

Memorandum in Opposition

Torts, Insurance and Compensation Law Section Workers' Compensation Division

TICL #1

March 2, 2016

S. 6405-A – Part G
A. 9005-A – Part G

By: BUDGET
By: BUDGET
Senate Committee: Finance
Assembly Committee: Ways and Means
Effective Date: 120 Days after becoming law

AN ACT to amend amend the Workers' Compensation Law.

THE TORTS, INSURANCE AND COMPENSATION LAW SECTION WORKERS' COMPENSATION DIVISION OPPOSES THIS LEGISLATION

The Workers' Compensation Division of the Torts Insurance and Compensation Law section of the New York State Bar Association is a bipartisan group of attorneys practicing workers' compensation on behalf of injured workers, self-insured employer, third party administrator and workers' compensation carriers. It is our belief that the proposed revisions to the Workers' Compensation Law would significantly reduce due process within the workers' compensation system.

Due process before the Board would be particularly impacted by changes proposed in Section 8, Section 21, and Section 22 of the Budget Bill. The proposed change in Section 8 would allow for a hearing to be assigned at any time to "any referee as determined by the Board." This change to the statute would end the continuity of hearings before a single assigned Workers' Compensation Law Judge. The continuity of hearings before one Judge allows for better understanding of the parties and the issues at hand so that an informed decision can be rendered. This type of movement of the cases from one Judge to another was previously found to be inappropriate under the Workers' Compensation Law by the Third Department in the case of Prather v. Amerada Hess Corp., 95 A.D.3d 1633, 945 N.Y.S.2d 791 (3d Dept. 2012). Allowing this procedural change to potentially undermines the credibility of the decisions in the workers' compensation system by allowing a Judge who has never seen the parties, and was not present for development of the record to step into a case and render a decision for the first time. Familiarity with the parties, the location where they live, and the facts and circumstances of the specific case as it is developed before the Board provides a level of knowledge or context which makes for better decisions. Allowing a decision from a Judge who may be in a distant part of the state and who lacks that familiarity or context would allow for decisions to be rendered in a vacuum and potentially subject to undue

influence based on policies and procedures of the Workers' Compensation Board. The benefits involved in workers' compensation cases in New York State are substantial. To the parties and, in particular, to the injured workers, these claims are the most important events in their lives. Allowing decisions via video from a distance part of the state eliminates the opportunity for a meaningful hearing before the Workers' Compensation Board and decreases the credibility of the decision rendered in the claim. Decisions without proper context would also be subject to increased appeals due to the lack of lack of faith or trust in the decision and its knowledge of all of the relevant facts and circumstances of the parties. In an attempt to modernize and streamline scheduling, it is respectfully asserted that this policy change is likely to lead to further delays and increase delay due to greater numbers of appeals within the system.

Section 21 and Section 22 of the Budget Bill deal with Workers' Compensation Law Section 140 and Workers' Compensation Law Section 142. The proposed modifications to these sections impact the Workers' Compensation Law, and particularly, the appeals process within the agency. Section 20 proposes a reduction of Workers' Compensation Board Commissioners from 13 to 7 and also reduces the number of Commissioners who must be attorneys from 4 to 3. In a corresponding change under Section 21, an appeal could be decided by "any Board employee who is licensed to practice law in the State of New York or a single Board member."

It is respectfully asserted that the role of the Commissioners in the workers' compensation system is an important one. Workers' Compensation Commissioners are not beholden to the Workers' Compensation Board or the policies and procedures that the Board may have as goals for the system. The Commissioners serve as an independent review panel subject to significant vetting and legislative approval. The use of Commissioners to review decisions within the workers' compensation system allows for a fresh and independent look to ensure that a proper decision regarding the facts and the law at hand has been rendered. The reduction of the number of Workers' Compensation Board Commissioners and a decrease in the roll that those Commissioners play within the workers' compensation system greatly reduces the Legislatures involvement and oversight of the workers' compensation system. This change also increases the independence and power of the Board by eliminating meaningful checks and balances from the Legislature over the Workers' Compensation System.

Allowing single individuals, and particularly, employees of the Board to render decisions on appeals is a drastic change within the system and would limit rights to a meaningful appeal. Unlike the independence of Commissioners, the Judges and lawyers within the Workers' Compensation Board are under the direction and control of the agency. The freedom to render a meaningful and independent review of issues before the Workers' Compensation Board would be eliminated. The potential for dissenting opinions and the right to Full Board Review would be eliminated. Without meaningful review within the agency, appeals to the Appellate Division would see a significant increase. It is respectfully asserted that the drastic changes proposed in the budget bill to the handling of hearings and appeals is improper and limits the due process rights of all parties in the system. It is respectfully asserted that these changes should not be made.

Changes proposed in the Budget Bill would impact Workers' Compensation Law Section 14 and the calculation of the average weekly wage. It is also believed that this change is unnecessary and adversely impacts all parties within the workers' compensation system. Rather than using an entire year's worth of wages, the shorter calculation involving 13 weeks would fail to consider many facts and circumstances which could be detrimental to both the employer or the injured worker. Depending on the payment of bonuses, seasonal overtime issues, or other fluctuations in average weekly wage, a shorter calculation is less likely to be an accurate representation of the claimant's earning capacity and average weekly wage in a position. Retail workers might have a significant difference in their wage calculation and corresponding weekly benefits if their injury occurs during either a slow or busy season. This type of luck of the draw for the average weekly wage does not constitute good policy. The current calculation is a better representation of an individual's earnings within their employment. For example, if a yearly bonus of \$10,400.00 is paid in the 13 week period, it would raise the average weekly wage by \$800.00 per week. If that same bonus was paid outside of the 13 week period, there would be absolutely no impact on the average weekly wage. In either scenario, the calculation is unfair to one of the parties to the claim.

On behalf of the Workers' Compensation Division of the Torts Insurance and Compensation Law Section of the New York State Bar Association, it is respectfully asserted that the Governor's budget bill should be closely reviewed regarding the changes proposed to the workers' compensation system. The proposed changes will limit due process within the system and are likely to increase litigation and appeals creating increased delays and claim resolution rather than improved efficiencies. The majority of changes proposed are unnecessary and will not impact day-to-day operations within the Workers' Compensation Board nor will they reduce the cost of the system as a whole, and in fact, may drive up costs and create further delays.

Based on the foregoing the New York State Bar Association Torts, Insurance and Compensation Law Section Workers' Compensation Division **OPPOSES** this legislation.

Workers' Compensation Division Chair: John H. Snyder, Esq.