



New York State Senate

**Standing Committee on
Labor**

Public Hearing

To hear from the NYS Workers' Compensation Board, experts in workers' compensation, workers' compensation lawyers, labor partners, providers, and injured workers on the current state of workers' compensation and bring to light areas for improvement.

Testimony of:

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Thank you, Majority Leader Stewart-Cousins, Chair Ramos, and committee members for holding this public hearing to examine New York State's workers' compensation system and for the opportunity to present testimony.

The New York State AFL-CIO has advocated on behalf of injured workers for generations. Our priorities are preventing workplace illness, injury, and fatality; and ensuring that workers hurt and sickened on the job receive the wage replacement benefits they need to support themselves and the care necessary to heal, and that survivors of those killed at work are compensated. We are also sensitive to employer costs: every dollar spent on workers' compensation premiums or administration is a dollar not available at the bargaining table for wages, benefits, and terms and conditions of employment.

New York State has one of the nation's strongest workers' compensation statutes. Unfortunately, the State's workers' compensation system has suffered from a generation of prioritizing the interests of the financial services industry and the workers' compensation industrial complex over the interests of workers and employers. Over the past twenty-plus years, regressive application and administration of the Worker's Compensation Law has left us in the curious position of having a system intended to protect workers and employers that instead protects insurance carriers, administrators, and other workers' compensation vendors.

For instance, workers' compensation reforms enacted in 2007 and 2017 which were intended to protect workers and reduce costs for employers have not been applied to that effect. Examples of measures that have not successfully safeguarded workers include:

- Changes made to the safety net codified in Workers' Compensation Law ("WCL") §35 failed to meaningfully increase the number of workers eligible for extreme hardship redetermination.
- An independent medical examination ("IME") study and report required by WCL § 137 (12) identified many problems but only recommended continuing education and relatively insignificant changes in the process for scheduling exams.
- Modifications to WCL § 15 (3)(w) failed to alleviate the burden for certain injured workers to continually prove attachment to the labor market.

At the same time, these reforms, intended in part to lower costs for employers, have ushered in an era of record excess premium for insurance carriers. Historically, carriers would pay out approximately \$1.02 in losses for every dollar of premium collected. Carriers can maintain profitability, even if paying out more in losses than they collect in premium, because they retain proceeds generated by the investment income on their reserves during the pendency of claims, which routinely take years to resolve. While carrier profits are not reported, premium collected, losses and expenses are. Excess premium (premium collected minus losses and expenses) from 2017 to 2022 totaled over \$4.5 billion. Considering that insurers are historically profitable paying out slightly more in losses than they collect in premium, total profits for that period are likely significantly greater than \$4.5 billion. During a similar period, from 2019 to 2022, workers' compensation claims had fallen by nearly 10%.

More recent developments, however, are encouraging. In September, Governor Hochul enacted Chapter 352 of the Laws of 2023, sponsored in this house by Senator James Sanders, which increases the minimum benefit in steps beginning with workers injured on or after January 1, 2024, and eventually indexes it to one-fifth of the statewide average weekly wage in 2026.

With a newly empowered Chair, two newly appointed members, and new executive staff, the Board has begun to make progress. In September 2023, the full Board rightly reversed a Board panel decision and affirmed the Workers' Compensation Law Judge's decision in a case which awarded survivor benefits to the family of a school paraprofessional who died of COVID-19 after being exposed to a COVID-19-positive coworker. Also in September, the Board took action to curtail abuse of the pay-without-prejudice provision in WCL §21-a by carriers and self-insured employers.

While this progress is real, it is incremental, and much remains to be done.

Mental Health/Extreme Stress

The system's treatment of mental health claims, specifically extreme stress claims perpetuates harmful stigma and discrimination of mental illness and must be rectified. The New York State AFL-CIO supports S. 6635 Ramos/A. 5745 Reyes. This bill, which passed the Senate last month,

would prevent denial of claims pursuant to a defense that the injured worker experienced stress no greater than what usually occurs in their normal work environment. This places a threshold on the amount of harm a worker must endure before an injury resulting from that harm is covered. Applying this reasoning to physical injuries would work to deny coverage to workers who are not as physically strong or large, older workers, workers living with physical disabilities, and anyone who is more susceptible to physical injury for any other reason. Understanding the absurdity of this regressive approach to mental health, in 2017, the Legislature and Governor enacted amendments to WCL §10 (3)(b) eliminating this defense in claims made by certain first responders.

In addition to establishing parity among workers, ensuring extreme stress claims are covered regardless of occupation will prevent carriers and employers from shifting the cost of care for these claims to workers. Union-negotiated healthcare plans currently provide for mental healthcare that should rightly be paid for through the workers' compensation system. Whether through fees, premium contributions, copays, concessions at the bargaining table, or some combination of the four, workers pay for their own healthcare coverage. Shifting the cost of care for these workplace injuries to workers is akin to wage theft.

Because this defense was created through Board adjudicatory decision-making, it can be eliminated by the Board. However, the Board ignored an opportunity to revisit its regressive handling of mental health claims when it voted in April 2024 to appeal the Appellate Division Third Department decision in *Anderson v. City of Yonkers*, and three similar decisions, which prohibited the board from denying mental health claims made by essential workers who were mandated to work in person during the pandemic.

COVID-19

Workers exposed to COVID-19 at work are facing unprecedented challenges. Many of these workers have not filed claims and are beyond the deadline for doing so. Of those who have filed, many are having difficulty establishing their claims. Those whose claims are established are experiencing the reality that the specialists they need care from do not participate in the workers' compensation system. This is especially true for those suffering from long COVID, which

presents additional challenges to the system. Facilitating access to care and benefits for those suffering from long COVID will also limit shifting costs to union-negotiated healthcare plans.

A COVID-19 reopener that would allow workers who have passed the deadline to file, and measures that would facilitate and incentivize specialist providers' participation in the workers' compensation system should be considered.

Premium Fraud

Premium fraud gives employers willing to break the law a competitive advantage over law abiding employers. This advantage helps unscrupulous employers win public contracts. All too often, employers committing premium fraud also engage in other wage and hour as well as tax violations. Common premium fraud schemes include misclassification, under-reporting payroll, and claiming that workers are performing less dangerous substantive work.

In October 2022, a longtime public contractor pleaded guilty to a \$1 million insurance fraud in a widely reported settlement. The indictment in that matter included allegations that the employer classified laborers, foremen, and heavy equipment operators, as florists, office workers, and sales representatives, to fraudulently reduce its workers' compensation premium calculation. This type of fraud also puts workers at risk.

We look forward to working together on measures to combat premium fraud.

Additional Workers' Compensation Issues

Frequently, electronic audio recordings of hearings are inaudible, lost, or otherwise unavailable. Unavailability or unreliability of the official records of hearings delay adjudications which can lead to irreversible harm to an injured worker. The best way to ensure the availability and reliability of hearing records is to restore the use of stenographic reporters.

Delays in care and indemnity benefits are often due to unresolved disputes between the carrier or self-insured employer and the injured worker. To avoid such delays, hearings should be required

when requested by either party. Decisions on issues presented at such hearings should be made promptly.

Another source of delay and friction are IME abuses. Despite their “independent” moniker, IMEs are nothing but company doctors. Their use and associated abuses should be addressed. Specific measures considered must focus on reducing inherent conflicts of interest and should include requiring the Board to assign IMEs to cases, requiring IMEs to maintain a practice as a treating physician and require conflict of interest disclosures.

Despite the passage of a law to limit its use, the requirement that injured workers prove attachment to the labor market is routinely used to deny workers benefits. This requirement should be eliminated.

The safety net codified in WCL §35 was intended to prevent injured workers from falling into poverty when they reach the end of their duration caps and benefits are discontinued. Despite the 2017 attempt to strengthen the safety net, it remains ineffective. Thresholds and standards for qualification should be revisited.

To increase the likelihood that an injured worker receives all of the care and benefits they are entitled to, bargaining representatives should be notified about claims made by bargaining unit members.

The death benefit for workers without a spouse, children, or dependents in WCL § 16 (4-b) has been \$50,000 since 1990. This benefit should be increased and indexed.

Pursuant to Insurance Law 2304 (g), carriers are permitted to pass along defense expenses straight to employers because defense expenses are considered losses for the purposes of calculating loss costs. This removes any incentive to limit defense costs or even conduct a bare cost benefit analysis. Carrier expenses should be precluded from consideration in loss cost calculations.

The New York State AFL-CIO has adopted positions on dozens of workers' compensation bills that have been introduced by the legislature. Unfortunately, it is not feasible to cover all of them in this forum. Please do not draw any inferences based on the fact that an issue is not addressed.

Temporary Disability Insurance

The maximum temporary disability insurance ("TDI") benefit has lingered at \$170 per week since 1989. It has simply been too low for too long. The New York State AFL-CIO supports raising and indexing the maximum benefit to two-thirds of the statewide average weekly wage. We are however concerned about how much this will cost workers. Additionally, we must ensure that carriers providing this coverage are not permitted to fleece workers and employers. To that end, we must explore all possible options, including strict price controls.

With your leadership, New York can and will improve our workers' compensation system for injured workers and employers.

Thank you for your time.

The New York State AFL-CIO is a federation of 3,000 unions, representing 2.5 million members, retirees, and their families, with one goal: to raise the standard of living and quality of life of all working people. We keep New York State Union Strong by fighting for better wages, better benefits and better working conditions. For more information on the Union Movement in New York, visit www.nysaflcio.org.