



**TURLEY REDMOND
ROSASCO & ROSASCO, L.L.P.**
ATTORNEYS AT LAW

William J. Turley
Christopher M. Redmond
Troy G. Rosasco
Craig E. Rosasco
David E. Tobias
Vincent R. Hannigan
Scott R. Tirrell
Aimee Berlin
Jaclyn Simmons
Diana P. Bronnberg
Janet Santeramo-Dewaele
Crysti D. Farra

**3075 Veterans Memorial Highway - Suite 200
Ronkonkoma, New York 11779**
Tel: (631) 582-3700
Fax: (631) 580-3042
Toll Free 1-877-NY-DBLAW
Website: www.nydisabilitylaw.com
Blog: www.disabledworkerlaw.com

Mail all correspondence to Ronkonkoma Office

230 Hilton Avenue, Suite 4
Hempstead, N.Y. 11550
(516) 745-5666

The Woolworth Building
233 Broadway, 5th Floor
New York, N.Y. 10279
1-888-9HURTWORKE
by appointment only

70-50 Austin Street, Ste. 105
Forest Hills, N.Y. 11375
(718) 396-3500
by appointment only

2 Coraci Blvd., Suite 6
Shirley, N.Y. 11967
(631) 399-0400

431 Griffing Avenue
Riverhead, N.Y. 11901
(631) 399-0400
by appointment only

7th Annual Workers' Compensation Law & Practice Seminar

**Hilton Hotel
Melville, New York
July 8, 2010**

Practice Tips & Ethical Considerations

by

Troy G. Rosasco

I. Practice Tips

A. The 2007 Workers' Compensation Reforms and Impact on Permanent Partial Disabilities

- 1) The Workers' Compensation reforms pushed through by former Governor Eliot Spitzer in March of 2007, with the support of both Republicans and Democrats across the state, were the most significant change in the New York Workers' Compensation Law since the enactment of the statute in 1914.

- 2) The most important change in the law was the "capping" of Permanent Partial Disabilities, something that New York business interests had long sought. Prior to the 2007 reforms, a claimant classified with a Permanent Partial Disability (PPD) in many instances could receive lost wage benefits for life. The 2007 reforms "capped" or "truncated" PPD awards according to the following schedule:

Maximum Awards for Permanent Partial Disabilities for Injuries Occurring On or After March 13, 2007 (N.Y. Work. Comp. Law § 15-3(w))

% Loss of Wage Earning Capacity	Maximum Benefit Weeks	Number of Years
1% - 15%	225	4.33
16% - 30%	250	4.81
31% - 40%	275	5.29
41% - 50%	300	5.77
51% - 60%	350	6.23
61% - 70%	375	7.21
71% - 75%	400	7.69
76% - 80%	425	8.17
81% - 85%	450	8.65
86% - 90%	475	9.13
91% - 95%	500	9.62
96% - 99%	525	10.00

- 3) Therefore, subject to certain exceptions, the maximum duration of any Permanent Partial Disability award is now 10 years, no matter the age of the claimant at the time of the accident.
- 4) Unfortunately, to date the Medical Guidelines necessary to implement the new “caps” which were supposed to be promulgated by a special Workers’ Compensation Medical Guidelines Task Force, and adopted by the New York Workers’ Compensation Board, have yet to be seen. According to Workers’ Compensation Board sources, only approximately 500 claimants with potential permanent partial disability classifications have actually been classified as such due to the lack of Medical Guidelines. Workers’ Compensation Board sources estimate that there is currently a backlog of over 15,000 claimants waiting to be potentially classified with having a permanent partial disability pending the new Medical Guidelines. Those who were injured on or after March 13, 2007 and are still out of work have either been receiving “temporary disability awards” awaiting permanent classification, or in many instances their claims have been resolved with “buy-outs” known as Section 32 settlements.

B. Schedule Loss of Use (SLU) Injuries

- 1) Schedule loss of use (SLU) injuries refer to permanent injuries to specific body parts, usually injuries to extremities, that have reached “maximum medical improvement” and need no current ongoing care.
- 2) The 2007 reforms have had little impact on schedule loss of use evaluations and the Workers’ Compensation Board continues to use its 1996 Medical Guidelines to evaluate the percentage loss of use of such injuries. The table below details the amount of weeks of compensation awarded for certain SLU injuries depending upon the percentage of impairment:

TABLE FOR WEEKS AWARDED ON SCHEDULE LOSS OF USE OF BODY PARTS

Body Part	100%	50%	25%	10%	5%
Arm	312	156	78	31.2	5
Hand	244	122	61	24.4	12.2
Thumb	75	37.5	18.75	7.5	3.75
1st Finger	46	23	11.5	4.6	2.3
2nd Finger	30	15	7.5	3	1.5
3rd Finger	25	12.5	6.25	2.5	1.25
4th Finger	15	7.5	3.75	1.5	0.75
Leg	288	144	72	28.8	14.4
Foot	205	102.5	51.25	20.5	10.25
Great Toe	38	19	9.5	3.8	1.9
Other Toes	16	8	4	1.6	0.8
Eye	160	80	40	16	8

- 3) The value of an SLU award is simply the number of weeks the actual percentage loss of use for the particular extremity generates multiplied by 2/3 of the claimant's "average weekly wage" (AWW) (to be discussed in detail below), up to the statutory maximum compensation rate of the time of the accident (\$600.00 per week until 7/1/10, \$739.83 after 7/1/10)

C. Average Weekly Wage (AWW)

- 1) Part of the political trade-off in the 2007 Workers' Compensation reforms was the increase in the maximum workers' compensation rate. The business community wanted to do away with lifetime awards and the labor community wanted to increase maximum benefit rates that had been stuck at \$400.00 per week for 14 years. While the business community got the "caps" on PPD's they sought, injured workers now have an "indexed" maximum compensation rate which is tied to the "New York State average weekly wage," as determined by the New York State Department of Labor. The Department of Labor determined that the 2009 state average weekly wage was \$1,109.75, resulting in a new maximum rate of \$739.83 (2/3 of \$1,109.75) effective for all injuries on or after 7/1/10. This new "indexed" maximum rate will be adjusted yearly

dependent on calculation of the state average weekly wage by the State Department of Labor.

- 2) The new “indexed” average weekly wage maximum rates should remove the issue of fair adjustments for cost of living increases from the yearly political dysfunction in Albany. In parts of the state where wages are generally higher for claimant’s likely to suffer injuries on the job, this will result in fairer compensation awards that more accurately track the original intention of the Workers’ Compensation Law of replacing up to 2/3 the injured worker’s lost wages.

D. Medical Care and Choice of Health Providers

- 1) In addition to lost wage benefits, medical care is the other primary benefit of the New York Workers’ Compensation Law. Such medical benefits are supplied to the injured worker without any cost (no deductibles, co-pays, etc.). Continued receipt of medical benefits is not dependent on any lost-wage benefits. In fact, such medical care often allows injured workers to continue working without any lost time from work.
- 2) One of the additional major reforms of the 2007 legislation was to restrict claimant’s choice of medical providers. Now, employers or carriers regularly contract with exclusive diagnostic testing centers (MRI, CT-Scans, X-rays, etc.) and pharmacies which the claimant must use, except in case of a medical emergency. This provision supposedly lowers employer costs while not impacting the claimant medically. While this may be the case in the area of pharmacy services, many claimants and their treating doctors question the results and equipment used by the employer’s diagnostic networks (i.e. are they using radiologist in India to read MRI results? Are they using the most cutting edge equipment?) To date, the jury is out on the efficacy of the employer/carrier controlled diagnostic networks.

E. Psychological Injuries

- 1) The Workers' Compensation Law has long recognized that psychological injuries can either be directly caused by a work related accident or be the consequence of an injury or illness that is work related. The most common psychological injuries claimants face are both depression and post-traumatic stress disorder.

- 2) Usually, in the workers' compensation realm, depression is often seen as a result of a claimants' ongoing pain from physical injuries or a "feeling of worthlessness" as a result of being out of work and not providing for one's family. Such "consequential" injuries are quite common (yet still under-reported) and the Workers' Compensation Board will regularly authorize treatment for depression by either psychiatrists or psychologists who are coded to treat patients by the Workers' Compensation Board. In the most extreme instances, severe work related depression can result in a claimant's suicide. If so, a widow and/or any dependents can successfully pursue a separate death claim if a medical provider links the suicide to the underlying work-related depression. Sadly, I have had to handle more than a few of these claims.

- 3) Post-traumatic Stress Disorder (PTSD) became much better understood in the workers' compensation community after a flood of such claims were filed after the 9/11 tragedy. Innocent workers who saw bodies falling from the flaming towers were understandably psychologically scarred. Rescue workers who had to remove human remains from the pile at Ground Zero were often impacted permanently. However, PTSD was not unknown to the Workers' Compensation Board prior to 9/11. For instance, two co-workers driving to a sales meeting who are in a serious car accident where one dies might result in a PTSD claim by the surviving worker. In addition, sexual harassment and assault on the job often give rise to PTSD claims.

II. Ethical Considerations for the Workers' Compensation Attorney

1) The most drastic change in legal ethics for lawyers at the Workers' Compensation Board was the adoption of the new New York Rules of Professional Conduct effective April 1, 2009. While many have little impact on Workers' Compensation attorneys, new Rule 3.3 (a)(3) has substantially undercut the client's "right to confidentiality" in what he says to his lawyer. Some lawyers say it requires them to "rat out" a workers' compensation claimant who testifies falsely.

2) Specifically, Rule 3.3(a)(3) provides that:

"[i]f a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3(b) provides that "[a] lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3(c) then says that the duty to remedy such false testimony or misconduct applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6," the Rule regarding the lawyer's duty not to reveal or use client confidential information (i.e., what the old Code of Professional Responsibility ("Code") used to call "confidences" and "secrets").

In effect, Rule 3.3 requires lawyers to disclose confidential client information to a tribunal - and that includes the Workers' Compensation Board and its' Judges and Commissioners - if such disclosure is necessary to remedy any false testimony or intentional misconduct by a client related to the proceedings.

- 3) Essentially, this new rule places the lawyers “duty of candor to a tribunal” over his “duty of client confidentiality to the client” and may require the lawyer to “rat his client out” if the client testifies falsely when such is known to the lawyer. Bottom line - your lawyer is no longer your priest!