AGENDA

1. Legislative/Regulatory Update
2. SLU Guidelines Refresher
3. Docket Management and Virtual Hearings
4. Notable Decisions
Legislative: 2019 Session

Article VII 2019-2020 Exec. Budget, PPGG Part CC

- Expanded set of providers: NPs, LCSWs, Acupuncturists
- Authorizations for existing ‘ancillary’ providers: PAs, PTs, OTs
- Expands specific authority to resolve bills regarding all medical service, including DME and Rx
- Desk arbitration for all value levels
- Regulations in register 6-19-19; in midst of public comment

Farm Laborers Fair Labor Practice Act: A8419 /S6578

- Signed July 17, affects labor law (such as overtime & UI), public health law, WCL
- For workers compensation:
  - § 110-b: farm labor contractors – w/ notice of injury, must inform employer, owner, or operator
  - § 120: amended claim, attempted to claim, or “requested a claim form…” as basis
  - § 51: notice must be in English and Spanish
  - § 3(1)(14-b): amended to remove the $1200 total payroll threshold
  - § 201(6): definition of employment removed ‘service as farm laborers’ exclusion, meaning eligible for Paid Family Leave and disability benefits
- Effective date: set for 1-1-2020
Legislative: Adjudication from 2017 Reform

WCB has already adjudicated several aspects from 2017 reform:

- Amendment to §15(3)(w) on attachment to labor market
- Importance of ‘entitlement to benefits’ has led to Board making sure we handle any raised attachment issues at same point we rule on classification
- Extreme Hardship Redetermination (§35[3]) first cases moving through system
- §23 added a mandatory review of LWEC reductions by panel below safety net
- One case was remitted to consider first-responder stress under §10(3)(b) [Matter of McMillan v. Town of New Castle, 162 A.D.3d 1425] (disallowed upon remitter)
- New SLU Guidelines effective 1-1-18 (discussed below)

Legislative: Adjudication from 2017 Reform

Issue not yet adjudicated: Safety Valve / no MMI

- §15(3)(w) amended to include credit against PPD cap for weeks of Temporary Partial Disability paid after 130 weeks from date of accident, where d/a on or after April 10, 2017
- First eligible cases arise October 2019
- “Safety Valve” provides that credit against cap not available where claimant can show, when case is ripe, that Maximum Medical Improvement has not been attained
Legislative: IME Study & Committee

- Legislature directed an IME Advisory Committee to convene
- Composed of labor, business, physicians, carriers, self-insureds, and attorneys
- Facilitated meetings occur monthly on wide range of topics
- Address issues of administration, quality providers, and fairness
  - For example, “Same day, same manner”
  - Recommendations to legislature and Governor due at end of 2019

New and Pending Regulations

Medical Fee Schedule (MFS)

- First update in over 20 years; provided across-the-board increases for providers
- Consolidated some out-of-date codes
- Clarified and updated certain ground rules, including re: supervision
- New MFS took effect April 1, 2019
Prescription Drug Formulary

- 2017 reforms mandated WCB establish a Formulary; §13-o
- There were 4 public comment periods; last ended May 2019; adopted 6-5-19
- Compliance by 12-5-19 for new Rx and notice of non-compliant Rx
- As of 6-5-20 all refills and renewals need to be on formulary or have prior authorization
- Basic concept: there are 3 lists, one for 1st 30 days; one for balance of claim tied to our MTG; peri-operative for +/- 4 days of surgery.
- Provides that all compound medications must go through prior authorization.
- Process for prior approval or authorization of drugs not listed on the formulary
- Rx Fee Schedule established “lesser of” standard; adopted 4-17-19, eff. 10-1-19

Paid Family Leave Update

- Fully implemented 1-1-18
- All private employers covered via insurance or ask to self-insure
- Public employers may opt-in to provide for employees
- Union employees covered through employers, subject to CBA (including public)
- 2019 is year 2: AWW and week allotment increases for 4 years
  - 50% SAWW to 67% SAWW over 4 years
  - 8 weeks to 12 weeks over 4 years
- Disputes via NAM arbitration; vast majority PFL claims are handled without dispute
- NEW: Farm Labor, as discussed above
2018 Permanency Guidelines

- Brief update on changes from 2012 (1996) SLU guidelines to the 2018 SLU Guidelines

Contralateral

- Deficits should be measured by comparing to the baseline reading of the contralateral member, if appropriate. Using the contralateral is not appropriate where the opposite side has been previously injured or is not otherwise available for comparison [1.3(3)(b)]
Contralateral

- Where contralateral unavailable, 2018 Guidelines now contain designated normal ROMS for all tested sites
- Prior iterations had spotty indicators of normal ROMs

Goniometer

- To measure active range of motion (ROM), medical providers should generally utilize a goniometer. In order to measure the maximum range of active motion, three repeat measurements should be taken [1.3(3)(a)]
Amenability

- Prior Guideline classification element lists did not specify whether all or only some of the conditions need be present
- The 2018 Guidelines clarify that the presence of any of the listed conditions may result in a determination that the injury is amenable to classification instead of SLU (2018, Section 1.6[1] and [2])

Special Considerations

- Eliminates confusion as to whether conditions that fall under the category of Special Consideration are to be evaluated standalone or whether value can be added
- Instructions are now clear as to whether to add or not add
- The Special Considerations for meniscal and rotator cuff tears have been removed
Joint Replacements

- Includes charts for determining the loss associated with joint replacements (Shoulder 5.5, Hip 6.5, and Knee 7.5)
- Advances in medicine reflected
- A good outcome is now equated to a 35% SLU

Loading

- Prior Guidelines had limited description of how to apply a load to an SLU evaluation
- 2018 Guidelines contain a step by step explanation
- Loading figures involving fingers have been increased by 20%
Maximum ROM

- SLU cannot exceed the value of full ankylosis of the joint
- Multiple ankylosed joints, SLU cannot exceed the value of amputation (exception for loading)
- *Matter of Maloney v Wende* 157 AD3d 1155 (2018): Values added would exceed full ankylosis of the joint. Court labeled this an “illogical result” and affirmed WCB

Guidelines Apply Broadly

- New York medical providers must be Board authorized
- Permanency evaluations performed outside of New York must comport with these Guidelines
- Informs providers who may be otherwise unaware of existing law
Sources of Medical Evidence

- C-4.3 must be complete, or else is subject to rejection
- IME report, whether carrier or claimant, must comport with WCL 137 and 12 NYCRR 300.2
- To compel carrier payment for claimant IME, must meet 300.2(d)(2)

Permanency Threshold

- MMI is a prerequisite finding to permanency
- MMI cannot be determined prior to 6 months from the date of injury or disablement, unless otherwise stated or agreed to by the parties (2018, Section 1.2)
SLU Versus Classification

- No residual impairments must remain in the systemic area (e.g., head, neck, back, etc.) before the claim is considered suitable for schedule evaluation of an extremity or extremities involved in the same accident (2018, Section 1.5)
Formal and Informal Decisions

- Administrative Decisions - Claims Examining
- Proposed Decisions – Conciliation / Senior Attorneys
- Notices of Decision - Workers’ Compensation Judges

Calendaring of Cases

- Case referred to calendaring unit
- Time allowance set
- Part assigned
- Hearing notice prepared - Regulation 300.8
- Hearing notice served
What Types of Issues and How Many?

GRAND TOTAL..............................................277,000

Including

- Controverted Claims.............................................58,700
- Section 32 (indemnity and/or med)........................18,000
- Permanent Partial Disability (procedure 3-4 hearings)....15,000

Virtual Hearing Center (VHC)

- More than point-to-point video
- A new way to “appear” at a hearing
- No need for any participant to come to the Board in person
- All workers' compensation cases as of March 25, 2019
VHC = New Efficiencies

- No need to travel
- Comfort of own office
- Cases back up, another attorney at the office can sign in and cover the overage
- Automatic upload of documents
  www.wcb.ny.gov/content/ebiz/ecase/ecase_doc_upload.jsp

2018 Virtual Hearing Center

- We now have video of every hearing saved as an audio record
- Audio record is provided upon request at no charge
- Email request to DARMinutes@wcb.ny.gov

For those who haven’t seen or used VHC, here’s what the process looks like…
CIS

Hearing Notice

New York State Workers' Compensation Board

wcb.ny.gov/virtual-hearings

Overview

Virtual Hearings allow injured workers, attorneys/representatives, witnesses, and other participants to attend hearings online. Participants will no longer have to travel to a hearing site to attend their hearing.

The Board’s pilot program will make virtual hearings available for some hearings beginning in September 2022.

If you are eligible to participate for your hearing virtually, you will find instructions at the bottom of your hearing notice under “Virtual Hearing Available.”

To take part in a virtual hearing, you must:

- have a computer with a webcam or have a video conference system
- have a high-speed Internet connection
- be able to access the virtual hearing application - Test Your System
- meet all System Requirements for Virtual Hearings

Be sure to test your system at least 48 hours prior to your hearing.
Mark Yourself as Available or Away

Adding Your Hearing Schedule
### Hearing Added

#### Waiting Room

*You Are Ready!*

If you are appearing in person, please enter your hearing when called. If you are attending virtually, you will be notified with a pop-up to enter your hearing.

Add another hearing ID:

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<th>Claimant</th>
<th>Hearing ID</th>
<th>Case</th>
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<th>Status</th>
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*Added hearing with ID: 62791037*

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### Joining the Hearing

#### Hearing Started

Your hearing has started. Please click 'Enter Hearing' to enter your hearing.

If you experience an error or the hearing fails to load, you may click this button again to re-enter the hearing.

*Enter Hearing*
Mobile App – Logging In

Enter Your Hearing Information
- Hearing ID
- First Name
- Last Name
- Email
- Phone Number

Select Your Role
- Claimant
- Claimant Attorney
- Carrier Attorney
- Witness/Other Participant

Mobile App - Hearing

You are Ready!
Your hearing will start when the judge starts the hearing.
Participant Roles will appear abbreviated before name as:
- CL = Claimant
- CL Rep. = Claimant Representative
- INS Rep. = Insurance Representative
- WIT. = Witness
Payment of Posthumous Schedule

*Youngjohn v Berry Plastics Corp.*, 169 AD3d 1237

- Decedent had right shoulder, left elbow injury; SLU opinions submitted
- Then, claimant died; no surviving beneficiaries or dependents
- Stip 55% SLU left arm, 45% right arm
- Board found SLU limited per 15(d)(4) to reasonable funeral expenses
- WCL § 33 indicates payment of posthumous SLU to estate
- Resolving conflict between statutes, competing case law, and 2009 amendments, Court held SLU payable as allocated to date of death, plus funeral expenses
Full deduction for prior SLU

*Genduso v NYC Dept. of Education*, 164 AD3d 1509

- “… neither the statute nor the Board’s guidelines lists the ankle or the knee as body parts lending themselves to separate SLU awards. Rather, impairments to these extremities are encompassed by awards for the loss of use of the leg. Inasmuch as the 20% SLU award granted with respect to claimant’s 1997 injury was for the loss of use of his right leg, it was not improper for the Board to deduct it from the 40% SLU award that it found applicable to claimant’s 2013 injury in arriving at the final SLU award of 7.5%.”

Interstate Commerce / Jurisdiction

*McCray v CTS Enterprises Inc.;* 156 AD3d 1356

- Claimant lived in Florida, worked on CSX train, in dining service under CTS Enterprises
- Train was in NY; sustained knee injury while exiting train to purchase supplies
- CTS was found to be employer, based on finding that Federal Employer’s Liability Act didn’t preclude claim, and that there were sufficient contacts with NY
- WCL § 113 allows for comp in interstate commerce cases where claimant, employer, and carrier waive all federal rights and remedies
- FELA was applicable here, and CTS and UEF did not waive their rights to a federal claim; thus reversed and disallowed
Article 8-a Back Claim
*Chrostowski v Pinnacle Env. Corp.*, 169 AD3d 1217

- Was involved in cleanup of WTC; included lifting heavy bags of material
- Timely WTC-12; claim filed 2016
- For respiratory illnesses, all qualifying conditions, timely
- Back claim was found barred by §28
- Court reversed, as musculoskeletal disease is listed in §161(3)(e) as a qualifying condition, and the IME orthopedist characterized his “affliction as a lumbar spine repetitive use injury”

Medical Treatment Guidelines
*Gasparro v Hospice of Dutchess County*, 166 AD3d 1271

- Affirmed finding that MTG apply out-of-state
- Board found that per § 123 and *Kigin* that MTG applies out of state. Found LidoPro and Terocin were not in accord with MTG and resolved objections in favor of carrier
- Court: WCB may alter course from prior decisions, as we explained why
- Applying guidelines to out-of-state was rational
Gasparro (con’t)

Court’s rationale:

▪ “By applying the guidelines to treatment received in another state, the same medical standards of care — developed to ensure that claimants receive appropriate and effective medical care as recommended by the medical community identifying best practices — will apply equally to medical treatment received by in-state and out-of-state claimants.”

Very Recent Decisions

▪ 25-a [Verneau, Radley]
▪ 300.13 [Jones, Sweich, Presida]
Mandatory Full Board Review

Employer **Claire Hayduscko**: 2019 NY Wrk Comp 4070 8094
- Privately hired Home Health Aide considered a domestic worker entitled to benefits for over 40 hours of work

Employer **Postmates, Inc.**: 2019 NY Wrk Comp G191 7469
- Claimants who delivered food by bicycle through a digital platform were independent contractors rather than employees

Questions

- Visit the Board website: [wcb.ny.gov](http://wcb.ny.gov)
  - Regularly for updates
  - When you have a question