

Workers' Compensation Committee

Update to 2009 Report and  
Recommendations to September 11<sup>th</sup>  
Worker Protection Task Force

September 19, 2011

INTERNAL DRAFT  
NOT FOR PUBLIC DISTRIBUTION

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## Executive Summary

Although it has been ten years since the terrorist attacks of 9/11, there continue to be new developments in 9/11-related workers' compensation claims. New claims have been filed and older claims reopened and developed. This report provides an update on 9/11-related claims in the New York workers' compensation system, including those made on behalf of those who were affected directly by the events of 9/11 and those who were part of the rescue, recovery and clean up ("RRCU") operations. The report is a follow up to the May 2009 report of the Workers' Compensation Subcommittee of the 9/11 Worker Protection Task Force ("Subcommittee Report") and is based on data provided by the New York Workers' Compensation Board ("Board").

On September 11, 2010, the deadline for workers to register their participation in RRCU operations expired. Registration is necessary to qualify for the extended filing and notice timeframes provided by Article 8-A of the Workers' Compensation Law. As of September 1, 2011, the Board received 48,906 registration forms (known as WTC-12 forms), of which 47,702 (98%) were timely filed. 1,204 forms were received after the deadline. There was a nearly 50% increase in registrations between May 1, 2008 and September 13, 2010. There has also been an increase in actual workers' compensation claims that contain an associated WTC-12 registration form. As of September 1, 2011, more than 5,200 claims had an associated WTC-12.

Workers, primarily RRCU workers, continue to file new 9/11-related claims. In the period between May 1, 2008 and April 9, 2010, 742 new 9/11-related claims were identified, of which 516 were RRCU claims. All but 156 of these claims were assembled after May 1, 2008.

The experience of newly filed claims (assembled by the Board between May 1, 2008 and April 9, 2010) has been somewhat better than those filed prior to May 1, 2008. Nevertheless, the claims are still subject to much higher rates of litigation than normal workers' compensation claims:

- Payers disputed (controverted) 44% of new claims, with private insurers disputing a higher rate of claims (48%).
- Approximately 43% of new claims have been established while only 4% have been disallowed.
- Approximately one-quarter of claims have not been pursued (closed for either failure to prosecute or no prima facie medical evidence).

The Board continues to hear and decide older claims. In claims filed before May 1, 2008 (and included in the Subcommittee Report), the following activity occurred:

- The number of claims classified as 9/11-related fell by 49; those classified as RRCU fell by 24.
- 350 9/11-related claims were established as compensable, of which 310 were RRCU claims.
- 25 existing 9/11-related claims were disallowed, of which only 12 were RRCU claims.

Finally, since the Subcommittee Report, the Board has surveyed a subset of claimants who had filed 9/11-related claims but had not pursued them (closed for either failure to prosecute or no prima facie medical evidence). The survey reveals some of the confusion and frustration that exists around pursuing 9/11-related workers’ compensation claims.

### I. Article 8-A: Registration

Enacted in 2006, Article 8-A of the Workers’ Compensation Law enables those who participated in RRCU operations after the terrorist attacks of September 11, 2001 to file workers’ compensation claims for latent conditions more than two years after their initial exposure. To qualify for Article 8-A’s extended timeframes, which run from the workers’ date of disablement instead of the date of accident/exposure, one must have participated in RRCU operations between September 11, 2001 and September 12, 2002 and must register as a RRCU worker by filing a WTC-12 form (Registration of Participation in World Trade Center Rescue, Recovery, and/or Clean Up Operations) with the Workers’ Compensation Board before September 13, 2010.<sup>1</sup>

More than 47,700 WTC forms (including duplicate forms) were filed on or before the deadline. More than 7,000 forms were filed in the last five months before the deadline. The Board received another 1,204 forms in the 11 months after the deadline. The Board does not know how many of the individuals who filed forms after the deadline also filed a form timely.

**Table 1. WTC-12 Forms: Filed Pre- and Post- Deadline (as of 9/11)**

WTC-12 Filing Date	Number of WTC-12 Forms	Percentage of Forms Filed
Filed as of Sept 13, 2010	47,702	98%
<i>Filed as of May 1, 2008</i>	32,613	67%
<i>Filed as of April 9, 2010</i>	40,673	83%
Filed After Sept 13, 2010	1,204	2%
TOTAL	48,906	100%

Registration, by itself, does not initiate a claim. It merely preserves one’s ability to file a claim at a later date if the individual becomes disabled. Nearly ten years after 9/11, the vast majority of WTC-12 registrations have not resulted in actual workers’ compensation claims. Of those timely filed, 7,860 WTC-12 forms (16.5% of 47,700) are associated

<sup>1</sup> The registration deadline, which was extended on several occasions, ultimately fell on Saturday, September 11, 2010. Because the Board does not process mail on Saturdays, it accepted and processed as timely any WTC-12 form received on or before Monday, September 13, 2010.

with actual workers’ compensation claims. As a result of duplicate forms, there are 5,238 claims that have a WTC-12 registration form. The rate of actual claims is slightly higher among those who filed a late WTC-12 form.

**Table 2. WTC-12 Forms with Workers’ Compensation Claims**

WTC-12 Filing Date	Number of WTC-12 Forms Involving Claims	Percentage WTC-12 Forms involving Claims	Number of Claims Involved
Filed before Sept 14, 2010 (n=47,702)	7860	16%	5,238
Filed after and including Sept 14, 2010 (n= 1,204)	295	26%	230
Total (n=48,906)	8155	17%	5,468

## II. New Workers’ Compensation Claims (Assembled 5/1/08-4/9/10)

The Subcommittee Report was based on claim data as of May 1, 2008.<sup>2</sup> Therefore, the report contained only claims that had been assembled by the Board on or before May 1, 2008. This section includes information about claims that were assembled by the Board between May 1, 2008 and April 9, 2010.

In the nearly two year period, the Board identified 746 new claims that are possibly 9/11-related.<sup>3</sup> Of those, 516 (69.2%) are RRCU claims and 43 (5.8%) are victim claims. The remaining 187 are classified as other 9/11 or lack adequate information to classify. (Table 3) The number of new RRCU claims is significant. It represents more than a 10% increase in RRCU claims (Table 3).

**Table 3. Inventory of WTC Claims Summary (All Claims)**

Claim Type	All Claims	RRCU Claims
WTC Claims 5/1/08	12,234	4,984
Dropped Out	-49	-28
New Claims	746	516
WTC Claims 4/9/10	12,931	5,472

<sup>2</sup> The initial report contained extensive data about claims, including significant data that required manual review. In order to use data that had been thoroughly cleaned and subject to appropriate manual reviews, the subcommittee chose a cut-off date of May 1, 2008.

<sup>3</sup> The Board designates claims to be “9/11-related” if the claim involves an injury or illness alleged to result from the terrorist attacks and ensuing building collapses on 9/11 or the subsequent RRCU operations. Those who were injured in the attacks on 9/11 are designated as victims whereas those who were injured or exposed to hazardous materials as part of the RRCU operations are designated RRCU claims. The Board believes that its designations of 9/11-related, victim and RRCU claims are accurate, though there are some claims that are difficult to classify due to lack of information.

The majority of the new 9/11-related claims were assembled by the Board after May 1, 2008, though approximately 20% are claims that had been assembled prior to May 1, 2008 but were identified as 9/11-related for the first time after May 1, 2008 (Table 5). To understand whether the experience of more recently filed 9/11-related claims is different than those 9/11-related claims studied by the Subcommittee Report, this section analyzes the 561 claims that are not subject to ADR and were assembled after May 1, 2008 (Table 5). The data are current as of April 9, 2010.

**Table 4. New Claims Group Type (Filed Between May 1, 2008 and April 9, 2010)**

Group Type	Claims	Percentage
1. Victim	43	5.8%
2. RRCU at WTC Plaza	504	67.6%
3. RRCU Off Site	12	1.6%
4. Other - Not Victim / Not Rescue	28	3.8%
5. Not Classifiable	87	11.7%
6. Not WTC Related?	72	9.7%
Total	746	100.0%

**Table 5. New 9/11-related Claims Available for Analysis**

Category	Total
"New Claims" in May 2010 Update	746
ADR Claims	-31
Assembled Prior to 5/1/08	-154
Total Claims for this "Follow Up"	561

***A. Rate of Controversion***

One of the key findings in the Subcommittee Report was that 9/11-related claims, and RRCU claims in particular, were often disputed (“controverted”) by insurance companies and self-insured employers (collectively “payers”). In the Subcommittee Report, more than one-half of all RRCU claims were controverted, and nearly 46% of the most recent claims (those assembled between August 14, 2007 and May 1, 2008) were controverted.

This trend continues. Of the new claims assembled since May 1, 2008, 44% of 9/11-related claims and 44.8% of RRCU claims were controverted (Table 6). While this rate is slightly lower than the controversion rates in the Subcommittee Report, it remains

more than two and a half times higher than the controversy rate for non-9/11-related claims.<sup>4</sup>

**Table 6. Controverted Claims (New 9/11-related Claims)**

Activity Type	RRCU		Not RRCU		Total	
	#	Percent	#	Percent	#	Percent
Controverted	192	44.8%	55	41.7%	247	44.0%
Not Controverted	237	55.2%	77	58.3%	314	56.0%
Total	429	100.0%	132	100.0%	561	100.0%

\* excludes ADR and claims assembled prior to 5/1/08

The rate of controversy of RRCU claims was further analyzed by employer group. The Subcommittee Report showed that private employers had the highest rate of controversy of these claims (61.5%) followed by NYC agencies (50.2%). These two groups continue to hold the top spots, though the rate of controversy is modestly lower for each employer group than in the original report (Table 7).

**Table 7. Controverted Claims by Employer Group (New RRCU Claims)**

Employer Group	Controverted	Total	Rate
Police, Fire, and Sanitation	18	61	29.5%
NYC Agencies	11	25	44.0%
Other Public Agencies	5	14	35.7%
Private Sector	158	329	48.0%
Total	192	429	44.8%

Because these claims are the most recently assembled, many have not been fully adjudicated by the Board. As of July 7, 2010, 43% of the controverted claims had been established while only 4% had been denied. 16% of claims are pending and another 24% have not been pursued (are NPFME and/or FTP) (Table 8).

<sup>4</sup> The rate of controversy in non-9/11 claims is approximately 16%. See Workers’ Compensation Committee Report and Recommendations to September 11<sup>th</sup> Worker Protection Task Force, May 2009 (“May Report”), 18 n.32.

**Table 8. Outcome of Controverted RRCU Claims (New 9/11-related Claims)**

Outcome	As of 4/9/10	As of 7/7/10
Established	68 (35%)	83 (43%)
In Appeals	4 (2%)	2 (1%)
Pending	43 (22%)	31 (16%)
Denied by Law Judge	6 (3%)	8 (4%)
NPFME & FTP	3 (2%)	3 (2%)
NPFME (and not FTP)	14 (7%)	14 (7%)
FTP (and not NPFME)	35 (17%)	28 (15%)
Other/Unknown	19 (10%)	23 (12%)
Total	192	192

### ***B. Section 29 (Timeliness of Filing)***

In 2008, the Task Force recommended, and the Legislature and Governor enacted, several changes to the Workers’ Compensation Law. The legislative changes included an extension of the Article 8-A registration period, a rule requiring that the date of disablement that is most favorable to the claimant be chosen, and a provision within 8-A (WCL § 168) that precluded a finding of untimely notice or filing for rescue, recovery and clean-up workers who timely registered with the Board and filed their claim on or before September 11, 2010. Laws of 2008, ch. 489, §§ 18, 19, 20. These changes were directed at eliminating procedural bars for RRCU workers to file claims when they become ill.

The Subcommittee was interested in determining whether the changes to 8-A were successful. It is expected that the changes would result in fewer claims being controverted based on timeliness of filing. The Board, however, does not have accurate data regarding the nature of the controversy to determine whether litigation over timely filing declined. Instead, the Subcommittee chose to review manually all of the decisions in claims that were appealed to a three commissioner panel of the Board.

There were 43 claims assembled after May 1, 2008 that had been appealed to a Board panel as of July 7, 2010. Of those, more than one-third (15) involved questions about the application of 8-A, the timeliness of notice or filing, and/or the correct date of accident or disability. This suggests that application of 8-A is still a frequently litigated issue. The vast majority of the 8-A appeals were resolved in favor of the injured worker. Three of the appeals resolved timeliness challenges in favor of the claimant based on the 2008 changes to WCL § 168. Six of the appeals involved disputes over whether the individual was properly considered an RRCU worker: four of the six were disallowed because the worker did not perform rescue, recovery or clean up work or did not do so in the required

geographic zone. Four appeals involved disputes between carriers over the appropriate date of disability and therefore who was liable for the claim. One appeal involved a dispute as to whether the injuries or diseases were latent, as required by 8-A. One appeal involved a dispute as to whether 8-A applies to death claims – the Board panel found that it did not. The subcommittee reviewed the decisions in these appeals and felt that the Board was appropriately interpreting the changes to 8-A and that these changes were helpful in preserving the ability of rescue and recovery workers to file valid claims.

**C. Causal Relationship**

The Subcommittee Report evaluated the concern that injured workers had trouble establishing that their disability was causally related to their exposure. The subcommittee found that there was insufficient evidence to warrant creating a presumption of causal relationship in RRCU claims. It’s noteworthy that only two of the 43 recent appeals involved questions of whether the worker’s disability was causally related to 9/11-related exposure, and both appeals were resolved in the injured worker’s favor. The subcommittee continues to feel comfortable that the Board is appropriately handling questions of causal relationship and that a presumption of causal relationship is unnecessary.

**III. Status of Old Claims (Assembled Before May 1, 2008)**

This section reports on the current status (as of 4/9/10) of the claims that were part of the Subcommittee Report (i.e. assembled prior to May 1, 2008) and provides updated information as of April 9, 2010. The receipt of additional information has led to a small reduction in the number of claims that are still designated as 9/11-related and a similar decrease in the RRCU subset (Tables 9).

**Table 9. Inventory of 9/11-Related Claims (Assembled Before May 1, 2008)**

Claim Type	All Claims	RRCU Claims
WTC Claims 5/1/08	12,234	4,984
Dropped Out	-49	-28
WTC Claims 4/9/10	12,185	4,956

Two years produced additional activity in the original 9/11-related claims, which are largely consistent with the original findings. Many more claims were established (350) than disallowed (25) (Table 10). The vast majority (310/350) of the newly established claims are RRCU claims, accounting for a 24% increase in established claims (Table 11). Less than 90 additional claims were newly controverted, 80 of which were RRCU claims (Tables 10 and 11). There was a significant increase in claims that had appeals and significant reductions in claims that are pending, among all claims and more dramatically among RRCU claims (Tables 10 and 11).

**Table 10. Activity in All Claims (Assembled Before May 1, 2008)**

Activities	As In Original Report of 5/1/08	As of 4/9/2010	% Change
Controverted	4,415	4,504	2.0%
Disallowed	314	339	8.0%
Appealed	856	1,174	37.1%
Pending	793	375	-52.7%
Established	5,635	5,985	6.2%

**Table 11. Activity in RRCU\* Claims (Assembled Before May 1, 2008)**

Activities	As In Original Report of 5/1/08	As of 4/9/2010	% Change
Controverted	2,600	2,680	3.1%
Disallowed	90	102	13.3%
Appealed	337	572	69.7%
Pending	633	247	-61.0%
Established	1,288	1,598	24.1%

**IV. Survey of Unpursued Claims: No Prima Facie Medical Evidence and Failure to Prosecute**

The Subcommittee Report noted that a significant number of people who had filed claims that were designated as 9/11-related did not pursue their claims to the point of decision. More than 4,000 claims had been closed by the Board because the claimant failed to attend one or more hearings (known as “failure to prosecute” or “FTP”) and/or the claimant did not submit any medical evidence that documented a workplace injury or exposure (known as “no prima facie medical evidence” or “NPFME”). At the time the claims were closed, the Board notified the claimant that he or she could submit additional evidence to pursue the claim.

The report recommended that the Board contact those individuals whose claims were closed as FTP or NPFME to find out why they did not pursue their claim and to notify them that they may submit evidence to reopen their claim. In response to this recommendation, the Board began by reviewing many of the claim files to determine why they were FTP or NPFME and whether they could be established or reopened. In addition, the Board identified a subset of 400 such claimants who were most likely to have a viable claim. The Board attempted to contact these claimants by phone to further inquire about their claim and survey them regarding their failure to pursue the claim. These phone contacts did not yield significant results; very few answered the phone or returned the Board’s call. The Board subsequently sent a letter and survey to 381 of the 400 claimants (excluding those whose claim had been re-opened or who had withdrawn their claims because they were clearly ineligible for benefits). The Board received written responses from approximately 20% of the claimants, some of whom reported that

they were in need of medical care related to their claim. The Board attempted to assist those who might be eligible to establish their claims.

The re-opening of these claims, however, is complicated by Workers’ Compensation Law § 123. Section 123 limits the Board’s jurisdiction to re-open a claim after a lapse of seven years from the date of accident if the claim “has been ... disposed of without an award after the parties in interest have been given due notice of hearing or hearings and opportunity to be heard and for which no determination was made on the merits.” Since many of the claimants who are NPFME or FTP had notice of hearings and more than seven years has passed since September 11, 2001, section 123 may bar the Board from reopening.<sup>5</sup>

The Board determined with certainty that WCL § 123 does not bar reopening of a claim if the claim was closed by administrative determination, i.e. without ever holding a hearing. The issue was much closer for claims where there was a finding of no further action by the Board after the claimant failed to show up at a hearing. See *Matter of Magidson v Strategic Telemarketing, Inc.*, 2010 NY Slip Op 1399, 894 NYS2d 242 (2010) (WCL § 123 bars reopening when hearings were scheduled and the case was closed due to the claimant’s failure to appear); *Matter of Anheuser Busch*, 2005 NY Wrk Comp 69504161 (2005) (WCL § 123 bars reopening when hearings were scheduled and the case was closed due to the claimant’s failure to produce prima facie medical evidence). To avoid encouraging claimants with possibly stale claims to reopen their claims, the Board limited its surveying to those who had never had hearings scheduled in their claim.

In 2011, the Board mailed surveys to the remaining claimants whose claims had been closed by administrative determination without a hearing (1,443) and received responses in approximately 12% (173). As of this report, the Board has received a total of 226 responses out of 1,824 surveys mailed (12.4% response rate). Below are some of the highlights of the survey responses:

1. How were you affected by the World Trade Center disaster?
  - 95 (42%) performed rescue and recovery work
  - 45 (20%) performed clean up work
2. Why did you file a workers’ compensation claim when you did?
  - 119 (53%) filed a claim because “they didn’t want to miss a deadline”
  - 80 (35%) filed a claim because “I was sick as a result of 9/11”
3. When you filed your workers’ compensation claim, were you receiving medical care for your WTC-related injury or illness?
  - 105 (46%) were receiving medical care when they filed their workers’ compensation claim
  - 64 (28%) were not receiving medical care.

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<sup>5</sup> This provision likely does not present the same challenge to RRCU workers whose claims fall within Article 8-A because they could timely file a new claim more than seven years after the date of accident, as long as it was timely under 8-A.

4. Are you currently receiving or in need of medical care for a WTC-related injury or illness?
- 119 (53%) are currently receiving medical care for a WTC-related injury or illness
  - 29 (13%) need medical care but are not receiving it.
  - 74 (33%) are not sick and do not receive care
5. The Workers' Compensation Board could not determine if you were entitled to benefits either because there were no medical reports in your claim file or you elected not to pursue a claim for benefits. Which do you think apply to you? (check all that apply.)
- 87 (38%) were denied benefits because they weren't sick or injured.
  - 25 (11%) withdrew their claim because they were not sick or injured at the time.
  - 83 (37%) withdrew their claim for some reason
  - 39 (17%) missed work because they got sick or hurt on or near Ground Zero
  - 46 (19%) said they thought they were entitled to benefits but didn't receive any
  - 52 (23%) said they thought their claim was denied
6. If you believe you were entitled to benefits, which do you think apply to you? (Check all that apply.)
- 46 (20%) thought the claim was denied
  - 32 (14%) said it wasn't worth the effort to pursue a claim
  - 10 (4%) couldn't get a lawyer to take my case
  - 144 (64%) did not know how to pursue their claim
  - 18 (8%) did pursue the claim and are waiting to hear from the Board or insurance company
7. Have you received services from any of the following WTC health programs?
- 129 (58%) said No
    - 67 (30%) not need services
    - 43 (19%) not aware of services
    - 8 (4%) told I was not eligible
    - 32 (14%) under the care of my personal physician
  - 93 (41%) said Yes
    - 60 (27%) NY/NJ Consortium: WTC Medical Monitoring and Treatment Program at Mt. Sinai School of Medicine, SUNY Stony Brook, NYU/Bellevue Hospital, Queens College and the University of Medicine and Dentistry of New Jersey
    - 10 (4%) The Fire Department Medical Monitoring and Treatment Program
    - 11 (5%) WTC Environmental Health Center at Bellevue Hospital, Gouverneur Health Care Services and Elmhurst Hospital Center
    - 2 (1%) WTC National Responder Health Program (serving responders outside New York/New Jersey)

- 9 (4%) NYC 9/11 Benefit Program for Mental Health and Substance Use Services (formerly known as the “September 11th Mental Health and Substance Abuse Program”)
- 6 (3%) NYPD WTC Medical Monitoring Program

There was activity in a small number of these claims between May 2008 and April 2010. 53 RRCU claims that had not been pursued were pursued and established by April 2010 (Table 12). This represents about 2.5% of the previously not pursued claims. Another 19 non-RRCU claims were pursued and established by April 2010 (Table 12).

**Table 12. NPFME/FTP Reopened and Established (Assembled Before May 1, 2008)**

As of Date	FTP/NPFME on 5/1/08	Established as of 4/9/10
RRCU Only	2,392	53
All Claims	4,451	72

### Conclusion

The Workers’ Compensation Board continues to handle and decide a significant volume of 9/11-related claims. As time goes on, the bulk of new claims are from those who were involved in RRCU operations. The vast majority of RRCU workers who pursue their claims are ultimately compensated through workers’ compensation, but not without dispute by payers and substantial process before the Board. Nevertheless, the Board’s survey suggests that some number of those who did not pursue their workers’ compensation claims may still have been affected by the events of and response to 9/11.