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October 13, 2017

Ms. Clarissa M. Rodriguez, Chair
Workers' Compensation Board
328 State Street
Schenectady, New York 12305

Re: Proposed Amendments to Schedule Loss of Use Guidelines and Regulations

Dear Chair Rodriguez:

We write to oppose the current draft regulations changing the Schedule Loss of Use Impairment Guidelines. After thorough review, we ask you to return to the drawing table and substantially alter these regulations by taking the following actions:

1. Withdraw the proposed regulations concerning Independent Medical Examiners in their entirety, allowing for the legislatively directed study on IMEs to occur;
2. Re-examine technological advances in medical procedures as directed by the Legislature; and
3. Substantially amend the proposed Schedule Loss of Use rules and guidelines to ensure that changes in awards are directly related to medical advances, and that the new rules do not systemically reduce awards in an arbitrary manner.

Part NNN of Chapter 59 of the Laws of 2017 required the Board to promulgate new regulations and guidelines for Schedule Loss of Use (SLU) impairment awards that better aligned with "advances in modern medicine that enhance healing and result in better outcomes." As legislators, we understand the concern of businesses that old regulations may be medically outdated and impose unreasonable costs. Those concerns were balanced against the needs of injured workers in this specific proposal, and taken into consideration with the enactment of other workers' compensation reforms this year.

Unfortunately, the Board's proposal goes beyond the legislative intent in revising the current SLU guidelines. The draft regulations would drastically reduce benefits for a wide range of workers and bears no reasonable relationship to "advances in modern medicine that enhance healing and result in better outcomes." In many cases, the regulations would wholesale eliminate compensation for seriously injured workers, and improved medical procedures do not justify eliminating the need for compensation for serious injuries. By placing a substantial number of injuries into categories that presume little to no compensation, the Board has made a policy judgment that exceeds questions of medical improvements and worker healing.

Aside from contradicting the Legislature's instructions in Chapter 59, the Board's proposal would violate the Workers' Compensation Law more generally. Section 15 of the Workers'

Compensation Law provides set awards for the total or partial loss of use of an appendage. WCL Section 15-1(t) and (v) specifically require the evaluation of a worker's loss of earning capacity when determining awards for partial loss of use. SLU guidelines are intended to give the medical community a roadmap to determine a quantifiable partial loss. While clarification of subjective medical concepts may be useful, the Board cannot administratively determine that a disability suffered at work automatically receives little to no compensation.

Similarly, the Board's new rules would not compensate a worker if, despite their injury, they can adequately perform the job without experiencing excessive pain or muscular weakness. However, the Board's rules fail to consider broader compensation for the experience of a serious injury while at work. It is easy to imagine that a worker with a history of serious injury would experience a loss of earnings due to future employer concerns with re-injuring the damaged body part, regardless of the success of the surgery. Despite this fact, the Board's regulations do away with those awards based on broad determinations about types of injuries and effect on daily job performance.

The Board has also proposed regulations altering the use of Independent Medical Examiners (IMEs), including new proposals that would greatly affect due process within the hearings system. These additional regulatory provisions are inappropriate in light of the legislative history surrounding IME reform. Budget negotiators tentatively discussed reforms to the use of IMEs, but the final agreement ultimately created a taskforce to study the general issue of current use of carrier IMEs (Subpart G of Part NNN of Chapter 59). This report will examine proposals to "ensure fairness, improved methods of combating fraud, and providing the highest medical quality" while considering new "methods of assignment", such as statewide rotations of IMEs. After undertaking quarterly meetings, the report is to be published by December 31, 2019. As a result, any regulatory changes other than the impairment guidelines themselves are unnecessary at this time. The Legislature has not directed other action regulating IMEs, and therefore the Board lacks the authority to alter due process rights in its draft regulations.

Again, we urge the Board to re-examine the stated intent of the Legislature and revise the draft regulations. The Board should withdraw the new rules on IMEs, and substantially amend the SLU guidelines to more appropriately respond to medical advances. Injured workers are owed compensation as a matter of law, and the Board should recalibrate the draft guidelines to respect this unchanged fact.

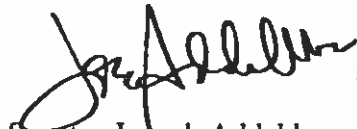
Sincerely,



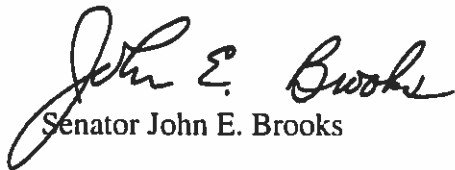
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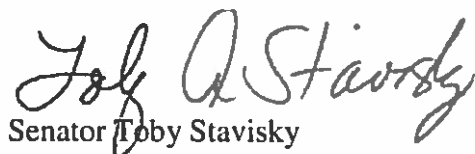

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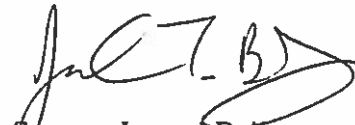

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