

Time for a Real Look at How the New York State Workers' Compensation System Treats Workers



THE
NEW
SCHOOL

CENTER FOR
NEW YORK
CITY AFFAIRS

Time for a Real Look at How the New York State Workers' Compensation System Treats Workers

A report by James A. Parrott and Nicholas B. Martin*, Center for New York City Affairs

Revised and Updated February 2020

** Nicholas B. Martin was a research assistant at the Center in the spring of 2019 when the initial report was written. Since the fall of 2019 he has been a budget and policy analyst at the Independent Budget Office of New York City. He did not work on this revised report.*

Acknowledgments

Thanks go to Bruce Cory for editorial assistance, to Ana Holschuh for designing the cover, and to Kristin Morse and Seth Moncrease for general support. Funding assistance was provided by the Injured Workers' Bar Association for this February 2020 update and for the original May 2019 report. The New York Committee for Safety and Health also provided funding for the 2019 report. We are particularly appreciative of valuable technical assistance provided by Robert Grey in helping us understand several of the complexities and nuances of the workers' compensation system. The authors accept sole responsibility for the substance and views presented in this report.

Cover photo credits: top left, Personnel Plus Burley; top right, Jazz Guy; bottom left, Isabella; bottom right, MTA.

Table of Contents

Executive Summary	3
1. Introduction	7
2. Occupational Injuries and Workers’ Comp Claims	9
Occupational injuries.....	9
Fatal occupational injuries in New York.....	13
Workers’ compensation claims	16
3. Workers’ Comp Basics and 2007 and 2017 System Changes	19
Workers’ comp basics	19
The 2007 “reform” changes in New York’s workers’ comp system.....	20
2017 legislative changes.....	22
Return to work programs.....	22
4. The Benefit Inadequacy Literature	24
What does benefit adequacy mean?	25
In practice, “income protection” means partial and fixed-in-time benefits.....	27
Income protection should mean what a worker would have earned	28
Moreover, wage replacement should include a provision for fringe benefits	29
Research on inadequacy of workers’ compensation cash benefits	29
Significant cost-shifting	32
5. Benefit Inadequacy in New York State	34
New York’s surprisingly low minimum and maximum benefit levels.....	34
Modeling actual and potential changes in New York’s wage replacement rates.....	36
6. Difficulty Accessing Benefits	39
7. Employer Costs and Insurance Profits in Perspective	42
Employer costs in perspective	42
Declining payments for medical costs and indemnity benefits.....	43
State Insurance Fund.....	47
Continuing problems with employer fraud	49
8. Conclusion	52
Appendices	54

Executive Summary

New York was the first state to adopt workers' compensation and was once a national leader in safeguarding the interests of workers injured on the job. However, worker protections under New York's workers' comp system have seriously eroded over the years as legislative and administrative changes have focused on curtailing benefits rather than minimizing injuries, adequately compensating injured workers, or fostering return to work. Fairly compensating injured workers used to be the guiding principle for workers' compensation; for the last several years, changes have reduced employer costs and boosted insurance company profits. New York needs to update income replacement payments to injured workers, improve access to benefits, particularly for low-wage workers, and ensure that businesses responsibly invest in enhancing worker safety.

Over 200,000 workers are injured annually in New York State, and workplace fatalities, particularly in construction, have soared to the highest level in 20 years. Nearly three-fourths of injuries in the private sector that result in lost workdays occur in predominantly low-wage industries or in industries, like construction, that hire many low-wage workers. Transportation, nursing homes, food manufacturing, hotels, and hospitals have the highest incidence of lost-workday injuries in the private sector. Immigrants, some of whom may experience language-access problems in navigating the workers' comp system, hold over one-third of all jobs in many higher-than-average injury-prone industries with large numbers of low-wage workers, such as construction, transportation, hotels, and hospitals.

State and local government workers, particularly those in law enforcement, nursing homes, hospitals, and public schools, have workplace injury incidence rates much higher than the state's overall injury rate. The inadequacy of New York's workers' compensation income replacement payments applies equally to private and State and local government workers.

New York has not been exempt from a disturbing national trend since the 1990s that has eroded payments meant to provide "income protection" to injured workers. A 2015 report from the federal Occupational Safety and Health Administration (OSHA) concluded: "employers now provide only a small percentage (about 20 percent) of the overall financial cost of workplace injuries and illnesses through workers' compensation. This cost-shift has forced injured workers, their families and taxpayers to subsidize the vast majority of the lost income and medical care costs generated by these conditions."

In the year following the OSHA report, the U.S. Labor Department warned, "As the costs of work injury and illness are shifted, high hazard employers have fewer incentives to eliminate workplace hazards and actually prevent injuries and illnesses from occurring."

New York's 2007 and 2017 legislative changes harmed most workers. Injured workers in New York receive an indemnity benefit (separate from payment for medical costs) equal to a maximum of two-thirds of their prior year's average weekly wages, subject to a maximum and a minimum weekly benefit. When a worker's physical impairment is less than 100 percent, benefits are adjusted for the degree of impairment. Relatively few workers receive two-thirds of their prior earnings. A 2007 increase in the maximum and minimum benefit levels raised the benefits for high-wage workers, did nothing for middle-wage workers, and provided a slight

benefit for some, but not all, low-wage workers. However, a cap on permanent partial disability payments wiped out benefits for all such injured workers beyond 10 years. For most long-term partially disabled high-wage workers, this 10-year limit more than offset the higher maximum.

For long-term (more than 15 years) injured workers, the wage replacement value of indemnity benefits is much lower than before the 2007 changes, and before that there had been no enhancements since 1992. A 2017 2.5 year cap on temporary disability payments, which had not been subject to a cap before, reduced benefits for all workers not fully recovered within a few years. For example, a worker injured for more than 10 years would see their wage replacement rate cut by 20 percent.

Indemnity benefits for those suffering workplace injuries are woefully inadequate, falling far short of lost earnings and posing an extra hardship on low-wage workers. A number of changes would enhance the degree to which lost wages are replaced by workers' comp disability payments. These could include raising the minimum and maximum weekly benefit levels and adjusting the base wage for expected increases in a workers' earnings potential had they not been injured on the job. Administrative reforms would better ensure that injured workers receive appropriate benefits in a more timely fashion. New York could also raise the two-thirds ratio to a worker's average wage to 70 percent or greater as some states have done.

For low-wage workers, losing a third or more of their wage, as happens in every worker's comp case, can be financially devastating, and can lead to indebtedness and the possible risk of losing their cars or homes. As the chart below indicates, New York's minimum and maximum benefit levels trail neighboring states (Massachusetts, Vermont, Connecticut, New Jersey, and Pennsylvania), and squarely place the Empire State in the middle rank among all 50 states. If New York's minimum weekly benefit were raised to the average of neighboring states (\$304), many workers would stand to see a greater benefit, particularly low-wage and many injured workers receiving partial disability benefits.

New York's Minimum and Maximum Workers' Comp Benefit Levels Trail All Neighboring States

NY's \$150 minimum weekly workers' comp benefit		NY's \$905 maximum (as of Jan. 2019) weekly benefit	
New York's rank among all states	23	New York's rank among all states	31
Average, 10 states with highest minimum	\$348	Average, 10 states with highest maximum	\$1,412
Average, 4 neighboring states (CT, MA, NJ, VT)*	\$304	Average, 5 neighboring states (CT, MA, NJ, PA, VT)	\$1,192
4 neighboring states compared to NYS	203%	5 neighboring states compared to NYS	132%

* PA minimum is 90% of workers' average weekly wage if less than \$525.

Source: National Academy of Social Insurance, *Workers' Compensation Benefits, Coverage, and Costs*, Oct. 2019.

Some higher-wage New York workers receive much less than two-thirds of their average wage. For example, a skilled tradesperson earning \$1,800 per week injured today would have her/his weekly worker's compensation indemnity benefit limited to \$905 (i.e., two-thirds of the 2018 statewide average weekly wage of \$1,359). Thus, this worker would see a wage replacement rate of only about 50 percent. For 2018, nearly one in four claimants was subject to the maximum benefit cap. Despite having one of the highest costs of living and the highest statewide average wage in the country, New York's workers' comp maximum ranks in the bottom half of all states. The 1972 National Commission on State Workmen's Compensation Laws recommended that the maximum indemnity benefit be set at twice a

state's average weekly wage—that would be over \$2,700 for New York. (In 1980, New York's maximum was 89 percent of the state's average weekly wage.)

National experts on workers' comp insurance urge that the wage base for indemnity benefits reflect a worker's earnings potential rather than the pre-injury wage. This would reflect earnings gains from periodic wage increases, longevity increases, and promotions that workers normally receive over the course of their careers. A very conservative approach to approximate an expected increase over time in a worker's earnings capacity is to index the worker's pre-injury wage to increases in the statewide average wage. The 1972 National Commission recommended that cash benefits be indexed to the increase in a state's average weekly wage. Over the past 15 years, New York's statewide average weekly wage rose by an average 2.86 percent annually—over 10 years this would increase a worker's wage base by 33 percent and over 20 years by 76 percent.

Many injured workers have difficulty accessing benefits. From the early stages of injury reporting and claim filing all the way through the increasingly litigious workers' compensation process, injured workers face a host of barriers to accessing benefits. Many injured workers never apply for workers' compensation, and vulnerable workers, such as immigrant and low-wage workers, face disproportionate barriers. A National Employment Law Project survey of over 600 low-income injured workers in New York City, Chicago, and Los Angeles, found that only nine percent received benefits. Half of the workers who reported injuries to their employer experienced retaliation.

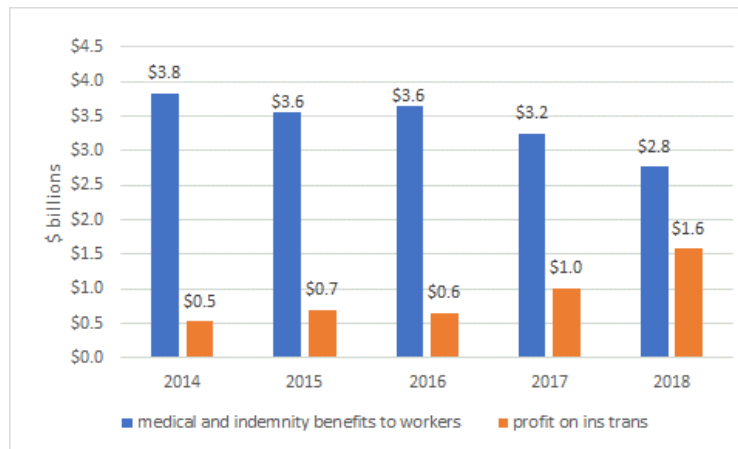
Various administrative changes after the 2007 legislation substantially added to the number and complexity of claim forms, medical reports for health care providers, and incident reports for employers. This increased complexity has made the system considerably less transparent and harder to access by many low-wage and immigrant workers. The Workers' Compensation Board's shift away from hearings to the issuance of non-hearing decisions leaves many workers without an opportunity to seek clarity regarding their cases and their rights.

Workers who are less than fluent in English face additional barriers to accessing benefits. While the Workers' Compensation Board offers translation services, only 0.3 percent of 2015 claims were filed in a language other than English, and only four percent of phone calls to the Board used interpretation services.

Employer costs for workers' compensation are a very small share (0.7 percent) of total employee compensation. Eighteen states have higher employer costs than New York does.

Profits have soared for New York's workers' compensation insurance companies while payments to or on behalf of workers for indemnity and medical costs have fallen in absolute and relative terms. Data from the National Association of Insurance Commissioners indicate a pronounced shift from workers' indemnity and medical benefits to insurance profits in recent years. The total dollar amount of worker benefits fell 28 percent from 2014 to 2018 while insurance profits tripled.

NYS workers' comp insurance profits soar while benefits slide, 2014-18



Source: National Associations of Insurance Commissioners

New York workers' comp profits topped \$1 billion for the first time in 2017, then jumped more than 50 percent to nearly \$1.6 billion in 2018. Benefits paid to or on behalf of injured workers were only 47 percent of premiums in 2018, while workers' comp insurance profits were an unbelievable 27 percent of every premium dollar.

Recommendations: New York needs to update income replacement payments, improve access to benefits, particularly for low-wage workers, and ensure that businesses responsibly invest in enhancing workplace safety. New York should restore the primacy of adequately compensating injured workers and expediting safe return to work. Specifically,

- The workers' compensation benefit structure should be enhanced to improve indemnity benefits, New York should:
 - raise the minimum and maximum weekly benefit levels;
 - adjust the base wage for increases in a workers' earnings potential; and
 - raise the ratio of benefits to a workers' wage higher than two-thirds.
- Statutory language changes requiring initial hearings in every case and clarifying ability to work following a workplace injury. Administrative procedures need to be made more worker-friendly, and more accessible to non-English speakers. Current anti-retaliation protections should be further strengthened.
- Resources should be invested in measures to reduce workplace injuries and illnesses and in return to work programs.
- Enforcement should be bolstered against the misclassification of workers as independent contractors that allows some employers to evade paying workers' compensation, placing their workers in serious jeopardy in the event of workplace accidents.

1. Introduction

The workers' compensation system is in crisis, across the United States and here in New York State. Workers' compensation historically has been a state-based system with relatively little federal oversight, despite its role as a fundamental part of the social safety net. Today, workers' comp falls far short of adequately protecting New York's workers. The system suffers from inadequately compensating injured workers for the often-substantial adverse effects on lifetime earnings, leaving out many workers entirely, and failing to promote workplace safety.

In late 2016, the U.S. Department of Labor (USDOL) took stock of the state-administered workers' compensation programs, concluding that many changes to them in recent years have reduced the adequacy of worker benefits. The USDOL found disturbing patterns, including the denial of claims that were previously compensated, decreased adequacy of cash benefits, restrictions on medical care provided to injured workers, and injured workers who were discouraged from applying for benefits. Their report states:

The current situation warrants a significant change in approach in order to address the inadequacies of the systems. We need to identify best practices in order to provide better benefits to injured workers, increase the likelihood that workers with occupational injuries and illnesses can access the wage replacement benefits they need until they can go back to work, and reduce costs to employers. In addition, the most effective means to reduce workers' compensation costs is to prevent work injuries and illnesses from occurring.¹

A year earlier, a report by the federal Occupational Health and Safety Administration (OSHA) had also identified significant problems with state workers' compensation programs. It noted how various changes over the years had shifted financial costs for workplace injuries and accidents from employers to workers and taxpayers:

The costs of workplace injuries are borne primarily by injured workers, their families, and taxpayer-supported components of the social safety net. Changes in state-based workers' compensation insurance programs have made it increasingly difficult for injured workers to receive the full benefits (including adequate wage-replacement payments and coverage for medical expenses) to which they are entitled. Employers now provide only a small percentage (about 20 percent) of the overall financial cost of workplace injuries and illnesses through workers' compensation. This cost-shift has forced injured workers, their families and taxpayers to subsidize the vast majority of the lost income and medical care costs generated by these conditions.²

¹ U.S. Department of Labor, *Does the Workers' Compensation System Fulfill Its Obligations to Injured Workers?* October 2016.

² Occupational Safety & Health Administration, U. S. Department of Labor, *Adding Inequality to Injury: The Costs of Failing to Protect Workers on the Job*, 2015.

The 1970 federal legislation establishing OSHA also created the National Commission on State Workmen's Compensation Laws to evaluate the states' systems of post-injury compensation. The Commission delivered its findings in 1972, reporting that "the protection furnished by workmen's compensation to American workers [was] in general, inadequate and inequitable."³ In total, the Commission made 84 recommendations, focusing on gaps in coverage and inadequate benefit levels for covered workers. Nineteen of the recommendations were deemed "essential." The extent to which states have followed these 19 recommendations has been used to gauge the adequacy of state workers' compensation systems over time. The average state compliance with the 19 essential recommendations nearly doubled, from 6.79 in 1972 to 12.85 in 2004. Nevertheless, New York's compliance was a below-average 10.75 in 2014.⁴

New York was the first state to adopt workers' compensation in 1910, and voters enshrined a right to workers' compensation protection in the State Constitution in 1914. Under the leadership of future New Deal U.S. Labor Department Secretary Frances Perkins in the 1920s, when she headed the state's Industrial Commission (re-named the Workers Compensation Board in 1971), New York led the nation in establishing vocational rehabilitation programs to aid injured workers.⁵ Despite this early history of leadership in safeguarding the interests of workers injured on the job, New York's workers' comp system has eroded considerably over the years, as legislative and administrative changes have often focused on curtailing benefits rather than adapting to changes in the economy, workforce, and medical treatment. The focus has shifted from fairly compensating injured workers to minimizing employer costs and protecting insurance company profits. New York needs to take a fresh look at its workers' comp system in order to restore the priority of fairly compensating victims of workplace injuries and ensuring that businesses responsibly invest in enhancing worker safety.

This report examines recent data on occupational injuries and illnesses in New York, summarizes changes in the State's workers' compensation since 2007, and discusses the adequacy and accessibility of workers' compensation benefits. We then examine trends in employer costs for workers' compensation, the profitability of workers' comp insurance, and evidence of employer premium fraud. The report concludes with recommendations for State legislative and administrative actions to improve New York's workers' comp system.

³ National Commission on State Workmen's Compensation Laws, July 1972

⁴ U.S. Department of Labor, *Does the Workers' Compensation System Fulfill Its Obligations to Injured Workers?* October 2016.

⁵ Robert Asher, "Workers' Compensation," *The Encyclopedia of New York State*, edited by Peter Eisenstadt and Laura-Eve Moss, Syracuse: Syracuse University Press, 2005.

2. Occupational Injuries and Workers' Comp Claims

There are about 200,000 workplace injuries in New York State each year, according to the federal Bureau of Labor Statistics (BLS). For a variety of reasons, mainly having to do with employer pressure and fear of retaliation, it is likely that this understates the true extent of occupational injuries and illnesses.⁶ Some injuries are resolved with medical attention only, but slightly over half are serious enough for the affected worker to lose one or more days from work. There are about 175,000 workers' comp claims filed annually in New York. In 2018, slightly over half of the 80,000 "established" claimants with a first indemnity award for lost worktime were low-wage workers. Three-fourths of all first indemnity awards went to workers whose weekly wages were less than the state's average weekly wage of \$1,357.⁷

Occupational injuries

The number of workplace injuries has fallen sharply in New York over the past two decades. From an average of 357,000 injuries for 1996-1998, the number dropped to an average of 204,000 for the 2016-2018 period. (2018 is the latest year for which occupational injury data are available.) That's a 43 percent decline over the past 20 years. And since New York's employment is greater today than 20 years ago, the workplace injury *incidence* rate (the number of injuries relative to employment) has declined by 46 percent over this period.⁸

In recent years, occupational injuries in New York have been concentrated in three broad sectors: predominantly low-wage industries of trade and transportation, administrative and waste management services, health care and social assistance, and leisure and hospitality (50 percent); agriculture⁹, construction, and manufacturing (12 percent); and state and local government (31 percent). Within state and local government, injuries are concentrated in local schools; hospitals; nursing homes; and justice, public order, and safety activities. The remaining higher-paying, predominantly white-collar sectors of management, information, finance and real estate, and professional and technical services accounted for seven percent of all occupational injuries and illnesses.

⁶ Emily A. Spieler and Gregory R. Wagner, "Counting Matters: Implications of Undercounting in the BLS Survey of Occupational Injuries and Illnesses," *American Journal of Industrial Medicine* 57: 1077-1084, 2014. As data presented below indicates, workplace injury incidence rates are higher for state and local governments, partly because New York's public sector workers are much more highly unionized and public employers are much less likely to pressure their employees to not report a workplace injury.

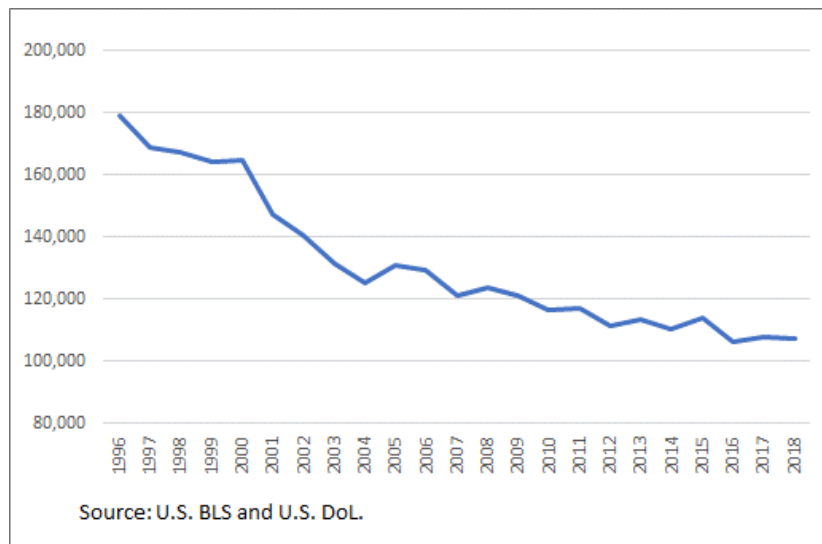
⁷ The Workers' Compensation Board annual report provides a breakout of established first indemnity award claimants by average weekly wage range. "Low-wage" here is defined as weekly wages less than two-thirds (\$900) of the state's average weekly wage of \$1,357. "Established" claims are cases where the Workers' Comp Board finds a work-related accident or injury. New York State Workers' Compensation Board, *2018 Annual Report*, pp. 5-8.

⁸ BLS, *Survey of Occupational Injuries and Illnesses*, annual data, 1996-1998 and 2015-2018.

⁹ Farmworkers are covered under New York's workers' compensation law.

In the discussion that follows, our focus is on workplace injuries (or illnesses) that cause a worker to miss one or more workdays. Injuries involving lost worktime are likely to result in a workers' comp claim for wage replacement, or indemnity, benefits. As Figure 1 indicates, the number of nonfatal injuries causing lost worktime has fallen from 180,000 in 1996 to 107,000 in 2018 (a 40 percent decline).

Figure 1 New York nonfatal injuries, cases with days away from work, 1996-2018



Not surprisingly, given changes in the state's economy and employment patterns, from 1996-1998 to 2015-2017 there has been a falloff in manufacturing injuries from 15 percent of the total to six percent in 2015-2017 and the share of injuries in all goods-producing industries declined from 20 percent to 11 percent, while the service-providing industries' share rose from 51 to 58 percent. The share of occupational injuries taking place in healthcare and social assistance industries rose from 15 to 20 percent over this period.

The improvement in workplace safety reflected in the nearly 50 percent reduction in *incidence rates* (i.e., injuries per 100 full-time equivalent workers) over the past two decades has taken place unevenly across industries. As Figure 2 indicates, workplace injury incidence rates have fallen by about half or more in construction, food manufacturing, nursing homes, and local government. On the other hand, there has been below-average improvements (reductions) in injury incidence rates in retail trade, and hospitals, with only a very slight improvement in hotels over the past two decades. Warehousing has a high

workplace injury incidence rate of 3.6. and there has not been much improvement over the past decade.

Figure 2 New York nonfatal occupational injuries and illnesses incidence rates, cases with lost-workdays, by selected industry, 1996, 2006, 2018

	incidence rates *			% decline in incidence rates	
	1996	2006	2018	1996-2006	2006-2018
Private industries	2.2	1.4	1.1	-36%	-21%
Construction	4.3	1.8	1.7	-58%	-6%
Food manufacturing	4.7	3.4	1.5	-28%	-56%
Warehousing & storage	n.a.	3.9	3.6	--	-8%
Retail	2.0	1.7	1.4	-15%	-18%
Hospitals	3.3	2.7	2.3	-18%	-15%
Nursing & residential care facilities	8.0	4.0	3.3	-50%	-18%
Hotels	2.8	2.9	1.7	4%	-41%
Local government	6.8	5.3	3.7	-22%	-30%

Note: italicized incidence rates for hospitals and nursing & residential care for 2017, latest available.
 * incidence rates = the number of injuries and illnesses per 100 full-time workers
 Source: U.S. BLS and U.S. DoL.

The data in Figure 2 are presented over two intervals, 1996 to 2006 and 2006 to 2018. The first period predates the 2007 legislative changes in New York's workers' compensation system; the second is roughly the first decade following those changes. While this study did not undertake a detailed analysis of factors contributing to the change in workplace injury incidence rates before and after the 2007 system changes, it is curious that greater workplace safety improvements overall and in high-injury industries like construction and nursing facilities occurred in the decade before the 2007 changes than in the decade since. Relatedly, one of the biggest relative safety improvements in the most recent decade occurred in local government, a sector that is largely self-insured and where there likely is greater reporting in the first place. Also, nationally, there was slightly greater improvement in worker safety between 2006 and 2018 than in New York. Nationally, the incidence of lost worktime injuries declined from 1.3 per 100 full-time workers in 2006 to 0.9 in 2018.

Nearly three-fourths of injuries in New York's private sector that resulted in lost workdays in 2018 were in predominantly low-wage industries or industries, like construction, that hire many low-wage workers. Figure 3 shows the number of cases by industry with lost workdays. The five industries with the greatest number of lost worktime injuries were: retail trade; hospitals; transportation and warehousing; nursing facilities; and construction. The industries employing many low-wage workers included in Figure 3 accounted for over

51,000 lost worktime injuries in 2018. Several of these industries, particularly transportation and warehousing, nursing homes, hotels, and hospitals, have among the highest injury incidence rates in the private sector. As noted above, in 2018 three-fourths of workers with established workers' comp claims involving lost worktime payments had weekly wages below the statewide average.

Figure 3 New York's nonfatal occupational injuries and illnesses concentrated in low-wage industries and industries with many low-wage workers, 2018

Industry	Cases with days away from work (000s)
Private industry	72.5
Retail trade	9.3
Hospitals	6.7
Transportation and warehousing	6.2
Nursing and residential care facilities	5.8
Construction	5.8
Wholesale trade	3.1
Social assistance	3.1
Food services and drinking places	4.1
Accommodation	1.5
Food manufacturing	0.8
Other services (except public administration)	1.9
Services to buildings and dwellings	1.3
Investigation and security services	0.4
Amusement, gambling, and recreation inds.	0.3
Agriculture, forestry, fishing and hunting *	0.5
Waste management and remediation services	0.5
Beverage and tobacco product manufacturing	0.2
Subtotal, these low-wage industries	51.5
Low-wage industries share of all private inds.	71.0%
Note: italicized figures are for 2017, latest available.	
* Excludes farms with fewer than 11 employees.	
Source: U.S. BLS and U.S. DoL.	

Immigrants, some of whom may experience language-access problems in navigating the workers' comp system, hold over one-third of all jobs in higher-than-average injury-prone

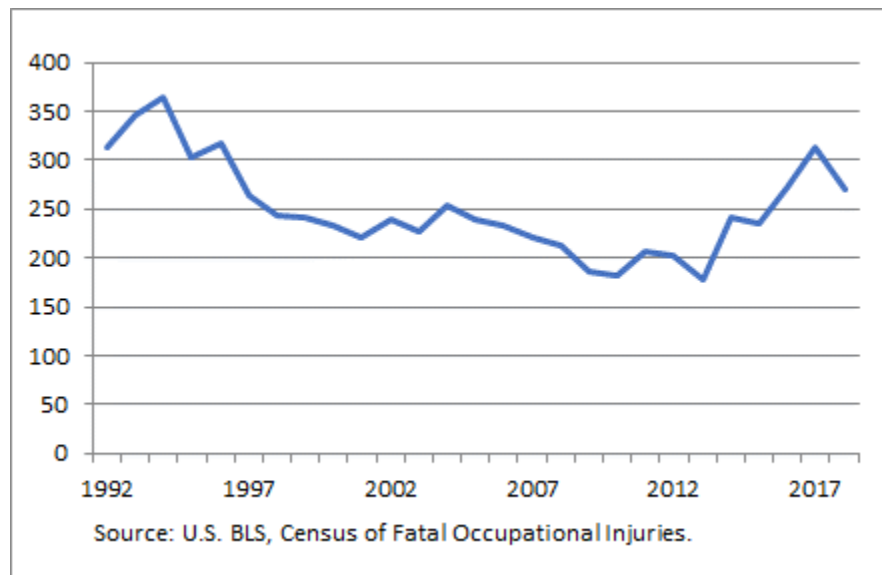
industries including construction, transportation and warehousing, and hotels and restaurants. Immigrants account for 28 percent of all New York workers.¹⁰

Fatal occupational injuries in New York

In the 27 years from 1992 to 2018, there were a total of 6,756 fatal occupational injuries in New York State, with an average of 250 annually. Overall, the number of workplace deaths fell steadily until reaching a low of 178 in 2013. Since 2013, however, there has been an alarming increase in annual workplace fatalities. From 2008-2018, annual workplace fatalities have ranged from 178 to 313, with 2017 being the deadliest year of the decade. There were 271 workplace fatalities in 2018, about the same as in 2016. New York fatalities in the last three years have been greater than at any time since the mid-1990s.

While the overall workplace fatality incidence rate has increased by nearly 50 percent from 2009-2011 to 2016-2018, several industries have seen above average increases. In that period, the incidence of construction fatalities has increased by about three-fourths, wholesale and retail trade fatalities by about half, and public administration fatalities by 90 percent. Increases in the number of workplace fatalities over this time are above average in construction, health care and social assistance, leisure and hospitality, administrative and waste services, and local government.

Figure 4 Fatal occupational injuries in New York State, 1992-2018



¹⁰ Data on immigrant share of industry workforce from the 2017 American Community Survey. Neither the BLS nor the state Workers' Compensation Board provide a breakdown of workplace injuries or claimants by race, ethnicity or nativity.

All the more remarkable, and worrisome, is that the data in the above figure include fatal work injuries among the self-employed as well as wage and salary workers. For 2015-18, an average of 64 New York self-employed workers suffered fatal occupational injuries each year. The occupational fatality rate for self-employed workers is over three times as great as for private payroll employees, 6.9 vs. 2.2 per 100,000 workers. The industries where large numbers of low-paid independent contractors are concentrated are also the industries with the highest fatality rates, including construction, transportation, administrative and support services, agriculture, and personal services. ¹¹

Figure 5 New York occupational fatalities, 2015-201, by race-ethnicity

	annual average fatalities	share of total	share of NYS population, 2017
Total	273	100%	100%
White (non-Hispanic)	182	67%	64%
Black or African-American (non-Hispanic)	27	10%	16%
Hispanic or Latino	48	18%	13%
Asian (non-Hispanic)	12	4%	8%
Other races or not reported (non-Hispanic)	3	1%	1%
<i>Note: the third column does not sum to 100% due to rounding.</i>			
Source: BLS, Census of Fatal Occupational Injuries, 2015-2018.			

Construction, agriculture, and transportation workers are subject to the greatest risk of fatal occupational injury in New York. Since the early 1990s, construction deaths have accounted for about one in every five occupational fatalities even though construction only accounts for about four percent of total employment in the state. Despite having only a half percent of New York's workers, agriculture had nearly eight percent of the occupational fatalities in 2018.¹² While the fatal injury rate across all employment sectors in New York State was 3.1 per 100,000 full-time equivalent workers, it was 7.5 for transportation, 10.5 for construction, and 29.3 for agriculture, forestry, and fishing.¹³

Overall, New York State's construction industry has become more dangerous recently, with 71 fatalities in 2016, 69 in 2017, and 58 in 2018. The average of 66 over these three years was twice the yearly average as recently as 2009-11. This trend mostly represents construction outside of New York City. There were 20 construction industry fatalities in New York

¹¹ BLS, *Census of Fatal Occupational Injuries*, 2015-2018.

¹² BLS, Bureau of Economic Analysis.

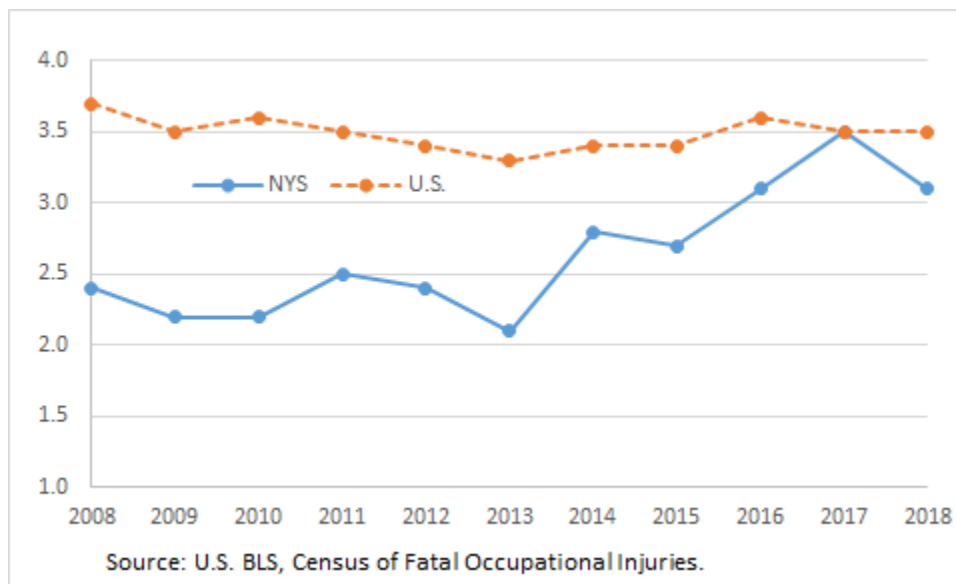
¹³ BLS, *Census of Fatal Occupational Injuries*, 2018.

City in 2017, down from a yearly average of 25 for 2013-15. The overwhelming majority of construction deaths in New York occur on non-union worksites, which accounted for 93 percent of construction deaths in New York City and 87 percent statewide in 2017.¹⁴ Construction workers killed on the job are also disproportionately older workers and Latino.

The New York Committee for Occupational Safety and Health attributes the reduction in New York City construction fatalities to increased prosecutions of construction contractors for a range of labor violations, including noncompliance with the legal requirement to maintain workers' compensation insurance. A coalition of construction trades unions and immigrant workers successfully won New York City Council legislation in 2017 to phase in mandatory safety training for all construction workers. By September of 2020 40 hours of safety training will be required.¹⁵

The surge in work-related fatalities in New York since 2013 contrasts sharply with the national trend over this period. Figure 6 below shows that, nationally, the incidence of work fatalities per 100,000 full-time equivalent workers has been relatively flat over the past decade while New York's incidence rate jumped from 2.5 in 2011 to 3.5 in 2017—the same as the national rate—before receding to 3.1 percent in 2018.

Figure 6 Incidence of fatal workplace injuries, New York & U.S. , 2008-18



¹⁴ NYCOSH, *Deadly Skyline: An Annual Report on Construction Fatalities in New York State*, 2019.

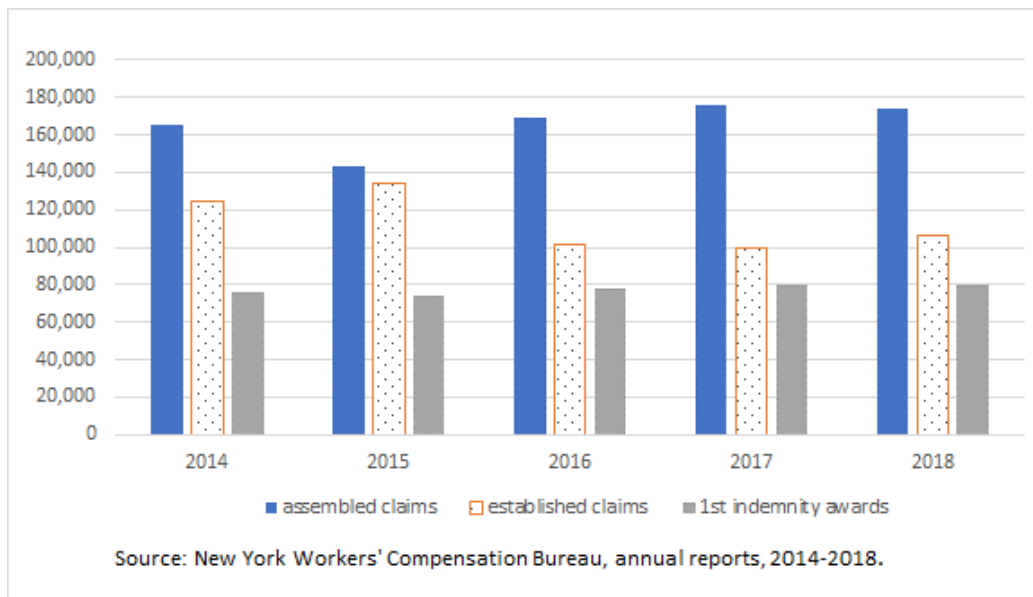
¹⁵ Joe Anuta, "City postpones construction-safety milestone," *Crain's New York Business*, November 7, 2018.

Workers' compensation claims

Our focus in this report is on the adequacy of workers' comp wage replacement, or indemnity, benefits for those whose injuries involve lost worktime. Because of changes in the methodologies used to track workers' comp claims by the Workers' Compensation Board, it is not possible to present a consistent long-term trend for claims filed. (Since the Board switched to all-electronic claims filing and data reporting by employers and carriers in 2014, reporting and administrative processing have become standardized.)

There have been about 175,000 claims filed with, or "assembled," by the Workers' Compensation Board in each of the past two years, 2017 and 2018 (see Figure 7). A claim is "established" when the Board makes a finding of a work-related accident or injury. Since 2015, the number of established claims has been around 100,000 annually. First indemnity awards (or payment for lost worktime) were made in 80,000 cases a year in 2017 and 2018.

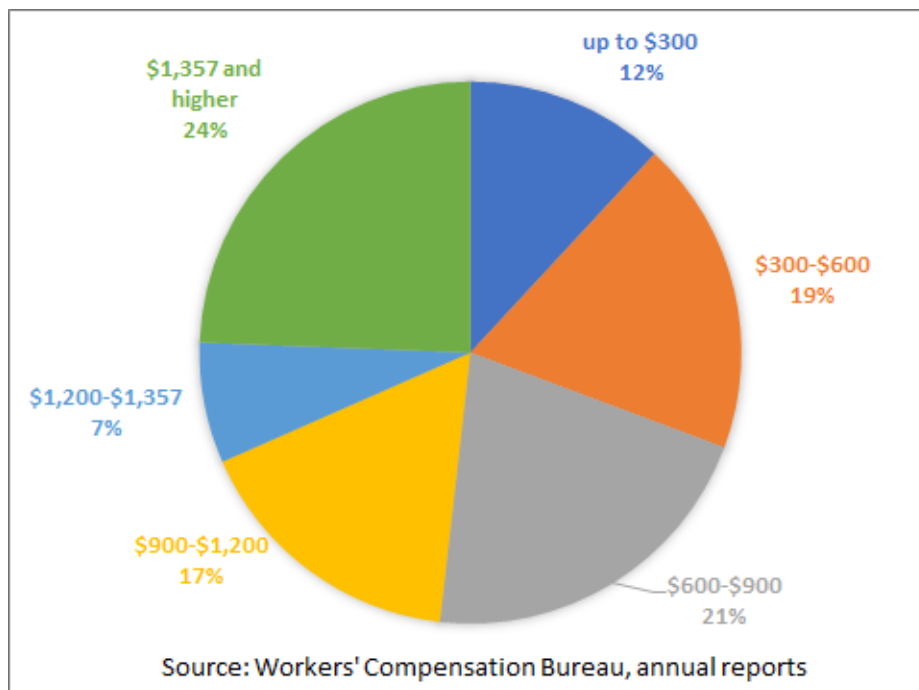
Figure 7 New York workers' comp claims: filed (assembled), established and 1st indemnity awards, 2014-2018



Three-fourths of all first indemnity awards went to workers whose weekly wages were less than the state's 2018 average weekly wage of \$1,357 (see Figure 8). Most (52 percent) injured worker recipients were "low-wage"—defined here as weekly wages less than two-thirds of the state's average weekly wage, or about \$900. Slightly fewer than one-quarter (24 percent) had average wages above the state's average weekly wage—these workers will have their weekly lost worktime payment capped. The weekly cash benefit amount any

injured workers would receive is much less than the average wage categories shown in Figure 8. At most, an injured worker would receive two-thirds of their prior average weekly wage. If their degree of physical impairment is less than total, they would receive a fraction of two-thirds depending on the degree of impairment. For example, a worker with a 50 percent impairment receives an indemnity benefit equal to one-third of their prior average weekly wage (i.e., 50 percent of two-thirds). An upstate worker paid the state minimum wage of \$11.80 during 2020, with normal weekly wages of \$472 would receive a workers' comp indemnity payment of only \$157.33 weekly for a 50 percent physical impairment.

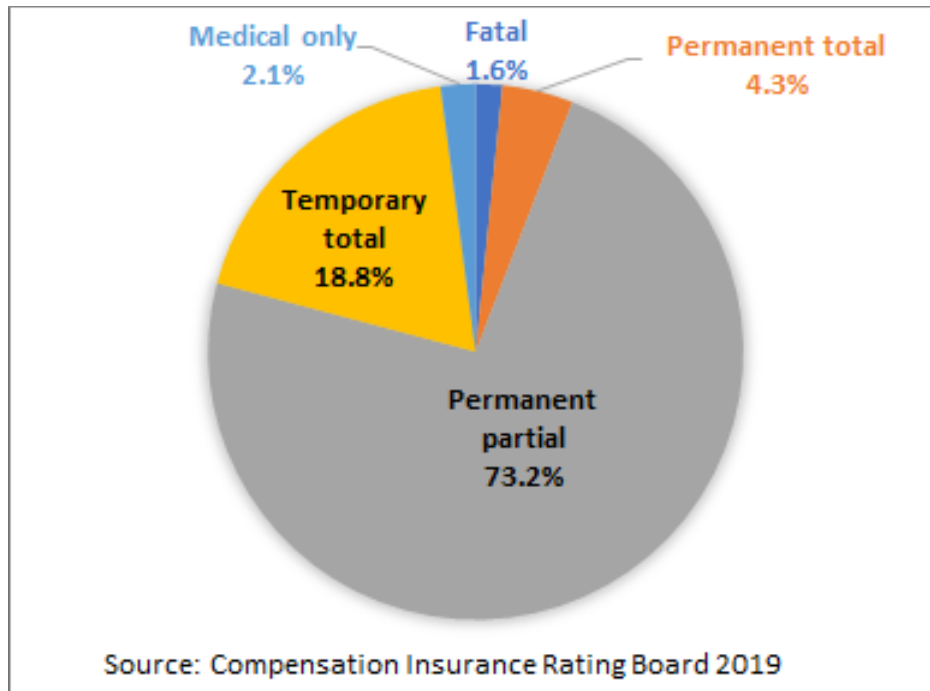
Figure 8 Average weekly wage, 1st indemnity awards, 2018



Medical-only claims that do not involve lost worktime account for nearly 60 percent of all workers' comp claims, yet account for only 2.1 percent of all worker comp payments. Temporary total disability claims represent 21 percent of claims by number and a roughly comparable 19 percent of payments. Permanent partial disability payments account for by far the largest share of all payments—73 percent—nearly four times their 19.2 percent share of the number of claims (see Figure 9). In looking just at cash benefits, permanent partial cases accounted for a larger share in New York than nationally, with smaller shares for the other three indemnity categories in New York compared to the nation overall.¹⁶

¹⁶ National data for 2014 from the National Academy of Social Insurance.

Figure 9 New York workers' compensation payments, by injury type, 2018



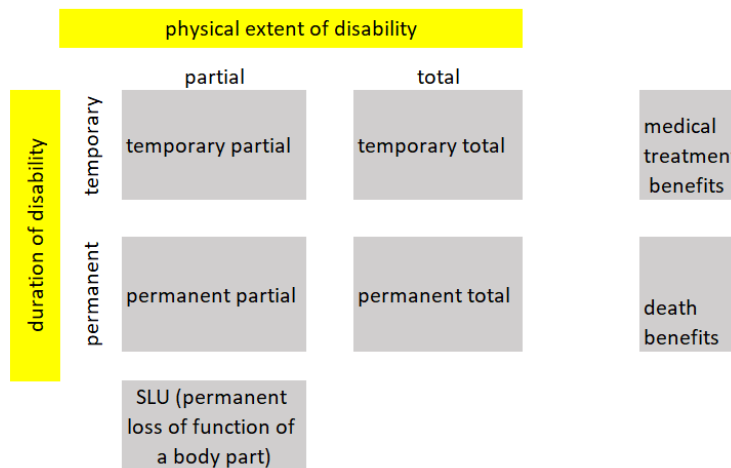
3. Workers’ Comp Basics and 2007 and 2017 System Changes

Workers’ comp basics

If a worker is injured in New York State, they must notify their employer within 30 days of the injury or within two years from the “date of disablement” in the case of an occupational illness. After the injury is reported, the employee must file an employee claim along with a medical report completed by a physician. At this point, the employer may either accept or contest the claim.

In New York there are seven types of workers’ compensation benefits: Temporary Partial Disability, Temporary Total Disability, Permanent Partial Disability, Permanent Total Disability, Schedule Loss of Use (loss of function of a body part), Medical Treatment, and Death Benefits (see Figure 10).

Figure 10 Forms of New York workers' compensation benefits



SLU: schedule loss of use, benefit amount varies by body part

An injured worker unable to work for more than seven days is entitled to cash benefits to compensate for lost worktime in addition to medical coverage, which is covered regardless of the disability length. Cash benefits do not cover the first seven days of disability unless the disability lasts for more than 14 days. The amount of cash benefits is calculated at two-thirds of the worker’s average weekly wage over the prior year, subject to a maximum and

minimum amount. As noted earlier, three-fourths of cases involve partial rather than total physical impairment with benefit calculations depending on the degree of physical impairment sustained by the injured worker (as determined by medical providers).

From 1992 to 2007, the state's maximum weekly benefit was \$400. While \$400 was approximately two-thirds of the state's 1992 average weekly wage, no mechanism was put in place to adjust the maximum benefit as the average weekly wage rose. As a result, the value of the maximum benefit fell to about 40 percent of the state's average weekly wage by 2006, with the share of workers' comp claimants facing benefits limited by the maximum value of \$400 per week reaching 54 percent for 2004-2006. According to a 2007 study comparing average total temporary disability benefits across states, New York had the third-lowest benefits in the nation, exceeding only Mississippi and Arizona.¹⁷

The 2007 "reform" changes in New York's workers' comp system

The most significant reform to the system since 1992 occurred with the 2007 New York Workers' Compensation Reform Act that phased in an increase in the maximum benefit level along with a cap for permanent partial disability payments. This "reform" resulted from a political compromise between the State AFL-CIO and the Business Council of New York. Both entities were represented on a task force appointed by newly-elected Governor Eliot Spitzer in late 2006. The agreement called for the maximum benefit to increase by \$100 in 2007 and by \$50 increments in 2008 and 2009 before being fixed to a value of two-thirds of the state's average weekly wage beginning July 1, 2010. The 2007 reform included a provision that the maximum value would be increased annually after 2010 to maintain the two-thirds ratio to the statewide average weekly wage. For the year beginning July 1, 2019, the maximum weekly benefit is \$934, two-thirds of the average weekly wage of \$1,401.¹⁸

The minimum weekly workers' comp benefit that had been set at \$40 in 1992 was increased to \$100 with the 2007 reforms. In 2013, the minimum benefit was increased again, this time to \$150. However, unlike the maximum benefit, these one-time increases in the minimum benefit did not include a provision for automatic adjustments calibrated to the statewide average weekly wage. As noted below, despite having the highest average weekly wage of all states, New York's minimum and maximum benefit rates place it squarely in the middle rank among all 50 states.

¹⁷ New York State Insurance Department, *Report to the Governor From the Superintendent of Insurance Summarizing Workers' Compensation Data and Recommending Improvements in Data Collection and Development of a Research Structure for Public Policy*, March 2008, p. 37.

¹⁸ For the year beginning July 1, 2018, the maximum benefit was \$905 (based on the state's average weekly wage for 2017 of \$1,357). New York Workers' Compensation Bureau website, <http://www.wcb.ny.gov/content/main/onthejob/wcBenefits.jsp>

In an effort to offset the cost of increasing the statutory maximum benefit level, the 2007 reforms imposed a time limit for permanent partial disability benefits. The duration of “permanent” partial disability benefits for workers who have sustained a disability deemed permanent by medical providers is no longer permanent but are capped. Benefit duration now ranges from 225 to 525 weeks (roughly four to 10 years), depending on the degree of disability. This change significantly decreases the lifetime value of permanent partial disability awards for workers at any wage. For example, a 40-year-old worker earning \$800 per week (\$40,000 per year) with a moderate disability would see a reduction in benefit duration from 1,300 weeks of permanent disability to only 300 weeks of permanent disability. After the benefit cap, this worker would lose benefits at age 46. The 2007 reforms slash the lifetime value of this worker’s benefits from \$346,000 to \$80,000. Any temporary disability would be paid additional to the weeks of permanent disability (prior to 2017 without limitation but capped at 130 weeks after 2017.)

The 2007 legislation created several task forces, among them a Return to Work Task Force, but none of its recommendations have been implemented, despite the potential benefits for workers’ wage-earning capacity and employer cost savings. The legislation also mandated an annual Safety Net Report from the State Department of Labor to assess the impact of the new benefit cap. The expectation was that capping permanent partial disability benefits would create sufficient pressure on injured workers to return to work, and the Safety Net Reports were intended to identify whether permanent partially disabled workers whose benefits were capped were returning to work or not, and if not, whether they were enduring financial hardship as a result of their work injury. Reports were issued only for 2008-2010 and after a hiatus, a report was issued in 2016.

Responsibility for the Safety Net Report was transferred to the Workers Compensation Board in 2017. Evidence suggests that relatively few permanent partially disabled workers return to work. For example, the 2008 Insurance Department report reviewed data for permanent partially disabled workers reaching a lump-sum settlement and found that there was no difference in return to work for those who settled compared to those who did not.¹⁹

Other provisions of the 2007 reform included strengthening penalties for employer fraud, such as noncompliance with the requirement to provide workers’ comp coverage for all employees. There were also changes to workers’ compensation medical treatment guidelines and a variety of procedural changes.

¹⁹ New York State Insurance Department, *Report to the Governor From the Superintendent of Insurance Summarizing Workers’ Compensation Data and Recommending Improvements in Data Collection and Development of a Research Structure for Public Policy*, March 2008, p. 6.

2017 legislative changes

After capping permanent partial disability benefits in 2007, New York capped temporary partial disability benefits in 2017. Following the 2007 reforms, a worker with a temporary partial disability would receive benefits until recovery (defined as maximum medical improvement) or until they were found to have a permanent disability. If he or she were determined permanently disabled, the worker would then be subject to the permanent partial disability cap. However, as of April 2017, injured workers face a cap of 130 weeks (2-and-a-half years) for temporary partial disability benefits. Any temporary partial disability benefits already paid past 130 weeks are now subtracted from the worker's permanent partial disability cap, further limiting benefits for injured workers. The 2017 reforms also ended the practice of requiring permanent partial disability recipients to prove attachment to the labor market. Finally, the 2017 changes slightly reduced the extreme hardship level required to apply for a redetermination of disability to over 75 percent loss of wage earning capacity, from a previous level of over 80 percent.

In April 2017, the State Legislature directed the Workers' Compensation Board to review the workers' comp permanency impairment guidelines in order to better reflect medical advances. As a result, the Workers' Compensation Board proposed reducing "Schedule Loss of Use" benefits dramatically, by limiting injured workers' ability to provide medical evidence for their cases and reducing benefit levels for schedule loss injuries across the board. After the Board received extensive criticism for proposing severe cuts to workers' comp benefits, the cuts were scaled back to a smaller reduction in benefits for some schedule loss cases, beginning in 2018.²⁰

Return to work programs

Return to Work (RTW) programs are designed to benefit both employers and employees. For employers, RTW can reduce the cost of interrupting production or hiring replacement workers, and for employees, RTW can mitigate earnings losses from injury and even help with rehabilitation. RTW addresses a critical need. Between 2013 and 2015, the Workers' Compensation Research Institute surveyed workers in 15 states three years after workplace injuries and found that between 11 percent and 19 percent reported not working, and an additional six-11 percent reported earning significantly less than before their injuries.²¹

²⁰ New York State Workers' Compensation Board, "2018 Permanent Impairment Guidelines for Schedule Loss of Use Evaluation," Bulletin Subject No. 046-1011, December 28, 2017.

²¹ Bogdan Savych and Vennela Thumula, *Comparing Outcomes for Injured Workers in Michigan*. Cambridge, MA: Workers Compensation Research Institute, 2016. In its "manual" for employers on establishing a return to work program, the Workers Compensation Board notes: "research and practical experience has shown that there is only a 50% chance that an injured employee will return to work after a six-month absence; this decline (sic) to a 25%

Interest in RTW programs increased in the 1980s and 1990s as health care and workers' compensation costs rose rapidly, with new disability management programs incorporating elements of medical management, workplace accommodations, and other strategies. Studies of several RTW programs show improved outcomes for workers. The RAND Institute for Civil Justice compared large California firms and found that those with RTW programs averaged nearly 40 percent reductions in disability duration compared to firms without such programs. Successful RTW strategies included modifying work equipment, tasks, or schedules, and transferring workers to other jobs.²² In Washington State, a medical management model focusing on reducing lost time, residual disability, and cost has seen approximately four fewer days out of work and estimates a \$1,600 savings per injured claim.²³ Oregon also offers a variety of subsidies for RTW practices, including employer wage subsidies, claim cost reimbursement, and accommodation cost support. In 2014, Oregon found that injured workers from four years earlier who had participated in a RTW program were eight percent more likely to be employed and had recovered, on average, to 100 percent of their preinjury wages.²⁴

In New York, the 2007 Return to Work Task Force recommended implementing several programs to potentially benefit both workers and employers, including educational programs for employers, the requirement of a formal return-to-work policy for employers with over 25 employees, vocational rehabilitation evaluation, incentive programs, and data collection. However, few of the Return to Work Task Force's recommendations have been implemented.²⁵

The most recent NYS DOL Safety Net Report, from 2016, tracks workers with a permanent partial disability facing the benefit cap instituted in 2007. It lists the number of workers who return to work, reclassify as totally disabled, or who remain subject to the benefit cap, or remain out of work after benefit expiration. As of 2016, there were a total of approximately 22,000 cases. While around 17,000 are subject to the cap, the remaining cases were resolved through other methods, such as a lump sum settlement. In 2016, less than one percent of these injured workers had reached the benefit cap, with 30 having returned to work and 133 not working. This data has not been released since updated since 2016. The Workers' Compensation Board should release a new Safety Net Report to better assess the effects of the 2007 benefit caps.²⁶

chance following a one-year absence and is further reduced to a 1% chance after a two-year absence.”

http://www.wcb.ny.gov/content/main/ReturnToWork/RTW_Handbook.pdf

²² McLaren, Christopher F., Robert T. Reville, and Seth A. Seabury. 2010. “How Effective Are Employer Return to Work Programs?” Rand Center for Health and Safety in the Workplace Working Paper No. WR-745-CHSWC. Santa Monica, CA: Rand Corporation.

²³ Washington State Department of Labor and Industries. 2014b. “COHE Metrics and Oversight.” PowerPoint presentation, April 24, Advisory Committee on Healthcare Innovations and Evaluations (ACHIEV). Tumwater, WA: Washington State Department of Labor and Industries.

²⁴ Oregon Department of Consumer and Business Services. 2015. *2014 Report on the Oregon Workers' Compensation System*. Salem, OR: Oregon Department of Consumer and Business Services.

²⁵ New York State Department of Labor. 2008. *Report of the Commissioner on Return to Work*.

²⁶ New York State Department of Labor. *2016 Annual Safety Net Report of the Commissioner*.

4. The Benefit Inadequacy Literature

The New York State Insurance Department's first report following enactment of the 2007 New York State Workers' Compensation Reform Act set out a framework for benchmarking the state's workers' comp system and made recommendations for improved data collection and related policy research. The Insurance Department (which regulated the Workers' Compensation Board until replaced by the Department of Financial Services in 2011) emphasized in its report: "A fundamental purpose of the workers' compensation system is to provide [injured] workers with wage replacement benefits to support them during the healing period and to assist them in returning to work as early as practicable."²⁷

A core tenet of the "grand bargain" between employers and workers that produced the workers' comp system is that the cost to the employer of providing indemnity benefits should operate as an incentive to improve workplace safety, minimize the incidence of work-related injuries and illnesses, and promote appropriate return to work. Thus, the "bargain" means that, in exchange for giving up the right to sue employers, benefits paid to injured workers should be "adequate," and to the extent they are, the cost to the employer should induce sufficient investments to improve workplace safety.

In an extensive look back at history of the "grand bargain," Northeastern University law professor Emily A. Spieler recently characterized the thrust of the work of the 1972 National Commission on State Workmen's Compensation Laws this way:

Perhaps most significantly, the Commission's Report reflected and created a broad public consensus regarding issues of adequacy in workers' compensation programs. Rather than a system that was designed to balance employers' desires against workers' need, with limited benefits being the *quid pro quo* for employers' tort immunity, the Commission suggested that adequacy of benefits—including fair administration and access to medical care for injured workers—should be paramount.²⁸

In looking back in 2010 on the work of the 1972 National Commission, Peter Barth, its executive director, stated: "taking account of the fact that workers had lost the right to sue their employers for death or disability due to employer negligence, it appeared that workers had struck a bad bargain when evaluated against the indemnity benefits that were provided under the state

²⁷ New York State Insurance Department, *Report to the Governor Summarizing Workers' Compensation Data and Recommending Improvements in Data Collection and Development of a Research Structure for Public Policy*, March 2008, p. 96.

²⁸ Emily A. Spieler, "(Re)Assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017," *Rutgers University Law Review*, LXIX (3), 2017, p. 932.

laws.”²⁹ Barth was suggesting that it had been a “bad bargain” precisely because benefits paid to workers were far from adequate.

In her historical assessment, Spieler noted that workers’ benefits increased for a while in the wake of the 1972 Commission and reached a still far-from-adequate peak around 1992, but a concerted anti-worker reaction that had begun a decade earlier picked up steam through the 1990s and has continued since, if not intensified. By the time of the 2016 stock-taking by the U.S. Labor Department, the inadequacy of benefits had substantially worsened. The Department’s report stated:

Despite the sizable cost of workers’ compensation, only a small portion of the overall costs of occupational injury and illness is borne by employers. Costs are instead shifted away from employers, often to workers, their families and communities.³⁰

The report went on to note the inevitable consequence of this cost-shifting in terms of shrinking the pressure on employers to take basic precautions to protect workers from injury and death.

As the costs of work injury and illness are shifted, high hazard employers have fewer incentives to eliminate workplace hazards and actually prevent injuries and illnesses from occurring. Under these conditions, injured workers, their families and other benefit programs effectively subsidize high hazard employers.³¹

Indeed, there is ample evidence that New York’s workers’ compensation system, and many of the changes made in 2007 and 2017, have further lessened the adequacy of benefits provided to workers suffering workplace injuries, thereby significantly depriving workers of their livelihoods, and, in the words of the 1972 National Commission report, “reducing workmen’s compensation benefits . . . [and] the stimulus to safety inherent in having employers bear the full cost of work-related injuries and diseases.”³²

What does benefit adequacy mean?

Workers’ compensation cash benefits are meant to indemnify (or compensate) a worker for lost wages due to a work injury. The heading for the section on enhancing benefit adequacy in the 1972 National Commission report was: “A modern workmen’s compensation program should provide substantial protection against interruption of income.”³³

²⁹ Cited in Spieler, *Ibid*, pp. 925-926.

³⁰ U.S. Dept. of Labor, *Does the Workers’ Compensation System Fulfill Its Obligations to Workers*, 2016, p. 1.

³¹ *Ibid*.

³² *Report of the National Commission on State Workmen’s Compensation Laws*, Washington, D.C. July 1972, p. 58.

³³ *Report of the National Commission on State Workmen’s Compensation Laws*, Washington, D.C. July 1972, p. 18.

From the start, indemnity benefits in a workers' comp context are less than 100 percent. The worker suffers an injury, which may entail pain and suffering, but under workers' compensation, the worker is at best entitled to a portion of lost wages and medical benefits to cover the cost of medical care. Under the "grand bargain," the worker gives up the right to sue the employer for negligence that may have caused the worker considerable pain and suffering. The longstanding rationale for less than 100 percent wage replacement is the concern that without some reduction below full pay, the worker would have less incentive to undergo physical rehabilitation and return to work. However, if indemnity benefits are grossly inadequate to the point of constraining the ability of the injured worker to support their family and regain physical capacity then return to work becomes a hollow concept.

There is mounting evidence in New York (and other states), that wage replacement falls substantially short by any reasonable interpretation of adequacy and equity principles. The most recent (and ongoing) analysis on wage replacement comes from research at the RAND Corporation led by economist Michael Dworsky that was commissioned by the California Commission on Health and Safety and Workers' Compensation as part of California's reform legislation enacted in late 2012. In the second interim report for this multi-year study, published in December 2018, Dworsky et.al. reviewed the literature on benefit adequacy and wage replacement and observed:

Permanently disabled workers in California have historically experienced severe earnings losses as a result of their injuries. Earnings and employment losses due to injury are not only large, but they also tend to be highly persistent, if not permanent. These findings are not peculiar to California; studies on the economic consequences of permanently disabling workplace injury from other settings also show large and persistent reductions in earnings and employment to be the expected results of permanently disabling workplace injury.³⁴

Despite suggestions in the immediate wake of New York's 2007 workers' comp changes that the State should undertake a careful analysis of earnings losses and the wage replacement effects of its benefit structure, the State never followed through with such research. Given the many limitations in New York's benefit structure and the administration of claims processing and benefits discussed below, it seems evident that the dire conclusions regarding earnings losses and the inadequacy of wage replacement summarized by Dworsky apply equally to New York as well as other states.

³⁴ Michael Dworsky, Stephanie Rennane, and Nicholas Broten, *Wage Loss Monitoring for Injured Workers in California's Workers' Compensation System, 2014-2015 Injury Year Findings (Second Interim Report)*, December 2018, p. 3.

In practice, “income protection” means partial and fixed-in-time benefits

In practice, New York’s workers’ comp system entails an unduly restrictive interpretation of what basic wage replacement or “income protection” means. While not on the job due to a work injury, New York workers only receive a *maximum* of two-thirds of their average weekly wage for the year prior to the injury (and if their injury is less than completely disabling, benefits are calculated at the percent of impairment times the two-thirds ratio). The extent to which cash benefits in New York adequately replace lost wages has remained very limited and the value of benefits generally has been eroded.

Moreover, the cash indemnity in New York is subject to a maximum amount equal to two-thirds of the statewide average weekly wage. Several states set their maximum at 100 percent of the state average weekly wage, and 30 states and the District of Columbia had maximum weekly benefits greater than New York’s \$905 maximum as of January 2019.³⁵ This is all the more surprising and unacceptable considering that in 2018 New York had the highest average wage of all 50 states. In addition to most Northern states, this list of 30 states with higher maximum benefit levels than New York includes Virginia, Kentucky, North Carolina, Florida, Tennessee, and Texas.

Thus, for 2018, all New York workers with annual earnings over \$67,938 had their weekly cash indemnity amount capped at \$871. This means that about 30 percent of all injured New York workers qualifying for indemnity benefits received less than two-thirds of their average wage or salary.³⁶ A worker earning \$1800 weekly, e.g., would receive a cash amount less than half of their normal wage.

While many other states also peg the cash indemnity amount to two-thirds of a worker’s weekly wage, many states also recognize that low-wage workers would have a particularly difficult time supporting themselves and their families on one-third less than what they normally earn. Injured low-wage workers may be forced to take on more debt to support their families, increasing the risk that they could lose their cars or homes.

At the time the 1972 National Commission was meeting, there was an active public policy discussion about a guaranteed annual income as a means to address poverty. For that reason, the Commission did not make a recommendation regarding appropriate minimum workers’ comp benefits because, in their words, “we assume a family assistance program or other form of

³⁵ National Academy of Social Insurance, *2019 Workers Compensation, Benefits, Costs and Coverage*, Appendix Table C with cross-state comparisons, October 2019. In New York, the maximum weekly benefit was \$905 for the year beginning July 1, 2018. The maximum increased to \$934 on July 1, 2019. Comparisons to other states use the \$905 figure since that is the time period for which comparative state data were presented in the National Academy’s latest annual workers’ compensation report.

³⁶ *New York Workers’ Compensation Board 2018 Annual Report*, p. 5.

income maintenance program soon will assure all families a sufficient income” and keep them above poverty.³⁷ However, the Commission did recommend that the minimum weekly benefit in death cases be at least 50 percent of the state’s average weekly wage.³⁸

Most states provide at least a minimum weekly cash benefit. In New York’s case, the minimum is only \$150—that’s only about 11 percent of the state’s average weekly wage. Twenty-two states and the District of Columbia have higher minimum workers’ compensation benefits, with some considerably higher (e.g., North Dakota \$576, Vermont \$437, South Dakota \$403, and Idaho \$354.)

In 1972, the National Commission urged the two-thirds benchmark for the cash indemnity benefit maximum as a starting point, but recommended that higher thresholds be phased in, with cash benefits subject to a maximum of 100 percent of a state’s average weekly wage by July 1, 1975 and that the maximum should be increased in steps to reach 200 percent by July 1, 1981.³⁹

The 1972 National Commission report also urged an alternative method for determining benefit levels—80 percent of spendable weekly earnings. Spendable earnings would adjust gross earnings for payroll taxes and federal and state income taxes. Assuming Earned Income Tax Credits, both federal and state, were included in the spendable earnings concept, this method likely would yield higher benefits for injured workers with children.⁴⁰

Income protection should mean what a worker would have earned

New York’s current minimalist approach to basic workers’ comp indemnity benefits leaves many workers far short of adequacy. Setting a worker’s cash benefits at two-thirds of their prior year’s pay and then freezing that for the duration of eligibility penalizes workers by ignoring potential wage growth subsequent to the workplace injury. It deprives a worker of future indemnity compensation for any pay increases they might receive as well as increases non-injured workers in their cohort might receive. Wage replacement should reflect the earnings trajectory that a worker would have experienced had she/he not suffered a workplace injury. As the quote from Dworsky and colleagues cited earlier in this section emphasized, there has been considerable research regarding the shortfall between the cash benefits received by injured workers compared to the earnings for comparable, uninjured workers. This research is summarized below.

³⁷ *Report of the National Commission on State Workmen’s Compensation Laws*, Washington, D.C. July 1972, p. 58.

³⁸ *Ibid.*, p. 72.

³⁹ *Report of the National Commission on State Workmen’s Compensation Laws*, Washington, D.C. July 1972, p. 62.

⁴⁰ As of January 2018, Alaska, Iowa, and Michigan set regular cash benefits at 80 percent of a worker’s spendable earnings. National Academy of Social Insurance, *2018 Workers Compensation, Benefits, Costs and Coverage*, Appendix Table C.

Moreover, wage replacement should include a provision for fringe benefits

Injured workers are further harmed by the fact that cash indemnity benefits do not include any provision for loss of supplemental pay (such as overtime) and fringe benefits that workers might suffer as a result of not being able to work or having to work fewer hours given a partially incapacitating injury. For example, an injured worker is at risk of losing family health insurance and paid leave based on usual working time. Their retirement security also will suffer if they were covered by a defined contribution retirement savings plan linked to their regular earnings, as are many workers. An injured worker also stands to lose future Social Security benefits as their wage base on which contributions are made shrinks.

In its discussion of the need to raise indemnity benefits, the 1972 National Commission report noted the increase in the growth of fringe benefits relative to wages during the 1960s and early 1970s. Labor economists consider the cost of fringe benefits as integral to the wage bargain between worker and employer. Accordingly, the Commission noted that total labor compensation (wages plus fringe benefits) was 11.4 percent higher than wages, nearly twice the differential as in the late 1950s.⁴¹ While the Commission made no specific recommendation in its report regarding fringe benefits, total labor compensation nationally in 2016 was 22.9 percent greater than wages, and in New York, 24.1 percent higher.⁴² This is more than twice the differential in the early 1970s, and suggests that indemnity benefits should be adjusted to reflect the greater cost to the worker since employer-paid fringe benefits are lost along with wages when workplace injuries prevent a worker from being able to work.

Research on inadequacy of workers' compensation cash benefits

Several leading workers' comp researchers concur that the best method to gauge the extent to which cash benefits replace lost earnings is to use administrative wage records and a comparison group methodology. For example, a recent report from the ongoing RAND studies for the State of California describes this method,

We match injured workers to control workers in the same firm at the time of injury who closely resemble injured workers in terms of past earnings, job tenure, and employment status. After demonstrating that earnings prior to injury match closely between the injured worker and controls prior to injury, we then use these control workers to estimate what injured workers would have earned in the absence of injury. In particular, we estimate the relative difference in

⁴¹ *Report of the National Commission on State Workmen's Compensation Laws*, Washington, D.C. July 1972, p. 55.

⁴² Bureau of Economic Analysis personal income data series for U.S. and New York.

earnings, employment, and at-injury employment between the injured and control workers to estimate wage loss over time.⁴³

Using this research method, a 2001 RAND Institute for Civil Justice study by Reville and colleagues estimated the 10-year loss-replacement rates for permanent partial disability claimants in five states. Their results are summarized in Figure 11, below.

In these five cases, earnings losses experienced by injured workers ranged from 16 to 26 percent and loss-replacement rates (i.e., the extent to which benefits replaced lost earnings) ranged from 29 to 46 percent, well below the two-thirds ratio of benefits to wages used in many states. These results can only be construed to be seriously inadequate. Earnings losses resulted from a combination of missed work and lower earnings than received by comparable workers who were not injured. The low loss replacement rates are a measure of benefit inadequacy and reflect the limitations in benefit structure, mainly the failure to adequately account for potential earnings, but also the effect of maximum benefit ceilings.

Figure 11 Ten-year earnings losses and loss replacement rates for five states

	New Mexico	Washington	California	Wisconsin	Oregon
Potential earnings 10 years post-injury	\$167,244	\$250,251	\$238,262	\$222,055	\$197,737
Ten-year losses	\$34,314	\$41,220	\$61,767	\$49,477	\$39,202
Earnings loss rate	21%	16%	26%	22%	20%
Total cash benefits	\$15,832	\$16,734	\$22,612	\$14,452	\$16,636
Before-tax loss replacement rate	46%	41%	37%	29%	42%
Note: permanent partial disability claimants					
Source: Robert T. Reville, Leslie I. Boden, Jeffrey E. Biddle, and Christopher Mardesich, <i>An Evaluation of New Mexico Workers' Compensation Permanent Partial Disability and Return to Work</i> , MR-14-14-ICJ, Santa Monica, CA: RAND Institute for Civil Justice, 2001.					

⁴³ Stephanie Rennane, Nicholas Broten, and Michael Dworsky, *Wage Loss Monitoring for Injured Workers in California's Workers' Compensation System, 2016-2017 Injury Year Findings (Third Interim Report)*, RAND, February 2020, p. x.

While we do not have the data needed to compare the experience in New York State to the five states in either the 2001 RAND study or the ongoing RAND studies for the State of California, all of these states set their benefits at two-thirds of a worker's average pre-injury wage, and maximum benefit levels for New Mexico and Oregon were comparable to New York's \$400 maximum during the early and mid-1990s.

A more recent loss replacement study of New Mexico went beyond the Reville, et.al. study in considering workers by gender and by three categories of injury severity, and in tracking the earnings of injured workers who left the state or entered self-employment. This study, by Seabury, et.al., looked at workers with moderate temporary disabilities, severe temporary disabilities, and permanent partial disabilities, and also utilized comparison worker groups. Not surprisingly, earnings losses were higher the more severe the injury. However, the extent to which indemnity benefits offset earnings losses increased with the injury severity. As Figure 12 below indicates, for men, earnings losses were nearly twice as great in the case of permanent partial disabilities (PPDs) compared to moderate temporary total disabilities (TTDs), while loss-replacement rates were much greater for PPDs than for TTDs (25 vs. three percent). Similar patterns hold for females.⁴⁴

Figure 12 Ten-year earnings losses and loss replacement rates, by injury severity, New Mexico

	Males			Females		
	Moderate temporary total disability	Severe temporary total disability	Permanent partial disability	Moderate temporary total disability	Severe temporary total disability	Permanent partial disability
Potential earnings 10 years post-injury	\$264,072	\$258,503	\$303,666	\$193,605	\$183,245	\$213,775
Ten-year losses	\$27,396	\$45,042	\$58,122	\$21,287	\$36,869	\$46,783
Earnings loss rate	10%	17%	19%	11%	20%	22%
Total cash benefits	\$826	\$6,638	\$14,395	\$646	\$4,857	\$9,704
Before-tax loss replacement rate	3%	15%	25%	3%	13%	21%

Note: TTD = temporary total disability; PPD = permanent partial disability

Source: Seth A. Seabury, Ethan Scherer, Paul O'Leary, Al Ozonoff, and Leslie Boden, "Using Linked Federal and State Data to Study the Adequacy of Workers' Compensation Benefits," *American Journal of Industrial Medicine*, LVII, p. 1171, 2014.

⁴⁴ Seth A. Seabury, Ethan Scherer, Paul O'Leary, Al Ozonoff, and Leslie Boden, "Using Linked Federal and State Data to Study the Adequacy of Workers' Compensation Benefits," *American Journal of Industrial Medicine*, LVII, 1165-73, 2014.

In New York, temporary total disability claims account for slightly more than half of all indemnity claims and 19 percent of indemnity benefits. Permanent partial disability cases are slightly less than half of all claim counts, but 73 percent of indemnity benefits.⁴⁵ The Seabury analysis suggests that benefits fall even further short of replacing losses for temporary total than for permanent partial disabilities.

Research on Canadian workers' comp systems found roughly 100 percent wage-replacement for claims with more than 50 percent impairment ratings in Ontario, and about 125 percent in British Columbia. Hunt and Dillender note that all Canadian workers' comp systems provide coverage through government funds and benefits are more generous with either short or nonexistent waiting periods.⁴⁶

In an article published in the *American Journal of Industrial Medicine*, economist and health and safety expert Leslie Boden and colleagues analyzed the post-injury earnings and mortality for over 36,000 workers relative to a large comparison group. They compared experiences for workers suffering lost-time injuries compared to workers whose injuries required medical treatment but that did not involve lost working time. Boden, et.al. concluded: "Lost-time occupational injuries are associated with a substantially elevated mortality hazard."⁴⁷

Significant cost-shifting

The failure of the workers' compensation system to adequately replace earnings for injured workers is part of a broader problem where various costs are shifted to others, including public safety net programs, other insurance providers, as well as workers and their families. Public health experts J. Paul Leigh and James P. Marcin analyzed the total costs generated by workplace injuries and illnesses and estimated that workers' comp systems covered only 21 percent of the overall financial cost of occupationally caused injuries and illnesses. This estimate includes medical costs, lost earnings, fringe benefits, and the value of home production injured workers were no longer able to provide. Leigh and Marcin divided costs into medical and productivity losses (i.e., losses from earnings, fringe benefits and labor services rendered at home that injured workers could no longer perform.) Workers' comp covered 45 percent of medical costs but only 12 percent of productivity losses. Of the total of \$250 billion in total workplace injury-related costs generated in 2007, workers' comp systems paid 21 percent of the

⁴⁵ New York Compensation Insurance Rating Board, *2019 State of the System*.

⁴⁶ H. Allan Hunt and Marcus Dillender, *Workers' Compensation, Analysis for Its Second Century*, W.E. Upjohn Institute for Employment Research, 2017, pp. 96-97.

⁴⁷ Leslie I. Boden, Paul K. O'Leary, Katie M. Appelbaum, and Vorghos Tripodis, "The Impact of Non-fatal Workplace Injuries and Illnesses on Mortality," *American Journal of Industrial Medicine*, July 2016.

costs as noted above, but workers and their families absorbed half of the costs, taxpayers covered 16 percent, and private health insurance companies bore the remaining 13 percent.⁴⁸

Leigh and Marcin identify two major implications from their study:

First, because workers' compensation absorbs only roughly 21 percent of true cost, workers' compensation premiums are "too low." The ability of workers' compensation premiums to perform their economic function as a signal to firms and governments is blocked. When the costs of what economists refer to as an externality—in this case, injury and illness—are too low, a greater than optimal amount of the externality will be produced; "the market" will generate a level of occupational industry and illness that is inefficiently too high. Second, equity is undermined. Victims and their families absorb most of the cost shifting. Moreover, "innocent" third parties such as other private non-workers' compensation insurance carriers as well as taxpayers absorb roughly 37% of the amount not paid by workers' compensation.⁴⁹

The research findings discussed above regarding the gross inadequacy of workers' compensation indemnity benefits, and the far-reaching extent of cost-shifting that results from serious system shortcomings likely apply as well to New York's workers' compensation system. These shortcomings pose a great challenge for policymakers. Arguably, the top policy priority should be to focus on workers, to improve benefit adequacy and timely return to work, along with ensuring that the necessary investments are made in the prevention of workplace injuries and illnesses.

One way to operationalize an increase over time in a worker's earning capacity is to index it to inflation or to the increase in average wages. Recognizing that inflation would erode the value of indemnity benefits and the notion of "income protection," the National Commission recommended that in the case of a permanent total disability, the worker's cash benefit should be indexed to the increase in the state average weekly wage.⁵⁰ That seems like a reasonable approach for use in New York, and it is modeled in the next section.

⁴⁸ J. Paul Leigh and James P. Marcin, "Workers' Compensation Benefits and Shifting Costs for Occupational Injury and Illness," *Journal of Occupational and Environmental Medicine*, LIV (4), April 2012, 445-450.

⁴⁹ *Ibid.*

⁵⁰ *Report of the National Commission on State Workmen's Compensation Laws*, Washington, D.C. July 1972, p. 64.

5. Benefit Inadequacy in New York State

New York's indemnity benefit structure suffers from several flaws that contribute to its overall inadequacy. Both minimum and maximum weekly benefits are very low relative to those in other states and to all of its neighboring states, a puzzling situation given that New York is a high-wage state and generally is considered among the more progressive states for economic and social policies. And as will be shown in this section, the 2007 and 2017 changes that put time limits on permanent partial disability and temporary disability payments, respectively, have significantly eroded the wage replacement rates for New York's workers' comp indemnity payments. Further, this section models changes in wage replacement rates relative to a typical worker's earnings potential, assuming modest expected annual wage increases.

New York's surprisingly low minimum and maximum benefit levels

As noted in Section 2, the 2007 changes raised the minimum weekly benefit to \$100 from \$40, where it had been since 1992. A further adjustment in 2013 lifted the minimum to \$150. The maximum weekly benefit, which had been held at \$400 since 1992, was increased to \$500 in 2007 and increased over the next three years to reach two-thirds of the state's average weekly wage in 2010. It has been adjusted since in line with a two-thirds relationship to the state average weekly wage, putting it at \$934 from July 2019 to June 2020.

It is surprising that since New York has the highest average weekly wage in the country that it has such a low minimum weekly benefit at \$150. The state has seen rapid growth in recent years in low-wage occupations such as homecare, personal care aide, and food preparation, but the state has not adjusted its workers' comp benefits to reflect the fact that many New Yorkers live paycheck to paycheck. For most New York workers making less than \$30,000 annually, the 2007 reforms did not increase benefits at all. For low-wage workers, losing a third of their wages can be financially devastating, and can lead to indebtedness and the possible risk of losing their car or home.

And as noted in Section 3, more than half of those receiving payments for lost worktime injuries in New York State are low-wage workers. Yet 22 states and the District of Columbia have higher minimum benefit levels than New York. Four of New York's neighboring states (Massachusetts, Vermont, Connecticut, and New Jersey) have higher minimums and the average for these four states is \$304 (see Figure 13). New York's \$150 minimum level is less than half of that. The minimum weekly benefit in Pennsylvania is 90

percent of a worker's average weekly wage if that average is less than \$524.50.⁵¹ If New York's minimum weekly benefit were raised to the average of its neighboring states, 40 percent of workers receiving benefits likely would see a higher minimum benefit.

Figure 13 Nearly half of all states have a minimum weekly benefit greater than New York's \$150 weekly minimum

Nearly half of all states have a weekly minimum greater than New York's \$150 minimum

New York rank among states by minimum	23
Average, 10 states with highest minimum	348
Average, 22 states with higher minimum	\$276
Average, 4 neighboring states (CT, MA, NJ, VT)	\$304

Source: National Academy of Social Insurance, *Workers' Compensation: Benefits, Coverage, and Costs*, Washington DC, October 2019, Table C.

Under the best of circumstances with New York's current benefit structure, injured workers receive two-thirds of their lost wages (i.e., relative to their pre-injury wage). However, some higher-wage workers receive much less than this. For example, a skilled tradesperson earning \$1,900 per week (and likely working only part of the year due to the seasonal nature of most construction) who suffers a 100 percent injury-related disability would have her/his weekly worker's compensation indemnity benefit limited to \$934 (i.e., two-thirds of the 2018 statewide average weekly wage of \$1,401). Thus, this worker would see a wage replacement rate of slightly under 50 percent. For 2018, nearly one in four of all claimants was subject to the maximum benefit cap.⁵²

Relative to other states, New York's maximum benefit is quite low. Despite having one of the highest costs of living in the country,⁵³ New York ranks 31st in maximum benefit level. Most states set their maximum at 100 percent of the state average weekly wage while New York's is still at two-thirds. The Empire State's maximum in 2018 was 36 percent below the \$1,412 average maximum for the 10 states with the highest maximum, and 24 percent less than the average maximum of \$1,192 for our five neighboring states (see Figure 14).

⁵¹ National Academy of Social Insurance, *Workers' Compensation: Benefits, Coverage and Costs*, Washington, D.C. October, 2019, Appendix Table C.

⁵² *New York Workers' Compensation Board 2018 Annual Report*, p. 6

⁵³ According to the Bureau of Economic Analysis Regional Price Parity measure, New York State's statewide average cost of living (2016) is 15.6 percent above the national average and the second highest among all states after Hawaii.

Figure 14 New York's \$905 maximum benefit as of January 2019 ranks 31st among states; five neighboring states pay maximum benefits 32 percent greater than NYS

New York rank among states by maximum	31
Average, 10 states with highest maximum	\$1,412
Average, 2nd 10 states with highest maximum	\$1,111
Average, 5 neighboring states	\$1,192

Source: National Academy of Social Insurance, *Workers' Compensation: Benefits, Coverage, and Costs*, Washington DC, October 2019, Table C.

Modeling actual and potential changes in New York's wage replacement rates

To demonstrate the relatively low wage replacement rates under New York's benefit structure, we present a series of simple scenarios for a worker with an average wage of \$900, about the median wage for 2018 workers' comp claimants. We estimate wage replacement over 10- and 20-year periods, and under three policy regimes, prevailing in 1995, 2010, and 2018. These policy regimes represent, respectively, pre-2007 changes, the period after the 2007 changes but before the 2017 changes (reflecting the cap on permanent partial disability payments), and the period after the 2017 changes (when temporary disability payments were capped). In each of these scenarios, we are assuming a worker with a 50 percent disability, and, for simplicity, we do not factor in any post-injury wage earnings. [That is, we calculate the wage replacement of benefits relative to lost earnings under an assumption the worker does not return to work.]⁵⁴

In the top panel of Figure 15 (Appendix Figure 1 details the assumptions used in the modeling) we show the effects of the three policy regimes on wage replacement, assuming the pre-injury wage remains the basis for calculating expected wages. Under the first policy regime, i.e., pre-2007, wage replacement is at 33.3 percent reflecting the two-thirds of the worker's pre-injury wage times the 50 percent disability. That one-third wage replacement is the same for the 20-year period. However, the impact of the 2007 and 2017 changes combine to reduce wage replacement to less than 14 percent over 20 years.

⁵⁴ In all of the scenarios, we also assume a temporary disability of 65 percent, on average, for a period of 4.5 years before the worker is declared to have a 50 percent permanent partial disability for the duration of the periods under consideration.

The effect of the permanent partial disability limitation introduced in 2007 can be seen in the 20-year scenario reducing wage replacement from 33.3 percent to 17.1 percent—essentially a 49 percent reduction. The top panel also shows the adverse effect of the 2.5-year cap on temporary disability enacted in 2017 in both time periods, with a further 17 percent reduction for the 10-year period and a nearly 20 percent reduction over 20 years.

Figure 15 Wage replacement scenarios following 2007 and 2017 policy changes, and with potential earnings growth

For a worker with a \$900 average weekly wage in the pre-injury year
See Appendix Figure 1 for modeling assumptions.

Scenario A: Pre-injury wage remains the basis for expected wages (as under current system)

year of injury	policy regime	temp disability period (weeks)	Total WC benefits	expected wages at pre-injury rate	wages lost	wage replacement rate	wage replacement change from prior policy regime
10 years							
1995	pre-2007	234	\$156,000	\$468,000	\$312,000	33.3%	---
2010	2007-2017	234	\$156,000	\$468,000	\$312,000	33.3%	0.0%
2018	post-2017	130	\$129,000	\$468,000	\$339,000	27.6%	-17.3%
20 years							
1995	pre-2007	234	\$312,000	\$936,000	\$624,000	33.3%	---
2010	2007-2017	234	\$160,200	\$936,000	\$775,800	17.1%	-48.7%
2018	post-2017	130	\$129,000	\$936,000	\$807,000	13.8%	-19.5%

Scenario B: Earnings potential growth of 2.86 % annually, but benefits per pre-injury wage

year of injury	policy regime	temp disability period (weeks)	Total WC benefits	expected wages rising 2.86% annually	wages lost	wage replacement rate	wage replacement change vs. no wage growth
10 years							
1995	pre-2007	234	\$156,000	\$548,309	\$392,309	28.5%	-14.6%
2010	2007-2017	234	\$156,000	\$548,309	\$392,309	28.5%	-14.6%
2018	post-2017	130	\$129,000	\$548,309	\$419,309	23.5%	-14.6%
20 years							
1995	pre-2007	234	\$312,000	\$1,275,235	\$963,235	24.5%	-26.6%
2010	2007-2017	234	\$160,200	\$1,275,235	\$1,115,035	12.6%	-26.6%
2018	post-2017	130	\$129,000	\$1,275,235	\$1,146,235	10.1%	-26.6%

Source: Authors' estimates

The top panel measures wage replacement against the pre-injury wage with no adjustment over time as under current law. In the bottom panel of the first figure, we introduce a wage growth factor to illustrate a typical worker's potential earnings trajectory based on periodic wage increases, promotions, or job changes made to increase earnings. As a proxy measure for growth in earnings potential we use 2.86 percent annually, representing the increase in New York's statewide average annual wages between 2003 and 2018.⁵⁵ As one would expect, assuming growth in earnings potential but no adjustment on the benefit side reduces the wage replacement rate for each specific scenario comparing the result in the bottom panel to the corresponding result in the top panel. For example, under the pre-2007 regime, wage replacement would be measured at 28.5 percent after 10 years rather than 33.3 percent. And after the 2007 and 2017 changes, wage replacement would be 23.5 percent over 10 years. Over 20 years, wage replacement would fall to a mere 10.1 percent after the 2007 and 2017 changes assuming modest growth in earnings potential.

The Appendix includes comparable scenarios for a worker with an average weekly wage of \$1,800 (Appendix Figure 2), and for a low-wage worker figured at one-third of the state's average weekly wage for each of the three years modeled (Appendix Figure 3). For the higher wage worker (Appendix Figure 2), the effect of the particularly low maximum benefit cap of \$400 in the pre-2007 policy regime reduced wage replacement from one-third to 22.2 percent. Over the 10-year period, the 2007 policy change lifted wage replacement to one-third, but then the cap on permanent partial disability, also introduced in 2007, reduced wage replacement nearly in half for the 20-year period as a whole. Other changes were similar to the policy effects for the worker with an average weekly wage of \$900 modeled in Appendix Figure 1.

The impacts for the low-wage worker modeled in Appendix Figure 3 are similar as for the worker with \$900 in average wages.

⁵⁵ Compounded over 10 years, 2.86 percent yields 28.9 percent and over 20 years, 70.9 percent.

6. Difficulty Accessing Benefits

As important as understanding the inadequacy of injured workers' benefits is, that only tells part of the story. In fact, many injured workers never reach the point where they can receive benefits at all, or access benefits after unnecessary delays. From the early stages of injury reporting and claim filing all the way through the workers' compensation process, injured workers face a host of barriers to accessing benefits, resulting in serious consequences for their physical and economic well-being.

Workers with routine injuries to the most serious injuries often fail to receive workers' compensation. For example, one California study found no workers' compensation benefits for a third of workplace carpal tunnel injuries, and no workers' compensation benefits for a third of all workplace injuries requiring amputation.⁵⁶

Some workers are completely ineligible for workers' compensation. In New York, most workers misclassified as independent contractors are ineligible for workers' compensation, except for those in the car service industry who are covered under State law by special purpose industry workers' comp funds.⁵⁷ There are an estimated one million independent contractors working in predominantly low-paying industries in New York who are, with the exception of car service drivers, not covered by workers' compensation. The occupational fatality rate for these workers is over three times as great as for private payroll employees.⁵⁸

For eligible workers, injury reporting is the first step in the workers' compensation process, and the first place where workers' access to benefits is blocked. Estimates of the extent to which workplace injuries are underreported vary. Monica Galizzi's study of health care workers found that only 63 percent of workplace injuries were reported. Using a series of other databases, Kenneth Rosenman found that up to 68 percent of Michigan's occupational injuries and illnesses went unreported by the BLS.⁵⁹ Additionally, work-related illnesses are even more difficult to estimate accurately, as they sometimes occur significantly later than the initial causal exposure and may not be recognized as work-related. In summarizing the literature, Alison Morantz and

⁵⁶ Joe L, Roisman R, Beckman S, et al. "Using multiple data sets for public health tracking of work-related injuries and illnesses in California," *American Journal of Industrial Medicine* 2014; 57:1110-19.

⁵⁷ For more on misclassification of employees as independent contractors, see New York State DOL, *Annual Report of the Joint Enforcement Task Force on Employee Misclassification*, February 1, 2015. (Per Governor Cuomo's Executive Order No 2, the Misclassification Task Force should issue an annual report but none have been issued since 2015.)

⁵⁸ Lina Moe, James A. Parrott, and Jason Rochford, *The Magnitude of Low-Paid Gig and Independent Contract Work in New York State*, Center for New York City Affairs at The New School, February 2020.

⁵⁹ Rosenman K.D., Kalush A, Reilly M.J, et al. How much work-related injury and illness is missed by the current national surveillance system? *Journal of Occupational and Environmental Medicine* 2006; 48:357-365.

colleagues noted that 35-45 percent of workplace injuries do not result in workers' compensation claims.⁶⁰

Just as workers often fail to report injuries, many eligible workers never file a workers' compensation claim. Estimates of underclaiming range from 30 percent to as high as 79 percent.⁶¹ The reasons for underreporting and underclaiming are varied. Some workers may lack a basic knowledge of their eligibility for accessing workers' compensation benefits or understanding of the workers' compensation process. Additionally, some workers may not file a claim because they do not think their injury is serious, because they are afraid of the stigma associated with workers' comp, or because they have heard about poor experiences with the system from friends or coworkers.

Only a fraction of workers with recorded injuries apply for workers' compensation, and vulnerable workers, such as immigrant and low-wage workers, face disproportionate barriers in accessing benefits. In addition to the problems listed above, some workers likely fear retaliation from their employers. Because experience rating affects employers' workers' compensation insurance costs, employers have a financial incentive to discourage or prevent workers from receiving benefits. Undocumented workers face an additional layer of vulnerability, with the possibility of legal consequences due to their immigration status. A 2008 study surveyed 607 low-income injured workers in New York City, Chicago, and Los Angeles, finding that only nine percent received benefits. Half of the workers in this survey who reported their injury to their employer experienced some form of retaliation, including employers firing or reporting workers to immigration authorities, confirming the fear that many vulnerable workers hold about reporting injuries or claiming benefits. These workers had higher injury rates than average, but ultimately received lower benefit levels. In a third of these cases, these workers paid for the medical care associated with their injuries out of pocket.⁶²

Workers who do not speak English face additional barriers to accessing benefits. The workers' compensation system requires the completion of numerous complex forms, which presents a difficulty to workers not fluent in English. While the New York State Workers' Compensation Board offers translation services, only 0.3 percent of claims were filed in a language other than English (three percent of these claims were in a language other than Spanish), and only four percent of phone calls to the Board used interpretation services. Since approximately 13 percent

⁶⁰ Alison Morantz, Julia Bodson, Sarah Michael Levine, and Marcus Vilhelm Palsson, "Economic Incentives in Workers' Compensation: A Holistic, International Perspective," *Rutgers University Law Review*, Spring 2017, p. 1065.

⁶¹ M. Galizzi, P. Miesmaa, L. Punnett, , , C. Slatin, and Phase in Healthcare Research Team (2010). "Injured Workers' Underreporting in the Health Care Industry: An Analysis Using Quantitative, Qualitative, and Observational Data," *Industrial Relations*, 49(1), 22-43.

⁶² Annette Bernhardt, et. al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*. National Employment Law Project, 2009.

of New York State residents do not speak English, these figures suggest that many non-English-speaking workers struggle to access workers' comp benefits.⁶³

The Board administrative practices can inadvertently limit benefit access. In 2008, for example, the Board changed its policy to no longer automatically index claims. Instead, for a claim to reach the point at which an employer or carrier must respond, the injured worker must submit a medical report in addition to the claim. The significant gap between claims filed and claims indexed demonstrates that many claims may face significant delays because of this administrative hurdle.⁶⁴ Additionally, the Board has increased its use of administrative and proposed non-hearing decisions to expedite claim processing. However, this change has caused an increase in the number of requests to re-open hearings, suggesting that the practice has the effect of impeding workers seeking benefits.⁶⁵

Generally, injured worker claimants without legal counsel face a daunting challenge in successfully pursuing their claim when confronted by the legal firepower insurance carriers deploy to oppose worker claims.

New York State's medical treatment guidelines, adopted in late 2010, are another source of friction for workers attempting to access workers' compensation benefits. Physicians must strictly adhere to the new medical treatment guidelines or request a variance from the Board. According to the Workers Compensation Research Institute, the medical treatment guidelines have not generated any significant medical cost savings but have created millions of dollars in costs due to the tens of thousands of variance hearings, while also preventing workers from receiving medical care in a timely fashion.⁶⁶

Another phenomenon that tends to reduce worker benefits is the use of so-called "Independent Medical Examiners," or IMEs. Employers and insurance carriers often call for physicians to perform an "independent medical exam" several weeks after workers are initially assessed and awarded benefits, a practice that often results in workers' comp benefits being reduced after the initial assessment.⁶⁷

⁶³ Robert E. Grey, *Workers' Compensation in New York State: State of the System 2016*, Grey & Grey, June 17, 2016.

⁶⁴ *Ibid.*

⁶⁵ New York State Workers' Compensation Board, *2018 Annual Report*.

⁶⁶ Carol Telles, *Monitoring the Impact of the 2007 Reforms in New York*. October, 2012, New York: Workers' Compensation Research Institute.

⁶⁷ Robert E. Grey. *Workers' Compensation in New York State: State of the System 2014*. October 7, 2014. (Available from the author, Grey & Grey, LLP.)

7. Employer Costs and Insurance Profits in Perspective

While business groups often complain about workers' compensation costs, in reality such costs are a relatively small share of total employee compensation and are not particularly high in New York relative to other states. Moreover, in recent years, payments to or on behalf of workers for indemnity and medical costs have fallen in absolute terms and relative to employer premium costs while the profits of workers' comp insurance companies have sky-rocketed.

Employer costs in perspective

Employer costs for workers' compensation have generally trended down over the past two decades and are relatively low in relation to many other states. Employer costs for workers' compensation are a relatively small share (0.7 percent) of total employee compensation, and only 0.9 percent of business profits in New York State.⁶⁸ According to the National Academy of Social Insurance, New York ranks 19th among all states in terms of employer costs for workers' compensation relative to covered payroll (See Figure 16).

Figure 16 New York ranks 19th among states in workers' comp employer costs per \$100 of covered payroll, 2012-2017 average

rank	State	average 2012-2017	rank	State	average 2012-2017
1	Alaska	\$2.41	11	North Dakota	\$1.61
2	Montana	\$2.21	12	West Virginia	\$1.60
3	Wyoming	\$1.94	13	Hawaii	\$1.58
4	California	\$1.94	14	Iowa	\$1.57
5	Vermont	\$1.81	15	Louisiana	\$1.50
6	Oklahoma	\$1.78	16	New Jersey	\$1.49
7	South Carolina	\$1.78	17	New Mexico	\$1.47
8	Wisconsin	\$1.71	18	Pennsylvania	\$1.46
9	Idaho	\$1.68	19	New York	\$1.45
10	Washington	\$1.67	20	Florida	\$1.43
				<i>U.S. average</i>	\$1.33

Source: National Academy of Social Insurance, *Workers' Compensation: Benefits, Costs and Coverage*, Oct. 2019.

⁶⁸ Data are for 2017. Employer costs for workers' compensation from the National Association of Insurance Commissioners (NAIC), *Report on Profitability By Line by State*, annual report, 2017; employee compensation and "gross operating surplus" data from U.S. Bureau of Economic Analysis. Gross operating surplus represents total business profits in the Bureau of Economic Analysis' gross state product series. In 2017, gross operating surplus was 25 percent greater than total wages in New York.

Declining payments for medical costs and indemnity benefits

Relative to total payroll, the share of worker benefits incurred (combining indemnity, or wage replacement payments, and medical claims) has declined in recent years. Figure 17 shows the amount of worker benefits per \$100 in covered payroll from 2001 to 2017, the latest year in the National Academy of Social Insurance data. The trend rose from 2008 to 2012 through a combination of higher benefits as the maximum benefit was raised, an increase in settlements and other factors related to the 2007 legislation, along with a payroll decline in the wake of the 2008-09 Great Recession. More recently, the average for 2015-17 was about five percent less than the average for the three prior years. There almost certainly was a further sharp drop in the benefit-to-payroll ratio in 2018. According to the National Association of Insurance Commissioners' data, the total dollar value of New York workers' comp benefits incurred declined by 15 percent from 2017 to 2018.⁶⁹

Figure 17 New York workers' comp benefits per \$100 of covered payroll, 2001-2017

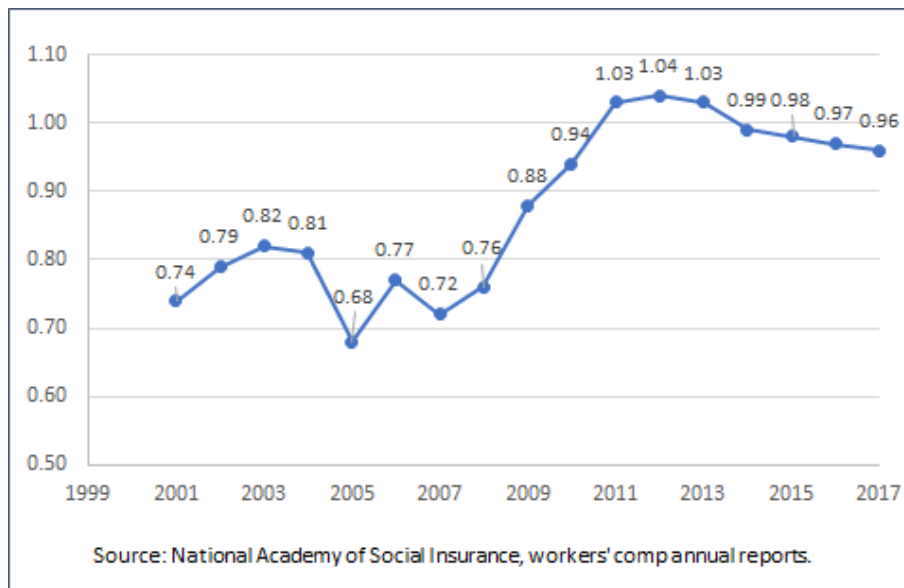
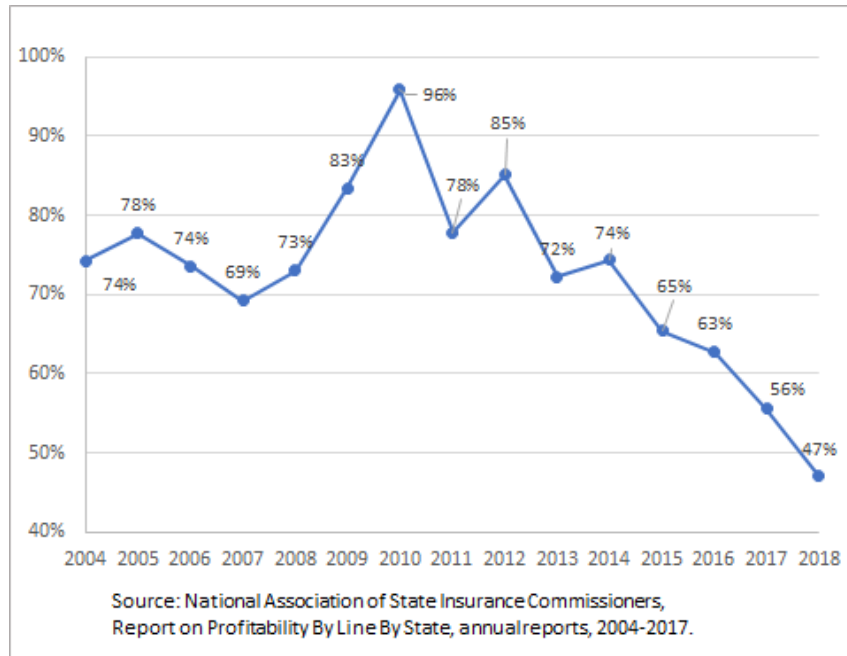


Figure 18 below shows that the cost of worker benefits incurred relative to premiums dropped to 47 percent in 2018 from 96 percent in 2010. There is ample grounds given the changes in the workers' comp benefit structure discussed in section 5 above to attribute some of the decline in worker benefits relative to premiums in recent years to the caps on permanent partial and

⁶⁹ The National Association of Insurance Commissioners (NAIC) compiles data directly from insurance companies, including the New York State Insurance Fund. NAIC, *Report on Profitability By Line By State*, annual reports.

temporary total disabilities. The ratio of worker benefits to premium revenue has been much lower over the past four years than in the years immediately preceding the 2007 changes.

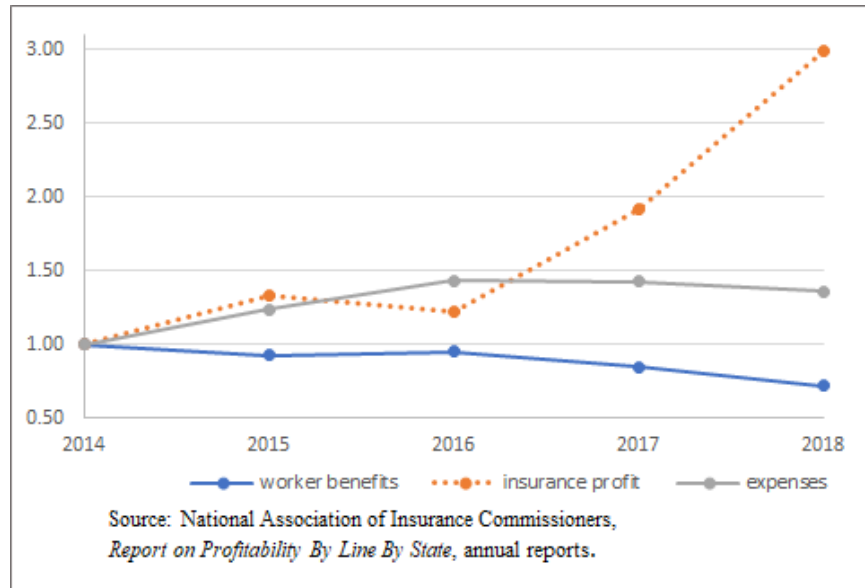
Figure 18 Sharply declining share of premium paid in medical costs and indemnity benefits incurred in New York since 2010



The sheer decline in worker benefits is demonstrably clear from the recent trend in the total dollar amounts of benefits incurred. From 2014 to 2018, there was a 28 percent falloff in the dollar value of incurred worker benefits. The dollar value of benefits fell from \$3.8 billion in 2014 to less than \$2.8 billion in 2018. This trend is in stark contrast to the trend over these years in insurance carrier expenses and in insurance profits. Both have risen sharply, as evident in Figure 19 below. Expenses rose by 36 percent and profits soared by 200 percent, a tripling. Trends over a relatively short period of time should be interpreted with caution, and it is possible that the profit line will eventually turn down given the 2018 and 2019 loss cost (premium rate) changes. Still, the further erosion in indemnity benefits from the 2017 legislation suggests that the dollar value of worker benefits may not rebound any time soon.

Workers' compensation premiums are based on a host of factors starting with actuarial projections of "loss costs," that is, the amounts that will be needed to fund injured worker claims for wage replacement benefits and medical expenses and the associated expenses related to administration and "loss adjustment." The loss cost projections by the Compensation Insurance Rating Board (CIRB) involve past claims experience, projections on the ultimate costs of prior claims, and an analysis of trend factors involving employment and wage levels. Each July, the

Figure 19 New York workers' comp profits soar while worker benefits slide, 2014-18 (levels indexed to 2014=100)



New York Department of Financial Services approves a final loss cost change from the prior year after reviewing the CIRB proposal. The loss cost change becomes the basis for the premiums charged by individual insurance companies, with the actual premium determined by a host of factors including company-specific loss cost multipliers, experience ratings, safety programs, deductible amounts, and other factors.

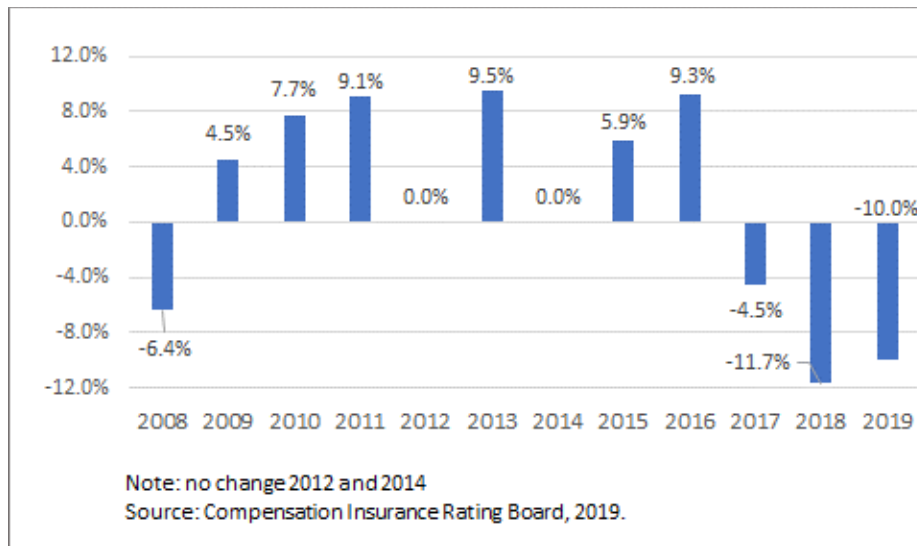
In May of 2019, the CIRB proposed a further 10 percent loss cost decrease for the premium year beginning October 1, 2019, following an 11.7 percent decrease in 2018.⁷⁰ (See Figure 20 below.) In part, the decreases for 2018 and 2019 reflect projections of declining incurred claims costs relative to expected premium growth.

To gauge the financial performance of the workers' compensation insurance industry, noted workers' comp expert John Burton⁷¹ has written about the value of looking at a performance measure called the "operating ratio." Operating ratio is calculated as the total of all carrier expenses minus investment earnings, as a percentage of premiums.⁷² Workers' compensation

⁷⁰ There was also a 4.5 percent premium decline in 2017. The three-year cumulative decline from 2016 to 2019 was 24.1 percent.

⁷¹ Among other positions, Burton was the chairman of the 1972 National Commission on State Workers' Compensation Laws.

⁷² John F. Burton, Jr. "Workers' Compensation Insurance Industry Underwriting Results in 2011," Workers' Compensation Resources Research Report, December 2012.

Figure 20 Approved New York workers' compensation loss cost level

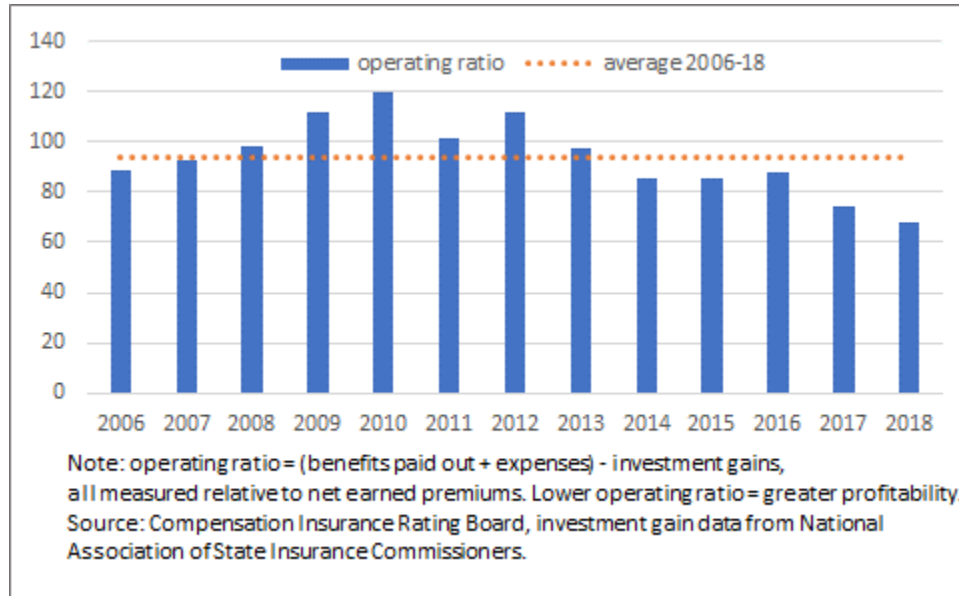
insurance entails maintaining substantial “long-tail” reserves to pay out claims over the course of an injured worker’s claims case (that could involve payments to a beneficiary in the case of a fatal injury) that could stretch out over several years. “Losses” related to worker benefits and associated operating expenses should be covered by premium payments with insurance profits largely determined by the investment earnings derived from the substantial loss reserves. Burton notes that a related concept, the “combined ratio,” is often used as a measure of insurance industry performance. The combined ratio looks at all operating expenses plus dividends paid to policyholders relative to premiums. However, Burton writes that the combined ratio “represents an incomplete and potentially misleading record of the profitability of insurance carriers because no account is taken of investment gains (or losses.)”⁷³

Figure 21 below draws data from the CIRB and NAIC data on investment gains to calculate an operating ratio for New York workers’ compensation insurance carriers, including the State Insurance Fund. An operating ratio below 100 means that, in the aggregate, the industry is profitable. An operating ratio above 100 indicates that losses exceed premium revenue and net investment gains combined. There are invariably cycles in the insurance markets, and workers’ comp is no exception. Figure 21 shows results over a 13-year period from 2006-18 that includes periods of profitability at the beginning and at the end but several years in between when the industry bore net losses. The figure also shows a horizontal dashed line as the average over the 2006-18 period at 94.1, indicating average overall profitability over this period. Comparable data

⁷³ Ibid.

on the performance of the New York workers' comp insurance companies reported by the NAIC also show a long-term picture of profitability over the 2004-18 period based on operating ratio results.⁷⁴

Figure 21 New York workers' compensation operating ratio (a measure of profitability) has improved considerably since 2013



In the 15-year history of the workers' comp insurance industry performance data for New York companies from NAIC, there have been only two years—2017 and 2018—when profits on insurance transactions exceeded investment gains. In 2018, profits on insurance transactions were 26.8 percent compared to investment gains of 14.6 percent. Workers' compensation insurers' profits in New York exceeded \$1 billion for the first time in 2017, and then jumped by 56 percent to almost \$1.6 billion in 2018.

State Insurance Fund

Workers' compensation in New York is provided through three main channels—private insurance carriers, the State Insurance Fund, and self-insured employers. The New York's State Insurance Fund (SIF) competes with private insurers and is the insurer of last resort for high-risk employers. It was established in 1914. For 2016, private insurers paid 45 percent of all worker benefits in New York, self-insured employers accounted for 33 percent of benefits, and the SIF

⁷⁴ NAIC data show an average operating ratio from 2004-18 of 94.6. NAIC, *Report on Profitability By Line By State*, annual reports.

paid 22 percent of benefits to injured workers. Both the self-insured and State fund are relatively more important in New York than the national average.⁷⁵

Since self-insured employers do not pay premiums, the SIF accounted for a greater proportion (38 percent) of all workers' comp premiums paid in New York in 2017.⁷⁶ The SIF is by far the largest workers' comp insurance carrier in the state, with a market share about equal to the seven largest private carriers combined.⁷⁷

Over the past five years (2014 to 2018) for which data are available on the SIF website, the SIF had net income relative to premiums that averaged 28.6 percent, with net investment earnings that averaged 26.8 percent of premiums. (See Figure 22.) Since 2015, premiums alone more than covered incurred worker benefit costs and expenses. The SIF's workers' comp fund had net income of \$811 million in 2016, \$843 million in 2017, and \$1.1 billion in 2018, with net income exceeding net investment income in each year.⁷⁸

Figure 22 Financial results for the New York State Insurance Fund, Workers' Compensation Fund

	(\$ millions)				
	2014	2015	2016	2017	2018
Net earned premiums	\$2,354	\$2,487	\$2,480	\$2,296	\$2,226
Medical + indemnity benefits incurred	\$1,961	\$1,786	\$1,457	\$1,316	\$1,392
Expenses	\$804	\$797	\$858	\$781	\$488
Net investment income	\$549	\$616	\$646	\$645	\$720
Net income	\$148	\$519	\$811	\$843	\$1,067
loss reserves (year-end)	\$8,443	\$8,953	\$9,094	\$9,041	\$9,045
surplus (year-end)	\$3,715	\$3,977	\$4,497	\$5,944	\$7,096

Source: NYSIF annual reports

The recent experience of the Black Car Fund also raises questions about the disconnect between workers' comp funding and worker benefits. In an unusual arrangement to provide workers' comp coverage to black car drivers who are considered independent contractors, the State authorized the establishment in 1999 of a nonprofit, the New York Black Car Operators Injury

⁷⁵ Nationally, 59 percent of non-federal workers' comp benefits are paid by private insurers, 26 percent by self-insured employers, and 15 percent by state funds. Four states (ND, OH, WA, and WY) have exclusive state funds, and 17 states, including New York, have competitive state funds. NASI States, 2018, pp. 18, 23.

⁷⁶ CIRB, *2018 State of the System*, 2019, p. 5.

⁷⁷ The seven largest private workers' comp insurance carriers in New York are, in order, AmTrust, Travelers, The Hartford, Chubb, Zurich, Berkshire Hathaway, and Old Republic. CIRB, *2018 State of the System*, 2019, p. 5.

⁷⁸ NYSIF annual reports.

Compensation Fund (commonly known as the Black Car Fund). The Black Car Fund is controlled by the industry and collects a 2.5 percent surcharge applied to the passenger fare for every black car trip, including all New York City trips dispatched by apps like Lyft and Uber. Black Car Fund revenues have soared with the rapid expansion in app-dispatch services that have reached 20 million trips per month. While the fund reportedly paid \$65 million in benefits to drivers in 2017 and it offers safety classes, a \$50,000 death benefit and vision and other benefits for drivers, its revenues are such that through related entities it is investing in Long Island City real estate, spending heavily on lobbying state and local officials to influence legislation it favors, and making campaign contributions.⁷⁹

Over the past five years, 2014 to 2018, the profitability of New York's workers' comp insurance companies greatly exceeded that of other insurance lines in New York and slightly surpassed the average performance of workers' comp insurers in other states. See Figure 23. While workers' comp insurance profits in New York averaged 15.7 percent over the 2014-18 period, profits for all other insurance lines in New York State averaged less than half that, 7.6 percent. New York's workers' compensation insurance companies generated 15.8 percent investment returns over this period, easily exceeding the returns for their counterparts in other states and other insurance lines within the Empire State.

Profitability among workers' comp insurers around the country is at record levels. The National Council on Compensation Insurance (NCCI), which is the rating bureau for 38 states (not including New York or California), recently presented its annual report on the financial performance of the industry in the 38 states it services and noted that pre-tax operating profits rose from 23.6 percent in 2017 to 26 percent in 2018. This is considerably higher than the 7.2 percent average for the last 20 years. NCCI also reported that each of its 38 states reported a drop in claim frequency from 2013-17.⁸⁰

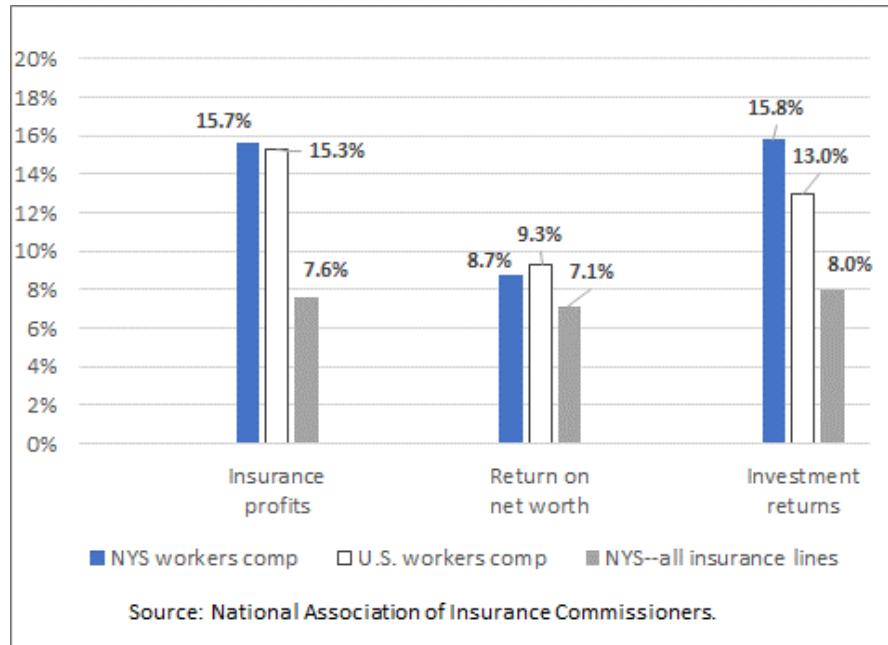
Continuing problems with employer fraud

There has long been a problem with some employers seeking to evade compliance with the State requirement to have workers' compensation coverage for all employees. Not only does this seriously jeopardize the ability of injured workers to receive proper medical care and indemnity benefits, but noncompliance un-levels the playing field among businesses. Because of concern about employer noncompliance, the 2007 legislation increased monetary penalties for noncompliance and gave the Workers' Comp Board the authority to issue stop work orders—basically causing a business to shut down until evidence of workers' comp coverage was provided to enforcement officials. As Figure 24 below shows, there was an initial flurry of enforcement activity in the first two years following this measure (2008 and 2009). Then there were several years when fewer enforcement resources were deployed and the number of stop

⁷⁹ Will Bredderman, "The Black Car Fund may have swerved out of its lane," *Crain's New York Business*, April 15, 2019.

⁸⁰ "Industry Profits Continue to Rise, NCCI Reports," *WorkCompCentral*, May 15, 2019.

Figure 23 Profitability of NYS workers' comp compared to other states and other NYS insurance lines, 2014-2018



work orders fell from almost 2,000 in 2009 to about 1,200 in 2012 and 2013. That was followed by a rebound in stop work orders in 2015 and slightly lower numbers the following two years. About three-fourths of all stop work orders are issued in New York City.

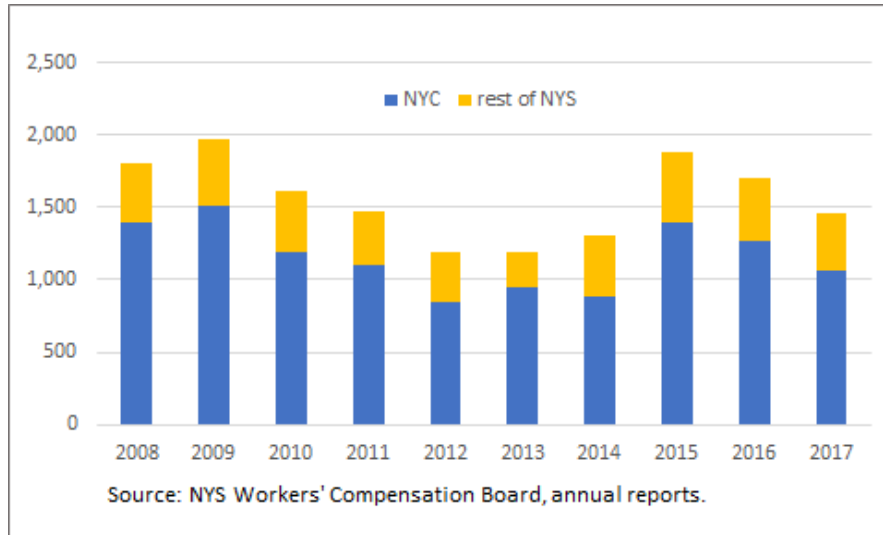
For the first time since 2007, the Board's 2018 annual report included no mention of employer fraud enforcement efforts.⁸¹ The noncompliance penalty was initially increased with the 2007 legislation to \$2,000 every 10 days without insurance for all employers, but then reduced in 2013 for smaller employers (e.g., \$500 for every 10 days without insurance for businesses with up to five employees).⁸²

Premium fraud, for both workers' compensation insurance and unemployment compensation insurance, is particularly an issue in the New York City construction industry. For example, in 2014, the Manhattan District Attorney released a grand jury report recommending significant changes to better prevent employer workers' compensation insurance fraud, citing reports of

⁸¹ And as noted earlier, the State Labor Department has not issued an annual report on the enforcement activities of the Inter-agency Misclassification Task Force since 2015.

⁸² New York State Workers' Compensation Board, *Centennial, Celebrating 100 Years of New York State's Workers' Compensation and Leading the Way Forward for the Next Century*, Albany, 2014, pp. 30-35.

Figure 24 Stop work orders to enforce New York’s requirement for workers’ compensation coverage



extensive misclassification of workers as independent contractors in the construction industry. In releasing the grand jury report, the district attorney noted that his office had recovered \$4.8 million in the prior year from criminal defendants who pleaded guilty to violating the workers’ comp law. The grand jury report recommended increased penalties proportionate to the magnitude of fraud, noting that under existing law a defendant faces no more than a Class E felony whether the amount of fraud is \$1,000 or \$100,000. Other recommendations dealt with measures to overhaul the insurance application and insurance carrier audit procedures to bolster enforcement efforts.⁸³

The employer fraud problem persists. For example, in May 2018, the Manhattan DA, together with several other State and local law enforcement offices, announced the indictment of Parkside Construction and its principals in connection with a wage theft case involving 520 high-rise construction workers that also involved avoiding payment of workers’ compensation premiums. The district attorney found that Parkside hid \$42 million in payroll from the New York State Insurance Fund in order to maintain fraudulently low premiums, “thereby evading more than \$7.8 million in insurance premiums.” Among the jobsites where Parkside was engaged was a super-luxury high-rise tower on “Billionaires’ Row” along West 57th Street in Manhattan.⁸⁴

⁸³ Manhattan District Attorney Cyrus R. Vance, Jr., “DA Vance: Grand Jury Recommends Significant Changes to Prevent Workers’ Compensation Insurance Fraud,” press release, March 25, 2014.

⁸⁴ Manhattan District Attorney Cyrus R. Vance, Jr., “DA Vance, Partners Announce Criminal Charges in Multimillion Dollar Wage Theft and Insurance Fraud Case,” press release, May 16, 2018.

8. Conclusion

Despite an early history as a national leader in safeguarding the interests of workers injured on the job, New York's workers' compensation system has eroded considerably over the years, as legislative and administrative changes have often focused on curtailing benefits rather than adapting to changes in the economy, workforce, and business practices. While legislative changes in 2007 and 2017 included some positive measures, for the most part changes significantly lessened the adequacy of worker benefits. The unfortunate result is that the focus of workers' compensation in New York has shifted from fairly compensating injured workers to minimizing employer costs.

Key findings in this report include (for a fuller version of report highlights, see the Executive Summary):

- Improvements in reducing workplace injuries have slowed in many industries, particularly those employing low-wage workers, and New York has seen a disturbing rise in fatal workplace injuries in recent years;
- More than half of those receiving payments for lost worktime injuries are low-wage workers, and, prior to injury, three-fourths earned less than the state's average wage;
- For a variety of reasons, many injured workers have difficulty accessing benefits. Administrative changes since 2007 have made a complicated claims-filing process more challenging, and a shift away from hearings makes it harder for injured workers to seek clarity regarding their cases and their rights;
- Many aspects of New York's workers' comp benefit structure combine to deliver inadequate lost-worktime compensation to injured workers. These include minimum and maximum benefit levels trailing neighboring and many other states, caps on compensation for temporary and permanent disabilities, and an outdated two-thirds ratio of compensation relative to a worker's pre-injury wage;
- Employer costs for workers' compensation are a very small 0.7 percent share of total employee compensation and rank in the middle range of costs for all 50 states;
- Since the 2007 "reforms," payments to or on behalf of workers have fallen relative to workers' comp premiums while insurance company profits have soared;

- Workers' comp profits skyrocketed to \$1.6 billion in 2018 and rather than improving the benefit structure for injured workers, premium rates are being slashed. The State Insurance Fund had net income of over \$1 billion in 2018, and now has a surplus (beyond reserves needed to pay incurred benefits) of over \$7 billion.

The Empire State needs to take a fresh look at its workers' comp system in order to restore the priority of fairly compensating victims of workplace injuries and ensure that businesses responsibly invest in enhancing workplace safety.

Generally, New York needs to update income replacement payments to injured workers, improve access to benefits, particularly for low-wage workers, and ensure that businesses responsibly invest in enhancing workplace safety. New York should restore the primacy of adequately compensating injured workers and expediting safe return to work. Specific recommendations include:

- The workers' compensation benefit structure should be enhanced to improve indemnity benefits, New York should:
 - raise the minimum and maximum weekly benefit levels;
 - adjust the base wage for increases in a workers' earnings potential; and
 - raise the ratio of benefits to a workers' wage higher than two-thirds.
- Administrative procedures need to be made more worker-friendly, and more accessible to non-English speakers. Current anti-retaliation protections are weak and should be strengthened.
- Resources should be invested in return to work programs and in measures to reduce workplace injuries and illnesses.
- Enforcement should be bolstered against the misclassification of workers as independent contractors that allows some employers to evade paying workers' compensation, placing their workers in serious jeopardy in the event of workplace accidents.

Appendices

Appendix Figure 1

NYS wage replacement, pre-injury wage and adjustment for earnings potential

Worker with \$900 AWW (about 54th percentile for 2018 claimants ranked by AWW)

Assumptions--wage replacement over 10 and 20 years

moderate disability, assume 50% disability for 4.5 years (234 weeks); then 50% permanent disability

for post-2017 period, temp disability benefits capped at 2.5 years (130 weeks), and benefits beyond that applied against PPD cap for 2007-17 period, at 50% disability, worker receives PPD benefits for maximum of 300 weeks

no return to work

Note: all time periods in weeks, all benefit rates are weekly

10 years		520 weeks			PPD						wage replacement
year of injury	policy frame	time period	temp disability rate	temp benefit paid	PPD rate	PPD period	PPD benefits paid	Total WC benefits	expected wages	wages lost	rate
1995	pre-2007	234	\$300	\$70,200	\$300	286	\$85,800	\$156,000	\$468,000	\$312,000	33.3%
2010	2007-2017	234	\$300	\$70,200	\$300	286	\$85,800	\$156,000	\$468,000	\$312,000	33.3%
2018	post-2017	130	\$300	\$39,000	\$300	300	\$90,000	\$129,000	\$468,000	\$339,000	27.6%

20 years		1040 weeks			PPD						wage replacement
year of injury	policy frame	time period	temp disability rate	temp benefit paid	PPD rate	PPD period	PPD benefits paid	Total WC benefits	expected wages	wages lost	rate
1995	pre-2007	234	\$300	\$70,200	\$300	806	\$241,800	\$312,000	\$936,000	\$624,000	33.3%
2010	2007-2017	234	\$300	\$70,200	\$300	300	\$90,000	\$160,200	\$936,000	\$775,800	17.1%
2018	post-2017	130	\$300	\$39,000	\$300	300	\$90,000	\$129,000	\$936,000	\$807,000	13.8%

Scenarios w/ earnings potential growth of 2.86 % annually, but benefits per pre-injury wage

10 years		520 weeks			PPD						wage replacement
year of injury	policy frame	time period	temp disability rate	temp benefit paid	PPD rate	PPD period	PPD benefits paid	Total WC benefits	expected wages	wages lost	rate
1995	pre-2007	234	\$300	\$70,200	\$300	286	\$85,800	\$156,000	\$548,309	\$392,309	28.5%
2010	2007-2017	234	\$300	\$70,200	\$300	286	\$85,800	\$156,000	\$548,309	\$392,309	28.5%
2018	post-2017	130	\$300	\$39,000	\$300	300	\$90,000	\$129,000	\$548,309	\$419,309	23.5%

20 years		1040 weeks			PPD						wage replacement
year of injury	policy frame	time period	temp disability rate	temp benefit paid	PPD rate	PPD period	PPD benefits paid	Total WC benefits	expected wages	wages lost	rate
1995	pre-2007	234	\$300	\$70,200	\$300	806	\$241,800	\$312,000	\$1,275,235	\$963,235	24.5%
2010	2007-2017	234	\$300	\$70,200	\$300	300	\$90,000	\$160,200	\$1,275,235	\$1,115,035	12.6%
2018	post-2017	130	\$300	\$39,000	\$300	300	\$90,000	\$129,000	\$1,275,235	\$1,146,235	10.1%

Appendix Figure 2

NYS wage replacement, pre-injury wage and adjustment for earnings potential

Worker with \$1800 AWW

Assumptions--wage replacement over 10 and 20 years

moderate disability, assume 50% disability for 4.5 years (234 weeks); then 50% permanent disability for post-2017 period, temp disability benefits capped at 2.5 years (130 weeks), and benefits beyond that applied against PPD cap for 2007-17 period, at 50% disability, worker receives PPD benefits for maximum of 300 weeks no return to work

Note: all time periods in weeks, all benefit rates are weekly

Maximum weekly benefits: 1995, \$400; 2010, \$1,111; 2018, \$1359

10 years		520	weeks		\$780							
year of policy time	injury frame	disability period	temp benefit rate	temp benefits paid	PPD rate	PPD period	PPD benefits paid	Total WC benefits	expected wages	wages lost	wage replacement rate	
1995	pre-2007	234	\$400	\$93,600	\$400	286	\$114,400	\$208,000	\$936,000	\$728,000	22.2%	
2010	2007-2017	234	\$600	\$140,400	\$600	286	\$171,600	\$312,000	\$936,000	\$624,000	33.3%	
2018	post-2017	130	\$600	\$78,000	\$600	300	\$180,000	\$258,000	\$936,000	\$678,000	27.6%	

20 years		1040	weeks								
year of policy time	injury frame	disability period	temp benefit rate	temp benefits paid	PPD rate	PPD period	PPD benefits paid	Total WC benefits	expected wages	wages lost	wage replacement rate
1995	pre-2007	234	\$400	\$93,600	\$400	806	\$322,400	\$416,000	\$1,872,000	\$1,456,000	22.2%
2010	2007-2017	234	\$600	\$140,400	\$600	300	\$180,000	\$320,400	\$1,872,000	\$1,551,600	17.1%
2018	post-2017	130	\$600	\$78,000	\$600	300	\$180,000	\$258,000	\$1,872,000	\$1,614,000	13.8%

Scenarios w/ earnings potential growth of 2.86 % annually, but benefits per pre-injury wage

10 years		520	weeks								
year of policy time	injury frame	disability period	temp benefit rate	temp benefits paid	PPD rate	PPD period	PPD benefits paid	Total WC benefits	expected wages	wages lost	wage replacement rate
1995	pre-2007	234	\$400	\$93,600	\$400	286	\$114,400	\$208,000	\$1,096,618	\$888,618	19.0%
2010	2007-2017	234	\$600	\$140,400	\$600	286	\$171,600	\$312,000	\$1,096,618	\$784,618	28.5%
2018	post-2017	130	\$600	\$78,000	\$600	300	\$180,000	\$258,000	\$1,096,618	\$838,618	23.5%

20 years		1040	weeks								
year of policy time	injury frame	disability period	temp benefit rate	temp benefits paid	PPD rate	PPD period	PPD benefits paid	Total WC benefits	expected wages	wages lost	wage replacement rate
1995	pre-2007	234	\$400	\$93,600	\$400	806	\$322,400	\$416,000	\$2,550,471	\$2,134,471	16.3%
2010	2007-2017	234	\$600	\$140,400	\$600	300	\$180,000	\$320,400	\$2,550,471	\$2,230,071	12.6%
2018	post-2017	130	\$600	\$78,000	\$600	300	\$180,000	\$258,000	\$2,550,471	\$2,292,471	10.1%

Appendix Figure 3

NYS wage replacement, pre-injury wage and adjustment for earnings potential

Worker with AWW of 1/3 of SAWW: \$224, 1995; \$386, 2010; \$471, 2018 (about 1/3 of statewide workforce)

Assumptions--wage replacement over 10 and 20 years

moderate disability, assume 50% disability for 4.5 years (234 weeks); then 50% permanent disability

for post-2017 period, temp disability benefits capped at 2.5 years (130 weeks), and benefits beyond that applied against PPD cap

for 2007-17 period, at 50% disability, worker receives PPD benefits for maximum of 300 weeks

no return to work

Note: all time periods in weeks, all benefit rates are weekly

\$224 \$386 \$471

10 years		520 weeks		temp		temp		temp		PPD		wage	
year of	policy	disability	benefit	benefits	PPD	PPD	benefits	Total WC	expected	wages	wages lost	replacement	
injury	frame	period	rate	paid	rate	period	paid	benefits	wages	wages lost	rate		
1995	pre-2007	234	\$75	\$17,468	\$75	286	\$21,350	\$38,818	\$116,453	\$77,636	33.3%		
2010	2007-2017	234	\$129/\$150*	\$31,772	\$129	286	\$36,827	\$68,599	\$200,877	\$132,277	34.2%		
2018	post-2017	130	\$157	\$20,417	\$157	300	\$47,115	\$67,532	\$245,000	\$177,468	27.6%		

20 years		1040 weeks		temp		temp		temp		PPD		wage	
year of	policy	disability	benefit	benefits	PPD	PPD	benefits	Total WC	expected	wages	wages lost	replacement	
injury	frame	period	rate	paid	rate	period	paid	benefits	wages	wages lost	rate		
1995	pre-2007	234	\$75	\$17,468	\$75	806	\$60,168	\$77,636	\$232,907	\$155,271	33.3%		
2010	2007-2017	234	\$129/\$150*	\$31,772	\$129	300	\$38,630	\$70,402	\$401,753	\$331,351	17.5%		
2018	post-2017	130	\$157	\$20,417	\$157	300	\$47,115	\$67,532	\$490,000	\$422,468	13.8%		

Scenarios w/ earnings potential growth of 2.86 % annually, but benefits per pre-injury wage

10 years		520 weeks		temp		temp		temp		PPD		wage	
year of	policy	disability	benefit	benefits	PPD	PPD	benefits	Total WC	expected	wages	wages lost	replacement	
injury	frame	period	rate	paid	rate	period	paid	benefits	wages	wages lost	rate		
1995	pre-2007	234	\$75	\$17,468	\$75	286	\$21,350	\$38,818	\$136,468	\$97,650	28.4%		
2010	2007-2017	234	\$129/\$150*	\$31,772	\$129	286	\$36,827	\$68,599	\$235,164	\$166,564	29.2%		
2018	post-2017	130	\$157	\$20,417	\$157	300	\$47,115	\$67,532	\$286,948	\$219,416	23.5%		

20 years		1040 weeks		temp		temp		temp		PPD		wage	
year of	policy	disability	benefit	benefits	PPD	PPD	benefits	Total WC	expected	wages	wages lost	replacement	
injury	frame	period	rate	paid	rate	period	paid	benefits	wages	wages lost	rate		
1995	pre-2007	234	\$75	\$17,468	\$75	806	\$60,168	\$77,636	\$317,392	\$239,756	24.5%		
2010	2007-2017	234	\$129/\$150*	\$31,772	\$129	300	\$38,630	\$70,402	\$546,934	\$476,532	12.9%		
2018	post-2017	130	\$157	\$20,417	\$157	300	\$47,115	\$67,532	\$667,373	\$599,841	10.1%		

* The weekly benefit rate of \$129 for the worker injured in 2010 gets bumped up to \$150 when the new minimum benefit takes effect July 1, 2013.

THE
NEW
SCHOOL

CENTER FOR NEW YORK CITY AFFAIRS

The Center for New York City Affairs at The New School is dedicated to advancing innovative public policies that strengthen neighborhoods, support families, and reduce urban poverty. Our tools include: rigorous analysis; journalistic research; candid public dialogue with stakeholders; and strategic planning with government officials, nonprofit practitioners, and community residents.