



# REVIEWED COSTS

**g.c.g. risk management, inc.**

**WORKERS' COMPENSATION, INSURANCE, CLAIMS AND LAW FOR THE EMPLOYER**

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## **WORKERS' COMPENSATION BOARD ADOPTS NEW IMPAIRMENT GUIDELINES AND RELEASES DRAFT OF PROPOSED PRESCRIPTION DRUG FORMULARY FOR PUBLIC COMMENT**

Workers' Compensation Law Section 15 (3) allows for a schedule of payments for a loss of use of a body part where the disability is "partial in character but permanent in quality." This additional benefit is awarded for a permanent functional loss of a member (i.e. an arm, hand, leg, foot, loss of vision or hearing loss). These awards are not given for wage replacement. As such, a claimant could receive a large monetary benefit even if he or she had minimal or no loss of time from work. As the yearly maximum benefits have increased following the 2007 Workers' Compensation reforms, the resulting value of these awards has increased substantially.

On April 10, 2017, Governor Cuomo signed into law new legislation that repealed the permanency impairment guidelines for schedule loss of use evaluations that had been in place since 1996. The new law required the Workers' Compensation Board to adopt new guidelines to take effect on January 1, 2018. The legislation required that the new impairment guidelines "shall be reflective of advances in modern medicine that enhance healing and result in better outcomes." The adoption of the new impairment guidelines was characterized by supporters of the legislation as "significant reforms to the workers' compensation system creating meaningful savings for all employers."

The first draft of the guidelines was submitted for public comment on September 1, 2017. The response was overwhelming, with 55,000 negative comments, mostly from claimant's attorneys and from Labor. The Workers' Compensation Board went back to the drawing board and submitted revisions to the proposed guidelines. The revised guidelines were adopted on December 28, 2017 and were to take effect on January 1, 2018. What follows is an illustration of the schedule loss of use award for the same injury, comparing the originally proposed guidelines and the newly adopted guidelines:

**Facts of the Case:** An employee has a right knee injury with a date of injury of July 1, 2016. The employee's average weekly wage is \$1,500.00 per week. This entitles him to the maximum weekly benefit of \$864.32. The employee/claimant undergoes a total knee replacement because of the accident.

	<b>Old Guidelines</b>	<b>Proposed Guidelines Issued 9/1/2017</b>	<b>Final Guidelines Effective 1/1/2018</b>
<b>SLU % = Benefit Weeks</b>	50% = 144 weeks	Range of 0-30% = 86.4 weeks	Range of 35-80% = 100.8 to 230.4 weeks
<b>Total Award</b>	\$124,462.08	\$0 to \$74,677.24	\$87,123.45 to \$199,139.32

Schedule Loss of Use awards will continue to depend primarily on the range of motion, which is subjective, and within the control of the claimant. Following are some of the changes incorporated in the adopted guidelines:

- New charts and diagrams
- There is no more automatic minimal schedule of 10%-15% for a rotator cuff tear (evaluations now start at 0% and are based on a range of motion).
- Doctors cannot add schedules for abduction (movement of the limb away from the body) and flexion (bending). Now only one finding applies.
- Doctors must consider the range of motion of the contralateral extremity (the opposite limb)



- Doctors must measure range of motion three times and use the highest measurement
- Shoulder and hip replacements are valued within a 35%-80% range, whereas the 1996 guidelines started at a 50% range
- Schedules for extremities (i.e. toes) when combined, cannot exceed 100% of the foot

It appears unlikely that these changes will have a significant impact on the overall value of schedules or result in meaningful savings to the employer. As illustrated, the new guidelines do little to stop the enormous windfalls such awards provide to the claimant. The new guidelines do not account for cases where the employee has returned to his pre-accident job and is functioning at 100% capacity. There is no consideration of the advances in modern medicine, as originally proposed.

This same legislation included a provision that required the Workers' Compensation Board to establish a comprehensive *prescription drug formulary* on or before December 31, 2017. Instead of adhering to that date, the Workers' Compensation Board has announced a proposed formulary and is seeking public comment. The current draft of the formulary has an effective date of July 1, 2018, which is designed to accommodate the public comment period. Hopefully, the Board will have better luck with the Prescription Drug Formulary than it did with the Impairment Guidelines. However, given the impact that the public comment period had on the latter, we cannot be optimistic on the outcome of the former.

The sobering conclusion about this 2017 legislation is that press releases from elected officials and lobbyists touting *significant reforms and meaningful savings* are easy to promise, but *substantive reforms and real savings* are hard to deliver.

Judith Brodsky, Esq. and Marc Gnesin contributed this article.

## **OSHA PENALTIES INCREASED BY 2% OVER LAST YEAR**

For the third year in a row, workplace violations penalties continue to increase. According to the Occupational Safety and Health Administration (OSHA), on January 2, 2018, civil penalty amounts for violations of workplace safety and health standards increased by 2% from last year. In accordance with the Federal Civil Penalties Inflation Adjustment Improvements Act of 2015, the Department of Labor is required to adjust penalties for inflation each year. Along with OSHA, there are four other agencies under the Department of Labor that have penalties that are impacted. These are the Employee Benefits Security Administration, the Mine Safety and Health Administration, the Office of Workers' Compensation Programs, and the Wage and hour Division.

Following are the types of OSHA Violations, with the new penalty amounts:

- **WILLFUL:** A willful violation is defined as a violation in which the employer either knowingly failed to comply with a legal requirement (purposeful disregard) or acted with plain indifference to employee safety. The fine for this is now **\$129,336 per violation**.
- **SERIOUS:** A serious violation exists when the workplace hazard could cause an accident or illness that would most likely result in death or serious physical harm, unless the employer did not know or could not have known of the violation. The fine for this is now **\$12,934 per violation**.
- **REPEATED:** If an employer is cited for a particular violation, and a subsequent inspection reveals another identical or very similar violation. The fine for this is now **\$12,934 per violation**.
- **OTHER-THAN-SERIOUS:** A violation that has a direct relationship to job safety and health but is not serious in nature. The fine for this is now **\$12,934 per violation**.
- **FAILURE TO CORRECT VIOLATIONS:** The fine for this is now **\$12,934 per day for each day the condition continues**.

OSHA has commented that these penalty increases will deter violations, providing a significant benefit not only for workers, but also for responsible employers who will have a more level playing field when competing with employers who are not following the law. The top ten cited violations, as announced by OSHA in September 2017 are: 1) Fall Protection/General Requirements, 2) Hazard Communication, 3) Scaffolding, 4) Respiratory Protection, 5) Lockout/Tagout, 6) Ladders, 7) Powered Industrial Trucks, 8) Machine Guarding, 9) Fall Protection/Training Requirements, and 10) Electrical/Wiring Methods. If you have any of the listed hazards at your worksite, or you have any other safety concerns, have GCG's Health & Safety team provide professional, high-quality, individualized assistance to ensure that your safety programs and policies are up-to-date and in compliance. For further information, please contact our Health & Safety Team Coordinator, [angela.goff@gcgriskmanagement.com](mailto:angela.goff@gcgriskmanagement.com), or one of our specialists: [elsie.tai@gcgriskmanagement.com](mailto:elsie.tai@gcgriskmanagement.com), [rudolph.lu@gcgriskmanagement.com](mailto:rudolph.lu@gcgriskmanagement.com), [hamid.abuzaid@gcgriskmanagement.com](mailto:hamid.abuzaid@gcgriskmanagement.com), or [ralph.ciano@gcgriskmanagement.com](mailto:ralph.ciano@gcgriskmanagement.com).