousands of comments from injured workers, the Board issued a second set of proposed guidelines with relatively minor departures from its longstanding approach on November 22, 2017.³¹⁷ It then adopted these guidelines and made them applicable to all cases that did not have a permanency report on file as of January 1, 2018.³¹⁸

The administrative effort to neutralize the statutory provision for schedule loss of use did not end with the withdrawal of its first set of proposed guidelines. Instead, the Board developed a number of new approaches to reduce or deny benefits for schedule loss of use.

³¹³ See N.Y. WORKERS' COMP. BD., WORKERS' COMPENSATION GUIDELINES FOR DETERMINING IMPAIRMENT, FIRST EDITION (2017), on file with author and available for download at <https://www.greyandgrey.com/post/the-2017-schedule-loss-debate> [https://perma.cc/9C4S-RXL5]; see also 39 N.Y. Reg. 21–23 (Sept. 6, 2017); see also N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-978, CHAIR PROPOSES NEW PERMANENT IMPAIRMENT GUIDELINES, (2017), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_978.jsp [https://perma.cc/27SM-G6YD].

³¹⁴ N.Y. WORKERS' COMP. BD., WORKERS' COMPENSATION GUIDELINES FOR DETERMINING IMPAIRMENT, FIRST EDITION (2017), *supra* note 313.

³¹⁵ See, e.g., *Worker's Compensation Board Proposes Drastic Changes to Schedule Loss of Use Awards to be Implemented January 2018*, CARROTHERS & CLOUGH, PLLC, <http://nylawcc.com/workers-compensation-board-proposes-drastic-changes-to-schedule-loss-of-use-awards-to-be-implemented-january-2018/> [https://perma.cc/2234-FZDY].

³¹⁶ *In re Petrie*, 109 N.E. 549, 550 (N.Y. 1915).

³¹⁷ See N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-1005, BOARD ANNOUNCES SECOND COMMENT PERIOD FOR PROPOSED PERMANENT IMPAIRMENT GUIDELINES (2017), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_1005.jsp [https://perma.cc/HU7Y-WLGS].

³¹⁸ See N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-1011, 2018 PERMANENT IMPAIRMENT GUIDELINES FOR SCHEDULE LOSS OF USE EVALUATIONS (2017), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_1011.jsp [https://perma.cc/BMP6-ENBJ].

The Board's principal approach was the creation of a policy that an injured worker who had permanent injuries to both a limb and a non-schedule site (such as the neck or back), but had returned to work at full wages, was not entitled to compensation for the schedule loss.³¹⁹ The Board took the position that if there was a finding of non-schedule permanent partial disability to one body part, then this created a potential entitlement to benefits for that injury which the injured worker could "virtual[ly] bank[]" unless and until there was an actual loss of wages.³²⁰ The Board additionally held that this benefit (which, despite the language of the opinion, is hypothetical) was the only benefit to which the injured worker was entitled, and that its existence precluded an award of actual benefits for schedule loss of use.³²¹

Thus, under the Board's approach, a worker whose injury was limited to a limb was entitled to an award for schedule loss of use, but a worker who had the same limb injury and had also injured his or her spine was entitled to nothing. Similarly, a worker who injured a limb in one accident and the spine in a different accident would be entitled to benefits, but one who suffered both injuries in the same accident would not.³²²

The Board's approach to the issue was rejected by the appellate division in *Taher v. Yiota Taxi*.³²³ In *Taher*, the court explained:

A claimant who sustains both schedule and nonschedule injuries in the same accident may receive only one initial award because an SLU award and an award made for permanent partial disabilities are both intended to compensate a claimant for loss of wage-earning capacity sustained in a work-related accident and concurrent payment of an award for a schedule loss and an award for a nonschedule permanent partial disability for injuries arising out of the same work-related accident would amount to duplicative compensation. Nevertheless, all impairments sustained by a claimant, whether resulting from schedule or

³¹⁹ See *Metro. Hosp.*, WCB No. G0761641, 2016 NYWCLR (LRP) LEXIS 253, *7-8 (Sept. 6, 2016). This was in large part enabled by the Board's 2012 Guidelines, which assigned "severity rankings" to virtually all spinal injuries, thus providing a basis to find "permanency," even in the absence of any functional limitations, and where the worker had returned to full and unrestricted employment. See 2012 IMPAIRMENT GUIDELINES, *supra* note 312, at 71-75.

³²⁰ See *Metro. Hosp.*, 2016 NYWCLR (LRP) LEXIS 253, at *7-8.

³²¹ See *id.* at *8.

³²² See *Taher v. Yiota Taxi, Inc.*, 78 N.Y.S.3d 500, 502 (App. Div. 2018).

³²³ See *id.* at 503.

nonschedule injuries, must be considered in determining lost wage-earning capacity attributable to a nonschedule permanent partial disability classification. *However, in the unique circumstance where no initial award is made based on a nonschedule permanent partial disability classification, a claimant is entitled to an SLU award.*³²⁴

After citing its earlier opinion in *Gallman v. Walt's Tree Service, Inc.*,³²⁵ the court went on to hold:

*[C]ontrary to the position taken by the Board, claimant may ultimately receive an SLU award notwithstanding his nonschedule classification for the injuries that he sustained in the underlying work-related accident. Claimant may not, however, receive both an SLU award and nonschedule award for the impairments that he sustained in the same work-related accident.*³²⁶

Finally, the court noted that if the injured worker later became entitled to an award for his nonschedule permanent partial disability, the carrier would be entitled to take credit for its previous payment of a schedule loss award, just as occurs when any other schedule loss award is rescinded due to a change in condition and further disability.³²⁷

The court's decision did not end the Board's administrative quest to diminish worker benefits for schedule loss of use. Instead, the Board simply refused to adhere to the court's decision. In *In re Trevi Nail Corp.*,³²⁸ a WCL judge rejected the unanimous medical opinions that there were no permanent neck or back injuries, and instead classified the claimant as having a nonscheduled permanent partial disability.³²⁹ The claimant appealed, contending that even if the neck and back injuries were properly classified, then because no compensation was awarded for the nonschedule permanent partial disability, the schedule loss awards should be entered pursuant to *Taher*.³³⁰

³²⁴ *Id.* at 502–03 (emphasis added) (citations omitted).

³²⁵ *Gallman v. Walts Tree Serv., Inc.*, 352 N.Y.S.2d 516 (App. Div. 1974).

³²⁶ *Taher*, 78 N.Y.S.3d at 503 (emphasis added).

³²⁷ *See id.* at 503 n.2 (citing *Sunukjian v. Price Chopper*, 12 N.Y.S.3d 652, 653 (App. Div. 2015)).

³²⁸ *Trevi Nail Corp.*, WBC No. G1568888, 2018 NY Wrk. Comp. LEXIS 11587 (Nov. 15, 2018).

³²⁹ *See id.* at *3.

³³⁰ *See id.* at *4–5.

The Board held that “the holding in *Taher* neither warrants nor necessitates a rescission of the finding that the” claimant was not entitled to awards for schedule loss of use.³³¹ Instead, the Board found that “[t]he principle holding in *Taher*, that a claimant may be entitled to a SLU award in the unique circumstances that they are not entitled to a nonschedule award, failed to address the amenability provisions of the 2018 Permanency Guidelines.”³³² The Board went on to reiterate its discredited view that “[t]he virtual banking of cap weeks is the benefit received under such circumstances and is the benefit permitted by WCL 15(3) and the Permanency Guidelines.”³³³

There was no interpretation of the decision in *Trevi Nail* other than that the Board simply determined that it would not accept the court’s statement of the law, and that it would continue to apply the very same legal standard that the court had expressly overruled.

The Board repeated its recalcitrance in *Trevi Nail* in a number of other decisions.³³⁴ In each decision the Board used the same language to conclude that the court “failed” to arrive at a decision acceptable to the Board, proceeding to disregard the holding in *Taher* and to deny a schedule loss award based on the Board’s theory that virtual banking of non-schedule permanent partial disability benefits is the benefit provided by the statute³³⁵—notwithstanding the fact that there is no provision of the Workers’ Compensation Law that refers to virtual banking or any other hypothetical benefit.

The issue ultimately returned to the appellate division, which invalidated the Board’s policy for the second time in a trio of decisions issued on February 27, 2020.³³⁶ In *Arias v. City of New York*, the court wrote that “the Board’s disregard of *Matter of Taher* was in error” and proceeded to seriatim overrule each of the Board’s contentions.³³⁷ The Board was then compelled to issue a new “Subject Number” rescinding its previous policy and agreeing to reopen and

³³¹ *Id.* at *5.

³³² *Id.* at *7.

³³³ *Id.* at *8.

³³⁴ See, e.g., N.Y.S. Office of Tech., WCB No. 50208277, 2019 NY Wrk. Comp. LEXIS 1094, at *6–7 (Jan. 30, 2019); Town of Oyster Bay Sanitation, WCB No. G1178308, 2019 NY Wrk. Comp. LEXIS 403, at *6–7 (Jan. 14, 2019); FNCS Enters., Inc., WCB No. G0718701, 2019 NY Wrk. Comp. LEXIS 783, at *10, *13–14 (Jan. 8, 2019).

³³⁵ See N.Y.S. Office of Tech., 2019 NY Wrk. Comp. LEXIS 1094, at *7; *Town of Oyster Bay Sanitation*, 2019 NY Wrk. Comp. LEXIS 403, at *6; *FNCS Enter., Inc.*, 2019 NY Wrk. Comp. LEXIS 783, at *10.

³³⁶ See *Arias v. City of New York*, 120 N.Y.S.3d 203, 207 (App. Div. 2020); *Fernandez v. N.Y. Univ. Benefits*, 120 N.Y.S.3d 207, 208 (App. Div. 2020); *Saputo v. Newsday, LLC*, 118 N.Y.S.3d 797, 799 (App. Div. 2020).

³³⁷ *Id.* at 204–06.

revisit claims in which it had improperly denied compensation to the injured worker.³³⁸

After its failed efforts to administratively nullify the appellate division's decisions on this issue, the Board then determined that it would construe those decisions as narrowly as possible. Thus, in *Gambardella v. New York City Transit Authority*³³⁹ and other cases,³⁴⁰ the Board held that a worker with both a nonschedule permanent partial disability and a schedule loss could only be compensated for the schedule loss if he or she had returned to work at full wages, as had the claimants in *Taher* and *Arias*.³⁴¹

In *Gambardella*, the injured worker never missed any time from work because of his injuries and retired based on his years of service after he sought a decision about his schedule loss of use, but before the award was made.³⁴² The Board found that the "decisions in *Taher* and *Arias* only apply to claimants who have returned to work at preinjury wages at the time of classification, and, because claimant had voluntarily retired, he was not attached to the labor market at the time of classification and therefore not entitled to any award."³⁴³

The appellate division again reversed the Board's decision, holding instead that "[t]o the contrary, the rule that we announced was broader" and that "[t]he Board's interpretation and application of the foregoing rule is too narrow."³⁴⁴ Instead:

[T]he salient condition for a claimant to receive an SLU award where he or she has both schedule and nonschedule impairments arising out of the same accident is the fact that he or she is ineligible to receive a nonschedule award at the time of classification, whether that be due to his or her return to work at preinjury wages or, as here, voluntary retirement.³⁴⁵

³³⁸ *SEE* N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-1211 PROCEDURE FOR DETERMINING AWARDS FOR CERTAIN SCHEDULE LOSSES OF USE (2020), https://www.wcb.ny.gov/content/main/SubjectNos/sn046_1211.jsp [<https://perma.cc/UP8Z-LT64>].

³³⁹ *Gambardella v. N.Y.C. Transit Auth.*, 167 N.Y.S.3d 213 (App. Div. 2022).

³⁴⁰ *E.g.*, *Manhattan & Bronx Surface Transit*, WCB No. G2268970, 2022 NY Wrk. Comp. LEXIS 1162, at *6 (Mar. 3, 2022); *Robert Half Int'l, Inc.* WCB No. 1871892, 2020 NY Wrk. Comp. LEXIS 15345, at *7-8 (Nov. 13, 2020); *Clinton County NYS*, WCB No. 1941268, 2021 NY Wrk. Comp. LEXIS 2465 (Apr. 16, 2021).

³⁴¹ *See id.* at 214.

³⁴² *See id.*

³⁴³ *Id.*

³⁴⁴ *Id.* at 215.

³⁴⁵ *Id.*

The Board, joined by the Transit Authority, subsequently moved for leave to appeal this decision to the Court of Appeals.³⁴⁶

A second approach the Board employed was to reduce a schedule loss award made for injury to one body part by a previous award made for injury to a different body part, as it did in *Genduso v. New York City Department of Education*.³⁴⁷ In *Genduso*, the claimant “sustained work-related injuries to his right ankle and right knee when a ladder holding a co-worker toppled over on him.”³⁴⁸ He received an award for the schedule loss of use of his leg that incorporated the deficits from both the knee and ankle injuries.³⁴⁹ When he reinjured the same knee in a later accident, the Board found that previous deficits from both the knee and the ankle injuries could be deducted from the award for the later knee injury.³⁵⁰ On the specific facts of that case, the Board’s decision was upheld by the appellate division.³⁵¹ The Board then expanded its interpretation of *Genduso* to permit the deduction of any previous schedule loss involving one part of a limb from a later schedule loss involving a different part of the same limb.³⁵² Thus, if the injured worker was found to have a 22.5% loss of use of the arm due to an elbow injury, and was later found to have a 27.5% loss of use of the same arm due to a shoulder injury, the Board would only make an award for a 5% loss of use of the arm in the later case after deducting the previous 22.5%.³⁵³

The Board’s position was ultimately rejected by the Court of Appeals in *Johnson v. City of New York*. Instead, the court held that “separate [schedule loss] awards for different injuries to the same statutory member are contemplated by” the statute, and that when a second injury causes “an increased loss of use, the claimant is entitled

³⁴⁶ Both motions were dismissed. See *Gambardella v. N.Y.C. Transit Auth.*, 2022 N.Y. LEXIS 2361 (2022); *Gambardella v. N.Y.C. Transit Auth.*, 2022 N.Y. LEXIS 2371 (2022).

³⁴⁷ *Genduso v. N.Y.C. Dep’t of Educ.*, 82 N.Y.S.3d 662, 663–64 (App. Div. 2018).

³⁴⁸ *Id.* at 663.

³⁴⁹ *Id.*

³⁵⁰ *Id.* at 663–64.

³⁵¹ *Id.* at 664.

³⁵² See, e.g., *Marriot Marquis*, WCB No. 1523733, 2019 N.Y. Wrk. Comp. LEXIS 6524, at *4 (June 21, 2019) (citing *Genduso*, 82 N.Y.S.3d at 663); *Town of Huntington*, WCB No. 1285273, 2019 N.Y. Wrk. Comp. LEXIS 5864, at *3 (June 4, 2019) (citing *Genduso*, 82 N.Y.S.3d at 663); *Covington v. N.Y.C. Dep’t of Corr.*, 129 N.Y.S.3d 863, 864 (App. Div. 2020) (citing *Blair v. SUNY Syracuse Hosp.*, 125 N.Y.S.3d 490, 491–92 (App. Div. 2020); *Rybka v. Cent. N.Y. Psychiatric Ctr.*, 132 N.Y.S.3d 341, 341 (App. Div. 2020); *Hluska v. Cent. N.Y. Psychiatric Ctr.*, 132 N.Y.S.3d 338, 338–39 (App. Div. 2020) (citing *Kleban v. Cent. N.Y. Psychiatric Ctr.*, 128 N.Y.S.3d 318, 320 (App. Div. 2020); *Green v. N.Y.C. Dep’t of Corr.*, 137 N.Y.S.3d 750, 751 (App. Div. 2021); *Neely v. N.Y.C. Dep’t of Corr.*, 137 N.Y.S.3d 749, 749–50 (App. Div. 2021).

³⁵³ See *Liuni v. Gander Mountain*, 135 N.Y.S.3d 201, 202–03 (App. Div. 2020), *rev’d*, *Johnson v. City of New York*, 195 N.E.3d 1 (N.Y. 2022).

to [a schedule loss] award commensurate with that increased loss of use.”³⁵⁴ Thus, under the Court of Appeals decision, the claimant in *Liuni* was eligible for additional compensation if the “second injury resulted in an increased loss of use of his left arm.”³⁵⁵ This would mean that Liuni should receive compensation for an additional 27.5% schedule loss, instead of 5%.³⁵⁶

The Board also contends that schedule losses to a body part that were evaluated under the 1996 guidelines should be deducted from a new schedule loss to the same body part evaluated under the 2018 guidelines.³⁵⁷ Because the new guidelines are more restrictive than the previous guidelines, this often results in a larger deduction than would have been appropriate had the previous injury been evaluated under the same standard as the new injury. By way of illustration, a total knee replacement was valued as a 50–55% schedule loss of use under the 1996 guidelines,³⁵⁸ whereas it may be valued as low as a 35% schedule loss under the 2018 guidelines.³⁵⁹ Thus, a worker could have a less significant knee injury that was valued under the 1996 guidelines as a 35% schedule loss of use, later have a second injury after 2018 that requires a total knee replacement, and receive no compensation in the second case because the injury that was evaluated under the old guidelines is subtracted from the injury being evaluated under the new guidelines. By contrast, if the new injury and the old injury were evaluated under the same standard, the new injury would result in an additional award. In addition, the Board has argued that it is entitled to deny compensation for an injury to a limb, no matter how severe and no matter what functional impact it may have, if the specific diagnosis is not listed in its guidelines.³⁶⁰ The Board’s position on this issue has twice been rejected by the appellate division.³⁶¹

*Estate of Youngjohn v. Berry Plastics Corp.*³⁶² is another example of the Board’s determination to administratively diminish

³⁵⁴ *Johnson*, 195 N.E.3d at 3.

³⁵⁵ *Id.* at 9–10.

³⁵⁶ *See id.*

³⁵⁷ *See, e.g.*, *Pepsi Cola*, WCB No. 50117763, 2019 N.Y. Wrk. Comp. LEXIS 6763 (June 28, 2019) (citing *Genduso*, 82 N.Y.S.3d at 663).

³⁵⁸ N.Y. WORKERS’ COMP. BD., MEDICAL GUIDELINES *supra* note 312, at 19.

³⁵⁹ N.Y. WORKERS’ COMP. BD., WORKERS’ COMPENSATION GUIDELINES FOR DETERMINING IMPAIRMENT, *supra* note 311, at 45.

³⁶⁰ *See, e.g.*, *Semrau v. Coca-Cola Refreshments USA Inc.*, 138 N.Y.S.3d 227, 228–29 (App. Div. 2020); *Blue v. N.Y. Off. of Child. & Fam. Servs.*, 170 N.Y.S.3d 631, 633 (App. Div. 2022).

³⁶¹ *See Semaru*, 138 N.Y.S.3d at 231; *Blue*, 170 N.Y.S.3d at 636.

³⁶² *Estate of Youngjohn v. Berry Plastics Corp.*, 94 N.Y.S.3d 396 (App. Div. 2019), *aff’d*, 169 N.E.3d 589, 600 (N.Y. 2021).

compensation for schedule loss of use.³⁶³ In 2009, the Legislature amended Workers' Compensation Law section 15(3)(u) to require payment of schedule loss awards in a lump sum instead of periodically in order to maximize the benefit to injured workers.³⁶⁴ Prior to this amendment, the periodic payment requirement resulted in the payment of the portion of the schedule loss that had "accrued" between the date of accident and the date of death (plus funeral expenses), and the forfeiture of the remainder of the award.³⁶⁵

In *Youngjohn*, the Board decided that instead of maximizing payment to the family of a deceased worker, the 2009 amendment should instead be interpreted to deny payment of any portion of the award except funeral expenses.³⁶⁶ The appellate division reversed this decision, finding that the statutory amendment did not give the injured worker's family lesser benefits than had been payable under the rule in *Healey*.³⁶⁷ The Court of Appeals affirmed this decision.³⁶⁸

It is evident from the foregoing that there has been a significant administrative effort to reduce schedule loss of use benefits for injured workers. This is a departure from the approach taken by the Legislature, in which any limitation of one statutory benefit has been accompanied by expansion of another, and by the judiciary, which has continued to interpret the law "with fair liberality, to the end of securing the benefits which it was intended to accomplish."³⁶⁹

2. Permanent Partial Disability

The administrative effort to limit benefits for injured workers has included non-schedule permanent partial disability. As discussed in Part IV.C.1, the 2007 legislation imposed duration limits (caps) on non-schedule permanent partial disability benefits, which are one of five statutory categories of workers' compensation benefits.³⁷⁰ The Legislature did not, however, impose time limitations on any other category of benefits under the law until 2017, when it added a time limitation on temporary partial disability benefits in cases where the injured worker was eventually found to have a permanent partial

³⁶³ See *id.* at 398.

³⁶⁴ See Act of Aug. 26, 2009, ch. 351, sec. 2, § 15(3)(u), 2009 N.Y. Laws 1063, 1063.

³⁶⁵ See *Healey v. Carroll*, 125 N.Y.S.2d 734, 735–36 (App. Div. 1953).

³⁶⁶ See *Youngjohn*, 94 N.Y.S.3d at 398.

³⁶⁷ *Id.* at 400.

³⁶⁸ *Estate of Youngjohn v. Berry Plastics Corp.*, 169 N.E.3d 589, 600 (N.Y. 2021).

³⁶⁹ *In re Petrie*, 109 N.E. 549, 550 (N.Y. 1915).

³⁷⁰ The law provides benefits for permanent total disability, temporary total disability, schedule loss, and temporary partial disability in addition to non-schedule permanent partial disability. See N.Y. WORKERS' COMP. §§ 15(1)–(2), (3)(a)–(u), (5).

disability.³⁷¹ It also did not impose any limitation on the Board's continuing jurisdiction and authority to modify awards and reclassify a disability, the last of those limitations having been abandoned in 1933.³⁷²

Following the 2007 legislation, the Board originally concluded that if an injured worker had a change in his or her condition after being classified permanently partially disabled, the PPD caps did not apply to periods of temporary total disability because the latter benefits fell under a section of the statute in which the Legislature had not imposed any time limitations.³⁷³

However, on February 11, 2019, the Board issued a decision in *Jacobi Medical Center*³⁷⁴ in which it disavowed its prior decisions and held that after an injured worker is classified permanently partially disabled: (1) his or her rate cannot be adjusted based on any later change in condition (the injured worker in *Jacobi* having had two spinal surgeries after classification);³⁷⁵ (2) the duration caps continue to apply to any period of disability after classification, regardless of its character;³⁷⁶ and (3) any request for reclassification must be made prior to the expiration of the PPD cap.³⁷⁷

The impact of this decision (which was the continuation of an administrative trend regarding permanent partial disability that is discussed further in Part V.C.1) was to limit substantive benefits—for temporary total disability, temporary partial disability, increase in permanent partial disability, and even permanent total disability—for workers who were classified permanently partially disabled. A separate impact of this decision was to limit the ability of workers to access benefits under the statute because the Board's decision self-limited the authority that it had been granted by the Legislature.³⁷⁸ The Board then incorporated this self-limitation into

³⁷¹ See N.Y. WORKERS' COMP. § 15(3)(w) (Consol. 2023); see also N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-936, 2017 WORKERS' COMPENSATION REFORM (2017), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_936.jsp [<https://perma.cc/T4F4-FFZQ>].

³⁷² See *supra* Part III.A.4.

³⁷³ See, e.g., Kraft Foods, Inc., WCB No. G0160350, 2018 N.Y. Wrk. Comp. LEXIS 9781, at *5 (Sept. 28, 2018); Southampton Elementary Sch., WCB No. G0026054, 2018 N.Y. Wrk. Comp. LEXIS 8097, at *7–8 (Sept. 6, 2018); Heritage Ctrs., WCB No. 80805401, 2018 N.Y. Wrk. Comp. LEXIS 4538, at *16 (May 18, 2018).

³⁷⁴ *Jacobi Med. Ctr.*, WCB No. 00825967, 2019 NY Wrk. Comp. LEXIS 1557 (Feb. 11, 2019).

³⁷⁵ *Id.* at *2–3, *16–17.

³⁷⁶ *Id.* at *11–13.

³⁷⁷ *Id.* at *17–18. In *Jacobi*, the Board *sua sponte* retroactively modified awards that had been entered at seven hearings in accordance with this new policy, concluding that based on its own modification, the worker's time frame to apply for reclassification had expired. See *id.* at *2–6, *15–16.

³⁷⁸ See *id.* at *11–14.

its proposed amendments to title 12, section 300.13 of the New York Codes, Rules and Regulations, which would expressly prohibit reclassification after the expiration of an injured worker's PPD cap.³⁷⁹ These proposed amendments were not adopted because their underlying theory was invalidated by the series of appellate division decisions discussed hereafter.

In short, the decision in *Jacobi* and the proposed regulation amounted to an abdication of the Board's statutory authority (and historic obligation) to administer the statute in order to ensure the delivery of benefits to injured workers. In its place, the Board created a one-time adjudication, after which the workers' compensation system's responsibility to the injured worker would end.³⁸⁰

Once again, the appellate division rejected the Board's effort to administratively truncate the benefits provided by the statute. In *Sanchez v. Jacobi Medical Center*,³⁸¹ the court held that "[t]he Workers' Compensation Law provides compensation for four distinct classes of injury: permanent total disability, temporary total disability, permanent partial disability and temporary partial disability."³⁸² Because "at any particular time, a claimant can be classified under one, and only one, of the four categories of disability . . . the Board did not comply with the statute when it counted the weeks during which claimant was classified as temporarily totally disabled against the cap for his nonschedule" permanent partial disability award.³⁸³

Moreover, the court held "that the Board's determination with respect to the timeliness" of an application to reopen "was in error" because it was "in direct contravention to the plain language of" the statute.³⁸⁴ The court, therefore, reversed the Board's decision in its entirety and remanded the case for further proceedings not inconsistent with its decision.³⁸⁵

On remand, the Board, as it had done in *Taher*, attempted to administratively nullify the appellate division's decision.³⁸⁶ Rather than permit development of the record as the appellate division had

³⁷⁹ See *supra* Part V.A.

³⁸⁰ See *Jacobi*, 2019 NY Wrk. Comp. LEXIS 1557, at *11–14.

³⁸¹ See *Sanchez v. Jacobi Med. Ctr.*, 118 N.Y.S.3d 792 (App. Div. 2020).

³⁸² *Id.* at 794.

³⁸³ *Id.* at 795–96.

³⁸⁴ *Id.* at 797.

³⁸⁵ *Id.* The appellate division subsequently also rejected the Board's attempt to administratively nullify the provision of Workers' Compensation Law section 35 that permits an injured worker to apply for a classification of industrial total disability at any time. See *Minichiello v. N.Y.C. Dep't of Homeless Servs.*, 136 N.Y.S.3d 182, 184 (App. Div. 2020).

³⁸⁶ See *Sanchez v. Jacobi Med. Ctr.*, 146 N.Y.S.3d 318, 321 (2021); see also *supra* Part V.B.1.

suggested, the Board *sua sponte* reduced the periods of temporary total disability in order to minimize their extension of the permanent partial disability cap weeks and reclassified other periods of temporary disability as permanent partial disability in order to count those weeks as cap weeks.³⁸⁷

The appellate division again reversed the Board, holding that it was not at liberty to modify periods of temporary total disability that the court had previously upheld and that its modification of other awards without holding a hearing violated the injured worker's due process rights and was an abuse of the Board's discretion.³⁸⁸ The court further held that based on its own guidelines, which the Board had disregarded, the Board could not find that an injured worker was permanently partially disabled in the absence of evidence that the worker was at maximum medical improvement.³⁸⁹

The inescapable conclusion is that—but for the bulwark provided by the courts—the Board would abandon, as expeditiously as possible, the “widespread belief in [the Workers' Compensation Law's] value as a means of protecting workingmen and their dependents from want in case of injury.”³⁹⁰

3. Voluntary Withdrawal from the Labor Market

Only a miniscule number of the Board's decisions are appealed to the appellate division. For example, in 2006 there were 266,539 WCL judge decisions.³⁹¹ Only 14,512 of those decisions—about five percent—were appealed to the Board.³⁹² That same year, the appellate division issued in appeals from the Board Panel—less than one percent of the number of Board Panel decisions and less than five one-hundredths of one percent of the number of WCL judge decisions.³⁹³ The appellate division's decisions on an issue therefore usually represent a tiny fraction of the number of cases the Board has decided on that subject. Thus, a stark change in the number of appellate decisions on an issue is generally a reliable barometer of a significant shift in the Board's approach.

³⁸⁷ See *Sanchez*, 146 N.Y.S.3d at 321–22.

³⁸⁸ *Id.* at 322–23.

³⁸⁹ See *id.* at 322; see also *O'Flaherty v. MRZ Trucking Corp.*, 148 N.Y.S.3d 282, 286 (App. Div. 2021).

³⁹⁰ *Post v. Burger & Gohlke*, 111 N.E. 351, 353 (N.Y. 1916).

³⁹¹ N.Y. WORKERS' COMP. BD., 2006 ANNUAL REPORT 13 (2006), http://www.wcb.ny.gov/content/main/TheBoard/2006AnnualReport_Web.pdf [<https://perma.cc/7ZVE-6NGM>].

³⁹² *Id.*

³⁹³ *Id.* at 16.

The earliest notable pro-employer shift in the Board's decisions can be traced to 1999 and concerns the issue of voluntary withdrawal from the labor market. From 1914 until 1999, there were fewer than ten reported appellate division decisions on the issue,³⁹⁴ in keeping with the established principle that an injured worker was entitled to benefits for the compensable disability unless the connection between the injury and the loss of earnings was interrupted by an event unrelated to the disability.³⁹⁵

In the next four years, from 1999 through 2002, there were fourteen reported appellate division decisions on this issue—almost as many as in the eighty years before.³⁹⁶ The change in the Board's approach to the issue is exemplified by *Evans v. Jewish Home & Hospital*,³⁹⁷ in which the Board found that the worker had voluntarily withdrawn from the labor market because he had not been advised to retire by a doctor.³⁹⁸ The imposition of this new burden on the worker was reversed by the appellate division.³⁹⁹

In the decade from 2003 through 2012 (when *Zamora* was decided), the figure leaped to eighty-seven reported appellate division decisions on the issue.⁴⁰⁰ This was attributable to the onset of Board decisions holding—contrary to well-established precedent—that an injured worker was obligated to demonstrate attachment to the labor market as a condition of his or her receipt of partial disability benefits, and that the failure to do so represented a voluntary withdrawal from the labor market.⁴⁰¹ The Board's decisions on this issue were repeatedly reversed by the appellate division.⁴⁰²

The trend in the number of appellate division decisions on the issue of voluntary withdrawal from the labor market is shown in Table 5.

³⁹⁴ See results of LEXIS search for “workers compensation” & “voluntary withdrawal” & “labor market,” narrowed to published New York appellate division decisions from January 1, 1914, to December 31, 1999.

³⁹⁵ See, e.g., *Roberts v. Gen. Elec. Co.*, 174 N.Y.S.2d 533, 535 (App. Div. 1958).

³⁹⁶ See results of LEXIS search for “workers compensation” & “voluntary withdrawal” & “labor market,” narrowed to published New York appellate division decisions from January 1, 1999, to December 31, 2002.

³⁹⁷ *Evans v. Jewish Home & Hosp.*, 734 N.Y.S.2d 678 (App. Div. 2001).

³⁹⁸ *Id.* at 679.

³⁹⁹ *Id.* at 680.

⁴⁰⁰ See results of LEXIS search for “workers compensation” & “voluntary withdrawal” & “labor market,” narrowed to published New York appellate division decisions from January 1, 2003, to December 31, 2012.

⁴⁰¹ See, e.g., *Tipping v. Nat'l Surface Cleaning Mgmt., Inc.*, 816 N.Y.S.2d 202, 203 (App. Div. 2006).

⁴⁰² See, e.g., *id.* at 203–04; *Leeber v. LILCO*, 816 N.Y.S.2d 205, 206 (App. Div. 2006); *Pittman v. ABM Indus., Inc.*, 806 N.Y.S.2d 301, 303 (App. Div. 2005); *Jiminez v. Waldbaums*, 780 N.Y.S.2d 799, 800 (App. Div. 2004).

Table 5. Appellate Division Decisions: Voluntary Withdrawal from the Labor Market

Era	Length of Era	Number of App. Div. Decisions	App. Div. Decisions per Year
1914–1998	85 years	9	0.11
1999–2002	4 years	14	3.5
2003–2012	10 years	87	8.7

It is evident that there was a significant shift in the Board's approach to this issue in the late 1990s, as the rate of appellate division appeals on the subject increased more than fourteen-fold compared to the previous eight decades.⁴⁰³ The trend then continued to accelerate in the early 2000s, as the appeal rate on the issue again more than doubled.⁴⁰⁴ Considering the ratio of appellate division decisions to Board Panel and WCL Judge decisions, each appellate division opinion likely represents hundreds or thousands of cases in which the issue was decided by the Board.

As discussed above, the driving factor behind this trend was the Board's administrative decision to impose a new requirement (proof of labor market attachment) upon a group of workers (partially disabled workers who had not voluntarily withdrawn from the labor market). This culminated in 2012 in *Zamora*, in which the Board elected to affirmatively appeal from the appellate division's decision in favor of the injured worker and sought a decision from the Court of Appeals denying her benefits.⁴⁰⁵ *Zamora* was the first—but not the last—case in the history of the New York Workers' Compensation Law in which the Board chose to adopt the employer and insurer's position and to litigate in the courts against the injured worker.⁴⁰⁶

⁴⁰³ See *supra* Table 5.

⁴⁰⁴ See *supra* Table 5.

⁴⁰⁵ See *Zamora v. N.Y. Neurologic Assocs.*, 970 N.E.2d 823, 824–25 (N.Y. 2012).

⁴⁰⁶ Recently, the Board litigated a case against a different injured worker involving a similar issue. See *O'Donnell v. Erie County*, 146 N.E.3d 1171, 1175–76 (N.Y. 2020).

After the decision in *Zamora*, the Board adopted an administrative policy that it would require every injured worker to demonstrate attachment to the labor market if the issue was raised by the employer—without engaging in any analysis about whether the separation from employment was voluntary or involuntary, and without considering whether it could be inferred that any individual worker's loss of wages flowed from the compensable disability.⁴⁰⁷

The appellate division has, however, periodically rejected the Board's decisions on this issue. In *Poulard v. Southside Hospital*,⁴⁰⁸ the court held that it was improper for the Board to require proof of attachment to the labor market where there was no evidence of a voluntary withdrawal from the labor market and there had been no finding of permanent partial disability.⁴⁰⁹ In *Bowers v. New York City Transit Authority*,⁴¹⁰ the court held that the Board could not require proof of labor market attachment before a finding was made about whether the worker was totally or partially disabled.⁴¹¹ In *Delk v. Orange & Rockland*,⁴¹² where the Board made a finding that there was no labor market attachment prior to the date that the employer had raised the argument, the appellate division reversed the decision, observing that it violated the Board's own stated policy on the issue.⁴¹³ And in *Policarpio v. Rally Restoration Corp.*,⁴¹⁴ where the Board's decision was patently contrary to the evidence, the court reversed the Board's finding that the injured worker's benefits were forfeited by failure to demonstrate attachment to the labor market.⁴¹⁵ And in *Hernandez v. AABCO Sheet Metal*,⁴¹⁶ the court held that the Board's authority to terminate benefits based on a lack of attachment to the labor market commenced not on the date the employer or carrier raised the issue, but instead on the date evidence was submitted.⁴¹⁷

When the Legislature amended the statute in 2017 in an effort to relieve permanently partially disabled workers from the obligation to prove attachment to the labor market as a condition of receiving benefits, the Board seized on the phrase “at the time of classification”

⁴⁰⁷ See *id.*

⁴⁰⁸ *Poulard v. Southside Hosp.*, 114 N.Y.S.3d 493 (App. Div. 2019).

⁴⁰⁹ *Id.* at 494–95.

⁴¹⁰ *Bowers v. N.Y.C. Transit Auth.*, 115 N.Y.S.3d 159 (App. Div. 2019).

⁴¹¹ *Id.* at 161.

⁴¹² *Delk v. Orange & Rockland*, 141 N.Y.S.3d 180 (App. Div. 2021).

⁴¹³ *Id.* at 182–85.

⁴¹⁴ *Policarpio v. Rally Restoration Corp.*, 137 N.Y.S.3d 557 (App. Div. 2020).

⁴¹⁵ *Id.* at 560–61.

⁴¹⁶ *Hernandez v. AABCO Sheet Metal*, 171 N.Y.S.3d 600 (App. Div. 2022).

⁴¹⁷ *Id.* at 603; see also *Blanch v. Delta Airlines*, 168 N.Y.S.3d 902, 903 (App. Div. 2022).

to create a bifurcated classification process in which the employer and carrier would be assured an opportunity to raise the issue before the injured worker could be found permanently partially disabled and obtain the protection of the statute.⁴¹⁸

Overall, it is evident that beginning in the mid-1990s, the Board's vision of the law began to travel in the opposite direction from the

widespread belief and demand that compensation should be awarded to workmen who were injured and disabled temporarily or permanently in the course of their employment . . . [because] a system of compensation would be in the interest of the general welfare by preventing a workman from being deprived of means of support as the result of an injury received in the course of his employment.⁴¹⁹

4. Expansion of Administrative Authority

In the past decade, the Board has increasingly used its administrative appeal decisions to expand its authority, most often to the detriment of injured workers. While we have previously discussed this issue in connection with the Board's guidelines for schedule loss of use,⁴²⁰ it applies to a far broader range of issues.

In *Hazan v. WTC Volunteer Fund*,⁴²¹ the injured worker was a former emergency medical technician (EMT) who responded, as a volunteer, to the September 11, 2001, attack on the World Trade Center.⁴²² He later filed a claim for benefits as a volunteer covered by Workers' Compensation Law Article 8-A, which had been added to the statute in 2006 in order to provide expanded coverage for World Trade Center responders.⁴²³ The Board denied his claim on the grounds that it had issued a Subject Number restricting the definition of "volunteer" to one who "was acting under the direction and control of a volunteer agency."⁴²⁴

On appeal, the appellate division observed that the statute "is to be afforded a liberal construction" and "that the Legislature rejected'

⁴¹⁸ See *O'Donnell v. Erie County*, 146 N.E.3d 1171, 1175–76 (N.Y. 2020).

⁴¹⁹ See *In re Petrie*, 109 N.E. 549, 550 (N.Y. 1915).

⁴²⁰ See *supra* Part V.B.1.

⁴²¹ *Hazan v. WTC Volunteer Fund*, 987 N.Y.S.2d 484 (App. Div. 2014).

⁴²² *Id.* at 485.

⁴²³ See *id.* at 485–86.

⁴²⁴ *Id.*

the more restrictive definition of volunteer” that the Board was applying.⁴²⁵ The court went on to hold:

[T]o the extent that the Board has consistently relied upon the subject orders in denying benefits to volunteers who were not affiliated with an authorized rescue entity or volunteer association, we need note only that while Workers' Compensation Law § 141 vests the Board's chair with certain powers to administer the provisions of the Workers' Compensation Law, it does not vest him or her with the authority to supplement or amend duly enacted legislation. Accordingly, whatever the net effect of such orders may be, they “cannot overrule the statute itself.”⁴²⁶

The appellate division again rejected the Board's effort to expand its authority in *Liberius v. New York City Health & Hospitals Corp.*⁴²⁷ In *Liberius*, the employer failed to pay an award that had been made by a “proposed decision” issued pursuant to Workers' Compensation Law section 25(2-b), the conciliation statute.⁴²⁸ The Board refused to award the worker the twenty percent late payment penalty mandated by Workers' Compensation Law section 25(3)(f), choosing instead to fine the employer \$500 pursuant to Workers' Compensation Law section 25(2-b)(h).⁴²⁹ The Board had promulgated a regulation stating that in cases decided by proposed decision, the injured worker was entitled to only the \$500 fine, not the twenty percent penalty.⁴³⁰ The court reversed the Board's decision, holding that “[a] regulation cannot contravene [the injured worker's] statutory entitlement,” and that the Board's regulation—enacted to the injured worker's detriment—was contrary to the statute.⁴³¹

In *Murtha v. Verizon N.Y. Inc.*,⁴³² the injured worker's treating physician did not appear for a deposition that had been directed by the WCL judge.⁴³³ The Board precluded the injured worker's physician from testifying and additionally penalized his attorney for

⁴²⁵ *Id.* at 486–87 (quoting *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 661 N.Y.S.2d 293, 296–97 (App. Div. 1997)).

⁴²⁶ *Hazan*, 987 N.Y.S.2d at 487–88 (quoting *Russomanno v. Leon Decorating Co.*, 119 N.E.2d 367, 369 (N.Y. 1954)).

⁴²⁷ See *Liberius v. N.Y.C. Health & Hosp. Corp.*, 11 N.Y.S.3d 305, 308 (App. Div. 2015).

⁴²⁸ *Id.* at 307.

⁴²⁹ *Id.*

⁴³⁰ See *id.* at 308.

⁴³¹ *Id.* at 307–08.

⁴³² *Murtha v. Verizon N.Y. Inc.*, 76 N.Y.S.3d 662 (App. Div. 2018).

⁴³³ *Id.* at 663.

“using dilatory tactics [by] not having” the physician available to testify.⁴³⁴ The appellate division reversed the Board on both grounds, finding that the statute the Board relied upon “does not authorize the Board to assess a penalty against a party’s counsel” and that even if it had imposed a penalty under a different statute, “we would not find it to have been warranted” because the Board’s own regulation imposed the obligation to subpoena a physician on the employer and carrier, not the injured worker or his attorney.⁴³⁵

In *Knapp v. Bette & Cring LLC*,⁴³⁶ the Board precluded the report and testimony of the injured worker’s doctor because his attorney had texted him the day before the deposition to advise him that the issue being litigated was schedule loss of use.⁴³⁷ The appellate division reversed the Board’s decision, finding “that claimant’s counsel in no way influenced [the doctor’s] testimony through the text message,” as evidenced in part by the fact that his “testimony fully comported with the report that he had previously filed with the Board.”⁴³⁸

In *Nock v. New York City Department of Education*⁴³⁹ and *Galatro v. Slomins, Inc.*,⁴⁴⁰ the Board attempted to convert non-merits closures into preclusive determinations in order to prevent the injured worker from seeking benefits.⁴⁴¹ In *Nock*, although the appellate division affirmed the Board, it was an effective reversal because the court held that the Board had merely “disallowed the claim based on the record as it existed,” which did not “preclude[e] claimant from submitting further medical evidence of a causal relationship between her injury and employment.”⁴⁴² In *Galatro*, the appellate division reversed the Board on due process grounds.⁴⁴³

In *Weishar v. Dan Tait Inc.*,⁴⁴⁴ the insurer agreed to a settlement with the injured worker pursuant to Workers’ Compensation Law section 32.⁴⁴⁵ After the settlement was approved by the Board, but before the expiration of the ten-day post-approval waiting period, the worker died of unrelated causes.⁴⁴⁶ The insurer then sought to

⁴³⁴ *Id.* at 664.

⁴³⁵ *Id.* at 664–65 (citing *Estwick v. Risk Mgmt. Plan.*, 998 N.Y.S.2d 674, 675 (App. Div. 2015)).

⁴³⁶ *Knapp v. Bette & Cring LLC*, 87 N.Y.S.3d 745 (App. Div. 2018).

⁴³⁷ *Id.* at 746–47.

⁴³⁸ *Id.* at 747.

⁴³⁹ *Nock v. N.Y.C. Dep’t of Educ.*, 75 N.Y.S.3d 330 (App. Div. 2018).

⁴⁴⁰ *Galatro v. Slomins, Inc.*, 115 N.Y.S. 3d 131 (App. Div. 2019).

⁴⁴¹ *Nock*, 75 N.Y.S.3d at 331; *Galatro*, 115 N.Y.S.3d at 132–33.

⁴⁴² *Nock*, 75 N.Y.S.3d at 332 (citing *Hartwell v. Amphenol Interconnect Prods.*, 858 N.Y.S.2d 442, 444 (App. Div. 2008)).

⁴⁴³ *See Galatro*, 115 N.Y.S.3d at 133.

⁴⁴⁴ *Wisher v. Dan Tait Inc.*, 147 N.Y.S.3d 181 (App. Div. 2021).

⁴⁴⁵ *Id.* at 182.

⁴⁴⁶ *Id.*

withdraw from the settlement, depriving the injured worker's estate of the proceeds.⁴⁴⁷ The Board permitted the insurer to withdraw on the basis that it would be “unfair” or “unconscionable” to hold the insurer to the agreement, and the appellate division affirmed, deferring to the Board's discretion.⁴⁴⁸

It is clear that the Board has repeatedly exercised its discretion and sought to expand its administrative and regulatory authority in order to erect new hurdles for injured workers attempting to access their benefits under the statute, or to deny those benefits altogether.

C. Workers' Compensation Board Procedures

In addition to regulatory action and administrative appeal decisions, the Board has also limited both access to benefits and the substance of benefits through a host of administrative procedures. These can be divided into two general categories: formal and informal. Formal procedures are those announced, acknowledged, or published by the Board, whereas informal procedures are those which occur without any official regulation, decision, or publication—but equally affect the fabric of the system.

1. Formal Procedures

The primary repository of the Board's formal—but not regulatory or decisional—activity is its Subject Numbers.⁴⁴⁹ These agency announcements are used for a variety of routine administrative purposes: announcing legal holidays and closures,⁴⁵⁰ updating mileage reimbursement rates,⁴⁵¹ providing information about changes to the maximum weekly benefit rate as it is indexed to the

⁴⁴⁷ See *id.* at 182–83.

⁴⁴⁸ *Id.* at 183.

⁴⁴⁹ See *Board Bulletins and Subject Numbers*, N.Y. WORKERS' COMP. BD., <http://www.wcb.ny.gov/content/main/SubjectNos/subjectNos.jsp> [<https://perma.cc/GN3M-VTEJ>].

⁴⁵⁰ N.Y. WORKERS' COMP. BD., SUBJECT NO. 187-1, 2023 LEGAL HOLIDAYS AND BOARD CLOSURES (2022), https://www.wcb.ny.gov/content/main/SubjectNos/sn187_1_2023.jsp [<https://perma.cc/S9D7-G6SC>].

⁴⁵¹ N.Y. WORKERS' COMP. BD., SUBJECT NO. 150-18.1, CHANGE IN RATE OF REIMBURSEMENT TO CLAIMANTS FOR TRAVEL BY AUTOMOBILE (2023), https://www.wcb.ny.gov/content/main/SubjectNos/sn150_18_1_2023.jsp [<https://perma.cc/DB2H-RQSJ>].

state average weekly wage,⁴⁵² confirming the adoption of regulations,⁴⁵³ etc.

Over time, however, the Board has increasingly utilized its Subject Numbers to announce its interpretation of the law and to otherwise create agency policy. This has, on occasion, been called into question by the appellate division.⁴⁵⁴ Their use has, however, continued unabated.

On December 20, 1999, the Board issued Subject Number 046-58 in which it announced the “issues deemed appropriate for referral to conciliation.”⁴⁵⁵ This non-regulatory announcement became an essential component of the Board’s use of proposed decisions, which are issued under the authority of the conciliation statute but as the product of the Board’s actions instead of agreement between the parties and without the meetings the statute calls for.⁴⁵⁶ Six years later, the Board further reduced the role of official hearings and decisions by entirely eliminating “Administrative Determinations” applicable to cases involving less than one week of lost time—leaving many injured workers without any formal determination at all regarding their claim.⁴⁵⁷

On September 3, 2003, the Board issued Subject Number 046-119, in which it outlined the issues it would require to be addressed in any agreement submitted for approval pursuant to Workers’ Compensation Law section 32.⁴⁵⁸ These requirements are not contained in the statute itself, nor are they found in the relevant

⁴⁵² N.Y. WORKERS’ COMP. BD., SUBJECT NO. 046-1159, NEW MAXIMUM WEEKLY BENEFIT RATE EFFECTIVE JULY 1, 2019 (2019), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_1159.jsp [<https://perma.cc/652Y-WFZ2>].

⁴⁵³ N.Y. WORKERS’ COMP. BD., SUBJECT NO. 046-1207, ADOPTION OF EXPANDED PROVIDER REGULATIONS (2019), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_1207.jsp [<https://perma.cc/NLN4-7P3N>].

⁴⁵⁴ See, e.g., *Hazan v. WTC Volunteer Fund*, 987 N.Y.S.2d 484, 487–88 (App. Div. 2014); *Liberius v. N.Y.C. Health & Hosps. Corp.*, 11 N.Y.S.3d 305, 308 & n.* (App. Div. 2015).

⁴⁵⁵ N.Y. WORKERS’ COMP. BD., SUBJECT NO. 046-58, CONCILIATION; EXPANSION OF ISSUES DEEMED APPROPRIATE FOR CONCILIATION; REVISED FORM CB-8, REQUEST FOR CONCILIATION (1999), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_58.jsp [<https://perma.cc/R82A-HYCD>].

⁴⁵⁶ See N.Y. WORKERS’ COMP. LAW § 25(2-b); N.Y. COMP. CODES R. & REGS. tit. 12, § 312.4 (2023). This is discussed further as a component of the Board’s informal administrative activity; *infra* Part V.C.2.

⁴⁵⁷ See N.Y. WORKERS’ COMP. BD., SUBJECT NO. 046-777, REDUCTION OF ADMINISTRATIVE DETERMINATIONS FOR CLAIMS WITH NO LOST TIME (2016), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_777.jsp [<https://perma.cc/HFF9-A35K>].

⁴⁵⁸ See N.Y. WORKERS’ COMP. BD., SUBJECT NO. 046-119, *supra* note 222.

regulation.⁴⁵⁹ The Board then supplemented this Subject Number on April 4, 2005, with another one imposing additional requirements.⁴⁶⁰ A third Subject Number was issued on November 13, 2009, in which the Board set forth additional requirements for the substance of section 32 stipulations, again extraneous to the statute itself.⁴⁶¹

Following the 2007 Act, a task force was convened by the New York State Insurance Department (now part of the Department of Financial Services) to address the process by which permanent partial disability would be determined under the new PPD caps.⁴⁶² The purpose of the task force—similar to that of the new safety net provision in Workers' Compensation Law section 35—was to ensure that because awards for permanent partial disability were now subject to time limitations, they would be determined as fairly as possible to the injured worker.⁴⁶³

On September 15, 2010, the Insurance Department transmitted its recommendations to the Board.⁴⁶⁴ However, the Insurance Department's task force did not reach a conclusion on some of the critical issues, and as a result, the Board issued a Subject Number seeking comments.⁴⁶⁵ Over a year later, on November 3, 2011, the Board issued its own guidelines governing the determination of loss of wage-earning capacity for permanently partially disabled workers.⁴⁶⁶ Two and a half years after that, on May 28, 2013, the Board issued a Subject Number announcing “efforts to promote

⁴⁵⁹ See N.Y. WORKERS' COMP. LAW § 32 (Consol. 2023); N.Y. Comp. Codes R. & Regs. tit. 12, § 300.36 (2023).

⁴⁶⁰ See N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-119.1, WCL § 32 WAIVER AGREEMENTS—ADDITIONAL ISSUES (2005), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_119_1.jsp [<https://perma.cc/A3YH-A9HV>].

⁴⁶¹ See N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-372, THE BOARD WILL NOT APPROVE MEDICARE HOLD HARMLESS LANGUAGE IN SECTION 32 AGREEMENTS (2009), https://web.archive.org/web/20130102213910/https://www.wcb.ny.gov/content/main/SubjectNos/sn046_372.jsp [<https://perma.cc/JVY7-DTVX>].

⁴⁶² See N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-446, CHAIR SEEKS COMMENT ON TASK FORCE PPD GUIDELINE RECOMMENDATIONS (2010), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_446.jsp [<https://perma.cc/U2SX-FD4F>].

⁴⁶³ See *id.*; N.Y. WORKERS' COMP. LAW § 35 (Consol. 2023).

⁴⁶⁴ See N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-446, *supra* note 462.

⁴⁶⁵ See *id.*

⁴⁶⁶ N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-472, WORKERS' COMPENSATION BOARD ANNOUNCES 2012 NYS GUIDELINES FOR DETERMINING PERMANENT IMPAIRMENT AND LOSS OF WAGE EARNING CAPACITY (2011), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_472.jsp [<https://perma.cc/545T-FWFN>]. Notably, the guidelines issued in 2012 also included criteria for the determination of schedule loss of use. *Id.* The 2017 legislation then directed reconsideration of these guidelines to account for the impact of “advances in modern medicine.” See Pt. NNN, subpt. B, § 1, 2017 N.Y. Laws at 393 (codified at N.Y. WORKERS' COMP. LAW § 15(3)(x) (Consol. 2023)).

permanency classifications.”⁴⁶⁷ In essence, this Subject Number declared that (1) periods of temporary total and temporary partial disability did not count against the PPD caps; (2) if classification of permanent partial disability was delayed, injured workers received greater benefits as the period of temporary disability was extended; and (3) the Board would take affirmative steps to accelerate permanency determinations in order to reduce benefits for injured workers because employers and insurers were not moving sufficiently aggressively to do so.⁴⁶⁸

Following the issuance of this Subject Number, the Board created special permanency parts into which cases deemed potentially suitable for non-schedule permanent partial disability were routed and expedited.⁴⁶⁹ In effect, the Board adopted the role of advocate for employers and insurers, raising issues on their behalf that would reduce benefits for injured workers. The Board has continued this initiative to the present day, identifying cases that it deems potentially suitable for permanency evaluation and *sua sponte* scheduling hearings in order to terminate the injured worker’s temporary disability benefits and accelerate the implementation of permanent partial disability benefits (and their ultimate termination).

In 2013, the Legislature amended Workers’ Compensation Law section 25-a to close the Special Fund for Reopened Cases.⁴⁷⁰ The Board promptly issued a Subject Number on October 10, 2013, addressing the Legislature’s action.⁴⁷¹ Insurers challenged the statute and were initially successful in invalidating its retroactive impact.⁴⁷² The Board filed an appeal as of right to the Court of Appeals and issued a Subject Number on May 4, 2016, stating that it

⁴⁶⁷ N.Y. WORKERS’ COMP. BD., SUBJECT NO. 046-548, CHAIR ANNOUNCES EFFORTS TO PROMOTE PERMANENCY CLASSIFICATIONS (2013), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_548.jsp [https://perma.cc/V56B-MX3M].

⁴⁶⁸ *See id.*

⁴⁶⁹ *See id.*

⁴⁷⁰ *See* Act of Mar. 29, 2013, ch. 57, Part GG, sec. 13, § 25-a, 2013 N.Y. Laws 290, 401.

⁴⁷¹ *See* N.Y. WORKERS’ COMP. BD., SUBJECT NO. 046-630, CLOSING OF THE FUND FOR REOPENED CASES (WCL § 25-A) (2013), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_630.jsp [https://perma.cc/4R5Z-P5PQ].

⁴⁷² *See, e.g.*, *Am. Econ. Ins. Co. v. State*, 31 N.Y.S.3d 456, 462 (App. Div. 2016), *rev’d*, 87 N.E.3d 126 (N.Y. 2017).

would not schedule any hearings on the issue until its appeal was decided.⁴⁷³ The Board's appeal was ultimately unsuccessful.⁴⁷⁴

On July 17, 2014, the Board issued a Subject Number encouraging employers and carriers to make use of Workers' Compensation Law section 21-a and to make "temporary payments" of compensation without accepting liability.⁴⁷⁵ This provision had been added to the statute nearly two decades earlier⁴⁷⁶ and had been almost completely disregarded by employers and insurers since that time. When this encouragement proved inadequate, the Board issued a second Subject Number on January 18, 2019, providing further guidance to insurers on the issue.⁴⁷⁷ As insurers have begun to respond to this encouragement and accept claims "without prejudice," the Board has in turn relied upon this claim status to deny the requests of injured workers for hearings and adjudication on the basis that the claim has been accepted without prejudice and therefore adjudication is premature until temporary payment status has expired—one year after the accident.⁴⁷⁸ In short, the Board revived a dormant provision of the 1996 legislation, called it to the attention of employers and insurers, and (twice) encouraged them to make use of it in order to avoid its own obligation to adjudicate the claims of injured workers.

The 2017 legislation included several provisions that were intended to benefit injured workers. Included among these provisions was the requirement that the Board schedule a hearing within forty-five days if the injured worker is not working and not being paid.⁴⁷⁹ The Board immediately issued a Subject Number outlining its interpretation of the legislation.⁴⁸⁰ One day later, it issued a second Subject Number sharply limiting the circumstances in which it intended to comply with the legislative direction for

⁴⁷³ See N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-851, BOARD APPEALS APPELLATE DIVISION, FIRST DEPARTMENT'S DECISION TO REOPEN THE WCL § 25-A FUND (2016), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_851.jsp [<https://perma.cc/A6K3-92WF>].

⁴⁷⁴ See *Am. Econ. Ins. Co. v. State*, 87 N.E.3d 126, 143 (N.Y. 2017).

⁴⁷⁵ N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-696, NOTICE REQUIREMENTS FOR ECLAIMS AND THE WCL § 21-A PROCESS (2014), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_696.jsp [<https://perma.cc/B7GC-WSAH>].

⁴⁷⁶ See Act of Sept. 10, 1996, ch. 635, § 42, 1996 N.Y. Laws 3214–15.

⁴⁷⁷ N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-1136, CHANGES TO ECLAIMS PROCESS FOR SECTION 21-A AND CLAIMS PAID WITHOUT LIABILITY (2019), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_1136.jsp [<https://perma.cc/J86U-SDYA>].

⁴⁷⁸ See *id.*

⁴⁷⁹ Act of Apr. 10, 2017, ch. 59, pt. NNN, subpt. D, sec. 1, § 25(2)(a), 2017 N.Y. Laws 253, 393–94.

⁴⁸⁰ See N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-936, *supra* note 371.

mandatory hearings—and threatening the imposition of penalties against any party or attorney who it deemed to have improperly made such a request.⁴⁸¹

On the same day, the Board issued a Subject Number setting forth its interpretation of the statutory “safety net” provision for injured workers with a significant permanent partial disability.⁴⁸² Similar to the Subject Numbers it had issued in connection with Workers’ Compensation Law section 32, the Board issued a new form and created administrative requirements and criteria to be applied by WCL judges in every case that was presented⁴⁸³—none of which are present in the statute or have been issued in regulatory form.

One day after that, on April 27, 2017, the Board issued a Subject Number stating that under its revised regulation for appeals and rebuttals—title 12, section 300.13 of the New York Codes, Rules and Regulations—it would now consider the cover sheet it had prescribed to be the substance of the appeal itself, and further that any defect or omission in the cover sheet would result in the automatic dismissal of the appeal or rebuttal, without regard to its merits.⁴⁸⁴ The Subject Number and regulation were subsequently rejected by the Legislature through the addition of Workers’ Compensation Law section 23-a, which expressly invalidated both the Subject Number and the regulation and instead required the Board to “permit any . . . mistake, omission, defect and/or other irregularity to be corrected,” or to disregard it in the absence of prejudice to the opposing party.⁴⁸⁵

The Board then issued a comprehensive Subject Number entitled “Attorney’s Fees,” in which it revised the forms to be submitted by attorneys when requesting a fee and created significant new requirements to be followed.⁴⁸⁶ The Legislature again responded by

⁴⁸¹ N.Y. WORKERS’ COMP. BD., SUBJECT NO. 046-937, URGENT HEARINGS WHERE CLAIMANT IS NOT BEING PAID (2017), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_937.jsp [<https://perma.cc/Z6GU-L5LH>].

⁴⁸² N.Y. WORKERS’ COMP. BD., SUBJECT NO. 046-938, EXTREME HARDSHIP REDETERMINATION PROCEDURE (2017), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_938.jsp [<https://perma.cc/UJQ9-EMK8>].

⁴⁸³ *See id.*

⁴⁸⁴ *See* N.Y. WORKERS’ COMP. BD., SUBJECT NO. 046-940, COMPLIANCE WITH THE BOARD’S NEW REGULATIONS FOR ADMINISTRATIVE REVIEW, FULL BOARD REVIEW, AND APPLICATIONS FOR BOARD RECONSIDERATION (2017), https://www.wcb.ny.gov/content/main/SubjectNos/sn046_940.jsp [<https://perma.cc/U6TC-JDAY>].

⁴⁸⁵ N.Y. WORKERS’ COMP. LAW § 23-a (Consol. 2023).

⁴⁸⁶ *See* N.Y. WORKERS’ COMP. BD., SUBJECT NO. 046-943, ATTORNEY’S FEES (2017), https://www.wcb.ny.gov/content/main/SubjectNos/sn046_943.jsp [<https://perma.cc/6UMA-D3FA>].

amending the statute to remove the Board's discretion over attorney fees and to instead create a statutory fee schedule.⁴⁸⁷

Absent judicial or legislative action, the Board's Subject Numbers operate as inflexible guidance to be followed by WCL judges and the parties, creating processes and adding requirements that cannot be found in the statute and are often absent even from the Board's regulations. Almost without exception, their impact is to create additional obstacles for injured workers in their quest to obtain benefits, rather than to eliminate technicalities and accelerate the payment of compensation. They are in no way consistent with the Court of Appeals' observation:

The Workmen's Compensation Law was particularly framed to avoid legal terminology and the technicalities of law pleading. It was intended that the working people themselves could make and file these claims and give the notice of injury. The cost and expense of employing attorneys were to be avoided if possible. The act was for the benefit of the workingman and his family, not for the profession.⁴⁸⁸

2. Informal Procedures

The Board's informal administrative procedures—activities that are not covered by regulation and are often unpublished and unannounced—have also operated to erode the ability of injured workers to enter the system and obtain benefits.

One example of this process is the Board's application of the conciliation statute.⁴⁸⁹ The statute provides that only “[c]laims where the expected duration of benefits is fifty-two weeks or less shall be transferred for conciliation within thirty days of receipt of a carrier's response to a notice of index.”⁴⁹⁰ It goes on to provide that “[u]pon receipt of a claim for conciliation, a meeting shall be scheduled, if necessary, within thirty days with all concerned parties before a conciliation counsel.”⁴⁹¹ The statute then establishes procedures for the filing of information prior to the meeting, for the meeting itself, and for the issuance of a decision following the meeting.⁴⁹² The statute plainly envisions that the Board will “index” claims, that the

⁴⁸⁷ See N.Y. WORKERS' COMP. LAW § 24 (Consol. 2023).

⁴⁸⁸ Kaplan v. Kaplan Knitting Mills, Inc., 161 N.E. 204, 205 (N.Y. 1928).

⁴⁸⁹ See N.Y. WORKERS' COMP. LAW § 25(2-b) (Consol. 2023).

⁴⁹⁰ *Id.* at § 25(2-b)(b).

⁴⁹¹ *Id.* at § 25(2-b)(c).

⁴⁹² *Id.* at § 25(2-b)(d)–(i).

carrier's response may include a "claim for conciliation," and that in such circumstances a "meeting" will occur for discussion of the claim and possible resolution.

Instead of following these statutory requirements, the Board now rarely indexes claims, but instead assembles them and only indexes claims that are not voluntarily accepted by the employer or carrier.⁴⁹³ However, absent indexing, the statutory predicate for the application of the conciliation statute is not met.⁴⁹⁴ Moreover, the Board has not promulgated a form for a party to make a claim for conciliation, but instead acts *sua sponte* to route claims into the conciliation process.⁴⁹⁵ Contrary to the statutory provision that limits the use of conciliation to "[c]laims where the expected duration of benefits is fifty-two weeks or less," the Board processes virtually every uncontested case in this manner, issuing both initial and subsequent decisions under the authority of the conciliation statute without regard to the duration of the disability.⁴⁹⁶ Finally, it does not hold meetings at which the injured worker and employer or carrier appear, but simply issues "proposed decision[s]" based on its own review of the file.⁴⁹⁷

In short, through a combination of non-regulatory formal administrative activity (the issuance of several Subject Numbers concerning conciliation) and informal administrative activity, the Board has achieved a process in which injured workers are given neither a formal hearing nor an informal conciliation meeting at which they can receive information about their rights under the law and be afforded an opportunity to be heard before any findings and awards are made. Instead, the agency issues a unilateral decision, making findings and awards, leaving the injured worker to interpret a complex bureaucratic document and its legal ramifications and, if desired, to file an objection in the time and manner prescribed by the Board.⁴⁹⁸ This process—which is not contemplated by and is in fact contrary to the statute—does not provide injured workers with

⁴⁹³ See *supra* Part V.A.

⁴⁹⁴ See N.Y. WORKERS' COMP. LAW § 25(2-b)(b).

⁴⁹⁵ See ROBERT E. GREY, WORKERS' COMPENSATION IN NEW YORK STATE: STATE OF THE SYSTEM 2016, at 28–29 (2016), <http://greyandgrey.com/wp-content/uploads/2018/07/Workers-Comp-in-NYS-State-of-the-System-2016.pdf> [<https://perma.cc/H5ER-MTTP>].

⁴⁹⁶ N.Y. WORKERS' COMP. LAW § 25(2-b)(b); see GREY, *supra* note 495, at 29–33.

⁴⁹⁷ See N.Y. WORKERS' COMP. LAW § 25(2-b)(f). In 2019, the Board renamed these documents "proposed conciliation decision[s]," presumably to clarify that they are issued under the authority of Workers' Compensation Law section 25(2-b) and thus to document its use of the conciliation statute. See N.Y. COMP. CODES R. & REGS. tit. 12, § 312.5(a) (2023).

⁴⁹⁸ See WORKERS' COMP. LAW § 25(2-b)(b)–(f). The Board's proposed conciliation decisions are unsigned by either the conciliation counsel envisioned by the statute or by a WCL judge and appear to be prepared by the Board's non-judicial administrative employees.

meaningful information about or access to the benefits provided by law.

The use of proposed decisions is only one of a number of administrative impediments for injured workers. Pursuant to title 12, section 300.23(b) of the New York Codes, Rules and Regulations, once the Board has directed payments to the injured worker, the employer or carrier must continue those payments at that rate until it files an application to reduce those payments, a hearing is scheduled, and the request is granted by a WCL judge.⁴⁹⁹ Not infrequently, a direction will be made for payments to continue at a partial disability rate pending surgery, after which the injured worker is entitled to benefits for temporary total disability.⁵⁰⁰ In this situation, the injured worker's attorney will often request a hearing or decision modifying the previous direction to reflect the increased benefit rate, thus providing the injured worker with protection from a unilateral benefit reduction in accordance with the regulation.

Over the past several years, the Board has routinely denied those requests, taking the position that as long as the insurer has voluntarily increased payments there is no issue that requires a hearing.⁵⁰¹ This administrative action effectively neuters the Board's own regulation by permitting insurers to unilaterally reduce an injured worker's benefits from total disability to the previously directed partial disability benefit rate, without a hearing or direction from a WCL judge. It instead shifts the burden to the injured worker to request a hearing to argue that the reduction was inappropriate after it has already occurred. This usually means that the injured worker's benefits are reduced for six weeks or more while he or she is awaiting a hearing. Conversely, had the Board issued a decision directing payments at the higher benefit rate, the worker's benefits would have continued at the higher benefit rate for that period, after which the employer or insurer would have borne the burden of proof of arguing for a reduction at the hearing.⁵⁰²

⁴⁹⁹ N.Y. COMP. CODES R. & REGS. tit. 12, § 300.23(b).

⁵⁰⁰ *Sanchez v. Jacobi Med. Ctr.*, 118 N.Y.S.3d 792, 796 (App. Div. 2020); N.Y.C. Dep't of Transp., WCB No. 09942259, 2008 NY Wrk. Comp. LEXIS 3449 (Apr. 21, 2008); Empire Health Choice, Inc., WCB No. 00205235, 2009 NY Wrk. Comp. LEXIS 12850 (Aug. 20, 2009); The Eagle House Rest., WCB No. 80310272, 2005 NY Wrk. Comp. LEXIS 8740 (Oct. 5, 2005).

⁵⁰¹ See S.B. 5867, 205th Leg. (N.Y. 2023), <https://www.nysenate.gov/legislation/bills/2023/s5867> [<https://perma.cc/BT5B-QGXX>] (proposing an amendment to section 20 of the Workers' Compensation Law to provide that the Board "shall index a claim . . . immediately upon receipt of a medical report in addition to either a claim filed by the injured worker or an employer's report of injury or illness," and that the Board "shall hold an initial hearing for each claim" within 60 days after indexing).

⁵⁰² See N.Y. COMP. CODES R. & REGS. tit. 12, § 300.23(g) (2023).

The Board's action in this regard is consistent with substantial anecdotal evidence that it is far less responsive to requests for hearings made by injured workers seeking to obtain benefits than it is from employers or insurers seeking to deny them.⁵⁰³ It has also begun to abrogate the requirement of Workers' Compensation Law section 20 that "[w]henver a hearing or proceeding for the determination of a claim for compensation is begun before a referee, pursuant to the provisions of this chapter, such hearing or proceeding or any adjourned hearing thereon shall continue before the same referee until a final determination awarding or denying compensation."⁵⁰⁴ This is associated (in part) with the Board's use of virtual hearings, in which a WCL judge is assigned to preside over hearings in a different region of the state via the internet.⁵⁰⁵

As a result, instead of WCL judges being assigned to a specific part in which they hear the same cases over a period of time, the statutory continuity requirement has been largely vitiated. When raised by a party, the WCL judge will routinely provide a response (absent any specifics) that the previously assigned judge is unavailable, in an effort to provide the justification permitted by the statute of "absence, inability or disqualification" of the previous referee.⁵⁰⁶

In addition to employing informal administrative procedures to reduce access to benefits, the Board has also used them to diminish the substance of statutory benefits. The impact of its decisions limiting schedule loss awards and its policy to accelerate non-schedule permanent partial disability classifications has been previously discussed in Parts V.B.1. and V.C.1. These policies have, however, been amplified by informal processes and requirements.

⁵⁰³ See GREY, *supra* note 495, at 39.

⁵⁰⁴ See N.Y. WORKERS' COMP. LAW § 20(1) (Consol. 2023).

⁵⁰⁵ See *Virtual Hearings*, N.Y. WORKERS' COMP. BD., <http://www.wcb.ny.gov/virtual-hearings/> [<https://perma.cc/AL2V-E8CW>]. The Board's virtual hearing process was associated with its closure of multiple hearing points around the state, increasing travel distances for injured workers in rural areas. *WC Bd. To Close Eight Hearing Points*, N.Y. WORKERS' COMP. DEF., <http://nyworkerscompensationdefense.com/wc-board-to-close-eight-hearing-points/> [<https://perma.cc/LB25-XJA4>]. It has also resulted in the elimination of the stenographic transcription of hearings required by Workers' Compensation Law sections 25(3) and 122. See N.Y. WORKERS' COMP. LAW §§ 25(3)(c), 122 (Consol. 2023). This in turn has resulted in the need to re-hear a number of cases in which its system has failed to produce a record. See, e.g., *Bien Cuit Wholesale LLC*, WCB No. 0794828, 2019 NY Wrk. Comp. LEXIS 10980, at *9 (Sept. 13, 2019); *Prestige Emp. Adm'rs*, WCB No. 2222524, 2019 NY Wrk. Comp. LEXIS 10044, at *5-6 (Aug. 30, 2019); *Favor Serv. Corp.*, WCB No. G2367841, 2019 NY Wrk. Comp. LEXIS 10497, at *4 (Aug. 13, 2019). There are dozens of similar Board decisions on this issue. See results of LEXIS search for "verbatim record" narrowed to administrative materials in New York from the Workers' Compensation Board.

⁵⁰⁶ N.Y. WORKERS' COMP. LAW § 20(1) (Consol. 2023); see, e.g., *Cannetti v. Darr Constr. Equip. Corp.*, 101 N.Y.S.3d 531, 532 (App. Div. 2019).

For example, on May 16, 2018, the Board issued Subject Number 046-1067A, purportedly to accompany a revision of the form for medical reports of permanent impairment that was needed to bring the form into conformity with the schedule loss guidelines the Board had issued in December of 2017.⁵⁰⁷ In addition to making changes related to schedule loss of use, however, the form also modified the criteria related to non-schedule permanent partial disability⁵⁰⁸—which had been untouched by the new schedule loss guidelines. The Subject Number made no mention of this modification, which removed the option for a treating physician to report that the injured worker was incapable of performing sedentary work.⁵⁰⁹ This effectively precluded the treating physician from reporting that the worker was permanently totally disabled, since the only remaining options were that the worker was capable of sedentary, light, medium, heavy, or very heavy work.⁵¹⁰

The clear goal of the unannounced modification to the form was to reduce the number of cases in which a treating physician reports a permanent total disability in order to increase the number of permanent partial disability classifications, subjecting the injured worker to the PPD caps and eventual termination of benefits. This is, of course, consistent with the Board's stated objective to accelerate permanent partial disability classifications in order to limit the duration of benefits available to injured workers, as well as its unsuccessful attempt to impose inflexible restrictions upon reopening and reclassification.⁵¹¹

⁵⁰⁷ N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-1067A, BOARD ANNOUNCES UPDATES TO ACCOMMODATE 2018 PERMANENT IMPAIRMENT GUIDELINES FOR SCHEDULE LOSS OF USE EVALUATIONS (2018), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_1067.jsp [<https://perma.cc/7WBJ-ZYDL>]; see also N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-1011, 2018 PERMANENT IMPAIRMENT GUIDELINES FOR SCHEDULE LOSS OF USE EVALUATIONS (2017), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_1011.jsp [<https://perma.cc/9RMD-JS7V>].

⁵⁰⁸ See N.Y. WORKERS' COMP. BD., DOCTOR'S REPORT OF MMI/PERMANENT PARTIAL IMPAIRMENT (C-4.3), http://www.wcb.ny.gov/content/main/forms/c4_3.pdf [<https://perma.cc/H689-HAQX>].

⁵⁰⁹ See *id.*; N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-1067A, *supra* note 507.

⁵¹⁰ See N.Y. WORKERS' COMP. BD., DOCTOR'S REPORT OF MMI/PERMANENT PARTIAL IMPAIRMENT (C-4.3), *supra* note 508. To report a permanent total disability, the treating physician would have to choose to leave the relevant section of the form blank and complete other areas of the form or submit a separate narrative report. See *id.* The Board has, however, offered no guidance on this by regulation, decision, Subject Number, instruction accompanying the form, or otherwise.

⁵¹¹ See N.Y. WORKERS' COMP. BD., Subject No. 046-548, *supra* note 467; *supra* Part V.B.2. The Board's decision in *Sovereign Container Line Inc.*, WCB No. 1031586, 2019 NY Wrk. Comp. LEXIS 8763, at *2-4 (Aug. 7, 2019), is emblematic of its commitment to limiting the payment of permanent partial disability benefits. In *Sovereign Container*, the Board chose to excuse the insurer's failure to object to claimant's reclassification as having a temporary total disability in

The Board has also developed informal procedures intended to limit permanent partial disability benefits. As discussed previously, a 2017 amendment to Workers' Compensation Law section 15(3)(w) relieved permanently partially disabled workers from the obligation to demonstrate attachment to the labor market.⁵¹² Two days after the statute was amended, the Board's General Counsel issued a "Bulletin" suggesting that even if an award of permanent partial disability benefits was made, "there can remain a question as to whether the disability was the reason full-time work was ceased."⁵¹³ The implication of this Bulletin was that even if awards of compensation were made at the time of the permanent partial disability finding, the Board would still entertain arguments raised by the employer or carrier that the injured worker had "voluntarily withdrawn from the labor market" at an earlier point of time, and upon such a finding retroactively require proof of labor market attachment.⁵¹⁴

The Board has also worked to restrict the applicability of the statutory "safety net" that the Legislature created in 2007 and expanded in 2017.⁵¹⁵ As discussed previously, the safety net was designed to permit the Board to extend or eliminate the duration caps for permanently partially disabled workers who had lost a substantial portion of their wage-earning capacity and for whom the loss of workers' compensation benefits would constitute an "extreme hardship."⁵¹⁶ The Legislature did not provide a definition of extreme hardship, instead permitting the Board to interpret and apply the provision.⁵¹⁷

On April 26, 2017, the Board issued Subject Number 046-938, in which it established a (non-regulatory) procedure for the determination of extreme hardship.⁵¹⁸ The Board chose to define

conjunction with a surgery and disregarded its own regulations for the purpose of entertaining the insurer's appeal and reducing the injured worker's benefits in accordance with its decision in *Jacobi Medical Center*. See *id.* at *3-4 (citing *Jacobi Med. Ctr.*, WCB No. 00825967, 2019 NY Wrk. Comp. LEXIS 1557 (Feb. 11, 2019)).

⁵¹² See *supra* notes 260-62 and accompanying text.

⁵¹³ N.Y. WORKERS' COMP. BD., OFFICE OF GENERAL COUNSEL BULLETIN 2017-01 (2017). This unofficial guidance was published three months later as part of Subject Number 046-958. N.Y. WORKERS' COMP. BD. SUBJECT NO. 046-958, CLAIMANT RECORD OF JOB SEARCH EFFORTS REVISED BOARD FORM C-258 AND NEW BOARD FORM C-258.1 (2017), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_958.jsp [<https://perma.cc/VHC6-H5FQ>].

⁵¹⁴ See N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-958, *supra* note 513.

⁵¹⁵ See N.Y. WORKERS' COMP. LAW § 35 (Consol. 2023).

⁵¹⁶ See *supra* Part IV.C.1; N.Y. WORKERS' COMP. LAW § 35(3) (Consol. 2023).

⁵¹⁷ See *supra* Part IV.C.1.

⁵¹⁸ N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-938, *supra* note 482.

extreme hardship as “a hardship that exceeds the usual or expected, and may include information about expected retirement income.”⁵¹⁹ It also mandated the use of a newly-promulgated form seeking information about income and expenses in the injured worker’s “household,” without regard to whether the other members of the worker’s household were under any legal obligation to support him or her.⁵²⁰

The Board has thus far rejected an overwhelming majority of requests for safety net relief it has considered.⁵²¹ *Millbrook Distribution Services* is emblematic of the Board’s approach, as it found that monthly expenses of \$1,919.73, as compared to income of \$1,246 (from Social Security disability, after termination of workers’ compensation benefits), did not constitute an extreme hardship.⁵²² In so doing, the Board relied upon its interpretation of the statutory term as involving “unusual or expected expenses,” and dismissed the injured worker’s “discretionary purchases” of “cigarettes, fast food, and instant ink,” as well as two items that were “not recurring costs.”⁵²³ The conclusion to be drawn from this decision is that the

⁵¹⁹ *Id.*

⁵²⁰ *See id.* For Form C-35, see N.Y. WORKERS’ COMP. BD., EXTREME HARDSHIP REDETERMINATION REQUEST (C-35), <http://www.wcb.ny.gov/content/main/forms/C35.pdf> [<https://perma.cc/H6RV-T8B5>].

⁵²¹ *See, e.g.*, Orchard Park Veterinary MC LLP, WCB No. 80805482, 2020 NY Wrk. Comp. LEXIS 11504, at *6 (Mar. 16, 2020); Sholz Buick Pontiac GMC Inc., WCB No. 30708972, 2020 NY Wrk. Comp. LEXIS 12329, at *10 (Feb. 12, 2020); Aramark, WCB No. 0014965, 2020 NY Wrk. Comp. LEXIS 10708, at *4 (Jan. 8, 2020); Lutheran Med. Ctr., WCB No. 00729826, 2019 NY Wrk. Comp. (Nov. 13, 2019); Lite Elite, WCB No. 00743237, 2019 NY Wrk. Comp. LEXIS 8889, at *3 (Aug. 9, 2019); Lincoln Hosp., WCB No. 00744839, 2018 NY Wrk. Comp. LEXIS 7123, at *16 (Aug. 6, 2018); Millbrook Distrib. Servs., WCB No. 40705652, 2019 NY Wrk. Comp. LEXIS 5267, at *6–7 (May 17, 2019); Downtown Club Condo., WCB No. 00836074, 2019 NY State Wrk. Comp. LEXIS 3565, at *7–8 (Apr. 5, 2019); Huntington Hill Rehab Ctr., WCB No. 0021630, 2019 NY Wrk. Comp. LEXIS 2887, at *9–10 (Mar. 18, 2019); FSR Contracting Inc., WCB No. 80709173, 2018 NY Wrk. Comp. LEXIS 7668, at *2–3, 5–6 (Aug. 20, 2018); Indep. Grp. Home, WCB No. G0026199, 2019 NY Wrk. Comp. LEXIS 1500, at *8–9 (Feb. 8, 2019); Res. Mgmt. Council Inc., WCB No. 0024159, 2020 NY Wrk. Comp. Bd. LEXIS 13916, at *6–7 (Sept. 24, 2020); Legacy Health Care, WCB No. G0031412, 2021 NY Wrk. Comp. LEXIS 8, at *10 (Jan. 4, 2021); Brooklyn Childs. Psychiatric, WCB No. 0029165, 2021 NY Wrk. Comp. LEXIS 433, at *7 (Jan. 25, 2021); Westbury Jeep, WCB No. 0167727, 2020 NY Wrk. Comp. LEXIS 9261, at *9 (May 26, 2020); Gen. Super Plating Co., WCB No. 60802049, 2020 NY Wrk. Comp. LEXIS 8550, at *3 (May 22, 2020); Unicorn Constr. Enters., WCB No. 00751424, 2020 NY Wrk. Comp. LEXIS 11422, at *7 (July 29, 2020); Eyal RD Gems Corp., WCB No. 00319053, 2020 NY Wrk. Comp. LEXIS 15098, at *8 (Aug. 14, 2020). *But see* Finger Lakes DDSO, 2021 NY Wrk. Comp. 70705496 (Mar. 16, 2021) (relief granted).

⁵²² *See* Millbrook Distrib. Servs., WCB No. 40705652, 2019 N.Y. State Workers’ Comp. Bd. LEXIS 5267, at *5–6 (May 17, 2019).

⁵²³ *See id.* at *6. The cost of cigarettes and instant ink was a total of \$117.76 per month. *See id.* at *5. If those expenses did not exist, the injured worker’s expenses after suspension of workers’ compensation payments still exceeded his income by over \$550 per month. *See id.* at *5–6. The “fast food” expense is not separately identified and is presumably included in the

Board has opted to avoid consideration of extreme hardship on the basis of income versus expenses, anticipating that a large number of safety-net eligible workers will have expenses in excess of their income once their permanent partial disability benefits are terminated. Instead, the Board has elected to view extreme hardship solely through the lens of “unusual or unexpected expenses.”⁵²⁴

This concept is entirely absent from the statute and is difficult to reconcile with a law that was

framed to supply an injured workman with a substitute for wages during the whole or at least a part of the term of disability. He was to be saved from becoming one of the derelicts of society, a fragment of human wreckage. He was to have enough to sustain him in a fashion measurably consistent with his former habits of life during the trying days of readjustment. The cost of such support becomes a charge upon the industry without regard to fault.⁵²⁵

In some of its denials, the Board has also used time limitations to reject safety net applications. The statute requires the application to be filed “within the year prior to the scheduled exhaustion of indemnity benefits” for permanent partial disability.⁵²⁶ Although this provision could easily be interpreted to prohibit an earlier application (more than one year prior to the end of benefits), but to permit a later application, the Board has consistently held that an application filed after benefits had already ended would not be considered.⁵²⁷

The Board has also declined to enforce the portion of the Legislature’s 2007 amendment to Workers’ Compensation Law section 32 providing that private insurers

shall offer each claimant the opportunity to enter into an agreement settling upon and determining the compensation and other benefits due, in the case of disability, within two

injured worker’s monthly food expenses of \$355. *See id.* However, even if food were eliminated entirely, then the injured worker’s expenses would exceed his income by about \$200 per month. *See id.*

⁵²⁴ *See id.* at 6.

⁵²⁵ *Surace v. Danna*, 161 N.E. 315, 315–16 (N.Y. 1928) (citing *Post v. Burger & Gohlke*, 111 N.E. 351, 353 (N.Y. 1916); *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 197 (1917)).

⁵²⁶ N.Y. WORKERS’ COMP. LAW § 35(3) (Consol. 2023).

⁵²⁷ *See e.g.*, *Lite Elite*, WCB No. 00743237, 2019 NY Wrk. Comp. LEXIS 8889, at *3 (Aug. 9, 2019).

years after the date the claim was indexed by the board or six months after the claimant is classified with a permanent disability, whichever is later, and in the case of death, within six months after entitlement to benefits is established for all beneficiaries. The offer made by the insurance carrier shall clearly state what portion of the offer is (i) for compensation as defined in subdivision six of section two of this chapter, if any; (ii) for medical benefits, including prescription medicine, if any; and (iii) for the fee of the attorney or licensed representative, if any. If a claimant is represented by an attorney or licensed representative, the insurance carrier shall present such offer to such legal representative. If a claimant is not represented by an attorney or a licensed representative, the insurance carrier shall, in addition to the offer to enter into a settlement agreement, provide the claimant with a statement of his or her rights, obligations and potential liability if the offer is accepted.⁵²⁸

As discussed previously, the combination of this mandatory settlement offer provision and the requirement for the insurer to make a deposit into the Aggregate Trust Fund if it failed to settle with the injured worker was designed to encourage fair settlement offers.⁵²⁹ The Board's non-enforcement of the mandatory settlement provision, and inconsistent enforcement of the Aggregate Trust Fund deposit requirement, undermine the injured worker's leverage in the process, and as a result, diminish the value of permanent partial disability benefits.

In sum, the Board's administrative actions—regulations, decisions, formal policies, and informal policies—present a significant impediment to injured workers seeking to access benefits under the law, and in many instances substantially reduce the substance of the benefits they ultimately receive.

VI. CONSTITUTIONAL ISSUES

The Board's administrative actions raise several constitutional concerns. Its use of administrative decisions, Subject Numbers, and informal procedures to create inflexible agency policies runs afoul of the constitutional prohibition against non-regulatory rulemaking.

⁵²⁸ Act of Mar. 13, 2007, ch. 6, sec. 73, § 32(a), 2007 N.Y. Laws 54, 91 (codified at N.Y. WORKERS' COMP. LAW § 32(a)).

⁵²⁹ See *supra* notes 222–25 and accompanying text.

Its substantial modifications to the claim process, denial of hearings, and widespread use of proposed decisions that are not issued in conformity with the relevant statutory provisions raises issues concerning procedural due process. And its apparent acquisition of an interest in the subject matter of the claims before it—a decision to limit worker benefits for the express purpose of providing an economic benefit to employers—deprives injured workers appearing before the agency of substantive due process.

A. Unconstitutional Rulemaking

As discussed in Parts V.B and V.C, the Board has employed administrative appeal decisions, Subject Numbers, and unofficial communications and procedures to establish and enforce administrative policies that it applies in a uniform fashion. This approach may well prove to be unconstitutional.

Article IV, section 8 of the New York State Constitution provides that “[n]o rule or regulation made by any state department, board, bureau, officer, authority or commission, except such as relates to the organization or internal management of a state department, board, bureau, authority or commission shall be effective until it is filed in the office of the department of state.”⁵³⁰

In considering this constitutional provision, the Court of Appeals has held:

The term, “rule or regulation”, has not, it is true, been the subject of precise definition, but there can be little doubt that, as employed in the constitutional provision, it embraces any kind of legislative or quasi-legislative norm or prescription which establishes a pattern or course of conduct for the future. The label or name employed is not important and, unquestionably, many so-called “orders” come within the term.⁵³¹

The Court of Appeals has further held that there is an important “distinction between ad hoc decision making based on individual facts and circumstances, and rulemaking.”⁵³² Further:

⁵³⁰ N.Y. CONST. art. IV, § 8.

⁵³¹ *People v. Cull*, 176 N.E.2d 495, 497 (N.Y. 1961).

⁵³² *Alca Indus. v. Delaney*, 709 N.E.2d 97, 98 (N.Y. 1999).

Choosing to take an action or write a contract based on individual circumstances is significantly different from implementing a standard or procedure that directs what action should be taken regardless of individual circumstances. Rulemaking, in other words, sets standards that substantially alter or, in fact, can determine the result of future agency adjudications.⁵³³

The key distinction is whether the agency has created a “blanket requirement” or has “allow[ed] for flexibility” depending on individual circumstances.⁵³⁴

Thus, in *439 East 88 Owners Corp. v. Tax Commission*,⁵³⁵ the Tax Commission’s policy—not reduced to a regulation—requiring the submission of certain information by every property owner was a violation of rulemaking requirements under the New York City Charter because it “dictate[d] a specific result in particular circumstances without regard to other circumstances relevant to the regulatory scheme.”⁵³⁶

Similarly, in *Callahan v. Carey*,⁵³⁷ a rule established by the New York City Department of Homeless Services was invalid where it denied its decision-makers “discretion to independently exercise their professional [j]udgment” and instead “establishe[d] precepts that remove [i]ts discretion by dictating specific results in particular circumstances.”⁵³⁸

Thus, to the extent that the Board’s decisions, Subject Numbers, and other administrative procedures establish inflexible rules that apply to all cases, regardless of their individual facts, they may violate the constitutional requirement that such rules be promulgated in regulatory form. Some of the Board’s actions that have fallen into this category are:

(1) Its administrative requirement that all injured workers who are partially disabled demonstrate attachment to the labor market

⁵³³ *Id.* at 99.

⁵³⁴ *See id.*; *see also* Council of N.Y. v. Dept. of Homeless Servs. of N.Y., 3 N.E.3d 128, 130 (N.Y. 2013) (quoting *Alca Indus.*, 709 N.E.2d at 99).

⁵³⁵ 439 E. 88 Owners Corp. v. Tax Comm’n of N.Y., 763 N.Y.S.2d 12 (App. Div. 2003).

⁵³⁶ *Id.* at 13.

⁵³⁷ *Callahan v. Carey*, No. 42582/79, 2012 N.Y. Misc. LEXIS 758 (Sup. Ct. Feb. 21, 2012).

⁵³⁸ *See id.* at *6–7 (first citing *Med. Soc’y v. Serio*, 800 N.E.2d 728, 737 (N.Y. 2003); then citing *DeJesus v. Roberts*, 746 N.Y.S.2d 1, 4 (App. Div. 2002)).

as a condition of receiving benefits, regardless of whether their separation from employment was voluntary or involuntary;⁵³⁹

(2) Its administrative definition of “volunteer” for purposes of providing benefits to World Trade Center responders, which was overturned by the appellate division in *Hazan*;⁵⁴⁰

(3) Its policies aimed at denying compensation for schedule loss of use, which were overturned in *Taher*, *Arias*, *Saputo*, *Fernandez*, *Youngjohn*, *Semrau*, *Blue*, and *Johnson*;⁵⁴¹

(4) Its attempts to use the statutory duration caps on permanent partial disability benefits to limit reopening and reclassification and to deny injured workers other statutory benefits for permanent disability, which were overturned in *Sanchez* (1), *Sanchez* (2), *O’Flaherty*, and *Minichiello*;⁵⁴²

(5) Its creation of substantive requirements for settlement agreements pursuant to Workers’ Compensation Law section 32 by way of Subject Numbers 046-119, 046-119.1, and 046-372, in addition to other unofficial requirements;⁵⁴³

(6) Its administrative definition of extreme hardship by way of Subject Number 046-938;⁵⁴⁴ and

(7) Its amendment of the medical permanency form (C-4.3 form) to eliminate the category of “less than sedentary work,” thus obstructing the ability of treating physicians and insurer medical consultants to report that an injured worker is totally disabled.⁵⁴⁵

Moreover, to the extent that some of these policies conflict with the express terms of the statute, they violate the plain meaning doctrine. For example, as discussed in Part III.A.4, the Legislature expressly removed statutory provisions that imposed time limitations on the Board’s ability to reclassify a disability, while maintaining the Board’s continuing jurisdiction to reopen cases at any time.⁵⁴⁶ However, in *In re Jacobi Medical Center*, the Board used an administrative decision to create its own time limitation and to

⁵³⁹ See *supra* Part V.B.3. This issue was discussed by the Court of Appeals in *O’Donnell v. Erie County*, 146 N.E.3d 1171, 1173–74 (N.Y. 2020).

⁵⁴⁰ See *supra* Part V.B.4.

⁵⁴¹ See *supra* Part V.B.1.

⁵⁴² See *supra* Part V.B.2; see also *Jacobi Med. Ctr.*, WCB No. 00825967, 2019 NY Wrk. Comp. LEXIS 1557 (Feb. 11, 2019).

⁵⁴³ See *supra* Part V.C.1.

⁵⁴⁴ See *supra* Part V.C.2. It is notable that the Board’s approach to this issue is essentially identical to its previous approach to the definition of “volunteer” in *Hazan*. See *Hazan v. WTC Volunteer Fund*, 987 N.Y.S.2d 484, 486–87 (App. Div. 2014). The appellate division’s reversal of the Board’s approach in that case does not appear to have had an impact on the agency’s willingness to use its Subject Numbers to define statutory terms.

⁵⁴⁵ See *supra* Part V.C.2.

⁵⁴⁶ See N.Y. WORKERS’ COMP. LAW §§ 15(6-a), 22, 123 (Consol. 2023).

restrict its own authority, holding that no case can be reopened and no disability reclassified after the expiration of the duration limit on permanent partial disability benefits.⁵⁴⁷ “[A]n administrative policy that ‘graft[s]’ onto the statute an addendum . . . violates the plain meaning doctrine.”⁵⁴⁸

It, therefore, appears that several of the Board’s remaining processes and procedures that limit worker benefits may be subject to challenge as unconstitutional rulemaking.

B. Procedural Due Process

The Court of Appeals has held:

Procedural due process requires notice and an opportunity for a hearing before the State may deprive a person of a possessory interest in his property. The protection is not limited to necessities, although the relative weight of the property interest involved may be relevant to the form of notice and hearing required by due process. Nor does the availability of the right turn on the relative degree of permanence of the deprivation, nor may it be defeated by provision for recovery of the property. Only an extraordinary or truly unusual situation will justify postponing notice and opportunity for a hearing.⁵⁴⁹

In the context of administrative agencies, the court has held that “[i]t is well settled that procedural due process in the context of an agency determination requires that the agency provide an opportunity to be heard in a meaningful manner at a meaningful time.”⁵⁵⁰

It has similarly held that “[p]rocedural due process recognizes that when the power of the government is to be used against an individual,

⁵⁴⁷ *Jacobi Med. Ctr.*, WCB No. 00825967, 2019 N.Y. State Workers’ Comp. Bd. LEXIS 1557, at *12–13 (Feb. 11, 2019).

⁵⁴⁸ *Smith v. Donovan*, 878 N.Y.S.2d 675, 679 (App. Div. 2009) (alteration in original) (quoting *Raritan Dev. Corp. v. Silva*, 689 N.E.2d 1373, 1376 (N.Y. 1997)).

⁵⁴⁹ *Blye v. Globe-Wernicke Realty Co.*, 300 N.E.2d 710, 714 (N.Y. 1973) (first citing *Sniadach v. Fam. Fin. Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Boddie v. Connecticut*, 401 U.S. 371 (1971)).

⁵⁵⁰ *Kaur v. N.Y. Urb. Dev. Corp.*, 933 N.E.2d 721, 735 (N.Y. 2010) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)); *see also* *Kaplan v. N.Y.C. Transit Auth.*, 78 N.Y.S.3d 452, 453–54 (App. Div. 2018); *Ickes v. Sayville Animal Hosp.*, 836 N.Y.S.2d 310, 311 (App. Div. 2007).

there is a right to a fair procedure to determine the basis for, and the legality of, such action.”⁵⁵¹

These references to “a meaningful manner at a meaningful time” and a “fair procedure” hark back to *White*, in which the Supreme Court upheld the constitutionality of the Workers’ Compensation Law while observing that “it perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead.”⁵⁵²

The progressive erosion of the injured worker’s ability to obtain access to the benefits provided by law raises a question about whether the current system comports with these due process requirements. The processes that are implicated include:

(1) The creation of a two-step assembly-and-indexing process, which complicates the claim process and largely defeats the injured worker’s access to the protection of Workers’ Compensation Law section 25(2)(b).⁵⁵³

(2) The decision to eliminate the issuance of decisions in cases that involve less than one week of lost time, which deprives those workers of information about their claims.⁵⁵⁴

(3) The use of proposed decisions in lieu of hearings, which do not provide workers with meaningful information about their claim or the benefits that are provided by the law—thus denying workers a meaningful opportunity to be heard.⁵⁵⁵

(4) The use of the temporary payment statute to refuse adjudication of claims until more than one year after the injury, which incontrovertibly denies workers an opportunity to be heard and a fair procedure to obtain benefits.⁵⁵⁶

(5) The formalistic requirement for parties to note a formal exception as a condition precedent to seeking administrative appellate review, which stands in stark contrast to the elimination of such a requirement in the civil and criminal court systems.⁵⁵⁷

(6) The creation of administrative hurdles and the threat of penalties to deter injured workers from making use of the Legislature’s 2017 amendment granting a mandatory hearing within

⁵⁵¹ *Morgenthau v. Citisource*, 500 N.E.2d 850, 854 (N.Y. 1986).

⁵⁵² *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 201 (1917).

⁵⁵³ See N.Y. COMP. CODES R. & REGS. tit. 12, § 300.37 (2023); *supra* Part V.A.

⁵⁵⁴ See N.Y. WORKERS’ COMP. BD., SUBJECT NO. 046-777, *supra* note 457; *supra* Part V.C.1.

⁵⁵⁵ See *supra* Part V.C.2.

⁵⁵⁶ See N.Y. WORKERS’ COMP. LAW § 21-a (Consol. 2023); N.Y. WORKERS’ COMP. BD., SUBJECT NO. 046-696, *supra* note 475; *supra* Part V.C.1.

⁵⁵⁷ See N.Y. COMP. CODES R. & REGS. tit. 12, § 300.13(2) (2023); *supra* Part V.A.

forty-five days in situations where the worker is not working and not receiving compensation.⁵⁵⁸

(7) The limitation of access to medical care through the enactment of Medical Treatment Guidelines and a prescription drug formulary which function to further regulate medical care.⁵⁵⁹

Viewed individually and as a whole, these processes call into question whether an “adequate” process exists that provides injured workers with “an opportunity to be heard in a meaningful manner at a meaningful time.”⁵⁶⁰ To the extent that they do not, this would be a violation of the workers’ constitutional right to procedural due process.

C. Substantive Due Process

In addition to procedural due process, the Constitution also requires the delivery of substantive due process, which is addressed to the legitimacy of the state’s action.

The right to an impartial adjudication is a basic element of due process. This aspect of due process applies equally in an administrative setting as it does in a judicial forum. Indeed, the relative lack of procedural protections in an administrative proceeding has been recognized as a basis for stricter application of the requirement that administrative decision-makers be impartial. . . . Thus, an administrative law judge may not act in a systematically biased manner in deciding cases. Rather, an administrative law judge is required to reach decisions by impartially applying the legal rules to the facts established by the record in each case.⁵⁶¹

Where, on the other hand, the administrative agency holds a generalized bias, or routinely interprets the facts or the law to the

⁵⁵⁸ See Act of Apr. 10, 2017, ch. 59, pt. NNN, subpt. D., sec. 1, § 25(2)(a), 2017 N.Y. Laws 253, 393–94; see N.Y. WORKERS’ COMP. BD., SUBJECT NO. 046-937, *supra* note 481; *supra* Part V.C.1.

⁵⁵⁹ See N.Y. COMP. CODES R. & REGS. tit. 12, §§ 324.2, 441; *supra* Parts IV.C.2, V.A. *But see* Kigin v. N.Y. Workers’ Comp. Bd., 24 N.E.3d 1064, 1065 (N.Y. 2014) (holding that the Board did not exceed its statutory authority in promulgating the Medical Treatment Guidelines).

⁵⁶⁰ See N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 201 (1917); Kaur v. N.Y. Urb. Dev. Corp., 933 N.E.2d 721, 735 (N.Y. 2010) (citing Mathews v. Eldridge, 424 U.S. 319, 333 (1976)).

⁵⁶¹ Kendrick v. Sullivan, 784 F. Supp. 94, 102 (S.D.N.Y. 1992) (first citing Schweiker v. McClure, 456 U.S. 188, 195 (1982); then citing Hummel v. Heckler, 736 F.2d 91, 93 (3d Cir. 1984)).

detriment of an injured worker, “this strikes at the very core of due process.”⁵⁶²

The Federal Administrative Procedures Act was created in 1946.⁵⁶³ As explained by Justice Jackson, the purpose of the Act was “to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge.”⁵⁶⁴ The committee report that provided the foundation for the Act expressed concern about the consequences for justice when

[t]he discretionary work of the administrator is merged with that of the judge. Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. . . . This not only undermines judicial fairness; it weakens public confidence in that fairness.⁵⁶⁵

Soon after the Supreme Court decision in *Wong Yang Sung*, the New York Court of Appeals adopted a similar view in *Hecht v. Monaghan*.⁵⁶⁶ In *Hecht*, the court observed that “[w]hen dealing with the public, the functions of an administrative agency fall into two broad categories, legislative and judicial.”⁵⁶⁷ The court held that the revocation of a hack license for a particular individual “is clearly not a merely administrative act concerned with the internal functioning of the agency itself, but it is a judicial or quasi-judicial function of the administrative body.”⁵⁶⁸ The court, therefore, concluded that an individual who appears before an administrative agency acting in its judicial capacity is entitled to due process, which includes a fair hearing.⁵⁶⁹

In *1616 Second Avenue Restaurant v. New York State Liquor Authority*,⁵⁷⁰ the Court of Appeals considered the circumstances under which the acts of an administrative agency could affect its judicial capacity in a manner that deprived an individual of the due

⁵⁶² See *Pronti v. Barnhart*, 339 F. Supp. 2d 480, 492 (W.D.N.Y. 2004).

⁵⁶³ Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559).

⁵⁶⁴ *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950).

⁵⁶⁵ *Id.* at 41–42.

⁵⁶⁶ *Hecht v. Monaghan*, 121 N.E.2d 421 (N.Y. 1954).

⁵⁶⁷ *Id.* at 424.

⁵⁶⁸ *Id.* at 424–25.

⁵⁶⁹ See *id.* at 425.

⁵⁷⁰ *1616 Second Ave. Rest. v. N.Y. Liquor Auth.*, 550 N.E.2d 910 (N.Y. 1990).

process right to a fair hearing.⁵⁷¹ The court found that statements made by the chairman of an administrative agency “to a legislative oversight committee indicated prejudgment of facts in issue in an adjudicatory proceeding,” which “deprived the licensee of due process of law under the Federal Constitution.”⁵⁷²

The *1616 Second Avenue* court noted that “[i]t is beyond dispute that an impartial decision maker is a core guarantee of due process, fully applicable to adjudicatory proceedings before administrative agencies.”⁵⁷³ Further, “administrative officials are expected to be familiar with the subjects of their regulation and to be committed to the goals for which their agency was created,” and this is expected to influence agencies acting in their legislative role.⁵⁷⁴ However, it is impermissible for an agency to prejudge “specific facts at issue in an adjudicatory proceeding. . . . It has been noted, moreover, that public statements that indicate prejudgment are especially problematic.”⁵⁷⁵

The Board has taken a variety of actions and made a number of statements that could lead a reasonable observer to the conclusion that it has leveraged its adjudicative function to further its policy views. When an agency acquires an interest in the outcome of the cases it is required to adjudicate, the result is that the agency no longer functions as a neutral arbitrator. This deprives litigants of substantive due process because the hearing is no longer fair.

Among the actions the Board has taken and the statements it has made that implicate substantive due process issues are:

(1) Appearing against the injured worker at the Court of Appeals or the Third Department in *Zamora*,⁵⁷⁶ *Kigin*,⁵⁷⁷ *O'Donnell*,⁵⁷⁸

⁵⁷¹ See *id.* at 911.

⁵⁷² *Id.*

⁵⁷³ *Id.* (citing *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975); *Warder v. Bd. of Regents*, 423 N.E.2d 352, 358 (N.Y. 1981)).

⁵⁷⁴ *1616 Second Ave. Rest.*, 550 N.E.2d at 912 (citing *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1168 (D.C. Cir. 1979)).

⁵⁷⁵ *1616 Second Ave. Rest.*, 550 N.E.2d at 912 (citing *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 80 (10th Cir. 1972); *Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970)); see also *Prince v. Dep't of Motor Vehicles*, 945 N.Y.S.2d 843, 851-52 (Sup. Ct. 2011).

⁵⁷⁶ *Zamora v. N.Y. Neurologic Assocs.*, 970 N.E.2d 823 (N.Y. 2012); see *supra* Part IV.D.

⁵⁷⁷ *Kigin v. N.Y. Workers' Comp. Bd.*, 24 N.E.3d 1064 (N.Y. 2014); see *supra* Part V.A.

⁵⁷⁸ *O'Donnell v. Erie County.*, 78 N.Y.S.3d 506 (App. Div. 2018); see *supra* Part V.B.3.

Taher,⁵⁷⁹ *Terranova*,⁵⁸⁰ *Arias*,⁵⁸¹ *Saputo*,⁵⁸² *Fernandez*,⁵⁸³ *Green*,⁵⁸⁴ *Youngjohn*,⁵⁸⁵ *Gambardella*,⁵⁸⁶ *Sanchez* (twice),⁵⁸⁷ and *Johnson*.⁵⁸⁸ In each case, the Board—which had served as the adjudicator in the case—joined the employer or insurer on appeal and contended that the injured worker was not entitled to benefits or medical treatment.

(2) Its various actions to limit non-schedule permanent partial disability benefits, including its decisions in *Sanchez* and *O’Flaherty*,⁵⁸⁹ its affirmative action to benefit insurers at the expense of injured workers by accelerating permanent partial disability classifications,⁵⁹⁰ the revision of its medical permanency form to omit a category for injured workers who are incapable of sedentary work,⁵⁹¹ and its definition of extreme hardship for purposes of safety net eligibility.⁵⁹² Indeed, in the Subject Number announcing its intent to accelerate classifications of permanent partial disability, the Board explicitly stated that its goal was to promote actions that insurers had not undertaken voluntarily, in order to implement benefit termination for injured workers and create savings for employers:

The Workers’ Compensation Reform Act of 2007 (2007 Reform) imposed duration caps on PPD-NSL benefits in claims that occurred after March 13, 2007 (Workers’ Compensation Law (WCL) § 15(3)(w)). These caps were the 2007 Reform’s central cost-savings measure and were expected to produce annual savings of approximately \$1 billion. . . .

⁵⁷⁹ *Taher v. Yiota Taxi, Inc.*, 78 N.Y.S.3d 500 (App. Div. 2018); *see supra* Part V.B.1.

⁵⁸⁰ *Terranova v. Lehr Contr. Co.*, 31 N.Y.S.3d 692 (App. Div. 2016), *rev’d*, 91 N.E.3d 1226 (N.Y. 2017).

⁵⁸¹ *In re Arias*, 120 N.Y.S.3d 203 (App. Div. 2020); *see supra* Part V.B.1.

⁵⁸² *Saputo v. Newsday, LLC*, 118 N.Y.S.3d 797 (App. Div. 2020); *see supra* Part V.B.1.

⁵⁸³ *Fernandez v. N.Y. Univ. Benefits*, 120 N.Y.S.3d 207 (App. Div. 2020); *see supra* Part V.B.1.

⁵⁸⁴ *Green v. N.Y.C. Dep’t of Corr.*, 137 N.Y.S.3d 750 (App. Div. 2021); *see supra* Part V.B.1.

⁵⁸⁵ *Estate of Youngjohn v. Berry Plastics Corp.*, 94 N.Y.S.3d 396 (App. Div. 2019), *aff’d*, 169 N.E.3d 589, 600 (N.Y. 2021); *see supra* Part V.B.1.

⁵⁸⁶ *Gambardella v. N.Y.C. Transit Auth.*, 167 N.Y.S.3d 213 (App. Div. 2022); *see supra* Part V.B.1.

⁵⁸⁷ *Sanchez v. Jacobi Med. Ctr.*, 118 N.Y.S.3d 792 (App. Div. 2020); *Sanchez v. Jacobi Med. Ctr.*, 146 N.Y.S.3d 318 (App. Div. 2021); *see supra* Part V.B.2.

⁵⁸⁸ *Johnson v. City of New York*, 195 N.E.3d 1 (N.Y. 2022); *see supra* Part V.B.1.

⁵⁸⁹ *See supra* Part IV.B.2.

⁵⁹⁰ *See* N.Y. WORKERS’ COMP. BD., SUBJECT NO. 046-548, *supra* note 467; *supra* Part V.C.1.

⁵⁹¹ *See supra* Part V.C.2.

⁵⁹² *See* N.Y. WORKERS’ COMP. LAW § 35(3) (Consol. 2023); N.Y. WORKERS’ COMP. BD., SUBJECT NO. 046-938, *supra* note 482; *supra* Part V.C.2.

Data shows that despite [the Board's previous] efforts, carriers have not achieved the level of PPD-NSL classifications that were expected. As of March 13, 2013, only 2,062 claims with accident dates from March 13, 2007 – March 12, 2008 have been classified, compared to 6,102 claims from 2002 at the same five year point. Private carriers are slowest – perhaps deterred by the requirement to deposit the present value of the PPD-NSL benefits into the Aggregate Trust Fund (ATF) if they cannot settle the claim within six months of classification. While increased Section 32 settlements prior to classification may account for some of the reduction in classifications, it is not sufficient to account for all of it. The average time from accident to classification has been increasing steadily and is now 6.4 years.⁵⁹³

(3) Its efforts to limit schedule loss of use awards initially by refusing to adhere to the appellate division's decision in *Taher* and later by its positions in *Semrau*, *Blue*, *Johnson*, *Gambardella* and *Youngjohn*.⁵⁹⁴

In each of these instances, the Board has made affirmative statements and/or taken affirmative actions to limit the benefits payable to injured workers under the statute—up to and including litigating against individual injured workers in the courts. In the case of non-schedule permanent partial disability benefits, these actions were taken with the express intent of providing \$1 billion in savings to employers, at the expense of injured workers.⁵⁹⁵ These statements and actions implicate potential violations of substantive due process on the grounds that the agency's roles of policymaker and adjudicator have merged, violating the neutrality and impartiality that is required in its adjudicative function.

VII. IMPACT ON INJURED WORKERS

The legislative and administrative issues discussed in Parts IV through VI have had a devastating impact on the adequacy of benefits for injured workers. A recent report by the Center for New

⁵⁹³ N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-548, *supra* note 467.

⁵⁹⁴ See *supra* Parts V.B.1, V.C.2.

⁵⁹⁵ See N.Y. WORKERS' COMP. BD., SUBJECT NO. 046-548, *supra* note 467.

York City Affairs at The New School outlined the scope of the issue.⁵⁹⁶ According to the New School report:

A 2007 increase in the maximum and minimum benefit levels raised the benefits for high-wage workers, did nothing for middle-wage workers[,] and provided a slight benefit for some, but not all, low-wage workers. However, a cap on permanent partial disability payments wiped out benefits for all such injured workers beyond 10 years. For most long-term partially disabled high-wage workers, this 10-year limit more than offset the higher maximum.⁵⁹⁷

In concrete terms, the New School reported:

For long-term (more than 15 years) injured workers, the wage replacement value of indemnity benefits is much lower than before the 2007 changes, and before that there had been no enhancements since 1992 (now more than a quarter-century ago). [In addition, the] 2017 2.5 year cap on temporary disability payments, which had not been subject to a cap before, reduced benefits for all workers not fully recovered within a few years. For example, a worker injured for more than 10 years would see their wage replacement rate cut by 20 percent.⁵⁹⁸

The New School provided specific examples of the impact of the 2007 and 2017 legislation on worker benefits. Under its analysis, workers' compensation benefits replaced only 28.5% of the wages lost by a worker who was injured before 2007, earned \$900 per week at the time of the accident, was permanently disabled, and lost ten years of earnings.⁵⁹⁹ If the worker was injured between 2007 and 2017, workers' compensation benefits replaced only 12.6% of the wages lost.⁶⁰⁰ For accidents after 2017, this figure drops to 10.1%.⁶⁰¹

⁵⁹⁶ See generally JAMES A. PARROTT & NICHOLAS B. MARTIN, THE NEW SCH., CTR. FOR N.Y.C. AFFAIRS, TIME FOR A REAL LOOK AT HOW THE NEW YORK STATE WORKERS' COMPENSATION SYSTEM TREATS WORKERS (2019), https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5ceeaeb7104c7b8e90ac03e8/1559146168690/Time+for+Real+Final+Merge_052419.pdf [<https://perma.cc/S64H-5B3D>].

⁵⁹⁷ *Id.* at 3–4.

⁵⁹⁸ *Id.* at 4 (emphasis omitted).

⁵⁹⁹ *Id.* at 36.

⁶⁰⁰ *Id.*

⁶⁰¹ *Id.*

As a result, the New School concluded that “[i]ndemnity benefits for those suffering workplace injuries are woefully inadequate, falling far short of lost earnings and posing an extra hardship on low-wage workers.”⁶⁰² It observed that not only does the system fail to provide adequate compensation for the wages lost by permanently disabled workers, but it also fails to do so for periods of temporary disability: New York’s minimum and maximum weekly benefit rates “trail[] all neighboring . . . states,” amounting to 74% of the average maximum benefit rate in the five neighboring states and only 44% of the average minimum benefit rate in those states.⁶⁰³

The New School report also addressed the issue of access to benefits, finding that:

Many injured workers have difficulty accessing benefits. From the early stages of injury reporting and claim filing all the way through the increasingly litigious workers’ compensation process, injured workers face a host of barriers to accessing benefits. Many injured workers never apply for workers’ compensation, and vulnerable workers, such as immigrant and low-wage workers, face disproportionate barriers. A National Employment Law Project survey of over 600 low-income injured workers in New York City, Chicago, and Los Angeles, found that only nine percent received benefits. Half of the workers who reported injuries to their employer experienced retaliation.

Various administrative changes after the 2007 legislation substantially added to the number and complexity of claim forms, medical reports for health care providers, and incident reports for employers. This increased complexity has made the system considerably less transparent and harder to access by many low-wage and immigrant workers. The Workers’ Compensation Board’s shift away from hearings to the issuance of non-hearing decisions leaves many workers without an opportunity to seek clarity regarding their cases and their rights.

Workers who are less than fluent in English face additional barriers to accessing benefits. While the Workers’

⁶⁰² *Id.* at 4 (emphasis omitted).

⁶⁰³ *Id.*

Compensation Board offers translation services, only 0.3 percent of 2015 claims were filed in a language other than English, and only four percent of phone calls to the Board used interpretation services.⁶⁰⁴

These comments relate directly to a number of the administrative actions discussed in Part V.

The New School ultimately concluded that

Despite an early history as a national leader in safeguarding the interests of workers injured on the job, New York's workers' compensation system has eroded considerably over the years, as legislative and administrative changes have often focused on curtailing benefits rather than adapting to changes in the economy, workforce, and business practices. While legislative changes in 2007 and 2017 included some positive measures, for the most part changes significantly lessened the adequacy of worker benefits. The unfortunate result is that the focus of workers' compensation in New York has shifted from fairly compensating injured workers to minimizing employer costs.⁶⁰⁵

This conclusion is entirely consistent with the trends discussed in this article.

VIII. SOLUTIONS

The remaining question to be considered is whether there are steps that can be taken to arrest the fall of the workers' compensation system in recent decades from the grand bargain that was originally envisioned and zealously guarded throughout the twentieth century. Possible solutions fall into three broad areas: statutory, regulatory, and structural.

A. *Statutory Solutions*

There are a number of potential statutory solutions that could address both access to benefits and benefit adequacy. From the standpoint of access, the Legislature could:

⁶⁰⁴ *Id.* at 5 (emphasis omitted); *see also id.* at 38–40.

⁶⁰⁵ *Id.* at 52.

(1) Require the Board to index a claim upon the receipt of any indication of a work-related injury, thus expediting the process for injured workers.

(2) Eliminate the conciliation and temporary payment statutes and require a hearing to be scheduled in each case. This would provide clarity to injured workers about the status of their claim as voluntarily accepted, contested, or formally established. It would also permit the delivery of information in person, which would better address the language and literacy concerns that are inherent in Board notices that are issued only in English, make technical legal findings, and do not provide meaningful information about benefits or the process to the vast majority of injured workers.

From the standpoint of benefit adequacy, the Legislature could:

(1) Increase the maximum weekly benefit rate to one hundred percent of the state average weekly wage, rather than two-thirds. This would bring New York's maximum benefit rate in line with the average of the five neighboring states.⁶⁰⁶

(2) Increase the minimum weekly benefit rate to one-quarter of the maximum benefit rate. This would bring New York's minimum benefit rate in line with the average of the five neighboring states.⁶⁰⁷ The minimum weekly benefit rate should also be indexed to the state average weekly wage in the same manner as the maximum rate.⁶⁰⁸

(3) Provide greater access to permanent total disability classification, which is not subject to the duration limits associated with permanent partial disability benefits and would thus greatly reduce the extent of uncompensated wage loss.

(4) Provide greater access for permanently partially disabled workers to the statutory safety net by reducing or eliminating the threshold for eligibility and defining the term *extreme hardship* in a manner consistent with the purpose of the law.

(5) Amend the statute to fully overrule the decision in *Zamora* and remove proof of attachment to the labor market as condition precedent to the receipt of partial disability benefits in the absence of proof of a voluntary withdrawal from the labor market in which the worker left employment for reasons wholly unrelated to the compensable injury.

(6) Clarify the statute to expressly adopt the appellate division's decision in *Taher* that an uncompensated non-schedule permanent

⁶⁰⁶ See *id.* at 33–34.

⁶⁰⁷ See *id.*

⁶⁰⁸ See *id.*

partial disability does not preclude an award of compensation for schedule loss of use.

B. Regulatory Solutions

The Board can also take regulatory steps to improve access to benefits for injured workers. As the New School report puts it, “[a]dministrative procedures need to be made more worker-friendly, and more accessible to non-English speakers.”⁶⁰⁹ This suggestion is consistent with the foundation of the law, which

was particularly framed to avoid legal terminology and the technicalities of law pleading. It was intended that the working people themselves could make and file these claims and give the notice of injury. The cost and expense of employing attorneys were to be avoided if possible. The act was for the benefit of the workingman and his family, not for the profession.⁶¹⁰

The Board can and should review its regulations to reduce and eliminate technical obstacles that impede the filing and processing of claims and that elevate form over substance, thus preventing the delivery of benefits on the merits of a case.

C. Structural Solutions

The constitutional issues discussed in Part VI point to one of the core concerns about administrative law: the dual roles occupied by the administrative agency in which “[t]he discretionary work of the administrator is merged with that of the judge. Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights.”⁶¹¹

In the case of the Board, it is apparent that the policy concerns of the administrators have been allowed to permeate its adjudicatory process. This is reflected in the issuance of Subject Numbers that are intended to direct adjudicatory decisions, as well as in the use of unofficial policies that govern judicial decisions.

⁶⁰⁹ *Id.* at 53.

⁶¹⁰ Kaplan v. Kaplan Knitting Mills, Inc., 161 N.E. 204, 205 (N.Y. 1928).

⁶¹¹ Wong Yang Sung v. McGrath, 339 U.S. 33, 42 (1950).

The best solution to this issue would be to restructure the functions of the Board in order to insulate its adjudicators from supervision, control, and influence by its administrators. In short, a core structural solution would be the creation of an independent judiciary, which “is essential if there is a right to have claims decided by judges who are free from potential domination” by others.⁶¹² One means of accomplishing this might be to transfer the WCL judges from the Board to the Office of Court Administration, creating a new Division of Workers' Compensation Law judges within that agency. Not only would this create the necessary degree of separation between the administrator and the adjudicators, but it would also enhance the legal resources available to WCL judges.⁶¹³

Structural change should not be limited to administrative law judges, but should extend to the Commissioners of the Board, who hear administrative appeals from WCL judge decisions.⁶¹⁴ Other than the Chair, who is charged with both administrative and adjudicatory duties, the roles of the Commissioners are largely limited to adjudication of appeals.⁶¹⁵ It would therefore be feasible to relocate the Commissioners (other than the Chair) along with the WCL judges to the Office of Court Administration or other suitable agency in order to facilitate independence of adjudication from administrative policy-making.

If, however, the Commissioners remain located within the Board, there are other readily available means of creating a degree of independence in their decision-making process. For more than a decade, the Board's Commissioners have not heard oral arguments of administrative appeals. This departs from a century of precedent in which arguments were heard in person. In this regard, it is

⁶¹² See *United States v. Will*, 449 U.S. 200, 217–18 (1980).

⁶¹³ Similar approaches exist in the context of the No-Fault Law, in which arbitrations are conducted not by the Department of Financial Services but by independent arbitrators; the New York City Office of Administrative Trials and Hearings, in which administrative law judges are unattached to any specific agency; and the United States Department of Labor Office of Administrative Law judges, in which administrative law judges hear cases falling under a variety of administrative systems that fall under the Department of Labor's umbrella. See *No-Fault Claims and Arbitration*, N.Y. DEP'T FIN. SERVS., https://www.dfs.ny.gov/complaints/file_no_fault_arbitration [https://perma.cc/HF86-DJC4]; *Rules of Conduct*, N.Y.C. ADMIN. TRIALS & HEARINGS, <https://www1.nyc.gov/site/oath/institute/rules-of-conduct.page> [https://perma.cc/D8AU-WSW4]; *OALJ Alternative Dispute Resolution (ADR)*, U.S. DEP'T OF LAB., https://www.dol.gov/appeals/alj_adr.htm [https://perma.cc/4GD2-K9CZ].

⁶¹⁴ See *Hearings and Appeals*, N.Y. WORKERS' COMP. BD., http://www.wcb.ny.gov/content/main/onthejob/hearings_OTJ.jsp [https://perma.cc/PE3P-XEBR].

⁶¹⁵ See N.Y. WORKERS' COMP. LAW §§ 140–142 (Consol. 2023).

important to note that the Commissioners, as members of the Board, have the statutory authority to hear evidence directly, develop the record, and to make their own factual findings.⁶¹⁶

The current administrative system effectively precludes the Board's Commissioners from exercising this statutory authority, and in fact from having any contact with injured workers or attorneys for either workers or employers. Instead, decisions are prepared by "appeal writers" under the supervision of the Board's General Counsel and provided to the commissioners for review and signature.⁶¹⁷

One means of creating a degree of independence among the Board's Commissioners would be to mandate the oral argument of administrative appeals. This would permit the Commissioners to observe the injured worker, hear the arguments of counsel for both the worker and the employer, and take whatever additional evidence the Commissioners believe is relevant to the decision in the case. Perhaps most importantly, it would provide the Commissioners with an opportunity to question and interact with counsel for workers and employers regarding the facts and the law, expanding their sources of information beyond that provided by the administrator (the office of the Board's General Counsel) and their own personal efforts.

While this would not create a full measure of judicial independence, it would improve upon the current system in which the entirety of the information available to the adjudicators is provided by the administrator's personnel, creating "an unwholesome atmosphere in which to adjudicate private rights."⁶¹⁸

IX. CONCLUSION

Although the fundamental provisions of the Workers' Compensation Law have not changed significantly since it was first enacted, the manner in which the grand bargain has been honored has changed significantly over the course of the last century. From 1914 until 1990, the law was continuously revised and expanded with the goal of providing improved benefits for injured workers.

⁶¹⁶ See *id.* at §§ 123, 142.

⁶¹⁷ To the extent that the Board's General Counsel serves in the role of administrator, the use of personnel who are directly supervised by the administrator to prepare adjudicative decisions is a clear-cut example of the perilous combination of administrative and adjudicative authority. The natural result is that administrative appeal decisions hew close to the policy views of the administrator, rather than being independent and based on the applicable statute, regulations, and case law.

⁶¹⁸ *Wong Yang Sung v. McGrath*, 339 U.S. 33, 42 (1950).

Beginning in 1990, however, the rise of workers' compensation as social legislation intended to provide benefits to injured workers at the expense of business stalled. By 1996, it had begun to fall, as worker benefits stagnated, and the focus shifted to creating cost savings for employers within the system. This was directly contrary to the basis of the grand bargain, in which the primary benefit to employers was insulation from tort liability, external to the system itself.

From 1996 until 2007, administrative actions and decisions were the primary source of erosion for worker benefits, as the statute itself remained largely unchanged. However, major statutory amendments in 2007 and 2017, while improving certain aspects of worker benefits, contributed to their overall diminishment. Meanwhile, administrative action accelerated throughout this period, combining with statutory changes to create a system that is almost unrecognizable when compared with its original form.

There are steps that can be taken to refocus the workers' compensation system on its original goal, which was to correct a system "that is economically unwise and unfair" by recognizing that injured workers "do not, and practically cannot, provide for themselves adequate accident insurance, and, therefore, the burden of serious accidents falls on the workmen least able to bear it, and brings many of them and their families to want" and by "compelling the employer to share the accident burden in intrinsically dangerous trades, since by fixing the price of his product the shock of the accident may be borne by the community."⁶¹⁹

The solutions contained in Part VIII of this article, among others, would play a role in achieving that beneficial outcome and in arresting (and perhaps reversing) the fall of the New York State workers' compensation system from its historic status as one of the most progressive in the nation.

⁶¹⁹ *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431, 436 (N.Y. 1911).