

UPSEU Workers' Compensation/ Disability Seminar

Ronkonkoma, New York – December 8, 2023



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- Admitted to practice law in New York, Florida & Connecticut
- College of Workers' Compensation Lawyers, Class of 2016
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- Contributing Author, *Workers' Compensation Law and Practice*, published by the New York State Bar Association
- New York State Workers' Compensation Board Reform Task Force Member, 2015
- Veterans Affairs Accredited Attorney
- Founding Member, Northeastern New York Committee on Occupational Safety & Health (NENYCOSH)
- National Hockey League and NCAA Division I Ice Hockey Referee (Ret.)

Introduction & Current Trends



January 10, 2009
Town of East Greenbush, New York
(Rensselaer County)

What happened on January 10, 2009?

- Deadly shootout on Interstate 90
- Patrol officer shot and killed civilian
- Patrol officer developed Post-Traumatic Stress Disorder
- Patrol officer unable to return to work
- Workers' Compensation claim denied
- Carrier argues stress was not unusual and extraordinary given that PTSD was from his job responsibilities

Normal and Ordinary Stress?

- Police Chief testifies shootout was most unusual and extraordinary event in the history of the Town
- Never previously experienced shootout in the Town
- All medical providers agreed Patrol Officer is disabled, unable to work, and has PTSD due to the shooting

What did the WCB and Courts say?

- WCB Denied claim – stress was not greater than that which other similarly situated workers’ experienced in the normal work environment
- N.Y.S. Supreme Court, Appellate Division, Third Department – Affirmed disallowance of the claim. Police Officer is on notice each day that deadly force may be required to subdue a suspect who is endangering public safety
- Really?
- Workers’ Compensation Law Section 10(3)(b)

Workers' Compensation Law Section 10(3)(b)

- Enacted April 21, 2017
- A claim for mental injury premised upon extraordinary work-related stress incurred in a work-related emergency
- The WCB may not disallow the claim, upon a factual finding that the stress was not greater than that which usually occurs in the normal work environment

Workers' Compensation Law Section 10(3)(b)

- Who is covered?
 - Police Officer
 - Firefighter
 - Emergency Medical Technician
 - Paramedic
 - Person certified to provide medical care in emergency
 - Emergency dispatcher
- Governor Hochul vetoed similar statute for civilians (December 2022)
- Presumptive PTSD statute pending (WCL Section 10(3)(c))

Types of Workers' Compensation Claims

- Mental Injury Claim Pitfalls:
 - Workers' Compensation Law Section 2(7):
 - The terms “injury” and “personal injury” shall NOT include an injury which is solely mental and is based on work related stress if such mental injury is a direct consequence of a lawful personnel decision involving a disciplinary action, work evaluation, job transfer, demotion or termination taken in good faith by the employer
 - Is mental diagnosis consequential to physical occupational trauma?
 - Stress was not unusual and extraordinary (WCL 10(3)(b))
 - One traumatic event or multiple traumatic events are ok
 - Military trauma (VA) and occupational trauma can co-exist

Types of Claims

- Accident



- Occupational Disease



COVID- 19

- An accident
- Positive lab test results
- COVID-19 was prevalent in the workplace
- When did individual first manifest symptoms?
- Were family member(s) sick first?
- File claim within two (2) years of diagnosis

Common Occupational Diseases

- Repetitive stress injuries
(e.g. carpal tunnel syndrome, tarsal tunnel syndrome, degenerative spine disease)
- Exposure to disease/ toxins
- Hearing loss

Necessary Medical Evidence

The Medical Report should include:

1. A description of the accident / condition(s) / job duties which the individual was exposed to in the course of their employment
2. The diagnosis/diagnoses; and
3. A statement signed by the medical provider that the diagnosis or diagnoses is causally related to the work accident/condition(s) / job duties, is probably related, more likely than not related or there is a relationship between the work accident/condition(s) / job duties and the resulting diagnosis/diagnoses

Workers' Compensation Law Benefits

Two (2) Big Basic Benefits under the Law

- Medical
- Indemnity Benefits (Lost Wages)
- Temporary Disability
- Permanent Disability

Workers' Compensation Law Benefits

Indemnity

- Average Weekly Wage (AWW)
- Maximum rate – 2/3rds of AWW
 - Subject to maximum rate in effect as of the date of accident/disablement
- Maximum Rates:
 - July 1, 2023 \$1,145.43
 - July 1, 2022 \$1,125.46
 - July 1, 2021 \$1,063.05
 - July 1, 2020 \$966.78
 - July 1, 1992 – June 30, 2007 \$400.00

Workers' Compensation Law Benefits

Temporary Disability

\$1,200.00

Average Weekly Wage

\$800.00

(100% Temporary Total Disability)

\$600.00

(75% Marked)

\$500.00

(62.5% Moderate-Marked)

\$400.00

(50% Moderate)

\$266.67

(33 1/3% Mild-Moderate)

\$200.00

(25% Mild)

\$0.00

(No Disability)

Workers' Compensation Law Benefits

Temporary Disability:

- Reduced Earnings
- Accrual Restoration

Permanent Disability:

- Schedule Loss of Use (extremity, hearing loss)
- Serious, Permanent Facial Disfigurement
- Non-Schedule Classified Permanent Disability (Head, Neck, Back, Mental Health Diagnosis)

Workers' Compensation Law Benefits

Light Duty Employment – Reduced Earnings

Example:

Average Weekly Wage.....\$1,500.00

Light Duty Wage.....\$1,000.00 (No overtime)

Raw Difference.....\$500.00

2/3rds of the Difference.....\$333.33

Unemployment & Workers' Compensation

- Not eligible for UIB if 100% disabled from all employment
- A partially disabled worker can simultaneously collect UIB and partial Workers' Compensation
- NYS Department of Labor calculates Average Weekly Wage
- UIB is reduced if combination of UIB and Workers' Compensation exceeds gross Average Weekly Wage

What is the amount of a Schedule Loss of Use Award?

Body Part	Weeks
Arm	312
Leg	288
Hand	244
Foot	205
Eye	160
Thumb	75
First Finger	46
Second Finger	30
Third Finger	25
Fourth Finger	15
Big Toe	38
Other Toe	16

Schedule Loss of Use Calculation

Facts:

- 25% Schedule Loss of Use (SLU) of the right arm
- \$1,200.00 Average Weekly Wage (AWW)
- Prior lost time payments: \$5,000.00

Calculations:

- 100% SLU of the arm = 312 weeks
- 25% of 312 weeks = 78 weeks
- Multiple 78 weeks x \$800.00 (2/3^{rds} of AWW) = \$ 62,400.00
- \$62,400.00 minus prior lost time payments (\$5,000.00)
- SLU Award is equal to \$57,400.00

*Medical remains open

Loss of Wage Earning Capacity Non-Schedule Classified Permanent Disability

% Loss of Wage Earning Capacity	Maximum Benefits Weeks	Number of Years
1% – 15%	225	4.33
16% – 30%	250	4.81
31% – 40%	275	5.29
41% – 50%	300	5.77
51% – 60%	350	6.23
61% – 70%	375	7.21
71% – 75%	400	7.69
76% – 80%	425	8.17
81% – 85%	450	8.65
86% – 90%	475	9.13
91% – 95%	500	9.62
96% – 99%	525	10.1

Loss of Wage Earning Capacity Calculation

Facts:

- 75% Loss of Wage Earning Capacity (LWEC)
- \$1,600.00 average weekly wage (AWW)
- Individual is out of work

Calculations:

- 75% LWEC = 400 weeks (7.69 years)
- Multiple 400 weeks X \$800.00 (2/3rds of AWW)
- \$320,000.00
- * No Cap/Limit if Permanent Total or Total Industrial Disability
- * Medical remains open

Voluntary vs. Involuntary Retirement

Do I have a Claim?

- Possible Claim for Permanent Lost Wages
- Consult with Medical Provider prior to retirement
- Confirm reason(s) for retirement in writing with Employer
- Application(s) for New York State Disability Retirement?
- Is Service Retirement without prejudice to a Disability Retirement?

New York State Disability Retirement

- Accidental
- Performance of Duty
- Ordinary

Notice & Claim Filing

- Accident
 - Notice
 - Claim Filing

- Occupational Disease
 - Notice
 - Claim Filing

What is an OC-110A Investigation & Why you should care about it?

- Knowledge is power
- Comprehensive Review of All Claims
- Proper Schedule Award(s)
- Possible Non-Schedule Award – Apportionment to accident(s) prior to March 13, 2007
- Section 123 Avoidance (Claim is Time-Barred)
- Multiple attorneys

Benefits Beyond Workers' Compensation Avoiding Tunnel Vision

- Veterans Benefits Claims
- Social Security Disability/SSI
- New York Disability Retirement
- Public Safety Officer's Benefits
- No-Fault
- Third Party Actions
- Unemployment
- Federal Vaccination Program
- Countermeasures Injury Compensation Program



Social Security Disability

What's your Social Security Full Retirement Age?

If you were born in:	Your Full Retirement Age is
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1943-1954	66
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1955	66 and 2 months
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1956	66 and 4 months
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1957	66 and 6 months
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1958	66 and 8 months
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1959	66 and 10 months
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1960 and later	67
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Social Security Disability (Title II)

- Payroll Tax–Funded Federal Insurance Program of the U.S. Government which provides financial assistance to disabled individuals
- Managed by Social Security Administration
- Monthly Benefits to people who have a medically determinable disability that restricts their ability to be employed
- Compare Social Security Disability versus Social Security Retirement

Social Security Disability

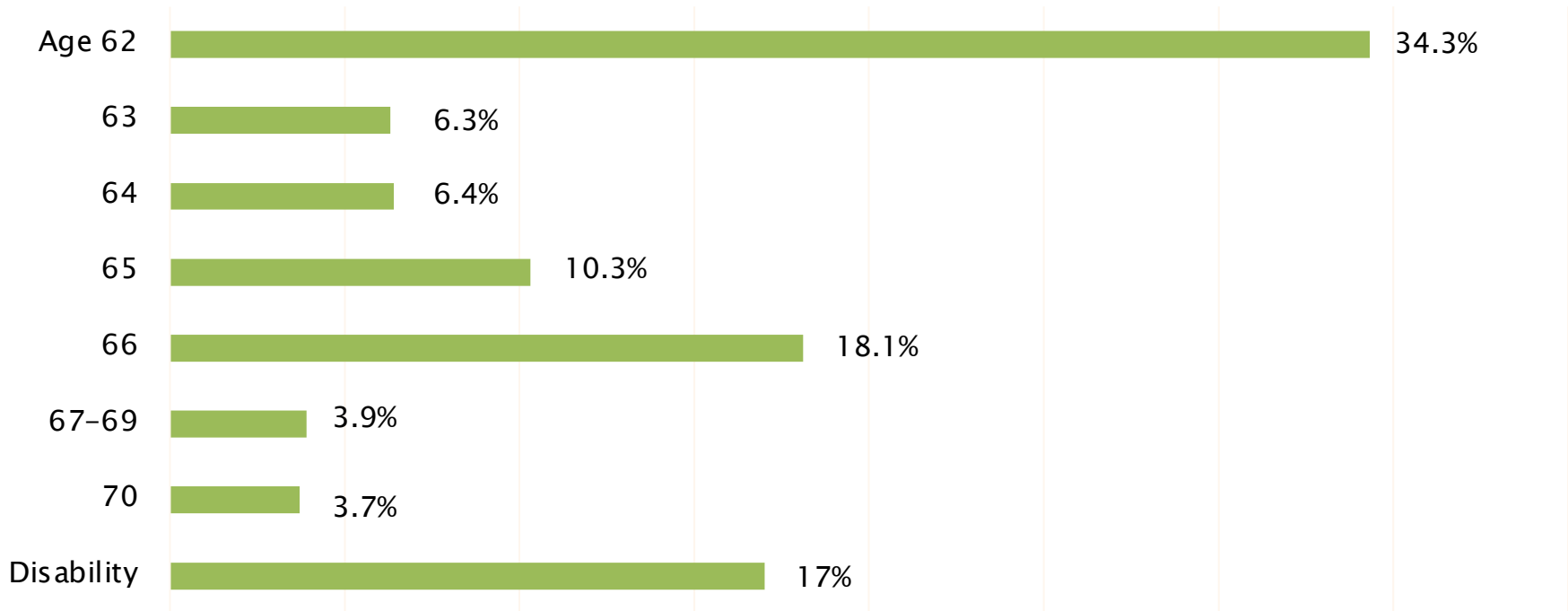
Benefits Depending on Claiming Age

Assuming someone born in 1960 with PIA of \$2,500

Claiming Age	% of PIA	Monthly Benefit (\$)
62	70.0%	1,750
63	75.0%	1,875
64	80.0%	2,000
65	86.7%	2,168
66	93.3%	2,332
67 (FRA)	100.0%	2,500
68	108.0%	2,700
69	116.0%	2,900
70	124.0%	3,100

Social Security Disability

When do people claim Social Security



Source: Social Security Administration

Social Security Disability

Five Step Sequential Evaluation Process

1. Out of work or working but earnings average less than \$1,470.00 / month
2. Severe condition lasting or expecting to last for at least 12 months
3. Condition found in the list of disabling conditions?
4. Can you do the work you did previously?
5. Can you do any other type of work?

SSD Claims – Practical Tips

- Apply as soon as you anticipate you will be disabled from substantial gainful work activities for more than 12 months
- 5 month waiting period following disability onset date
- All physical and mental health conditions considered

Can I work and still collect SSD benefits?

- Yes – but it depends on your earnings
- Trial work program
 - Test your ability to work
 - Still retain disability benefits
 - Earnings from at least 9 months (not necessarily consecutive) in a rolling 60-month period
 - 2023 monthly earnings: \$1,050.00
- Substantial gainful activity: \$1,470.00/month

How does Social Security Disability impact Workers' Compensation Lost Wages?

- An injured worker may simultaneously receive Workers' Compensation and Social Security Disability
- However, if the total amount of these benefits exceed 80% of an injured workers' average current earnings, the excess is deducted from their Social Security Disability benefit, unless reverse offset state
- Practice Tip: include life expectancy allocation in Settlement Agreement to maximize settlement benefit to injured worker, and minimize SSD offset

Public Safety Officers' Benefits (PSOB)

- Death

One-time benefit to eligible survivors

On/after October 1, 2022: \$422,035.00

- Disability

- On/after October 1, 2022: \$422,035.00

- One-time benefit to eligible public safety officers who are permanently and totally disabled as a result of a catastrophic (line of duty) injury.

- Education Benefits

- Financial Assistance for higher education expenses

- 45 months – \$1,401.00 per month

PSOB Presumptions

- Heart Attack or Stroke

Hometown Heroes Survivors Benefits Act of 2003
Enacted December 15, 2003

Officer engaged in nonroutine stressful or strenuous physical activity or training

- COVID-19

Safeguarding Americans First Responders Act
Enacted August 14, 2020

Protecting Americans First Responders Act
Enacted November 18, 2021

- Mental Health

Public Safety Officer Support Act of 2022
Enacted August 16, 2022

What is the Public Safety Officer Support Act of 2022?

- Expands eligibility for death and disability benefits under PSOB for PTSD and other stress-related disorders
- Exposure to a traumatic event in the line of duty resulting in PTSD or stress disorder(s) which cause permanent and total disability or death by suicide is presumed job related
- Effective January 1, 2019 (Retroactive Application)

What led to the Public Safety Officer Support Act of 2022?

- First responders are at 25.6 times higher risk for developing PTSD than civilians
- Although the U.S. Department of Defense considers service member suicide to be line-of-duty death, the Federal Government had not recognized Public Safety Officer suicide as death in the line of duty
- In 2017, 481 PSOB claims were approved, but none of them were for the more than 240 Public Safety Officers who died by suicide that year
- 2017–2021 – Congressional Budget Office estimated on average 225 public safety officers die by suicide each year

PSOB Key Considerations

1. Eligibility presumption retroactive/effective from January 1, 2019 for suicide / attempted suicide
2. File application within three (3) years from injury date or death, or three (3) years from August 16, 2022 if injury/death occurred on/after January 1, 2019
3. De minimis, nominal or honorary work, or work provided solely as reimbursement for incidental expenses is disregarded
4. PSOB Benefit not offset /reduced by Workers' Compensation, Social Security Disability, Disability Retirement or VA Disability Benefits
5. Review PSOB application submitted by employing agency for valuable information in support of related claims (i.e. Workers' Compensation)

Veterans Affairs Compensation Claims

- Temporary or permanent monthly money benefit for service-connected disability and/or death
- VA benefit is not offset or reduced by Workers' Compensation, Disability Retirement, Social Security or Public Safety Officer's Benefits
- Tax free, no asset/income restrictions
- No statute of limitations on when to apply, but preserving earliest effective date is critical
- File an intent to file (VA form 21-0966)
- Military trauma and occupational trauma can co-exist
- VA makes a lot of mistakes – challenge adverse determinations
- Attorney fee only if benefits paid on a denied/increase claim

VA Disability Compensation

Disability Rating	Monthly Payment
10%	\$165.92
20%	\$327.99
30%	\$508.05
40%	\$731.86
50%	\$1,041.82
60%	\$1,319.65
70%	\$1,663.06
80%	\$1,933.15
90%	\$2,172.39
100%	\$3,621.95

*Rates based on Veteran only. No dependents. Effective December 1, 2022

Source: va.gov

VA Compensation Claims

How to Prove Service Connection

- Current physical or mental disability
- Individual had an injury or disease in service or experienced an event in service that caused or aggravated an injury
- There is a link between your current condition and the event, injury or illness sustained in military service
- Presumption – A Veteran is presumed to be of sound health during the entrance examination into the military, unless the entrance file is annotated medically. Certain conditions are also presumed related to service.

VA Compensation Claims

- Create the narrative statement in support of claim (VA Form 21-4138)
- 0% rating – condition is service connected
- Combined ratings
- Total Disability Based on Individual unemployability (TDIU)
- Special Monthly Compensation (SMC)
- Do you have a dependent, spouse, child(ren), parents?
Increased benefit amount may be available to you

Should I have an attorney represent me?

Questions



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WHO'S PROTECTING YOU?