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**MEMORANDUM TO ALL CLIENTS OF
STEWART GREENBLATT MANNING & BAEZ**

**RE: OUTLINE OF PERTINENT CHANGES PURSUANT TO 2017
NEW YORK WORKERS' COMPENSATION REFORM
PROVISIONS**

The 2017 New York State Budget passed on April 9, 2017 and was signed into law by Governor Cuomo on April 10, 2017. The State Budget contains several pertinent workers' compensation reform provisions which will be summarized herein.

- I. Amendment to Workers' Compensation Law Section 15(3)(w)
 - a. Section 15(3)(w) has been amended to provide that compensation under this paragraph shall be payable during the continuance of such permanent partial disability, WITHOUT THE NECESSITY FOR THE CLAIMANT WHO IS ENTITLED TO BENEFITS AT THE TIME OF CLASSIFICATION TO DEMONSTRATE ONGOING ATTACHMENT TO THE LABOR MARKET.

- b. Upon classification a claimant is no longer required to remain attached to the labor market.
- c. The carrier's/employer's defense of attachment to the labor market is limited to temporary rates pre-MMI/classification.
- d. Eliminates the carrier's/employer's ability to reopen permanent partial disability classified cases based upon a claimant's failure to demonstrate an attachment to the labor market.
- e. Once a claimant is classified the established statutory cap is essentially guaranteed.

II. Additional amendment to Workers' Compensation Law Section 15(3)(w)

- a. Section 15(3)(w) is amended to provide the carrier or employer with a credit for prior payments against the statutory cap when permanent partial disability is determined.
- b. The credit applies "for a claimant with a date of accident or disablement after the effective date of the chapter of the laws of 2017 that amend this subdivision" (April 10, 2017).
- c. The credit for prior payments only applies to benefits paid beyond 130 weeks (2.5 years) from the date of accident or disablement.
- d. When permanency is at issue and the claimant has submitted medical evidence that he/she is not at Maximum Medical Improvement (MMI) and the carrier has produced or has had a reasonable opportunity to produce an Independent Medical Examination (IME) concerning MMI and the Board has determined that the claimant is not at MMI the carrier shall not receive a credit for weeks prior to a finding that the claimant has reached MMI.
- e. Once MMI has been reached the carrier/employer shall receive credit for any weeks of temporary disability paid to claimant after such finding against the statutory cap.

III. Amendment to Workers' Compensation Law Section 35 (extreme hardship redetermination)

- a. In cases where the loss of wage earning capacity is greater than 75%, a claimant may request, within the year prior to the scheduled exhaustion of indemnity benefits under Section 15(3)(w) that the Board reclassify the claimant to permanent total disability or total industrial disability due to factors reflecting extreme hardship.
- b. The “safety net” has been reduced from applying to a loss of wage earning capacity above 80% to a loss of wage earning capacity above 75%.

IV. Amendment to Workers' Compensation Law Section 23

- a. Section 23 has been amended to include mandatory Full Board Review in cases where a Board Panel reduces a finding of loss of wage earning capacity to a percentage below the safety net established by Section 35 of the Workers' Compensation Law (a loss of wage earning capacity above 75%)
- b. Guarantees mandatory Full Board Review in cases where the loss of wage earning capacity is established at a number greater than 75% and reduced unanimously by a Board Panel.

V. Workers' Compensation Law Section 15(3)(x) has been added to Section 15

- a. Provides that the Chair SHALL consult with representatives of labor, business, medical providers, insurance carriers, and self-insured employers regarding revisions to permanency impairment guidelines, including permitting review and comment by such representatives'

- chosen medical advisors, and after consultation SHALL in accordance with the State Administrative Procedure Act, propose for public comment revised permanency guidelines concerning medical evaluation of impairment and the determination of permanency.
- b. The new paragraph (x) of subdivision (3) of Section 15 of the Workers' Compensation Law applies to schedule loss of use evaluations requiring the Board to propose revised permanency guidelines for schedule loss of use evaluations.
 - c. The revised permanency guidelines are to be proposed by September 1, 2017 and "such guidelines to be adopted by the Chair by January 1, 2018."
 - d. The permanency impairment guidelines shall be reflective of advances in modern medicine that enhance healing and result in better outcomes.
 - e. If the Board fails to adopt permanency guidelines effective January 1, 2018 then the Board SHALL adopt, by emergency regulation, either the impairment guidelines proposed by the Chair on September 1, 2017 or the permanency impairment guidelines created by the consultant to the Board as voted on in an emergency meeting of the Board to be held on December 29, 2017.
 - f. In the event that the Board is unable to reach a decision at the December 29, 2017 meeting the Chair SHALL select the permanency guidelines to be adopted by emergency regulations and the emergency regulations shall be in effect for 90 days or until such time as permanent regulations are adopted by the Chair.
 - g. As of January 1, 2018 the 2012 permanency impairment guidelines pertaining to paragraphs a-v (schedule loss of use awards) of subdivision 3 of Section 15 are REPEALED and shall have no effect.

VI. Section 13 of the Workers' Compensation Law has been amended by adding a new Section 13-p Comprehensive Prescription Drug Formulary

- a. The Chair shall establish a comprehensive prescription drug formulary on or before December 31, 2017.
- b. The prescription formulary will include a two tiered list of high-quality, cost-effective medications that are pre-approved to be prescribed and dispensed, as well as additional non-preferred drugs that can be prescribed with prior approval.
- c. The drug formulary shall include limitations on the prescribing of compound medications and compounded topical preparations.
- d. The Board shall promulgate regulations to permit an interested party to submit a request to the medical director of the Board to alter or amend the formulary to consider changing the status of a drug from non-preferred to preferred.

VII. Amendment to Workers' Compensation Law Section 25(2)(a)

- a. When a claim is filed with medical evidence of a work related injury and the claimant is disabled and not working and the case has not been controverted, however, the employer/carrier is not making payments to the claimant the claimant may request a hearing to be held within 45 days of the Board's receipt of such request.
- b. If a case is filed with medical and the case is not controverted and payment is not made within the 18/10 rule the claimant is provided with the right to request a hearing within 45 days of the claimant's request.

VIII. Section 25 of the Workers' Compensation Law has been amended by adding a new paragraph Section 25(3)(g)

- a. Allows the Board to establish by regulation a performance standard concerning the subject of any penalty or assessment provision applicable to an insurance carrier or self-insured employer and the penalty or assessment would be remittable to the New York State Treasury.
- b. Allows the Board to assess a penalty for failure to meet promulgated standards and said penalties would be payable to the Chair.
- c. A final penalty determination is subject to review (appeal) under Section 23 of the Workers' Compensation Law. However, there is no stay in payment of the penalty pending the outcome of the application for administrative review.
- d. Payment of the penalty or assessment must be made within 10 days of the filing or a 20% penalty would be assessed payable to the Chair.
- e. Failure of the carrier or self-insured employer to pay without reasonable grounds will be subject to a Section 114-a(3) penalty.
- f. This amendment provides the Board with additional authority to establish penalties under the Payor Compliance Program.

IX. Amendment to Workers' Compensation Law Section 50(3)

- a. This amendment allows the Chair to execute an assumption of workers' compensation liability insurance policy on behalf of the Special Funds created under the provisions of subdivisions 8 and 9 of Section 15 and Section 25-a of the Workers' Compensation Law.
- b. The Board is also empowered with the ability to execute an assumption of workers' compensation insurance policy on behalf of the Uninsured Employers Fund.

- c. The Board is empowered to sign an assumption of liability policy which is essentially selling off the liability of the Special Funds and the Uninsured Employers Fund presumably to streamline the functions of the Board.

X. Section 137 of the New York State Workers' Compensation Law has been amended by adding a new subdivision 137(12)

- a. The Workers' Compensation Board shall conduct a thorough study of the utilization of independent medical examinations under the Workers' Compensation Law.
- b. The study is to occur within calendar year 2018 and the Board shall convene and present a preliminary report based upon said study to an advisory committee set to commence on or about January 1, 2019.
- c. By December 31, 2019 the advisory committee shall present detailed recommendations to the Governor, Speaker of the Assembly and the Majority Leader of the Senate.
- d. The recommendations will include administrative improvements, regulatory and statutory proposals.
- e. The Committee's report shall consider the feasibility of new methods of assigning independent medical examinations, such as through rotating providers or panels, statewide networks or other arrangements.
- f. The Workers' Compensation Board now has the power to study and make recommendations with regard to the Workers' Compensation Board's independent medical examination system.

Please note that all of the provisions set forth above are effective immediately. With regard to the amendment of Section 15(3)(w) to provide a credit against the statutory cap the credit only applies to accidents or disablements after the effective date of the legislation (April 10, 2017). These are the substantive and procedural workers' compensation provisions contained in the 2017 New York State Budget.

There are additional provisions which are regulatory. Should you require any assistance or review of any other provision please advise.

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