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New York -- Labor and Attorneys Groups Issue Joint Response in Guides Debate: [Top](#) [10/28/10]

By [Michael Whiteley](#), Eastern Bureau Chief

A consortium of groups representing New York unions and claimants' attorneys presented a joint set of recommendations to Gov. David Paterson and workers' compensation officials Wednesday aimed at breaking the impasse over the state's proposed impairment guides.

The recommendations, contained in a 55-page document sent to Paterson's staff and State Workers' Compensation Board (SWCB) Chairman Robert Beloten, call for the state to use a "grid" approach to determine loss of wage-earning capacity based on a variety of factors including functional impairment, age, skill level and education.

They also called for an immediate end to the board's use of a 2009 decision involving a worker for a Buffalo Auto repossession case as an interim means of converting impairments into loss of wage-earning capacity.

The recommendations leave room for a variety of approaches by the board.

Both the New York AFL-CIO and Robert Grey, the chairman of the New York Workers' Compensation Alliance and the author of the recommendations, said the significance of Wednesday's recommendations is that they represent a combined push for resolution by groups that have been at odds over other workers' compensation issues.

The recommendations were endorsed by the AFL-CIO, the Alliance, the New York Injured Workers' Bar Association (IWBA), the New York Council for Occupational Safety and Health (NYCOSH), and the Western New York Council on Occupational Safety and Health (WNYCOSH).

"The most important piece of this is that this many groups have endorsed a single document," Grey said Wednesday.

A series of 2007 reforms signed into law by former Gov. Eliot Spitzer called for development of new impairment guides as a trade-off for the imposition of the state's first duration caps on permanent partial disability (PPD) awards, which used to continue until the end of the disabled worker's life.

On Sept. 15, New York State Insurance Superintendent James Wrynn sent Beloten the first two components of the guides. The first would allow treating physicians to develop percentages of impairment for workers. The second establishes levels of functionality for injured workers.

But Wrynn told Beloten the task force working on the guides had reached an impasse over the third component – a means of translating impairment into loss of wage-earning capacity.

Wrynn said the task force failed to choose between four options:

- Building a grid that assigns percentage points of loss of wage-earning capacity based on a variety of factors unique to each worker.
- Using impartial vocational specialists to provide expert opinions on each worker.
- Combining the specialists with the grid in what Wrynn called the "hybrid" approach.
- Letting both workers and insurance carriers submit evidence to judges on wage-earning capacity in what Wrynn called the "litigation approach."

Grey's recommendations call for using a grid that would compare a worker's ability for "exertional function" before and after the injuries. It would then modify the difference based on age, education, skills, language proficiency, literacy, non-exertional impairments and other factors.

The grid would break down work demands into categories of "very heavy, heavy, medium light or sedentary."

It would also measure a worker's proficiency in speaking English and his or her level of literacy as they apply to the ability to adapt to jobs that demand less physical exertion.

"The benefit of the grid approach is that it provides consistency and predictability in loss of wage-earning capacity determinations," Grey said.

But he warned judges would have to be given wide discretion in applying the guides.

The groups also said that the board had erred in using a three-member decision, which has been dubbed the "Buffalo Auto Board Panel Decision," in determining lost wages while Spitzer's task force struggled to come up with impairment guides.

The complex ruling noted a structural conflict between existing law and the Spitzer reforms.

The New York Workers' Compensation Law traditionally was interpreted to mean that a PPD award allows for no less than a 25% loss of wage earning capacity.

But, in ending lifetime awards for PPD claims, the Spitzer reforms allowed for injuries involving loss of wage-earning capacity of between 1% and 15% of a worker's prior earning capacity.

The board argued in Buffalo Auto that the reforms were passed later than the existing law and therefore should prevail.

But the Alliance and IWBA argued in the recommendations that the statutes are in conflict and that the 25% standard should be maintained.

"The short answer is there are ways of harmonizing the two statutes without one having to void the other," Grey said Wednesday.

Brian Keegan, SWCB public information officer, declined comment on the recommendations. He said the board has not established a timetable for completing the new guidelines, which regulators call the Disability Duration Guidelines.

Stakeholders said Paterson's staff has called a meeting next Monday on Grey's recommendations with promises to put completion on the "fast track."

The meeting falls a day before New York voters decide between Attorney General Andrew Cuomo, a Democrat, and Buffalo businessman Carl Paladino, a Republican in the governor's race.

Following a series of scandals in his administration, Paterson chose earlier this year not to seek election.

Art Wilcox, chief of workers' compensation issues for the AFL-CIO, agreed the importance of Wednesday's recommendations is the combined weight to the groups behind them.

"I'm very pleased that the number of groups of this quality and size have come together to support one paper on this issue," Wilcox said.

The recommendations are here: <http://www.workcompcentral.com/pdf/2010/misc/FinalGuidesComments.pdf>.

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