

December 1, 2008

First Annual Safety Net Report of the Commissioner

M. Patricia Smith, Commissioner

Submitted pursuant to Section 35(4) of the Workers'
Compensation Law, Chapter 6 of the Laws of 2007



Executive Summary

The 2007 Workers' Compensation Reform legislation created, for the first time, a maximum number of weeks that an injured worker with a Permanent Partial Disability (PPD) classification could receive indemnity benefits for workplace accidents and dates of disablement which occur on or after March 13, 2007. The maximum benefit weeks range from 225 weeks where an injured worker's loss of wage-earning capacity is 15 percent or less, to 525 weeks where the loss of wage-earning capacity is greater than 95 percent.

Because of concern over the potential impact of the new PPD duration caps, Section 35 was added to the Workers' Compensation Law to establish a safety net for PPD claimants who surpass their number of maximum benefit weeks and have not been able to return to work. The goal of Section 35 is to assure that workers categorized by the Workers' Compensation Board (Board) as permanently partially disabled return to gainful employment to the greatest extent practicable.

Section 35 directed the New York State Commissioner of Labor (Commissioner) to survey and recommend best practices for return to work programs. In addition, Section 35 incorporated existing case law rights on total industrial disability. It also allowed claimants with a loss of wage earning capacity of 80 percent or greater to seek an exemption to the PPD duration caps on extreme hardship grounds. Finally, the Commissioner was directed to track those who are classified as permanently partially disabled over time on an annual basis starting December 1, 2008.

This "Safety Net Report" has been developed pursuant to Section 35 (4) which directed the Commissioner to track all claimants who have been awarded PPD status, in conjunction with the Board and the Superintendent of Insurance. The Governor and Legislature asked that the annual "Safety Net" report identify, at a minimum, the number of PPD claimants who have:

- (1) returned to gainful employment;
- (2) been recategorized as being totally industrially disabled;
- (3) remain subject to duration limitations set forth in paragraph w of subdivision three of section fifteen of this article; and
- (4) not returned to work, and whose indemnity payments have expired.

The statute directed the Commissioner to outline any additional steps necessary to minimize the number of workers who have not returned to work and who have not been recategorized from PPD.

Claimant data for accidents or dates of disability on or after the effective date of the new laws, March 13, 2007, through December 31, 2007 was provided by the Workers' Compensation Board, and were reviewed for this report. This data was matched with the Department's quarterly wage data through June 30, 2008. The Department's Research & Statistics Division provided statistical analysis for this report.

There are no claims appearing in the Board's data that reflect a classification of permanent total disability, total industrial disability or non-scheduled permanent partial disability pursuant to the terms of the reform law. The Board anticipates these classifications to occur in the near future and is actively developing the process and technology needed to reliably gather data on post-reform permanent partial disabilities for future Safety Net reports.

The clock has started to tick for those PPD claimants who are now subject to a cap on the receipt of benefits. And, time is of the essence for putting into place measures to minimize the number of injured workers who have neither returned to work nor been recategorized from PPD classification. The Department, therefore, makes the following recommendations:

- The Department should conduct a study within the next ninety days of the long-term return to work outcomes of claimants with accident dates between the first quarter 2000 and the second quarter 2006. The Department shall look at the wage data for these claimants eight quarters after injury to determine the level of sustained employment post-injury prior to the reform law. This information will provide a benchmark for evaluating the impact of the 2007 reforms and the safety net provisions. Based on the Department's findings, the Commissioner will make additional recommendations as necessary to minimize the number of workers who have not returned to work and who have not been recategorized from PPD.
- The Department and the Board should continue to move forward on implementing the policies, procedures, and statutory and regulatory changes that can improve return to work rates overall for workers' compensation claimants as recommended by the March 2008 Return to Work Report that the Commissioner issued in conjunction with the Return to Work Advisory Council.

Preface

Section 35 of the Workers' Compensation Law

Safety Net

1. Return to work.

(a) The commissioner of labor will issue a report to the governor, the speaker of the assembly, the majority leader of the senate, and the chairs of the labor, ways and means and finance committees of the assembly and senate on or before December first, two thousand seven, making recommendations as to how to assure that workers categorized by the board as permanently partially disabled return to gainful employment to the greatest extent practicable. Such commissioner will consider administrative and legislative remedies, and shall include estimates of cost in the report. The report shall examine best practices and the laws of other jurisdictions, as well as any relevant programs authorized by New York law. The report shall additionally examine return to work practices as implemented by carriers, the state insurance fund, employers, and the board. It shall also examine the relationship of vocational rehabilitation to ultimate return to work.

(b) The commissioner of labor will be assisted by an advisory council constituted of six persons appointed by the governor as follows:

- (i) a representative of organized labor appointed upon recommendation of the New York State American Federation of Labor-Congress of Industrial Organizations;
- (ii) a representative of the business community appointed upon recommendation of the Business Council of New York State, Incorporated;
- (iii) one person upon recommendation of the majority leader of the senate;
- (iv) one person upon recommendation of the speaker of the assembly; and
- (v) two other persons in the governor's discretion.

2. Total industrial disability. No provision of this article shall in any way be read to derogate or impair current or future claimants' existing rights to apply at any time to obtain the status of total industrial disability under current case law.

3. Extreme hardship redetermination. In cases where the loss of wage-earning capacity is greater than eighty percent, a claimant may request, within the year prior to the scheduled exhaustion of indemnity benefits under paragraph w of subdivision three of section fifteen of this article, that the board reclassify the claimant to permanent total disability or total industrial disability due to factors reflecting extreme hardship.

4. Annual safety net reporting. The commissioner of labor, in conjunction with the board and the superintendent of insurance, shall track all claimants who have been awarded permanent partial disability status and report annually on December first, beginning in two thousand eight, to the governor, the speaker of the assembly, the majority leader of

the senate, and the chairs of the labor, ways and means and finance committees of the assembly and senate:

(i) The number of said claimants who have:

- (1) returned to gainful employment;
- (2) been recategorized as being totally industrially disabled;
- (3) remain subject to duration limitations set forth in paragraph w of subdivision three of section fifteen of this article; and
- (4) not returned to work, and whose indemnity payments have expired.

(ii) The additional steps the commissioner contemplates are necessary to minimize the number of workers who have neither returned to work nor been recategorized from permanent partial disability.

Legislative Charge

When PPD benefit duration caps were negotiated, the need for a safety net was recognized and incorporated into the reform legislation. The new time limits on receipt of PPD benefits apply to those claimants who are classified as having a Permanent Partial Disability with “Nonscheduled Losses” (PPD NSL). The Governor, Legislature and stakeholders were particularly concerned about the ability of PPD claimants to return to work and whether they were able to do so before they surpassed their maximum number of benefit weeks. Both business and labor strongly supported a new emphasis on returning PPD claimants to work.

Chapter 6, Section 5 of the Laws of 2007, titled the 2007 New York Workers’ Compensation Law Reform, amended the workers’ compensation law by adding a new Section 35, which established several safety net provisions. The goal of Section 35 was to “assure that workers categorized by the board as permanently partially disabled return to gainful employment to the greatest extent practicable.”

The first part of Section 35 required the New York State Commissioner of Labor (Commissioner) to survey and recommend best practices for return to work programs as well as to consider the role of vocational rehabilitation. §35(2) provided that future claimants’ existing rights to apply at any time to obtain the status of total industrial disability under current case law should not be derogated or impaired. §35(3) allowed a claimant whose loss of wage-earning capacity is greater than 80% to request, within the year prior to the scheduled exhaustion of indemnity benefits, that the Board reclassify the claimant to a permanent total disability (PTD) or a total industrial disability (TID) due to factors reflecting extreme hardship.

This “Safety Net” Report is issued in response to §35(4), which directed the Commissioner, in conjunction with the Board and the Superintendent of Insurance, to track all claimants who have been awarded permanent partial disability (PPD) status. Beginning on December 1, 2008, the Commissioner is required to issue an annual “Safety Net” report to the Governor and Legislature on the number of PPD claimants who:

- (1) have returned to gainful employment;
- (2) have been recategorized as totally industrially disabled;
- (3) remain subject to duration limitations on PPD benefits; and
- (4) have not returned to work, and whose indemnity payments have expired.

The statute directed the Commissioner to outline any additional steps necessary to minimize the number of workers who have not been able to return to work or who have not been recategorized from permanent partial disability.

Report Data and Research Methodology

This report analyzed an aggregate cross-match of claimant data provided by the New York State Workers' Compensation Board (Board) with the New York State Department of Labor's quarterly wage data. Records for these individuals were matched by social security number against the employer-reported unemployment insurance wage data from the NYS Department of Taxation and Finance to obtain employment and industry data. Those claimants on the wage record file who received payments defined as wages from employers in the accident quarter were included.

The Board provided the Department with 670,003 claimant records reflecting accidents or dates of disability from 2000 through the end of 2007. Of the claimant records received from the Board, 615,833 or 91.9% had a matching wage record in the wage file for the quarter of their accident. 4.9% did not match due to missing or invalid social security numbers.

The Department reviewed data on claimants with injuries and dates of disability on or after March 13, 2007, the effective date of the new law, and through December 31, 2007 for this report. The Department initially planned to compare this claimant data to the Department's quarterly wage data for the first two quarters of 2008 to see what impact, if any, changes in the law and new duration caps would have on the outcomes of all claimants, particularly those classified as PPD. However, because of the limited number of claimants with two full quarters after injury, such a data analysis would be inconclusive.

At this time, the Department believes that research should focus on claimant data with accident or dates of disability from the first quarter of 2000, the first available claimant data from the Board, through June 30, 2006 in order to study the return to work rates up to eight quarters after accident or illness. The Department proposes to look at an expanded group of claimants and characteristics in order to better understand the return to work outcomes of claimants across classification.

Post-Reform Claims

The Department surveyed data for claimants with accidents and illnesses on or after the effective date of the 2007 reform law, March 13, 2007, through December 31, 2007. The table below provides counts for the number of TTD, PPD Sch and PPD NSL claimants with both private and government employers by quarter of accident in each of the four quarters of calendar year 2007. Because this claimant data is so recent, the overwhelming majority of claimants with private employers (95.87%) and government employers (96.88%) were TTD claims. PPD Sch claims were 4% of the private sector claims and 3% of government sector claims for this time period.

The Department initially identified 28 PPD NSL claims having both an accident date and a classification date on or after March 13, 2007, and the Department asked the Workers' Compensation Board for further information about these claims. According to the Workers' Compensation Board's review of the 28 PPD NSL claims, these claims did not reflect a classification of non-scheduled permanent partial disability subject to the terms of the reform law.

The Board reports that several situations account for these data points appearing to indicate a post-reform classification while the PPD NSL benefits were actually awarded based on the pre-reform law. For example, an injured worker with an occupational disease may have an "accident date" captured as the date the claim was made but the date of disablement was established earlier due to prolonged exposure. Other situations involve injured workers with multiple claims where the awards in a classification are apportioned among claims that pre-date the reform law.

Claimants by Quarter of Accident And Employer in Accident Quarter Accident Dates 3/13/07 – 12/31/07

Case Type	3/13/07 to 3/31/07	4/1/07 to 6/30/07	7/1/07 to 9/30/07	10/1/07 to 12/31/07	Total
Private					
Temp Total	2,360	10,166	10,452	8,332	31,310
PPD Sch	363	629	213	121	1,326
PPD NSL*	3	17	1	0	21
All Claimants	2,726	10,812	10,666	8,453	32,657
Government					
Temp Total	906	3,717	3,821	3,389	11,833
PPD Sch	81	196	68	28	373
PPD NSL*	1	6	0	0	7
All Claimants	988	3,919	3,889	3,417	12,213

*These PPD NSL claims were not found to be classified and subject to the terms of the new reform law.

Injured workers must reach maximum medical improvement before being classified by the Workers' Compensation Board with a permanent disability. The period of time from

March 13, 2007 to December 31, 2007 (the end date of this report's analysis) would generally be insufficient for an injured worker to heal adequately to attain maximum medical improvement.

The Board also reported that no claims were reclassified as a permanent total disability or total industrial disability under the new extreme hardship provisions of the reform law. The Board anticipates these classifications to occur in the near future and is actively developing the process and technology needed to reliably gather data on true post-reform permanent disabilities for future Safety Net reports.

Section 35 of the WCL requires the Department to track the number of claimants who have returned to gainful employment. Since post-reform claimants do not have many quarters following accident or illness and quarterly wage data is only available through June 30, 2008, the Department believes that an analysis of the return to work rates for post-reform claimants is premature at this time.

Recommendations

The Return to Work (RTW) Report was issued in March 2008 and included an analysis of return to work data for New York's workers' compensation claimant population. The analysis affirmed that the return to work rates of injured workers classified as PPD NSL were consistently and significantly lower than rates for those classified as Temporary Total Disability (TTD) or PPD with Scheduled Losses (PPD SCH) in all categories reviewed for the RTW Report. While claimants classified as TTD and PPD SCH employed in the private sector during the accident quarter experienced a decrease in average weekly wages after returning to work (-7.8% and -9.7%), the PPD NSL claimants had much lower average weekly wages (-58.0%) when returning to work with any employer.

The RTW Report concluded that creating a return to work culture throughout the workers' compensation system will be the key to ensuring that all claimants, including those facing duration caps on their benefits, remain an active part of New York's economy. This Safety Net Report presents the data requested by the statute, but it is too early to determine the impact of the new law on the outcomes of injured workers. Clearly, however, the new statutory reforms and caps on the duration of PPD benefits necessitate more extensive research on the ability of injured workers to return to work and remained employed as well as acting on the recommendations in the RTW Report.

Time is of the essence for putting into place measures to minimize the number of injured workers who have neither returned to work nor been recategorized from PPD classification. The Department, therefore, makes the following recommendations:

- The Department should conduct a study within the next ninety days of the long-term return to work outcomes of claimants with accident dates between the first quarter 2000 and the second quarter 2006. The Department will examine the wage data for claimants eight quarters after injury to determine the level of sustained employment post-injury prior to the reform law. Return to work outcomes of injured workers pre-reform will provide a baseline from which to judge how effectively the system helped return workers to work in the future. The study should identify key characteristics of claimants with injury dates prior to the reforms, which can be used as a benchmark to determine the impact of the reform changes on return to work rates for claimants across the entire workers' compensation system. Based on the Department's findings, the Commissioner will determine if additional recommendations are necessary to minimize the number of workers who have not returned to work and who have not been recategorized from PPD.
- The Department and the Board should continue to move forward on implementing the policies, procedures, and statutory and regulatory changes that can improve return to work rates overall for workers' compensation claimants as recommended

by the March 2008 Return to Work Report that the Commissioner issued in conjunction with the Return to Work Advisory Council.