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## **LEGISLATIVE AND POLICY UPDATE**

This newsletter is to provide updates on multiple pieces of legislation concerning the Workers' Compensation Laws ("WCL") that were passed by both houses and delivered to the Governor on December 21, 2022. The Governor had until December 30, 2022, to sign, veto, or request a chapter amendment. The governor did sign one of the five bills concerning Collateral Estoppel but vetoed the other four. The topics of the five bills were Temporary Total Disability (S00768/A1118), Minimum Weekly Rate (S8271A/A07178-A), Mental Injury (S6373B/A02020), Message Therapist (S2138/A8930), and Collateral Estoppel (S9149/A10349). The Board has also begun implementation of a new policy downstate, as of January 3, 2023, regarding TR rates which will also be explained in this newsletter.

The first of the five bills which were sent to the Governor was the **Temporary Total Disability bill** (S00768/A1118) which purposed to change the definition of temporary total disability

under WCL § 15(2) to “consist of the injured employee’s inability to perform his or her pre-injury employment duties or any modified employment offered by the employer that is consistent with the employee’s disability.” The bill essentially expands the definition of total disability to be from the claimant’s job and not all employment. The bill would obviously have disastrous ramifications for the employers of New York and the system as a whole as it would increase SLU awards, delay classifications, increase weekly benefits, and all but eliminate the attachment to the labor market defense. This would obviously significantly increase the cost of the system for employers and insurers.

This bill was vetoed by the Governor and was not approved. In the Veto Message (Veto No. 0188 if you wish to look up the text by following this [link](#)) the Governor noted that she was vetoing the bill because it “could result in a significant reduction in New York State’s work force and large increases to workers’ compensation costs.” The Veto Message goes on to cite the cost of the bill which could be upwards of \$500 million annually for the employers of New York. The Governor also cited that it would cost New York State as an employer significant money and that therefore this bill was more appropriate to consider during the State budget process next year and that, for now, the bill would be vetoed.

The second of the five bills which were sent to the Governor was the **Minimum Weekly Rate bill** (S8271A/A07178-A) which proposed to establish a new minimum weekly indemnity rate of 1/5<sup>th</sup> of the State AWW which would be indexed every year as determined by the Department of Labor. The current minimum rate of \$150 per week would more than double to \$337.63 as the current State AWW is \$1,688.19. Injured employees receiving wages less than \$337.63 per week would receive their full wages. This would impact both low earners and mild disabilities for high earners.

This bill was also vetoed by the Governor and was not approved. In the Veto Message (Veto No. 0194) the Governor noted that while she is in support of an increase in low-wage workers’ disability benefit payments, she could not approve this bill because of the “significant impact on the cost of workers’ compensation premiums for New York businesses.” The governor

went on to note that the impact of this bill would be felt most by employers who hire large populations of low-wage earners or part-time or seasonal employees who she did not seem to want to burden. The Governor also noted that the statewide AWW is skewed, particularly for upstate New York, as the significantly high wages paid in New York City skew the data for that region. The governor again noted that the bill would be more appropriate to consider during the State budget process next year given its impact on employers, including New York State, and that, for now, the bill would be vetoed.

The third of the five bills which were sent to the Governor was the **Mental Injury bill** (S6373B/A02020) which proposed to expand the lower standard for work-related mental injuries incurred on the job to all employees, not just first responders, and delete the requirement that, to get the lower standard, the stress must stem from a work emergency. The bill is an amendment of section 1 paragraph (b) of subsection 3 of section 10 of the WCL which was added in 2017 for police officers, firefighters, EMTs, paramedics and other certified medical providers who provide care in emergencies, to only need to prove that there was extraordinary work-related stress incurred in a work-related emergency. This is different from the usual standard that the stress was greater than that which usually occurs in the normal work environment, which applies to all other lines of employment. The bill essentially would eliminate the standard that the stress must be greater than that which usually occurs in the normal work environment which is currently the standard for all jobs not named above. The bill also eliminates the requirements for the stress to have to have occurred related to a “work related emergency” instead changing the standard to just at being stress at work. This obviously would have significant impact on employers as it would greatly expand the range of compensable mental injury claims, and increase the ease for claimants to establish weak mental injury claims and stay out of work collecting compensation since they would only have to prove extraordinary work-related stress instead of stress greater than that which usually occurs in the normal work environment.

This bill was also, thankfully, vetoed by the Governor and not approved. The Veto Message (Veto No. 0191) notes that this bill eliminates the requirements to show the stress is above that of a similarly situated co-worker and eliminates the requirement for it

to be during a work-related emergency. The Veto Message acknowledges the lower standard being appropriate for first responders who regularly put themselves in harms way but that it would not be appropriate for all workers. The Governor goes on that that she is investing in mental health in other ways and that this legislation would have a very high cost which is difficult to estimate given the scope of the compensation this proposal could potentially deliver. The Governor therefore concluded that she would discuss this proposal again in the context of budget negotiations in the future. For now, the bill is vetoed.

The fourth of the five bills which were sent to the Governor was the **Message Therapist bill** (S2138/A8930) which proposed to allow licensed massage therapists to be included as providers eligible to treat injured employees upon prescription or referral by an authorized physician, nurse practitioner, podiatrist, or physician's assistant. While this bill seems to be less disastrous than the previous three as it is not a direct increase to the money moving to claimants or expansion of the definition of what is compensable, it would likely still cost the insurers and employers of New York State significant money as there was no good definition as to how to quantify gains made from massage therapy and therefore it would be difficult to determine how much massage therapy should be authorized. This would likely mean claimants would treat with massage therapy for years which would be costly for insurers and ultimately employers.

This bill was also vetoed by the Governor and not approved. The Veto Message (Veto No. 0189) notes that while massage therapy can provide short term relief and have therapeutic value it is difficult to measure the impact on functional ability which would be difficult for the WCL to accommodate given that treatment and care under the WCL is strictly evidence based in that functional improvement must be shown for continued treatment. The Veto Message goes on noting that massage therapy codes are available for physicians and other providers as part of a treatment plan involving other treatment. Interestingly, the message then specifically notes that message therapy is not recommended in the majority of the Workers' Compensation Board's medical treatment guidelines and that therefore, absent the ability to quantify the benefits to individuals, the increase of costs to insurers and employers is too great and the legislation is vetoed.

The fifth of the five bills which were sent to the Governor was the **Collateral Estoppel bill** (S9149/A10349) which proposed to make findings of the WCB not have a collateral estoppel impact on any other related actions or proceedings outside of the workers' compensation forum, including those that arise out of the same set of facts. The bill has an important carve out which is that a determination of the existence of an employer-employee relationship before the WCB would still have a collateral estoppel effect. While this does not have any effect on proceedings before the WCB, it does matter for 3<sup>rd</sup> party cases. The bill eliminates the defense of collateral estoppel based on many factual determinations made by the Board including establishment/disallowance of sites, determination of degree of disability or permanency, and whether an accident happened. A disallowance of a site no longer can be used as a collateral estoppel defense in the 3<sup>rd</sup> party proceeding, just as a determination of an accident before the WCB can no longer be used to stop the carrier from asserting no accident occurred. As mentioned previously, determinations as to employer-employee relationship by the WCB do still have collateral estoppel effect in proceedings in forums outside of the WCB.

This bill was passed by the governor and signed into law. The bill is also effective immediately so going forward determinations before the WCB of all issues other than employer-employee relationship cannot be the basis of a collateral estoppel defense in Supreme Court or other venues.

Our final issue to discuss in this bulletin is a recent change downstate in the **WCB's policy on TR rates**. In late December, judges began informing our attorneys that they have been directed to no longer accept TR rates unless they are pending litigation and that parties must agree to firm TP rates or set cases for litigation. This policy was set to become effective on 01/03/2023 in Westchester County, New York City, and Long Island. While this will result in increased litigation, since most claimant's counsels will not want to accept a TP rate as it will allow carriers to raise attachment at an earlier stage, it does mean that there will be more TP rates to assert the 130-week credit and attachment defenses more easily.

It remains to be seen how Judge's will implement this directive or how long this directive will last as so far it does not seem to have been implemented outside of Westchester County, New York City, and Long Island and therefore may not have the support of all parts of the Board. This change is based on the recent amendment to the fee law which specified how claimant's attorney's fees would be paid but only included temporary total or temporary partial benefits making no mention of tentative rates. We expect pushback from claimant's counsel as to this new policy of the WCB in these areas as claimant's counsels do not like additional litigation and carriers having an easier time raising defenses to ongoing awards. We will, of course, keep up with any changes in this policy and issue new bulletins as new information becomes available.

As always Vecchione, Vecchione, Connors & Cano, L.L.P. is here for you to consult with on legislative updates and all stages of litigation, as well as any other issues. We are also available for in person or virtual presentation on this or any other topic.

If you have any questions on these bills or would like to schedule a presentation, please contact us at [info@vecchionelaw.com](mailto:info@vecchionelaw.com).

We welcome your feedback and look forward to providing information on topics that are of interest to you. If you have any questions about the information provided, or if you have a workers' compensation matter that you need assistance with, we are available to speak with you. Please contact us at [vvccnews@vecchionelaw.com](mailto:vvccnews@vecchionelaw.com).

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