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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/20/09

SPONSOR McSorley LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Workers' Comp Disabilities & Attorney Fees SB 609

ANALYST Peery-Galon

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>		Indeterminate but Substantial	Indeterminate but Substantial	Indeterminate but Substantial	Recurring	General Fund/ Uninsured Employment Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Workers' Compensation Administration (WCA)  
 Developmental Disabilities Planning Council (DDPC)  
 State Personnel Office (SPO)  
 Administrative Office of the Courts (AOC)

#### No Responses Received From

Administrative Office of the District Attorneys  
 General Services Department  
 Workforce Solutions Department  
 Department of Health

### SUMMARY

#### Synopsis of Bill

Senate Bill 609 amends the Workers' Compensation Act, Section 52-1-1 NMSA 1978, as follows:

**Section 1:** Amends Section 52-1-26 NMSA 1978, governing permanent partial disability, to provide that the disability awarded may exceed 99 percent when a percentage of disability is also due under Section 52-1-43 NMSA 1978 and the combined total benefit is calculated at more than 100 percent of disability, as permitted by Section 52-1-42.1 NMSA 1978.

**Section 2:** Amends Section 52-1-41 NMSA 1978, governing compensation benefits for total disability, to provide that for disability resulting in secondary mental impairment, the maximum period of compensation is 500 weeks and, if the worker is also entitled to a benefit under Section 52-1-43 NMSA 1978, the maximum period of compensation can exceed 500 weeks when the period provided for in Section 52-1-43 is added.

**Section 3:** Amends Section 52-1-42 NMSA 1978, governing compensation benefits for permanent partial disability, to provide that except as provided in Section 52-1-42.1 NMSA 1978, the percentage of permanent partial disability shall be determined pursuant to the provisions of Sections 52-1-26 through 52-1-26.4 NMSA 1978. The amendment further provides that where the partial disability results from a secondary mental impairment the maximum period is 500 weeks and, if the worker is also entitled to a benefit under Section 52-1-43 NMSA 1978, the maximum period of compensation can exceed 500 weeks when the period provided for in Section 52-1-43 is added.

**Section 4:** Enacts Section 52-1-42.1 NMSA 1978, governing percentage of disability for a combination of injuries, to permit receipt of a total benefit of more than 100 percent of disability when a benefit is due under Section 52-1-43 NMSA 1978 as a percentage of disability and a percentage of disability benefit is also due under another section of the Workers' Compensation Act.

**Section 5:** Amends Section 52-1-43 NMSA 1978, governing compensation benefits for injury to specific body members, to address the compensation amount for a partial loss of hearing in both ears and to provide for compensation increases when an injury worsens after a determination of the degree of partial loss.

**Section 6:** Amends Section 52-1-47 NMSA 1978, governing limitations on compensation benefits, to provide that compensation benefits for any combination of disabilities or any combination of disabilities and death shall not exceed an amount equal to 700 weeks multiplied by the maximum weekly compensation payable at the time of the accidental injury resulting in the disability or death under Section 52-1-41 *or* 52-1-42.1 NMSA 1978, exclusive of increased compensation and attorney fees awarded.

**Section 7:** Amends Section 52-1-54 NMSA 1978, governing fee restrictions, appointment of attorneys by the director or workers' compensation judge, discovery costs, offers of judgment, and penalty for violations, to provide that attorney fees may be awarded to reimburse a claimant's attorney for work conducted in obtaining an attorney fee due under the Act, provided that an employer shall pay 100 percent of the attorney fees awarded for that work and a worker is relieved from any responsibility for paying any portion of those fees. The proposed legislation also provides that the \$16,500 cap on attorney fees for a single accidental injury claim does not include reimbursement for travel, food and lodging at the rates specified in the Per Diem and Mileage Act for employees. The amendment provides further that a judge may exceed the cap in the case of an attorney representing a claimant who seeks and is awarded a benefit for a total permanent disability.

## FISCAL IMPLICATIONS

WCA reviewed the language set forth in Section 52-1-41 and 52-1-42 NMSA 1978 and compared the changes requested in the proposed legislation pertaining to the additional weeks to be paid for permanent mental impairments. The change outlines the intent expressed by the NM Supreme Court in the case Breen v. Carlsbad Municipal Schools, No. 27,950 (Cite as: 138 N.M. 331, 120 P.3d 413).

WCA noted the proposed legislation adds new material disability combinations for permanent injuries that allow multiple injuries to have a calculated “disability” over 100 percent. This section is unclear as disability is calculated based on an impairment rating within a statutory formula and the impairment ratings are determined as a percentage of whole-body or body extremity. The American Medical Association guides which determine impairment based on the injury has a progression of severity going from zero percent to not more than 99 percent. Hence, the determination of impairment progresses from the extremity to the whole body as the nature and severity of the injury progresses or is determined to be a multiple injury. Disability is a payment based on a calculation and is not more than 99 percent of the impairment rating of a whole-body case under all circumstances. The WCA is unable to estimate the cost of Section 52-1-42.1 NMSA 1978 as the intent of this section is unclear.

WCA reported the proposed legislation also includes a separate provision for permanent partial disability benefits for hearing loss under Section 52-1-43(B) NMSA 1978. The proposed legislation is unclear as to the number of weeks to be paid for total loss of hearing based on the initial extent of loss. For example, in paragraph (B)(1) the partial loss of hearing in both ears should be paid at 150 weeks as specified under the schedule. However, paragraph (B)(2), based on the initial extent of the original impairment, if the hearing loss worsens, then a maximum of 700 weeks is applicable. The conflict of the statute is if the initial extent of the hearing loss is total deafness in both ears, the total number of weeks paid is 150 weeks. It is therefore possible to have partial hearing loss in both ears and be paid for more weeks than if initially the worker’s hearing loss is total deafness. For this provision under the statute, the total loss-cost increase would be 0.52 percent.

WCA noted the other conflict with paragraph (B)(2) of Section 52-1-43 NMSA 1978, is that it is unclear that this paragraph is necessary based on the Workers’ Compensation Act. The fact the worker is not entitled to permanent partial disability (PPD) benefits until the worker has reached maximum medical improvement (MMI), means that an impairment rating is given based only on the part-of-body’s functional inability to improve or worsen. If the worker’s injury does worsen, then the worker is taken off of PPD and receives temporary total disability (TTD) until such time MMI is reached. At no point does the worker receive more than the 700 weeks based on the percentage of disability (See Section 52-1-43(D)NMSA 1978).

WCA noted the proposed legislation also amends Section 52-1-54(I) NMSA 1978 to include additional attorney fees to claimant attorneys for work performed to obtain those fees before a workers’ compensation judge. These fees would be paid entirely by the employer or employer’s representative. Lodging, travel and food expenses related to attorney fees would be at the rates specified in the Per Diem and Mileage Act for employees. The cost estimates for this provision would add up to \$800 per case for attorney fee awards. The total loss-cost percentage increase would be approximately 0.67 percent based on the accident year 2005. WCA stated the fiscal impact of the increase of attorney fees up to an additional \$2,500 for any Permanent Total Disability (PTD) case that exceeded the attorney fee cap is negligible.

WCA reported that overall, based on the current workers' compensation claim database, this proposal (excluding the new section NMSA 1978, §52-1-42.1) would increase loss-costs to up to 1.19 percent. The changes to the mental impairment disability weeks were not included in these projections because the current case law addresses the changes proposed.

SPO stated the proposed legislation could significantly increase the amount of time and money a claimant is due under the Workers' Compensation Act. The actual fiscal impact to employers (including the State) will hinge on the number, severity and duration of claims awarded. Since the period of compensation is significantly increased there should be an increased cost associated with the longer time period,

AOC noted there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

## **SIGNIFICANT ISSUES**

WCA reported in paragraph (B)(2) of Section 52-1-43 NMSA 1978, there appears to be a conflict in the interpretation of the number of weeks to be paid for total deafness under different circumstances. If the worker is initially totally deaf, then the statutes suggest that his disability is based only on 150 weeks. If the worker is partially deaf and his condition worsens the worker is eligible up to 700 weeks disability.

WCA reported the paragraph, Section 52-1-43(B)(2) NMSA 1978, is confusing in the context of the current paragraph D. Since the Workers' Compensation Act addresses the issues of a work-related injury worsening after MMI, the benefits paid under paragraph (B)(2) could be the continuation of TTD benefits to the end of 700 weeks or PPD benefits to the end of 700 weeks or a combination. But in any case, all injuries related to the schedule that have a reassessment of impairment after MMI would potentially be subject to this provision and it is unclear how this differs from paragraph D in the same section.

DDPC noted the proposed legislation amends the Workers' Compensation Act, the Act, Section 52-1-41.B NMSA 1978 changing the maximum period of compensation for disability resulting from primary mental impairment from one hundred weeks to five hundred weeks based on a New Mexico Supreme Court ruling in *Breen v. Carlsbad Municipal Schools*, 2005-NMSC-028, which states that "...primary mental and physical impairments under Sections 52-1-41 and -42 be treated equally for purposes of benefit compensation..." This added language allows up to five hundred weeks for the mental impairment and coupled with a physical impairment could amount to a maximum of seven hundred weeks making the statute consistent with the Supreme Court ruling.

DDPC noted amended Section 52-1-43.B.1 NMSA 1978 references that compensation for partial loss of hearing in both ears shall be calculated using the period specified in paragraph (43) of the Act, which is one hundred fifty weeks. However, the specified paragraph referenced in the schedule refers to a total loss of hearing, not a partial loss, thus creating some confusion in understanding what the compensation benefits might be. Further, Section 52-1-43.B.1 adds that should the partial loss worsen that the worker could receive a total benefit of seven hundred

weeks. What this seems to say is that if a worker begins with a total loss of hearing then the worker could only receive one hundred fifty weeks and if the worker had a partial loss, which worsened, then they would receive seven hundred weeks. Workers who receive a total loss of hearing due to work related injury should receive a maximum benefit.

DDPC noted Section 52-1-56.I NMSA 1978 amends the Act to allow attorneys fees for preparing and attending the hearing that would award fees. Currently, this is not compensable according to the Act and the worker is typically responsible for those fees.

SPO noted the extended timeframes may place an administrative and/or financial burden on employers. However, the extended timeframe and potential additional costs may provide additional motivation to businesses to provide more workplace safety training and a safer workplace for their employees.

### **PERFORMANCE IMPLICATIONS**

AOC noted the proposed legislation may have an impact on the following measures regarding district courts: cases disposed of as a percent of cases filed and percent change in case filings by case type.

### **RELATIONSHIP**

Senate Bill 609 has a relationship with House Bill 506 and Senate Bill 579.

### **TECHNICAL ISSUES**

The proposed legislation adds as new material disability combinations for permanent injuries that allow multiple injuries to have a calculated “disability” over 100 percent. WCA stated this section is unclear as disability is calculated based on impairment rating within a statutory formula and the impairment ratings are determined as a percentage of whole-body or body extremity. Paragraph (B)(2) of NMSA 1978, §52-1-43 does not make sense in the context of the current Workers’ Compensation Act (See NMSA 1978, §52-1-43(D)).

DDPC stated the language in Section 52-1-43.B.1 NMSA 1978 is unclear.

### **OTHER SUBSTANTIVE ISSUES**

WCA noted the Workers’ Compensation Administration Advisory Council has not seen the proposed legislation or has been advised to the substantial changes proposed.

DDPC stated there is an issue with the fact that under this proposed amendment, workers with partial loss of hearing receiving greater benefits than workers with a total loss of hearing.

RPG/mt