

SEPTEMBER 11  
WORKER PROTECTION TASK FORCE  
ANNUAL REPORT

JUNE 1, 2009



# **September 11th Worker Protection Task Force**

## **Introduction**

Many public employees, including police, fire, correction, sanitation and civilians rendered rescue, recovery and cleanup at the former World Trade Center site and other designated locations.... [T]he State must recognize the services that these individuals provided not only to the victims and their families, but to all citizens of the City and State of New York and the United States of America. As a result, it is only fitting that they be protected when a disability ensues as a consequence of their selfless acts of bravery working at the World Trade Center site and other sites.

Sponsors' Memorandum in Support of Legislation (A6281A, enacted as Laws of 2005, Chapter 104, amended by Laws of 2005, Chapter 93, hereinafter referred to as the "World Trade Center disability law").

## **Charter**

The September 11th Worker Protection Task Force ("Task Force") was created by the September 11<sup>th</sup> Worker Protection Task Force Act, which was enacted as part of the World Trade Center disability law. Laws of 2005, Chapter 104, Part B, as amended, Laws of 2005, Chapter 93, section 14.

The World Trade Center disability law amended the New York State Retirement and Social Security Law and the New York City Administrative Code to provide that any public employee who suffered an injury or illness directly related to the terrorist attacks on September 11, 2001, be presumptively eligible for an accidental disability. There are 19 members of the Task Force who are appointed as follows:

- Six members by the Governor
- Three members by the Temporary President of the Senate, two of whom shall be representatives from the organizations representing workers at the World Trade Center site and one of whom shall be a representative of a recognized health organization with appropriate expertise;
- Three members by the Speaker of the Assembly, two of whom shall be representatives from the organizations representing workers at the World Trade Center site and one of whom shall be a representative of a recognized health organization with appropriate expertise;

- The State Comptroller or his or her representative;
- The Comptroller of the City of New York or his or her representative;
- The Mayor of the City of New York or his or her representative;
- The Commissioner of the State Department of Health or his or her representative;
- The Commissioner of the State Department of Labor or his or her representative;
- The Director of the State Division of the Budget or his or her representative; and
- The Commissioner of the State Department of Civil Service or his or her representative.

## Task Force Members

The members of the Task Force are as follows:

- Dr. Thomas K. **Aldrich**, Pulmonary Medical Division, Montefiore Medical Center and Albert Einstein College of Medicine, **Chair**
- Lou **Matarazzo**, Executive Director, Detectives Endowment Association, **Vice Chair**
- Laura L. **Anglin**, Director, New York State Division of the Budget
- Suzy S. **Ballantyne**, Assistant to the President, New York State AFL-CIO
- Michael **Bloomberg**, Mayor, New York City
- Stephen J. **Cassidy**, President, Uniformed Firefighters Association
- Dr. Richard F. **Daines**, Commissioner, New York State Department of Health
- Thomas **DiNapoli**, New York State Comptroller
- Nancy G. **Groenwegen**, Commissioner, New York State Department of Civil Service
- Dr. Stephen **Levin**, Mt. Sinai-Irving J. Selikoff Center for Occupational and Environmental Medicine
- Patrick J. **Lynch**, President, New York City PBA
- John J. **McDonnell**, President, New York City Uniformed Firefighters
- Dr. James M. **Melius**, Administrator & Research Director, New York State Laborers' Health & Safety Trust Fund
- Peter D. **Meringolo**, Chairman, New York State Public Employees Conference
- Dr. David **Prezant**, Chief Medical Officer, Office of Medical Affairs, New York City Fire Department
- Lillian **Roberts**, Executive Director, District Council 37, AFSCME, AFL-CIO

- David J. **Rosenzweig**, President, Uniform Fire Dispatch Benevolent Association
- M. Patricia **Smith**, Commissioner, New York State Department of Labor
- William **C. Thompson, Jr.**, New York City Comptroller

Individuals who regularly participated in the Task Force as representatives for certain members included:

- Pico **Ben-Amotz**, Esq. for M. Patricia Smith, Commissioner, New York State Department of Labor
- Bob **Brondi** for Laura L. Anglin, Director, New York State Division of the Budget
- John **Burke** for Laura L. Anglin, Director, New York State Division of the Budget
- Lee **Clarke** for Lillian Roberts, Executive Director, District Council 37, AFSCME, AFL-CIO
- Robert **Coughlin**, Esq. for Thomas DiNapoli, New York State Comptroller
- Anthony **Crowell**, Esq. for Michael Bloomberg, Mayor, New York City
- Dr. Richard **Ciulla** for Nancy G. Groenwegen, Commissioner, New York State Department of Civil Service
- Lewis **Finkelman**, Esq. for William C. Thompson, **Jr.**, New York City Comptroller
- Brian **Geller**, Esq. for Michael Bloomberg, Mayor, New York City
- Joey Kara **Koch**, Esq. for Michael Bloomberg, Mayor, New York City
- Dr. Matthew P. **Mauer** for Dr. Richard F. Daines, Commissioner, New York State Department of Health
- Christopher J. **McGrath**, Esq. for Patrick J. Lynch
- Guille **Mejia**, for Lillian Roberts, Executive Director, District Council 37, AFSCME, AFL-CIO
- Patrick **Reynolds**, for John J. McDonnell, President, New York City Uniformed Firefighters
- William **Romaka** for Stephen J. Cassidy, President, Uniformed Firefighters Association
- Richard **Simon**, Esq. for William C. Thompson, Jr., New York City Comptroller

## **Mission**

The purpose of the World Trade Center disability law was to establish presumptive eligibility for accidental disability for the “public employees, including police, fire, correction, sanitation and civilians” who “rendered rescue, recovery and clean up at the former world trade center site and other designated locations” so that they can “be protected when a disability ensues.” Sponsor’s Memo in support of A6281A.

The Task Force was created in recognition of “health issues and concerns of the workers who participated in the rescue, recovery and clean up of the World Trade Center and related areas”. September 11<sup>th</sup> Worker Protection Task Force Act at section 2 (Laws of 2005, Chapter 104, Part B, section 2).

The Task Force is required to submit annual reports on or before June 1 to the governor, the temporary president of the senate and the speaker of the assembly that address (a) the progress being made in fulfilling the duties of the Task Force and in developing recommendations; and (b) recommend strategies or actions for ongoing monitoring and treatment of individuals.

The Task Force has the following duties relating to workers who participated in the World Trade Center rescue, recovery and cleanup:

- a) to obtain from the department of health and the New York city department of health, such departments’ review of statistical and qualitative data on the prevalence and incidence of sickness, illness and disability of such workers;
- (b) to obtain from other sources reviews of statistical and qualitative data on the prevalence and incidence of sickness, illness and disability of such workers;
- (c) assess based upon evidence presented, the nature, scope and magnitude of the health impacts caused by exposure to air and elements;
- (d) measure the adverse health effects of exposure on such workers;
- (e) to consult with any organization, health institution, governmental agency or person including, but not limited to, the department of health, the department of environmental conservation, the federal environmental protection agency, the New York committee for occupational safety and health and the occupational safety and health administration;
- (f) to identify and examine the limitations of any existing laws, regulations, programs, and services with regard to coverage, extent of disability,

process for determination, adequacy of coverage and treatment of specific types of disabilities and to undertake any recommendations;

(g) to receive and to consider reports and testimony from individuals, the health department, community-based organizations, voluntary health organizations, and other public and private organizations statewide to learn more about the diagnosis, care, and treatment of such workers at these designated sites; and

(h) to identify federal funding sources to assist state and local governments in paying costs associated with disability benefits under [the World Trade Center disability law].

The chair of the Task Force is empowered to establish committees for the purpose of making special studies pursuant to the above-referenced duties and may appoint non-Task Force members to serve on each committee as resource persons, who shall be voting members of the committees to which they are appointed.

## **Summary**

The World Trade Center disability law presumes that individuals who meet certain qualifying criteria and were involved in September 11<sup>th</sup> related operations in the line of duty may have incurred injuries or developed diseases that disabled them.

During the past year the Legislature enacted legislation implementing all six legislative changes unanimously recommended by the Task Force in its interim and second annual reports, dated March 4, 2008 and June 1, 2008 respectively. The legislation, enacted as Chapter 489 of the Laws of 2008, was based on Governor's program bill number 68 drafted by the Governor's office with assistance from the Task Force.

The Task Force met eight times during the twelve month period following its 2008 annual report to hear from groups seeking changes to expand the scope of the World Trade Center Disability Law, to follow up on two areas identified in its 2008 report as requiring further study and to discuss other matters that arose, including the status of state and federal legislative proposals.

### **1. Groups seeking inclusion in World Trade Center disability law**

The Task Force invited and heard from representatives of two groups concerning legislation that had been introduced in prior years. See A9039A / S6283-A, which sought to extend the World Trade Center disability presumption and death benefits provisions to Tier I and Tier II members of the Teachers Retirement System of the City of New York ("TRS"), and A10882 / S6706, A8946 / 6107,

Veto No. 97 of 2007. After hearing from representatives of the United Federation of Teachers (presentation notes attached as an Exhibit to this report), the Task Force issued a recommendation, set forth below, to support inclusion of Tiers I and II of TRS in the World Trade Center Disability Law.

While the Task Force heard an initial presentation from representatives of Teamsters Local 237 regarding a group of approximately 80 stock clerks who worked at a facility in Maspeth that received city owned vehicles that had been contaminated at the World Trade Center site on September 11<sup>th</sup>, Local 237 did not thereafter provide additional information requested by the Task Force regarding a subset of workers who were involved in steam cleaning operations at the Maspeth facility. Absent the additional information requested by the Task Force, the Task Force is not yet in a position to issue any recommendation regarding legislation sought by this group.

## **2. Continued study of medical boards and workers' compensation**

The Task Force worked on the following areas identified in 2008 as requiring further study: (1) encouraging pension medical boards to evaluate the criteria they use for reviewing disability applications and (2) working with the Task Force's workers' compensation committee regarding the functioning of the Workers' Compensation system for public employees who allege WTC-related injuries. The Task Force made efforts throughout the year to encourage the pension medical boards of the retirement systems of the City of New York to evaluate their criteria for reviewing disability applications. While survey responses were received from the New York City Employee Retirement System, other medical boards did not pursue such evaluations and the Task Force has accordingly set aside the issue.

By contrast, the Task Force is able to report significant progress on its study of workers' compensation issues. The workers' compensation committee established at the end of last year met through the past year and issued a report to the Task Force, a copy of which is attached as an exhibit to this 2009 annual report. That committee was comprised of the following five members: a representative of the Workers' Compensation Board, Mark Humowiecki, Special Counsel, a representative of the State Insurance Fund, Robert Sammons, a Workers' Compensation attorney, Dominic Tuminaro, and two physicians, James Melius, and Steven Markowitz. The committee received technical support from the Workers' Compensation Board's director of Management and Policy Services, Tom Wegener.

The Task Force reviewed the workers' compensation committee's report, discussed its analysis, findings and recommendations during the course of several meetings, and unanimously adopted each and every one of the committee's recommendations, as set forth below.

## Recommendations

The Task Force adopted the following recommendations by unanimous votes in favor, with only a single abstention by the City on only the first recommendation to extend the law to teachers in Tiers I and II.

### 1. Extension of Presumption to Tiers I and II

The Task Force recommends that the New York City Administrative Code and the New York State Retirement and Social Security Law be amended to extend to Tiers I & II of TRS the presumptions that were afforded to Tiers III & IV of TRS and the New York City Board of Education Retirement System.

### 2. Eliminate “Latent” from Definition of Qualifying Condition

The Task Force recommends that the Legislature should modify the definition of “qualifying condition” in Article 8-A to eliminate its reliance on “latent” and replace it with a non-exhaustive list of qualifying conditions based on a similar list from the New York Retirement and Social Security Law.<sup>1</sup> The proposed definition of qualifying condition in Section 161(3) of the Workers’ Compensation Law would read as follows:

“Qualifying condition” means any of the following diseases or conditions resulting from a hazardous exposure during participation in World Trade Center rescue, recovery or cleanup operations:

(a) Diseases of the upper respiratory tract and mucosae, including conditions such as conjunctivitis, rhinitis, sinusitis, pharyngitis, laryngitis, vocal cord disease, upper airway hyper-reactivity and tracheo-bronchitis, or a combination of such conditions;

(b) Diseases of the lower respiratory tract, including but not limited to bronchitis, asthma, reactive airway dysfunction syndrome, and different types of pneumonitis, such as hypersensitivity, granulomatous, or eosinophilic;

(c) Diseases of the gastroesophageal tract, including esophagitis and reflux disease, either acute or chronic, caused by exposure or aggravated by exposure;

(d) Diseases of the psychological axis, including post-traumatic stress disorder, anxiety, depression, or any combination of such conditions; or

(e) New onset diseases resulting from exposure as such diseases occur in the future including cancer, chronic obstructive pulmonary disease, asbestos-related disease, heavy metal poisoning, musculoskeletal disease and chronic psychological disease.

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<sup>1</sup> The list of qualifying conditions for state disability purposes is listed at Retirement and Social Security Law § 2(36)(c). The Committee recommends incorporating all but subsection (iv) which includes “diseases of the skin such as conjunctivitis, contact dermatitis or burns, either acute or chronic, caused by exposure or aggravated by exposure.” These sorts of skin conditions do not take years to develop.

The Legislature passed Article 8-A to eliminate obstacles to receiving workers' compensation benefits for RRCU workers by extending the deadlines for those suffering from diseases, such as the common World Trade Center-related psychiatric, respiratory and gastroesophageal diseases that would normally be treated as occupational diseases rather than accidents.<sup>2</sup> The legislative history notes that the Board traditionally has broad discretion to select a date of disablement so that such claims are covered and comply with the statute of limitations. The normal progression of such diseases often involves some early symptoms experienced well before the disease fully manifests itself. Such early appearance of symptoms was not intended to bar application of 8-A and its more relaxed filing deadlines.

The legislative modifications that were adopted in August 2008 should go a long way to reducing litigation over statute of limitations defenses. With the recommended modification to Section 161, the application of Article 8-A should be clarified and the amount of litigation over 8-A, and correspondingly over the statute of limitations, substantially reduced.

### **3. WC Board follow up with certain claimants whose cases have been closed**

The workers' compensation committee's report indicates a high rate of cases closed because there was no prima facie medical evidence (NPFME) or otherwise a failure to prosecute (FTP). The Task Force adopts the workers' compensation committee's recommendation that the Workers' Compensation Board contact the more than 4,000 9/11 claimants (rescue recovery and cleanup and others) whose cases have been closed as NPFME or FTP, advise them of their right to file medical evidence and reopen their claims, and suggest that they may want to consult an attorney and/or attend the publicly-funded 9/11 medical clinics. The Board should also request information from those claimants to help ascertain what barriers, if any, exist to pursuing claims in order to improve access to the workers' compensation system.

### **4. Further Monitoring of Causal Relationship Issue**

For the reasons set forth in the workers' compensation committee's report, the Task Force recommends that the committee should remain in effect to monitor developments in rescue recovery and cleanup claims. By the end of 2009, the Committee should meet again with the Workers' Compensation Board's MIS department to review updated data and develop additional measurements to determine what changes have occurred and the impact of any legislative changes. The Committee should also review the results of the Board's efforts to contact claimants whose cases were closed as NPFME or FTP,

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<sup>2</sup> See Sponsor Memo to Senate Bill 8348 (June 22, 2006), 2005 Legis. Bill Hist. NY S.B. 8348.

including any information provided by claimants regarding barriers to pursuing RRCU claims at the Board. In January 2010, the Committee should report to the Task Force any additional recommendations it has.

## **5. Reduce Inappropriate Controversion and Appeals**

The Task Force recommends that New York City and other self-insured employers and carriers review their internal practices and avoid inappropriate controversion of claims and appeals. While injured workers who pursue their claims ultimately prevail at a hearing at a high rate and on appeal at an even higher rate, the delay associated with litigation generates additional system costs and can create significant problems, financially and health-related, for the injured workers.

Self-policing by carriers and self-insured employers, however, may be inadequate to change such ingrained practices. Therefore, the Board should take an active role in deterring carriers and self-insured employers from needlessly controverting and/or appealing rescue recovery and clean up claims. The Board's recent reforms have achieved some initial success in reducing the rate of controversion and the time required to resolve controverted claims. The Board should continue in this vein, consider other ways of reducing the high rate of controversion among RRCU claims, and report on this effort to the task force. The Board has considerable authority to penalize carriers and self-insured employers who controvert or appeal a claim without justification. Workers' Compensation Law § 25(2)(c) authorizes a \$300 penalty if objections "were interposed without just cause." In 2007, the Board gained the power to impose the cost of the proceedings plus reasonable attorneys' fees against the attorney if the proceedings were "instituted or continued without reasonable ground." WCL § 114-a(3). The Board should consider utilizing these penalty provisions to discourage carriers and self-insured employers from controverting and appealing claims without good reason. At a minimum, this should discourage parties from taking unsupported positions in areas that the Legislature has acted to clarify, such as eligibility for Article 8-A and the recent suspension of the filing and notice deadlines for a significant group of 8-A claimants.

**EXHIBITS TO THE 2009 ANNUAL REPORT OF THE  
SEPTEMBER ELEVENTH WORKER PROTECTION TASK FORCE**

**EXHIBIT A**

**Notes from the United Federation of Teachers' presentation to  
the Task Force on November 6, 2008**

**EXHIBIT B**

**Workers' Compensation Committee Report and  
Recommendations to the September 11<sup>th</sup> Worker  
Protection Task Force.**

**EXHIBIT A**

**Notes from the United Federation of Teachers' presentation to  
the Task Force on November 6, 2008**



November 6, 2008

Re: WTC Commission Hearing on November 6, 2008

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7 schools near WTC  
> 6000 students  
over 440 staff

9 school buildings in D2 below Canal Street river to river  
about 8000 students  
over 700 staff members

amazing fortitude in the face of a terrifying spectacle

Every single student who was in those schools that morning eventually made it home to the safety of parents and loved ones as did every teacher and every member of the schools' staffs

The evacuation did not go smoothly

4 elementary schools within 4 - 6 blocks north or northwest of the WTC  
3 high schools, 2 are about 150 feet south of the south tower and Stuyvesant is about 5 blocks north  
Stuyvesant had 3 classrooms for 27 special needs students, many requiring wheelchairs or walkers

**AA Flight 11 hit north tower at 8:46 AM**

1<sup>st</sup> period of all 3 high schools had started so many students were in their classrooms

however with elementary schools many children were just arriving and were still in the courtyards and lobbies of the school buildings

Many of the younger children left with their family members

By the time the elementary schools made the decision to evacuate fewer than half and in some cases fewer than a quarter of the students remained

The first 2 schools to evacuate were Leadership and Economics

They felt the physical impact of the crash and saw glass, steel beams and unidentifiable objects on fire falling very rapidly to the ground beneath

Shelter drill in hallway away from windows

**9:03 AM UA Flight 175 crashes into South Tower**

both principals decide to evacuate and head to Battery Park about 4 blocks south

Elementary schools (PS 234, IS 89, PS 89 & PS 150)

1<sup>st</sup> response was to keep everyone calm and in place in the building and a similar approach was taken at Stuyvesant until 2<sup>nd</sup> plane crashed

schools in contact with DOE and Manhattan Sup's office, conflicting info, told to stay in place

**9:59 AM south tower collapsed**

Economics and Leadership about several blocks south of their schools

Caught in dust cloud

One student had so much soot in eyes he could not open them the next day

Paras had to carry 2 wheelchair bound students, wheelchairs couldn't move in dust and debris

Elementary schools and Stuyvesant not yet fully aware of south tower collapse

**10:15 AM**

Stuyvesant begins to evacuate first

700 freshman new to lower Manhattan

27 special needs students

then PS & IS 89M evacuate

then PS 150M

PS/IS 89 told to stay in basement, no basement in that building

IS 89 school evacuates

PS 89 principal told to stay in place she tells D2 office you can't see what I am seeing we want to leave

Both schools evacuate and head north to PS 41 or PS 3

Then PS 150 told to evacuate north

**10:23 AM**

PS 234M evacuates

The last school to evacuate was PS 234, which was closest to the north tower

They also were in touch with D2 office who told them to go to basement which they did

1<sup>st</sup> tower fell, 75 or so students in basement

then at 10:23 AM principal was told to evacuate

### **10:29 North Tower Collapses**

Stuyvesant and PS/IS 89M & PS 150 M was evacuating and was about 4 blocks north

North Tower Collapses at 10:29 AM when PS 234 was in the middle of the evacuation

As building began to topple,  $\frac{1}{2}$  the school went back into the building those at the front of the evacuation line ran north

So thousands of students and hundreds of staff members were in the immediate vicinity when the 2 towers fell

### **Murry Bergtraum**

Amid all the chaos, a teacher did not leave the building when people were evacuating. She was in the rear of the building where the handicapped would have gone to their buses. Of course there were no buses. There were about 30 LMS including several wheelchair bound students. She took charge of one of the wheelchair bound students. The AP of security was there along with a couple of other staff members. They were under the impression that buses were going to come at some point but they never came. They waited hours, after the towers came down they were still there. They decided when the towers came down that they had to take the students themselves out of the area.

There was no safe haven, they tried to get away from the plume. She pushed the wheelchair student home, We don't know if she was able to get a ride, but she delivered the student home.

This is the population we are talking about

7 schools in 6 buildings around the WTC site

3 schools about the property

Economics & Leadership about 150 feet from South Tower

PS 234M at Chambers street on north side of site

7 WTC schools

- 6000 students
- about 500 staff

9 D2 schools below Canal Street on east side of Manhattan

>about 8000 students

> about 700 staff

**Total**

1200 staff

14, 000 students

**8:46 AM** - AA flight # 11 hits north tower

Economics & Leadership shelter in place

High schools 1<sup>st</sup> period

Elementary schools - students still arriving

**9:03 AM** - UA Flight # 175 hits south tower

Economics & Leadership evacuate to Battery Park

All other WTC schools in their school buildings

**9:59 AM** - south tower collapses

Economics & Leadership caught in dust cloud

All other WTC schools not fully aware of south tower collapse

**10:15 AM** - PS & IS 89M are evacuating heading north

Stuyvesant begins to evacuate

PS 150M begins to evacuate

**10:23 AM** - PS234M begins to evacuate

**10:29** North tower collapses

Stuyvesant group and PS/IS 89M about 4 blocks north

PS 234M in middle of evacuation

**EXHIBIT B**

**Workers' Compensation Committee Report and  
Recommendations to the September 11<sup>th</sup> Worker  
Protection Task Force.**

## TABLE OF CONTENTS

<b>I.</b>	<b>EXECUTIVE SUMMARY</b>	<b>1</b>
<b>II.</b>	<b>WORKERS' COMPENSATION COMMITTEE</b>	<b>5</b>
<b>III.</b>	<b>9/11 AND THE WORKERS' COMPENSATION SYSTEM</b>	<b>7</b>
<b>IV.</b>	<b>POST-9/11 WORKERS' COMPENSATION REFORMS</b>	<b>10</b>
<b>V.</b>	<b>WTC-RELATED HEALTH PROBLEMS</b>	<b>14</b>
<b>VI.</b>	<b>COMMITTEE PROCEEDINGS</b>	<b>15</b>
1.	District Council 37	15
2.	New York City Law Department	17
<b>VII.</b>	<b>FINDINGS</b>	<b>18</b>
1.	High Rates of Litigation	18
2.	Commonly Litigated Issues	20
3.	Long Duration to Resolve Cases	22
4.	Many Claims Are Not Pursued	23
5.	Outcomes of Pursued Claims	26
6.	Outcomes: Controverted v. Uncontroverted Claims	28
7.	Outcomes: Appealed v. Not Appealed Claim	30
8.	Outcomes: Represented v. Unrepresented Claimants	32
<b>VIII.</b>	<b>COMMITTEE RECOMMENDATIONS</b>	<b>35</b>
1.	Notify NPFME and FTP Claimants	35
2.	Eliminate "Latent" from Definition of Qualifying Condition	35
3.	Further Monitoring of Causal Relationship Issue	37
4.	Reduce Inappropriate Controversion	39

## TABLES

1.	World Trade Center Workers' Compensation Claims	9
2.	WTC Claims by Assembled Time Period	10
3.	WTC Claims by Assembled Time Period: Rescue & Recovery Workers	10
4.	Litigation of WTC Rescue & Recovery Claims	19
5.	Controversion of WTC Rescue & Recovery Claims assembled after 8/14/07	20
6.	Time to Establish Claim	22
7.	Time to Resolve All Appeals	23
8.	Outcomes of WTC Rescue and Recovery Claims	24
9.	Outcomes of Pursued WTC Rescue and Recovery Claims	27
10.	Details of Disallowed WTC Rescue and Recovery Claims	28
11.	Outcomes: Controverted vs. Uncontroverted	29
12.	Outcomes of Pursued Claims: Controverted vs. Uncontroverted	30
13.	Outcomes: Appealed vs. Not Appealed Claims	31
14.	Outcomes of Pursued Claims: Appealed vs. Not Appealed Claims	32
15.	Outcomes: Represented v. Not Represented Claimants	33
16.	Outcomes of Pursued Claims: Represented v. Not Represented Claimants	34

## I. Executive Summary

Thousands of workers were killed or injured as a result of the terrorist attacks of September 11, 2001. Tens of thousands of workers participated in the subsequent rescue, recovery and clean-up (RRCU) operations. Many of the RRCU workers were injured or became ill as a result of exposure to the toxic dust. To date, more than 12,000 workers have filed workers' compensation claims in New York as a result of the 9/11 attacks, nearly 5,000 of which were filed by workers involved in RRCU efforts.

The September 11<sup>th</sup> Worker Protection Task Force ("Task Force") established the Workers' Compensation Committee ("Committee") to study 9/11-related workers' compensation claims, particularly those involving RRCU workers, and to recommend changes to New York's workers' compensation system. The Committee met ten times between April 2008 and January 2009, and reviewed extensive data and claim files from the Workers' Compensation Board ("Board").

Significant changes to New York's workers' compensation system have addressed selected 9/11-specific concerns. The most significant change was the passage of and subsequent revisions to Article 8-A of the New York State Workers' Compensation Law (WCL), which creates more lenient notice and claim filing deadlines for RRCU workers who register with the Board. To qualify for Article 8-A, one must have participated in RRCU operations in specific locations between 9/11/01 and 9/12/02, and have developed a latent condition as a result of such participation. Recent legislation amended the Workers' Compensation Law to expand and clarify application of Article 8-A, and to extend the registration deadline to September 11, 2010.<sup>1</sup>

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<sup>1</sup> Registration is not equivalent to filing a claim. To register, a RRCU worker submits a form WTC-12 which details his or her RRCU participation by employer, date and location. WCL § 162.

Based on its review of Board data, decisions, and claim files, the Committee makes the following findings about 9/11-related workers' compensation claims:

- Workers continue to file new 9/11-related claims, primarily RRCU claims.
  - Between August 16, 2006 and May 1, 2008, 1,380 individuals filed new 9/11-related claims (1,176 of which were RRCU claims).
  - Tens of thousands of workers have registered their participation in RRCU operations (by filing a WTC-12 with the Board), but have not yet filed a claim.
- There is a high rate of litigation among RRCU claims.
  - 53% of RRCU claims were controverted (compared with 16% of non-9/11 claims).
  - 7% of RRCU claims were appealed (compared with 5% of non-9/11 claims).
- Litigated RRCU claims take significantly longer to establish.
  - Controverted RRCU claims took four times as long to establish as not controverted RRCU claims (458 days v. 109 days).
  - Appeals added a median of 86 days to the resolution of RRCU claims.
- RRCU claims, considered as a whole, have fared worse than traditional claims.
  - RRCU claims are significantly less likely to be established than non-9/11 claims (25.5% v. 71.2%).
  - RRCU claims are significantly more likely to be closed for no prima facie medical evidence (NPFME) or failure to prosecute (FTP) than non-9/11 claims (48.1% v. 13.7%).

- The subset of RRCU pursued claims<sup>2</sup> fare considerably better than overall RRCU claims.
  - More than 60% of all claims pursued at the Board and more than 80% of NYC agency pursued claims are established.
- There has been extensive litigation over the statute of limitations, particularly the question of whether an RRCU claimant's condition is "latent," which is required to qualify for Article 8-A.
- There is little difference in outcome between controverted and non-controverted claims.
  - Among RRCU claims as a whole, there is little difference in the rates of establishment (30.1% v. 25.8%), denial (1.9% v. 2.5%) and claims not pursued (50.6% v. 57.6%) between controverted and non-controverted claims.
  - Among pursued RRCU claims, controverted and non-controverted claims have similar rates of establishment (60.8% v. 60.9%) and denial (5.8% v. 3.7%). Controverted claims are much more likely to be pending or in appeal (9.8% v. 19.0%).
- RRCU claimants who were represented by an attorney were significantly more likely to have their claims established and less likely to have them closed as NPFME or FTP than unrepresented claimants.
- 71% of RRCU claimants pursued at the Board were represented by attorneys.

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<sup>2</sup> In order to understand what happens to claims that are actually pursued at the Board, rather than claims that were filed protectively before the worker became ill, were not pursued, or were handled by an alternate forum, the Committee examined a subgroup of RRCU claims that excludes claims that were closed for FTP or NPFME or resolved through alternate dispute resolution (ADR). This subgroup is referred to as "pursued claims."

The Committee makes the following recommendations to the Task Force:

1. The Board should contact in writing claimants whose cases have been closed due to NPFME or FTP. The Board should a) notify claimants that they can submit new medical information and reopen their claims, b) advise them that they may want to consult an attorney or attend the publicly-funded 9/11 medical clinics, and c) inquire about why they did not submit medical information to the Board and other barriers they may have experienced.
2. The Legislature should revise the definition of “qualifying condition” in Article 8-A by substituting a specified list of qualifying conditions for the term “latent condition.”
3. The Committee does not recommend establishing a presumption of causal relationship for RRCU workers at this time. However, the Committee recommends continued monitoring of the issue and a further report to the Task Force based on additional Board data and the results of the Board’s communication with claimants who did not pursue their claims (see Recommendation 1).
4. Carriers and self-insured employers should avoid unnecessarily controverting RRCU claims. The Board should consider approaches that would penalize or otherwise deter the controversion or appeal of claims without good reason.

## II. Workers' Compensation Committee

In 2005, the New York State legislature passed the September 11<sup>th</sup> Worker Protection Act.<sup>3</sup> The law amended the New York Retirement and Social Security Law and the New York City Administrative Code to provide that public employees injured or made ill as a result of the September 11<sup>th</sup> RRCU efforts are presumptively eligible for disability benefits. It also created the Task Force, which consists of 19 members, including six appointed by the governor, three by the temporary president of the Senate, three by the speaker of the Assembly, the state and city comptrollers, the mayor of New York, and the heads of the state's Health, Budget, Labor, and Civil Service agencies.

The Task Force was created in recognition of the ongoing health issues facing public employees who participated in the RRCU efforts of the World Trade Center site and related areas.<sup>4</sup> The Task Force is charged with monitoring the health condition of 9/11 rescue, recovery, and clean-up workers, and investigating and making recommendations regarding changes to the disability laws.

The Task Force released an interim report in March 2008. The Task Force recommended seven changes, all but one of which principally affected the state disability system rather than the state workers' compensation system.

The Task Force also voted on February 28, 2008, to establish a Workers' Compensation Committee. The Task Force's resolution framed the following questions to be answered by the Committee:

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<sup>3</sup> Laws of 2005, Chapter 104, Part B, as amended Laws of 2005, Chapter 93, section 14.

<sup>4</sup> Laws of 2005, Chapter 104, Part B, § 2.

Should WTC-related workers' compensation claims have the benefit of a statutory presumption, or are other remedies possible? Although the World Trade Center disability law provides presumptive eligibility for benefits if the member meets the various requirements (time at site, geographical boundaries, etc) and if the member suffers from one or more of an enumerated list of injuries and illnesses, the Workers' Compensation Law includes no such presumptions. As a result, workers who pursue workers' compensation claims may often face extended delays and controversy while litigating the issue of whether their illness or injury is "causally related" to their WTC exposure. Meanwhile, those with identical exposure and illnesses who are eligible for pensions face no such obstacles.

The Task Force will appoint a committee of experts to evaluate the severity of the problem regarding the functioning of the workers' compensation system for public employees who allege WTC-related injury. The workers' compensation committee will be expected to obtain and evaluate specific data including but not limited to the numbers of workers for whom WTC-related claims have been made, the general nature of those claims, the percentage that have been resolved (for each category of illness), the percentage that have been controverted, the percentage that are under appeal, the percentage that are still pending, and the duration of time required for these processes. The workers' compensation committee will report findings and conclusions and make recommendations to the Task Force regarding potential solutions to any problems identified.

The Committee's members are:

- Mark Humowiecki, Esq., N.Y. Workers' Compensation Board
- Steven Markowitz, M.D., Queens College, City University of New York
- James Melius, M.D., Administrator, N.Y. Laborers' Health & Safety Fund
- Robert Sammons, N.Y.S. Insurance Fund
- Dominick Tuminaro, Esq., Attorney

Tom Wegener, director of MIS/Research for the Workers' Compensation Board, served as a vital resource to the Committee. He attended the vast majority of Committee meetings and provided extensive data in response to numerous requests from the members. The Committee also gratefully acknowledges the assistance of George Stolis, Robert Stevens, Mihir Vasavada, and Travis Masick of the Workers' Compensation Board's MIS/Research Division.

### **III. 9/11 and the Workers' Compensation System**

The terrorist attacks of September 11, 2001, were an unprecedented event in American history. Two thousand seven hundred fifty two (2,752) people perished as a direct result of the terrorist attacks in lower Manhattan.<sup>5</sup> The impact of 9/11, including the collapse of the two World Trade Center towers and other buildings in the area, reached well beyond those killed or injured that day. Hundreds of thousands of people who lived or worked in lower Manhattan were exposed to dangerous toxins on 9/11 and in subsequent days as fires burned at Ground Zero. In addition, more than 60,000 people participated in the RRCU efforts that occurred over the subsequent months. Relative to the general population, both groups experienced higher rates of injury and disease, including psychological, respiratory, and gastro-esophageal illnesses, in the subsequent months and years.

Workers' compensation is a social insurance program that has provided benefits, both financial and medical, to many of those affected by 9/11. New York first established its workers' compensation system in 1910, though the New York Court of Appeals declared it unconstitutional on March 24, 1911. The next day, 146 people, mostly women, perished in the infamous Triangle Shirtwaist Factory fire, considered the largest workplace disaster before 9/11. The Legislature subsequently passed a constitutional amendment, paving the way for the passage of a workers' compensation law in 1914 that withstood constitutional challenge. The workers' compensation system, which replaced the traditional tort system as a means of compensating injured workers, is often referred to as the Great Compromise. Employers agreed to pay for medical care and lost wages regardless of fault in exchange for injured workers agreeing to give up the right to sue.

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<sup>5</sup> Office of Chief Medical Examiner, New York City, Jan. 23, 2009.

Not everyone directly affected by 9/11 is eligible for benefits through New York workers' compensation. First, certain groups of employees are not covered by workers' compensation. Uniformed members of the New York City police, fire, and sanitation departments receive line-of-duty (LOD) benefits under the public retirement system instead. Second, federal workers are covered by a separate federal workers' compensation system. Finally, workers' compensation benefits are available only to workers injured "out of and in the course of employment." Residents of lower Manhattan who were not working at the time of the attacks and others who were not engaged in work activities at the time of their injury or exposure are not covered by workers' compensation.

As of May 1, 2008, 12,234 individuals filed 9/11-related claims with the Board<sup>6</sup> (Table 1). Of those, 4,984 (41%) were filed by individuals involved in RRCU efforts (Table 1). Nearly two-thirds of all 9/11-related claims were filed in the first two years after the event, but workers continue to file claims (Table 2). Nearly 1,400 new claims have been filed since August 2006 when Article 8-A was passed, which expanded the timeframe in which to file claims. Of those recently filed claims, 85% were RRCU workers (Table 3). Tens of thousands have registered with the Board by filing WTC-12 forms that state their participation in the RRCU operations but have not yet filed claims.<sup>7</sup>

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<sup>6</sup> The Board's Operations division 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 of 9/11 or the subsequent RRCU efforts. Claims involving those who participated in RRCU efforts are classified as RRCU claims, a subset of total 9/11-related claims. In connection with the Committee's work, the Board reviewed and updated all 9/11-related and RRCU claims through the cut-off date of May 1, 2008. The Board believes that its designations of 9/11-related and RRCU claims are accurate, though there are some claims that are difficult to classify due to lack of information.

<sup>7</sup> The Board has received 32,613 separate registration forms from individuals who have not yet filed claims for compensation. It is expected that some of these forms are duplicates. Therefore, the exact number of unduplicated individuals who have registered with the Board is unknown.

The City of New York was the single employer with the greatest number of RRCU claims filed against it.<sup>8</sup> Eight percent of all RRCU claims were filed against New York City's Police, Fire, or Sanitation Departments,<sup>9</sup> and six percent were against all other NYC agencies<sup>10</sup> (Table 1). Another 22% of RRCU claims were against other public agencies, among which the the Port Authority of NY/NJ had the most claims.<sup>11</sup> The remaining claims were against private employers.

**Table 1. World Trade Center Workers' Compensation Claims<sup>1</sup>**

Employer Group	Rescue & Recovery <sup>2</sup>	Percent of Total Rescue & Recovery	Other WTC	Total Claims	Percent Rescue & Recovery
Police, Fire, and Sanitation	385	7.7%	288	673	57.2%
NYC Agencies	289	5.8%	142	431	67.1%
Other Public Agencies	1,107	22.2%	764	1,871	59.2%
Private Sector	3,203	64.2%	6,056	9,259	34.6%
Total	4,984	100%	7,250	12,234	40.7%

1 - Assembled claims as of May 1, 2008 (does not include individuals who have registered with the Board by filing a WTC-12 but have not yet filed a claim with the Board.)

2 - Classified as Rescue, Recovery, and Clean Up Workers

<sup>8</sup> The Board has nine separate primary insurer ID codes that are used to identify claims against various agencies and subdivisions within the City of New York that are handled by the New York City Law Department's Workers' Compensation division. One of those codes is for the Police, Fire and Sanitation departments. The Committee has listed the Police, Fire and Sanitation departments separately because the data suggest that claims from those departments had different experiences and outcomes.

<sup>9</sup> Only non-uniformed members of the Police, Fire and Sanitation departments, including EMS workers, are eligible for New York workers' compensation.

<sup>10</sup> NYC agencies includes the departments of Health and Education, the Law Department, the Health and Hospitals Corporation, the Board of Higher Education, community colleges, and all city agencies other than Police, Fire, and Sanitation.

<sup>11</sup> Other public agencies include Port Authority of New York and New Jersey, New York City Housing Authority, New York City Transit Authority, the Triborough Bridge and Tunnel Authority, and various town, village, and county governments.

**Table 2. WTC Claims by Assembled Time Period**

Assembled Time Period	Police, Fire, and Sanitation		New York City Agencies		Other Public Agencies		Private Sector		Total	
	Claims	Pct	Claims	Pct	Claims	Pct	Claims	Pct	Claims	Pct
9/11/01 to 8/13/03	350	52%	148	34.3%	783	41.8%	6,298	68%	7,579	62%
8/14/03 to 8/13/06	183	27.2%	193	44.8%	982	52.5%	1,917	20.7%	3,275	26.8%
8/14/06 to 8/13/07	91	13.5%	67	15.5%	72	3.8%	668	7.2%	898	7.3%
8/14/07 to 5/1/08	49	7.3%	23	5.3%	34	1.8%	376	4.1%	482	3.9%
Total	673	100%	431	100%	1,871	100%	9,259	100%	12,234	100%

**Table 3. WTC Claims by Assembled Time Period: Rescue, Recovery & Clean-up Workers**

Assembled Time Period	Police, Fire, and Sanitation		New York City Agencies		Other Public Agencies		Private Sector		Total	
	Claims	Pct	Claims	Pct	Claims	Pct	Claims	Pct	Claims	Pct
9/11/01 to 8/13/03	143	37.1%	70	24.2%	365	33%	916	28.6%	1,494	30%
8/14/03 to 8/13/06	124	32.2%	142	49.1%	657	59.3%	1,391	43.4%	2,314	46.4%
8/14/06 to 8/13/07	76	19.7%	58	20.1%	55	5%	580	18.1%	769	15.4%
8/14/07 to 5/1/08	42	10.9%	19	6.6%	30	2.7%	316	9.9%	407	8.2%
Total	385	100%	289	100%	1,107	100%	3,203	100%	4,984	100%

## IV. Post-9/11 Workers' Compensation Reforms

The Legislature and three governors have previously modified the Workers' Compensation Law (WCL) to address issues unique to the 9/11-related claims. This is hardly surprising since the attacks represent the single largest workplace disaster in U.S. history. As a

basis for workers' compensation claims, it is unique and full of complications. Moreover, the heroic efforts of those who responded to the disaster by participating in the RRCU efforts create a social and moral imperative to fairly and adequately address the medical and financial consequences of their service.

In the immediate aftermath of 9/11, Governor Pataki suspended the requirement that an injured employee provide notice within 30 days of the accident.<sup>12</sup> The Board suspended its requirement that a death certificate be provided in a 9/11-related death benefit claim. For the first time, the Legislature extended death benefits to domestic partners, but only for those who perished in the 9/11 attacks.<sup>13</sup>

The unique nature of the 9/11 events and the progression of related illnesses, particularly for those exposed to toxic materials in connection with the RRCU efforts, challenged standard workers' compensation rules. Generally speaking, there are two types of workers' compensation claims – accidents and occupational diseases. Accidents typically occur as a result of a discrete event on a particular date and the injured worker has 30 days from that date to give notice to his or her employer and two years from that date to file a claim with the Board.<sup>14</sup> Occupational diseases develop over time as a result of prolonged exposure arising from certain types of hazardous employment.<sup>15</sup> As a result, the time periods for notifying one's employer and filing an occupational disease claim are relaxed and are measured from the worker's date of disablement rather than a date of accident.<sup>16</sup> Date of disablement can be any of several dates,

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<sup>12</sup> Executive Order 113.35 (2001).

<sup>13</sup> Chapter 467, § 1 of Laws of 2002 (adding § 4 to the N.Y. Workers' Compensation Law).

<sup>14</sup> N.Y. Workers' Compensation Law (WCL) §§ 18; 28.

<sup>15</sup> WCL § 3 contains an extensive list of occupational diseases and their corresponding hazardous exposure.

<sup>16</sup> In an occupational disease claim, the worker must give written notice within two years of the date of disablement (WCL § 45). The worker must file the claim with the Board within two years of the date of disablement and the date the worker knew or should have known that the disease is or was due to the nature of the employment (WCL § 28).

including the date one first receives a particular diagnosis, the date one becomes aware that the diagnosis is related to one's employment, or the date that one first misses work.

Following 9/11, the Board was constrained to treat all 9/11-related claims as accidents with the corresponding two year statute of limitations.<sup>17</sup> As a result, workers who grew ill over time from exposure to contaminants faced challenges if they did not submit their claim within two years from 9/11 or their last date of exposure.

To address the problem of workers who developed chronic illnesses more than two years after the exposure, the Legislature adopted Article 8-A in 2006.<sup>18</sup> Article 8-A applies a hybrid approach to RRCU exposure claims. It incorporates occupational disease-like notice and filing requirements for those involved in 9/11-related RRCU efforts who developed a "latent" disease or condition as a result of their exposure, allowing two years from the date of disablement.<sup>19</sup> To qualify for Article 8-A, one must have performed RRCU work at the World Trade Center site<sup>20</sup> between September 11, 2001 and September 12, 2002, and must register with the Board by filing a form setting forth information regarding one's participation in the RRCU efforts (WTC-12 Form) before August 14, 2007.<sup>21</sup> Those whose claims were disallowed previously were entitled to reopen them under the statute.

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<sup>17</sup> To make an occupational disease claim, one must show that the exposure or repetitive movement is a distinctive feature of the job. WCL § 39. Thus, although exposure-related diseases are commonly litigated as occupational disease claims, most RRCU workers were not in jobs for which exposure to toxic contaminants is a distinctive feature.

<sup>18</sup> Chapter 446, § 1 of Laws of 2006.

<sup>19</sup> WCL §§ 163; 164.

<sup>20</sup> The World Trade Center site is defined as anywhere below a line starting from the Hudson River and Canal Street; east on Canal Street to Pike Street; south on Pike Street to the East River; and extending to the lower tip of Manhattan, from WCL § 162(2). One can also qualify for Article 8-A if one worked at the Fresh Kills Landfill, the New York city morgue or the temporary morgues on the west side, or on the barges between the west side of Manhattan and Fresh Kills, in WCL § 162(1).

<sup>21</sup> WCL § 162.

In 2007, the Legislature extended the deadline for filing a WTC-12 form with the Board by one year, to August 14, 2008. It extended the deadline again in August 2008 – the current registration deadline is September 11, 2010.

The August 2008 legislation also broadened the coverage of Article 8-A. It filled a previously unforeseen gap of RRCU workers not covered by 8-A, consisting of injured workers who became disabled after September 2003 (when the two-year statute of limitations for accidents had run) but before August 2004 (more than two years before the adoption of Article 8-A), who could not have timely filed or reopened a claim (because none was ever filed) as a result of 8-A. To avoid any further unforeseen gaps in coverage, the legislation eliminates the statute of limitations and notice requirements for 8-A claims in which the date of disablement is between September 11, 2003 and September 11, 2008, provided that such claims are filed by September 11, 2010.<sup>22</sup> The statute also codifies the common law rule that the Board must choose a date of disablement that is most beneficial to the claimant.<sup>23</sup>

In addition to the 9/11-specific changes, the entire workers' compensation system has undergone significant transformation as a result of a broad-reaching reform law signed on March 13, 2007. The reform changed many aspects of the system. Most relevant to the issues of 9/11-related claims, the Board established new Streamlined Adjudication procedures to resolve disputed (or “controverted”) claims within 90 days. Even before the Board adopted the new Streamlined Adjudication procedures in September 2008, the Board substantially reduced the time to resolve controverted claims.<sup>24</sup> The new procedures are also designed to discourage the filing of so-called “protective” C-7s (Notice of Controversy). Since the institution of the new

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<sup>22</sup> WCL § 168.

<sup>23</sup> WCL § 164.

<sup>24</sup> In the period from January 1, 2008 to June 1, 2008, the Board resolved 88% of controverted claims within 90 days. Press Release of Chair Zachary Weiss (June 5, 2008) (available at <http://www.wcb.state.ny.us/content/main/PressRe/2008/SpeedClaimOp.jsp>)

claims assembly procedures, there has been a 56% decline in C-7 (Notice of Controversy) filings across the system.<sup>25</sup> The Board has also significantly reduced the time required to resolve administrative appeals since 2008.<sup>26</sup>

## V. WTC-Related Health Problems

The Task Force has reviewed the latest scientific evidence on the physical and mental health conditions that are experienced as a result of exposure to WTC dust (Appendix B of the March 2008 report). These conditions include upper and lower respiratory diseases, gastroesophageal reflux, post traumatic stress disorder, and other mental health conditions. While all of these conditions may occur due to other causes, there is ample scientific evidence that all are occurring at a much higher rate in RRCU workers. Other medical problems also appear to be related to WTC exposures (e.g., sarcoidosis), and much remains to be learned about the full health consequences of these exposures.

WTC-related health conditions vary in their clinical expression and frequently overlap, causing some delay or evolution in their diagnosis in a given individual. Often, the onset of symptoms is gradual or intermittent. In some cases, the onset of serious or persistent health problems may be delayed for years. In others, the person may experience acute symptoms or health problems that may initially respond to treatment and then become gradually more severe

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<sup>25</sup> For the period from October to December 2008, an average of 933 claims per month had new C-7s filed. For the period from January 2008 to September 2008, an average of 2139 claims per month had new C-7s filed. It is possible that a portion of this decline is due to the change in assembly rules and therefore may disappear over time. The new rules require the claimant to submit a medical report before the carrier's deadline to controvert the claim begins. Time will tell, but the January 2009 figures were the lowest (850 new C-7 filings) of the post-reform months.

<sup>26</sup> Between March 2008 and December 2008, the Board reduced the inventory of pending appeals from by 24% (from 4,743 to 3,620). From March 2008 to February 2009, the Board reduced the number of administrative appeals that were more than six months old from 22% to 9% of the inventory. Joint Report to the Governor from the Superintendent of Insurance and the Chair, Workers' Compensation Board, Summarizing and Benchmarking Workers' Compensation Data and Examining Progress on Prior Recommendations for Improvements in Data Collection, 20-21 (March 2009) available at <http://www.wcb.state.ny.us/content/main/TheBoard/2009DataCollectionReport.pdf>.

over time. This diverse pattern of symptoms and illness may be difficult to reconcile with the deadlines required in filing a workers' compensation claim.

It is also important to note that our knowledge of WTC exposures and disease patterns occurring among RRCU workers has developed gradually over only the last several years. In the first few years after September 11, 2001, the medical community and the WTC workers had limited knowledge of the frequency and persistence of health consequences of WTC exposures to workers. Even if the acute health condition appeared to be related to WTC exposures, the treating physician was not able to predict whether and for how long chronic WTC-related health conditions would arise and continue.

## **VI. Committee Proceedings**

The Committee met ten times over seven months. Representatives of District Council 37, AFSCME, AFL ("DC 37") and the City of New York's (NYC) Law Department, Workers' Compensation Division, both Task Force members, attended some of the Committee's meetings. Pico Ben-Amotz, Esq., Deputy Commissioner, N.Y.S. Department of Labor, attended the majority of the Committee's meetings on behalf of the Task Force.

### **1. District Council 37**

At the outset of the Committee's proceedings, Robert Grey, Esq. and Lee Clarke, on behalf of DC 37, presented a report based on published 9/11-related Board appeals. The report stated that 9/11 claims in general, and those against NYC in particular, are characterized by high rates of litigation and long delays in processing and adjudication. It posited that injured workers who pursued their claims generally prevailed in disputed cases, but needlessly suffered delays as

a result of the decision to dispute the claim. DC 37 noted three legal areas around which there is significant dispute and for which they recommended clarification.

### Statute of Limitations and Article 8-A

DC 37 noted a high incidence of litigation over the proper date of disablement and whether the claim was timely filed. The cases cited by DC 37 were decided under the Article 8-A before the August 2008 legislation, which addressed most of DC 37's concerns.<sup>27</sup>

### Use of "Latent" to Define "Qualifying Condition" Under Article 8-A

In order to qualify for the extended filing timeframes of 8-A, one must have a qualifying condition. The current definition of qualifying condition is "any latent disease or condition resulting from a hazardous exposure during participation in World Trade Center rescue, recovery or clean-up operations."<sup>28</sup> DC 37 argued that carriers were challenging whether a condition was latent any time the claimant had experienced any symptoms near the time of exposure.

### Causal Relationship

As a basic requirement of any workers' compensation claim, the injured worker must prove a causal relationship between the workplace accident or exposure and the injury or illness experienced. The unique nature of the World Trade Center exposure and the commonality of

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<sup>27</sup> Despite the recent amendments to Article 8-A to eliminate the statute of limitations as a barrier to RRCU claims with a date of disablement between September 11, 2003 and September 11, 2008, there is anecdotal evidence that carriers continue to litigate these issues months after the change. The Board, however, has clarified recently that § 164 suspended the notice and statute of limitation requirements for a significant group of RRCU workers. *See, e.g., In re NYC Dept. of Corrections*, WCB No. 00637440 (March 9, 2009). The Committee also heard concerns that litigation will continue over date of disablement because of the possibility that a WCLJ would select a date of disablement prior to September 11, 2003 or after September 11, 2008, in which case the statute of limitations and notice defenses would be available.

<sup>28</sup> WCL § 161.

many of the illnesses suffered by RRCU workers complicate the issue of causation. The medical community continues to study the frequency of World Trade Center-related diseases and is only beginning to produce statistically reliable epidemiological data.<sup>29</sup>

As noted above, the Legislature established a presumption of causality for RRCU workers who are covered by the state disability system. To qualify for the presumption, one must be diagnosed with one of an enumerated list of World Trade Center-related conditions, meet certain minimum exposure requirements and have not had a pre-existing history of the relevant disease.<sup>30</sup> DC 37 advocates establishing a comparable presumption under the Workers' Compensation Law.<sup>31</sup>

## **2. New York City Law Department.**

Mindy Roller, deputy director of the New York City Law Department's Workers' Compensation Division, testified on behalf of New York City. She denied that there were significant problems with 9/11-related claims generally and those involving New York City in particular. She asserted that the bulk of 9/11-related claims have been resolved and very few new claims are being filed. She also argued that the majority of cases that they controverted were never established, and therefore New York City was justified in its decision to fight the claim. She denied any need for a presumption of causal relationship.

The Committee set out to investigate the claims made by both DC 37 and New York City. In the course of the investigation, the data provided by the Board prompted additional avenues of inquiry. The Committee reviewed a significant amount of data and samples of claims to develop the following findings and recommendations.

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<sup>29</sup> See Part III, *supra*.

<sup>30</sup> See, e.g. RSSL Sections 63, 363, 507, 507-b, 556, 558, 605, 605-a, 605-b, 607-c.

<sup>31</sup> Senator Lanza has introduced such a bill in the current legislative session. S.B. 508 (text available at <http://public.leginfo.state.ny.us/menuf.cgi>). Similar bills have been introduced in prior sessions.

## **VII. Findings**

The Committee focused primarily on RRCU claims because they represent the vast majority of recent and future claims. The scientific data suggests that RRCU workers will continue to experience various health conditions as a result of their WTC dust exposure. Meanwhile, Article 8-A enables only RRCU workers to file such claims years after their exposure. The Committee examined any differences in how New York City and other self-insured employers and carriers defended RRCU claims.

### **1. High Rates of Litigation**

The Committee finds strong evidence to support DC 37's assertion that RRCU claims are frequently litigated. More than half of RRCU claims were controverted (Table 4). This is more than three times the typical rate of controverted cases of 16%.<sup>32</sup> Moreover, despite the changes to reduce obstacles for RRCU workers, the rate of controversion for claims filed between August 14, 2007 and May 1, 2008, was as high as previous periods and higher for certain carriers/self-insured employers (Table 5).

The rate of administrative appeal was also higher than normal. Approximately 7% of RRCU claims had at least one appeal from a WCLJ decision to a panel of three Board commissioners.<sup>33</sup> This is 40% higher than the average rate of appeal in the system.<sup>34</sup> The rate of

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<sup>32</sup> Between 2001-2007, 1,065,241 claims were assembled. As of January 2009, 170,050 of these claims (or 16%) had a pre-hearing conference to examine a controverted issue. Historically, the rate of controversion varies with the body part involved in the claim, and occupational disease claims are controverted more often. For example, based on claims data from 1995-96, claims involving the respiratory, circulatory, or nervous systems were much more likely to have a Notice of Controversy filed than claims involving the foot, ankle, or finger. Workers' Compensation Board, *WOMEN AND WORKERS' COMPENSATION IN NEW YORK STATE*, 71 (April 1997).

<sup>33</sup> Each party has the right to appeal the award or decision of a WCLJ to a panel of three commissioners of the Workers' Compensation Board ("Board panel"). If dissatisfied with the decision of the Board panel, the party may appeal to the full Board of commissioners, and to the Appellate Division, Third Judicial Department (WCL § 23).

<sup>34</sup> From 2001 through 2005, the Workers' Compensation Board assembled 785,882 claims. Of these, 38,057 claims (5%) have had at least one appeal.

appeal in claims that are pursued at the Board (see note 1 above) is more than 15% (327/2,084).  
(Table 13, p.30).

New York City agencies had the second highest rate of controversy and the highest rate of appeal amongst the four categories of employers. Its rate of controversy among claims filed since August 2007 (63%) was higher than previous periods and was significantly higher than those of other groups of employers, especially the other public employers (Table 5). New York City Police, Fire and Sanitation ranked lower both in terms of rate of controversy and appeals.

**Table 4. Litigation of WTC Rescue, Recovery & Clean-up Claims**

Litigation	Police, Fire, and Sanitation		New York City Agencies		Other Public Agencies		Private Sector		Total	
	Claims	Pct	Claims	Pct	Claims	Pct	Claims	Pct	Claims	Pct
No Hearings	146	37.9%	72	24.9%	654	59.1%	937	29.3%	1,809	36.3%
One or More Hearings	101	26.2%	64	22.1%	73	6.6%	276	8.6%	514	10.3%
Controverted & Appealed	10	2.6%	23	8.0%	15	1.4%	249	7.8%	297	6.0%
Controverted Only	119	30.9%	122	42.2%	361	32.6%	1,719	53.7%	2,321	46.6%
Appealed Only	9	2.3%	8	2.8%	4	0.4%	22	0.7%	43	0.9%
Total	385	100%	289	100%	1,107	100%	3,203	100%	4,984	100%

**Table 5. Controversion of WTC Rescue & Recovery Claims Assembled after August 14, 2007**

Employer Group	Rescue, Recovery, & Clean-up: Total	Rescue, Recovery, & Clean-up: Controverted	Percent Controverted
Police, Fire, and Sanitation	42	14	33.3%
NYC Agencies	19	12	63.2%
Other Public Agencies	30	9	30.0%
Private Sector	316	152	48.1%
Total	407	187	45.9%

## 2. Commonly Litigated Issues

Statute of limitations was one of the most commonly litigated issues for RRCU claims.<sup>35</sup> Prior to the passage of Article 8-A, litigation focused on when the statute of limitations should begin to run, i.e. whether to treat 9/11-related claims as occupational disease or accident claims. Since Article 8-A resolved that issue, much of the litigation focuses on whether one qualifies for the expanded statute of limitations under Article 8-A and what is the appropriate date of disablement.

One frequently litigated aspect of Article 8-A eligibility is whether the claimed condition is “latent.” Employers/carriers frequently argue that any history of symptoms at the time of the exposure or shortly thereafter makes the condition apparent, and therefore not latent. For instance, a carrier commonly challenges whether a RRCU worker who experienced a case of acute rhinitis while working on the pile at Ground Zero but several years later developed chronic

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<sup>35</sup> The Board data does not readily capture the nature of the defenses raised by the carrier or the issues actually litigated before the WCLJ. Historically, carriers have included every possible defense on the C-7 form, whether or not they intend to actually pursue the defense in litigation. Thus, the Committee looked at Board appeal decisions, where there is a much fuller discussion of the issues raised by the parties. The Committee’s conclusions regarding litigated issues are based on a manual review of 40 Board panel decisions by Mark Humowiecki and a statistical presentation by DC 37 based on 55 Board panel cases.

rhinitis has a “latent” condition because symptoms had occurred previously and therefore were not latent. The absence of a definition of “latent” in Article 8-A further complicates the matter.

Although the injured worker often prevails on the latency issue, the doctors on the Committee expressed concern about the analysis of latency in Board decisions.<sup>36</sup> They note that the term latent does not accurately describe the conditions with which Article 8-A is concerned. “Latent” typically refers in medicine to a period of dormancy, such as occurs with TB and herpes, when the symptoms are inactive between disease episodes. Article 8-A is concerned with diseases that have a period of variable progression from the time of exposure to the appearance of a fully-expressed disease, which are normally treated as occupational diseases as opposed to traumatic injuries characteristic of industrial accidents. In many instances, it simply is not clear to the treating physicians, much less the claimant, whether an acute illness will later become chronic. The fact that someone might receive a diagnosis and treatment for an acute respiratory or gastro-esophageal condition at the time of work should not disqualify her from receiving benefits if she does not file a claim until that condition becomes chronic.

A significant number of claims involving private employers were controverted because the Board notified more than one possible carrier who might be responsible.<sup>37</sup> There was rarely a question of the appropriate carrier/employer for public employees because most public

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<sup>36</sup> See e.g. *NYC Dept. of Corrections*, 2008 NY Wrk. Comp. 637440; 2008 NY Wrk. Comp. LEXIS 7966 (August 4, 2008); *NYC Dept. of Transp.*, 2008 NY Wrk. Comp. 447056; 2008 NY Wrk. Comp. LEXIS 3578 (April 23, 2008).

<sup>37</sup> The problem of multiple possible carriers arises if an employee was employed in RRCU work by more than one company, the employer had more than one workers' compensation carrier at different points in time, or there is a question as to whether 8-A applies. “For the purpose of determining which carrier has insurance coverage of the claim [under Article 8-A], the date of accident shall be considered the last day of such participation” (WCL § 166). In a normal occupational disease claim (e.g. respiratory conditions for asbestos handler), see e.g., *Safeway Environmental Corp.*, 2007 NY Wrk. Comp. 333236, 2007 NY Wrk. Comp. LEXIS 10414 (November 28, 2007), the last employer for whom the employee performed work of a dangerous nature is liable, though there is the possibility of apportionment amongst multiple employers (WCL § 44).

employers are self-insured and most public employees did not change employers while working in RRCU efforts.

### 3. Long Duration to Resolve Cases

The high rates of litigation impose significant costs on the system and those seeking benefits. Controverted RRCU claims require four times as much time to establish as non-controverted claims and typically took more than 15 months (Table 6). An appeal to a Board panel can add three months, on average, to the time required to resolve the claim (Table 7). The injured worker does not receive medical benefits or indemnity payments until the claim is established. Thus, the carrier's decision to controvert a claim may result in an ill RRCU worker enduring fifteen months without income and uncertain access to much-needed medical care.

**Table 6. Time to Establish Claim<sup>38</sup>**

Controverted Type	Rescue, Recovery, & Clean-up		Other WTC		Total Established	
	Claims	Days	Claims	Days	Claims	Days
Controverted	788	458	537	252	1,325	364
Not Controverted	481	109	3,810	133	4,291	131
Total	1,269	301	4,347	141	5,616	154

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<sup>38</sup> The chart measures the duration from claim indexing to establishment. Some claims may have been in an inactive status (including NPFME or FTP) during which the Board was awaiting additional information or action from the parties prior to establishment.

**Table 7. Time to Resolve Board Appeals**

Board Appeals Processing Period	Rescue, Recovery & Clean-up		Other WTC		Total Appealed	
	Claims	Pct	Claims	Pct	Claims	Pct
0 to 60 Days	98	28.8%	151	29.1%	249	29%
61 to 120 Days	130	38.2%	195	37.6%	325	37.8%
121 and over Days	112	32.9%	173	33.3%	285	33.2%
Total	340	100.0%	519	100.0%	859	100.0%
Median # of Days	86		86		86	

#### **4. Many Claims Are Not Pursued.**

The Committee examined the outcome of RRCU claims on a snapshot basis as of September 11, 2008. One-quarter of the RRCU claims filed had been established, and another 5.2% remained pending (Table 8). 48.1% were not pursued (either closed for no prima facie medical evidence (NPFME) or failure to prosecute (FTP)). This compares unfavorably with non-9/11-related claims filed with the Board. More than 70% of non-9/11-related claims filed in 2002 were established, while fewer than 14% were not pursued.<sup>39</sup> The outcome categories are somewhat fluid, however, as a claim may move between categories as it progresses. For example, an NPFME claim could become pending, established or disallowed once the claimant offers medical evidence and reopens the claim.

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<sup>39</sup> The Workers' Compensation Board assembled 170,683 claims that were not 9/11 related in 2002. Of these claims, 121,595 (or 71.2%) were established as of May 2008. Also, 23,398 (or 13.7%) were classified as having no prima facie medical evidence or the claimant failed to prosecute the claim.

**Table 8. Outcomes of WTC Rescue, Recovery and Clean-up Claims**

Outcome Categories	Police, Fire, and Sanitation		New York City Agencies		Other Public Agencies		Private Sector		Total	
	Claims	Pct	Claims	Pct	Claims	Pct	Claims	Pct	Claims	Pct
In Appeals	3	0.8%	4	1.4%	4	0.4%	53	1.7%	64	1.3%
ADR Process <sup>1</sup>	0	0.0%	0	0.0%	0	0.0%	500	15.6%	500	10.0%
Established	105	27.3%	93	32.2%	278	25.1%	793	24.8%	1,269	25.5%
Pending	13	3.4%	5	1.7%	10	0.9%	231	7.2%	259	5.2%
Disallowed Causal <sup>2</sup>	1	0.3%	1	0.3%	0	0.0%	2	0.1%	4	0.1%
Disallowed Other <sup>3</sup>	13	3.4%	4	1.4%	35	3.2%	38	1.2%	90	1.8%
NPFME & FTP <sup>4</sup>	29	7.5%	36	12.5%	85	7.7%	378	11.8%	528	10.6%
NPFME Only	167	43.4%	120	41.5%	639	57.7%	585	18.3%	1,511	30.3%
FTP (not NPFME)	27	7.0%	17	5.9%	35	3.2%	281	8.8%	360	7.2%
Other or Unknown <sup>5</sup>	27	7.0%	9	3.1%	21	1.9%	342	10.7%	399	8.0%
<b>Total</b>	<b>385</b>	<b>100%</b>	<b>289</b>	<b>100%</b>	<b>1,107</b>	<b>100%</b>	<b>3,203</b>	<b>100%</b>	<b>4,984</b>	<b>100%</b>

1. Alternative Dispute Resolution (ADR) process
2. Disallowed - causal relationship not established
3. Disallowed because of timing, work history, jurisdiction, or some other issue
4. NPFME - No prima facie medical evidence. FTP - Failure to prosecute or follow up on claim
5. Includes C8 Issues, S32 Discussions, or unable to classify outcome

The high rate of claims for which there was NPFME and/or FTP is striking. The Committee discussed various explanations for the high rate of non-pursued claims.

One possibility is that many RRCU workers filed protective claims in case they later became ill, even though they were not experiencing any symptoms at the time. In the aftermath of 9/11, there was confusion about what would be covered by workers' compensation and the Board made outreach efforts to encourage those affected to file claims. If the claimant has an exposure but has not yet developed an illness, he or she will not be able to establish PFME and may also fail to show up at hearings to pursue the claim.

A second possibility is that many who became ill as a result of their RRCU efforts did not know how to pursue their workers' compensation claim. Many were treated by their regular primary care physicians who, in contrast to occupational medicine physicians and orthopedists, are less familiar or hesitant to interact with the workers' compensation system. As a result, these doctors may be more likely to bill traditional health insurance for care instead of submitting medical records to carriers and the Board. Similarly, workers may have received treatment through the federally funded 9/11 medical programs. If the worker did not miss time from work, he or she may have little incentive to pursue the workers' compensation claim because his or her medical care is being paid already.

A third possibility is that the Board rigorously applied the prima facie medical evidence standard to deny claims where the doctor did not clearly state a causal relationship between the exposure and the illness.

The evidence suggests that the third explanation is unlikely to account for the bulk of NPFME claims. 85% of the NPFME claims had no medical documents of any kind in the Board file.<sup>40</sup> The remaining 15% had more varied explanations for being PFME. Based on a manual review of 50 NPFME claims with at least one medical document in the file, six were no longer properly characterized as NPFME because, in the previous month, they had been established (3), were pending in hearings (2), or were a duplicate claim (1).<sup>41</sup> Fifteen had medical documents sufficient to establish PFME but had been overlooked by the Board. In most of those cases, the Board received the medical evidence after the Board had closed the claim for NPFME. The

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<sup>40</sup> 530 of 3,645 9/11-related NPFME claims had at least one medical document in the file. Of those, 36 had a report that was received on or after the date the claim was closed as NPFME.

<sup>41</sup> The Committee reviewed a selection of 50 NPFME claims with at least one medical document. The term "medical document" is defined broadly as any of 34 different types of documents, including attending doctor's reports (C-4, C-4/C48, EC-4), medical narrative reports, physical therapist's reports (OT/PT3, OT/PT-4), HCFA-1450, HCFA-1500, Independent Medical Examination reports (IME, IME-3, IME-4, IME-5), Impartial Specialist's reports (IS-418, IS49), Functional Capacity Evaluation reports (FCE, FCE-4), and other reports/ documents reflecting medical treatment, evaluation, or payment.

Board reopened all 15 claims and moved them through the normal processes and is making changes to ensure that, in the future, new medical evidence received by the Board is reviewed in a timely manner. Only three other claims had medical reports that could possibly be considered PFME, but were disallowed by a judge at a hearing.

Unfortunately, there is insufficient evidence at this point to determine whether the first two explanations or another one account for the very high rate of non-pursued claims. The Committee believes this is an area in need of further research.

## **5. Outcome of Pursued Claims**

The high percentage of claims that are not pursued skews the outcome data. To understand how claimants fare when they pursue their claim at the Board, the Committee analyzed a subset of RRCU claims that excludes claims that were NPFME, FTP, or subject to alternate dispute resolution (ADR). The outcomes of such “pursued claims” are presented in Table 9.

More than 2,000 RRCU claims, or approximately 42% of all RRCU claims, have been pursued at the Board (Table 9). Of those, more than 60% have been established, with another 15.5% pending or in appeals (Table 9). More than 80% of pursued claims against NYC Agencies have been established, while fewer than 5% have been disallowed. Fewer than 5% of all pursued RRCU claims were disallowed on the merits of the claim. Strikingly, only one claim against NYC agencies and one claim against Police, Fire, and Sanitation were disallowed on grounds of causality (Table 9).

**Table 9. Outcomes of Pursued WTC Rescue and Recovery Claims (Excluding ADR<sup>1</sup>, NPFME, & FTP<sup>2</sup>)**

Outcome Categories	Police, Fire, and Sanitation		New York City Agencies		Other Public Agencies		Private Sector		Total	
	Claims	Pct	Claims	Pct	Claims	Pct	Claims	Pct	Claims	Pct
In Appeals	3	1.9%	4	3.4%	4	1.1%	53	3.6%	64	3.1%
Established	105	64.8%	93	80.2%	278	79.9%	793	54.4%	1,269	60.9%
Pending	13	8.0%	5	4.3%	10	2.9%	231	15.8%	259	12.4%
Disallowed Causal <sup>3</sup>	1	0.6%	1	0.9%	0	0.0%	2	0.1%	4	0.2%
Disallowed Other <sup>4</sup>	13	8.0%	4	3.4%	35	10.1%	38	2.6%	90	4.3%
Other or Unknown <sup>5</sup>	27	16.7%	9	7.8%	21	6.0%	342	23.4%	399	19.1%
Total	162	100%	116	100%	348	100%	1,459	100%	2,085	100%

1. Alternative Dispute Resolution (ADR) process
2. NPFME - no prima facie medical evidence. FTP - Failure to prosecute or follow up on claim
3. Disallowed - causal relationship not established
4. Disallowed because of timing, work history, jurisdiction, or some other issue
5. Includes C8 Issues, S32 Discussions, or unable to classify outcome

Nearly 60% of the disallowed RRCU claims were improperly filed with the New York Workers' Compensation Board rather than another jurisdiction (Table 10).<sup>42</sup> The next highest category of disallowed claims was untimely filed claims (21.3% for RRCU, 14.3 for all 9/11 claims). There were only four claims denied for lack of causal relationship, representing less than .1% of all RRCU claims, and .2% of pursued RRCU claims.

<sup>42</sup> This category includes those who should have filed in another state (e.g. New Jersey) or another system (e.g. federal system, state disability line of duty).

**Table 10. Details of Disallowed Rescue and Recovery Claims**

Denied Categories	RRCU		All Others		Total	
	Claims	Pct	Claims	Pct	Claims	Pct
Causal Relationship	4	4.3%	5	1.9%	9	2.5%
NYS WCB Jurisdiction	55	58.5%	108	41.1%	163	45.7%
Timely Filing	20	21.3%	31	11.8%	51	14.3%
Course of Employment	4	4.3%	68	25.9%	72	20.2%
Employer / Employee Relationship	3	3.2%	37	14.1%	40	11.2%
Other/Unknown	8	8.5%	14	5.3%	22	6.2%
Total	94	100%	263	100%	357	100%

## 6. Outcomes – Controverted v. Not Controverted Claims

One would expect a significant difference in outcomes between controverted and non-controverted claims.<sup>43</sup> Surprisingly, the outcomes are fairly similar. RRCU controverted claims were established more often than not controverted claims (30.1% v. 25.8%) (Table 11). Many more of the not controverted claims are closed for NPFME only, but the percentage of claims not pursued is comparable for controverted and not controverted claims (50.6% v. 57.6%). The rate of denial is somewhat lower in controverted cases than not controverted cases (1.9% v. 2.5%), but the difference is modest at best.

<sup>43</sup> A controverted claim is one that is challenged by the payor (insurer or self-insured employer), usually by the filing of a form C-7 Notice that Right to Compensation is Controverted. Some C-7 filings can be addressed administratively without a formal hearing, such as correcting the payor identified in the claim or questions of Board jurisdiction. Those C-7 filings that are corrected administratively are not considered “controverted” for purposes of the Board’s data. If a C-7 filing cannot be addressed administratively, the claim is typically scheduled for a pre-hearing conference, or on occasion, for a hearing directly. A claim is counted as a controverted claim either when a pre-hearing conference is held or when a C-7 with a qualifying medical is filed and the claim moved directly to a formal hearing.

**Table 11. Outcomes: Controverted vs. Not Controverted (Excludes ADR<sup>1</sup>)**

Outcome Categories	Controverted		Not Controverted		Total	
	Claims	Pct	Claims	Pct	Claims	Pct
In Appeals	63	2.4%	1	0.1%	64	1.4%
Established	788	30.1%	481	25.8%	1,269	28.3%
Pending	182	7.0%	77	4.1%	259	5.8%
Disallowed Causal <sup>2</sup>	4	0.2%	0	0.0%	4	0.1%
Disallowed Other <sup>3</sup>	44	1.7%	46	2.5%	90	2.0%
NPFME & FTP <sup>4</sup>	439	16.8%	89	4.8%	528	11.8%
NPFME Only	592	22.6%	919	49.2%	1,511	33.7%
FTP (not NPFME)	293	11.2%	67	3.6%	360	8.0%
Other or Unknown <sup>5</sup>	213	8.1%	186	10.0%	399	8.9%
<b>Total</b>	<b>2,618</b>	<b>100%</b>	<b>1,866</b>	<b>100%</b>	<b>4,484</b>	<b>100%</b>

1. Alternative Dispute Resolution (ADR) process
2. Disallowed - causal relationship not established
3. Disallowed because of timing, work history, jurisdiction, or some other issue
4. NPFME - no prima facie medical evidence. FTP - Failure to prosecute or follow up on claim
5. Includes C8 Issues, S32 Discussions, or unable to classify outcome

Excluding claims not pursued at the Board does not substantially change the relative outcomes between controverted and not controverted claims. Both groups have significantly higher rates of establishment – well above 50%. Not controverted claims are just as likely to be established as controverted ones (60.8% v. 60.9%), but are much less likely to be pending or in appeals than controverted claims (9.8% v. 19.0%) (Table 12). Perhaps most surprising, not controverted claims are disallowed at a somewhat higher rate than controverted claims (5.8% v. 3.7%).<sup>44</sup>

<sup>44</sup> The vast majority of disallowed, non-controverted claims were disallowed due to improper jurisdiction. Though a C-7 may have been filed in many of these claims, the Board does not consider them controverted for data purposes if they were decided by administrative decision without a pre-hearing conference or a hearing. *See supra* note 43.

It is noteworthy, however, that more than 62% of the claims pursued at the Board were controverted (1293 of 2085) (Table 12). In fact, the rate of controversion is higher among claims pursued at the Board than among all RRCU claims filed (Compare Table 12 to Table 4). Yet, the effectiveness of the controversion is questionable. Controverted claims are no more likely to be disallowed; in fact the opposite is true. Furthermore, controverted claims take much longer to decide and are much more likely to be in a state of active litigation than not controverted claims.

**Table 12. Outcomes of Pursued Claims: Controverted vs. Not Controverted (Excludes ADR<sup>1</sup>, NPFME, & FTP<sup>2</sup>)**

Outcome Categories	Controverted		Not Controverted		Total	
	Claims	Pct	Claims	Pct	Claims	Pct
In Appeals	63	4.9%	1	0.1%	64	3.1%
Established	788	60.9%	481	60.8%	1,269	60.9%
Pending	182	14.1%	77	9.7%	259	12.4%
Disallowed Causal <sup>3</sup>	4	0.3%	0	0.0%	4	0.2%
Disallowed Other <sup>4</sup>	44	3.4%	46	5.8%	90	4.3%
Other or Unknown <sup>5</sup>	213	16.5%	186	23.5%	399	19.1%
Total	1,294	100%	791	100%	2,085	100%

1. Alternative Dispute Resolution (ADR) process
2. NPFME - no prima facie medical evidence. FTP - Failure to prosecute or follow up on claim
3. Disallowed - causal relationship not established
4. Disallowed because of timing, work history, jurisdiction, or some other issue
5. Includes C8 Issues, S32 Discussions, or unable to classify outcome

## 7. Outcomes – Appealed<sup>45</sup> v. Not Appealed Claims

Claimants whose claims have been appealed fare much better than those whose claims are not appealed. More than three-quarters of appealed claims are established compared to only

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<sup>45</sup> Throughout the report, “appeal” is used to refer to claims that have been appealed from a Workers Compensation Law Judge to a panel of three Commissioners of the Workers’ Compensation Board. This is distinct from appeals from the Workers’ Compensation Board to the state Supreme Court Appellate Division.

one-fifth of non-appealed claims (Table 13). Not surprisingly, very few of the appealed claims were closed as NPFME or FTP. Cases that are appealed have generally made their way through the litigation process and been decided on the merits of fully developed information.

Interestingly, when non-pursued claims are eliminated, the rate of establishment is still significantly higher among appealed claims than non-appealed claims (82.3% v. 56.9%) (Table 14).

**Table 13. Outcomes: Appealed vs. Not Appealed Claims**

Outcome Categories	Appealed		Not Appealed		Total	
	Claims	Pct	Claims	Pct	Claims	Pct
In Appeals	9	2.6%	55	1.2%	64	1.3%
ADR Process <sup>1</sup>	0	0.0%	500	10.8%	500	10.0%
Established	269	79.1%	1,000	21.5%	1,269	25.5%
Pending	10	2.9%	249	5.4%	259	5.2%
Disallowed Causal <sup>2</sup>	4	1.2%	0	0.0%	4	0.1%
Disallowed Other <sup>3</sup>	19	5.6%	71	1.5%	90	1.8%
NPFME & FTP <sup>4</sup>	0	0.0%	528	11.4%	528	10.6%
NPFME Only	9	2.6%	1,502	32.3%	1,511	30.3%
FTP (not NPFME)	4	1.2%	356	7.7%	360	7.2%
Other or Unknown <sup>5</sup>	16	4.7%	383	8.2%	399	8.0%
Total	340	100%	4,644	100%	4,984	100%

1. Alternative Dispute Resolution (ADR) process
2. Disallowed - causal relationship not established
3. Disallowed because of timing, work history, jurisdiction, or some other issue
4. NPFME - no prima facie medical evidence. FTP - Failure to prosecute or follow up on claim
5. Includes C8 Issues, S32 Discussions, or unable to classify outcome

**Table 14. Outcomes of Pursued Claims: Appealed vs. Not Appealed (Excludes ADR<sup>1</sup>, NPFME, & FTP<sup>2</sup>)**

Outcome Categories	Appealed		Not Appealed		Total	
	Claims	Pct	Claims	Pct	Claims	Pct
In Appeals	9	2.8%	55	3.1%	64	3.1%
Established	269	82.3%	1,000	56.9%	1,269	60.9%
Pending	10	3.1%	249	14.2%	259	12.4%
Disallowed Causal <sup>3</sup>	4	1.2%	0	0.0%	4	0.2%
Disallowed Other <sup>4</sup>	19	5.8%	71	4.0%	90	4.3%
Other or Unknown <sup>5</sup>	16	4.9%	383	21.8%	399	19.1%
Total	327	100%	1,758	100%	2,085	100%

1. Alternative Dispute Resolution (ADR) process
2. NPFME - no prima facie medical evidence. FTP - Failure to prosecute or follow up on claim
3. Disallowed - causal relationship not established
4. Disallowed because of timing, work history, jurisdiction, or some other issue
5. Includes C8 Issues, S32 Discussions, or unable to classify outcome

## 8. Impact of Attorney Representation

Among RRCU claimants, 39% were represented by an attorney (Table 15). Claimants who were represented by an attorney had a much higher rate of establishment than unrepresented claimants (49.8% v. 9.6%). They also were less likely to have their claim closed for lack of medical evidence or failure to prosecute (24.1% v. 63.8%). Interestingly, the rate of denial is not significantly different between the two groups, though the rate was small (< 2%) in both groups.

It is important to note that claimants who have not lost time from work may have some difficulty obtaining legal representation because attorneys' fees earned by claimants' attorney are set by the Board and deducted from the indemnity benefits awarded to the claimant. Thus, in "medical-only" claims, the claimant does not receive direct financial payment and the attorney

cannot be awarded attorneys' fees.<sup>46</sup> In fact, it is illegal for the claimant's attorney to charge the claimant a fee that is not approved by the Board.

**Table 15. Outcomes: Represented v. Not Represented Claimants**

Outcome Categories	Attorney Represented		Not Represented		Total	
	Claims	Pct	Claims	Pct	Claims	Pct
In Appeals	63	3.2%	1	0.0%	64	1.3%
ADR Process <sup>1</sup>	6	0.3%	494	16.4%	500	10.0%
Established	979	49.8%	290	9.6%	1,269	25.5%
Pending	199	10.1%	60	2.0%	259	5.2%
Disallowed Causal <sup>2</sup>	4	0.2%	0	0.0%	4	0.1%
Disallowed Other <sup>3</sup>	33	1.7%	57	1.9%	90	1.8%
NPFME & FTP <sup>4</sup>	52	2.6%	476	15.8%	528	10.6%
NPFME Only	313	15.9%	1,198	39.7%	1,511	30.3%
FTP (not NPFME)	111	5.6%	249	8.3%	360	7.2%
Other or Unknown <sup>5</sup>	206	10.5%	193	6.4%	399	8.0%
Total	1,966	100%	3,018	100%	4,984	100%

1. Alternative Dispute Resolution (ADR) process
2. Disallowed - causal relationship not established
3. Disallowed because of timing, work history, jurisdiction, or some other issue
4. NPFME - no prima facie medical evidence. FTP - Failure to prosecute or follow up on claim
5. Includes C8 Issues, S32 Discussions, or unable to classify outcome

The outcomes change drastically, however, when one considers only claims pursued at the Board (Table 16). The group of unrepresented claimants who pursued their claims at the Board did less well than those with attorneys, but not as poorly as appears in Table 15. Represented claimants are more likely to have their claims established (66% v. 48.3%) and less likely to have them disallowed (2.5% v. 9.5%) (Table 16).

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<sup>46</sup> WCL § 24.

**Table 16. Outcomes of Pursued Claims: Represented vs. Not Represented Claimants (Excludes ADR<sup>1</sup>, NPFME, & FTP<sup>2</sup>)**

Outcome Categories	Attorney Represented		Not Represented		Total	
	Claims	Pct	Claims	Pct	Claims	Pct
In Appeals	63	4.2%	1	0.2%	64	3.1%
Established	979	66.0%	290	48.3%	1,269	60.9%
Pending	199	13.4%	60	10.0%	259	12.4%
Disallowed Causal <sup>3</sup>	4	0.3%	0	0.0%	4	0.2%
Disallowed Other <sup>4</sup>	33	2.2%	57	9.5%	90	4.3%
Other or Unknown <sup>5</sup>	206	13.9%	193	32.1%	399	19.1%
Total	1,484	100%	601	100%	2,085	100%

1. Alternative Dispute Resolution (ADR) process
2. NPFME - no prima facie medical evidence. FTP - Failure to prosecute or follow up on claim
3. Disallowed - causal relationship not established
4. Disallowed because of timing, work history, jurisdiction, or some other issue
5. Includes C8 Issues, S32 Discussions, or unable to classify outcome

The most striking fact, however, is that claimants who pursue their claims through the Board are much more likely to have attorneys –71% of pursued claims had attorneys (Table 16). This fact is open to interpretation. The implication could be that those who want to pursue their claims (or who have a valuable claim) are much more likely to hire an attorney (or be able to find an attorney willing to accept their case). Alternatively, one might conclude that those who do not have attorneys are less likely to make it through the system at the Board because unrepresented claimants lack the expertise of an attorney. This is closely related to the question of why there is such a high rate of NPFME and FTP among RRCU claimants and the answer will hopefully be found through additional research.

## **VIII. Committee Recommendations**

Based on these findings, the Committee unanimously makes the following recommendations to the Task Force with respect to the assigned questions regarding workers' compensation.<sup>47</sup>

### **1. Notify NPFME and FTP Claimants**

The Committee was troubled by the high rate of cases closed due to NPFME or FTP. The evidence available to the Committee is not sufficient to determine why so many claims were not pursued. The Committee recommends that the Board contact the more than 4,000 9/11 claimants (RRCU and non-RRCU) whose cases have been closed as NPFME or FTP, advise them of their right to file medical evidence and reopen their claims, and suggest that they may want to consult an attorney and/or attend the publicly funded 9/11 medical clinics. The Board should also request information from those claimants to help ascertain what barriers, if any, exist to pursuing claims in order to improve access to the workers' compensation system.

### **2. Eliminate "Latent" from Definition of Qualifying Condition**

The Legislature should modify the definition of "qualifying condition" in Article 8-A to eliminate its reliance on "latent" and replace it with a non-exhaustive list of qualifying conditions based on a similar list from the New York Retirement and Social Security Law.<sup>48</sup> The proposed definition of qualifying condition in Section 161(3) of the Workers' Compensation Law would read as follows:

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<sup>47</sup> It is important to note that although the scope of the Task Force is limited to public employees, New York Workers' Compensation Law does not generally distinguish between public and private employees. Since the 9/11-related RRCU efforts involved both public and private employees, any legislative changes to workers' compensation will impact both public and private employees equally.

<sup>48</sup> The list of qualifying conditions for state disability purposes is listed at Retirement and Social Security Law § 2(36)(c). The Committee recommends incorporating all but subsection (iv) which includes "diseases of the skin such as conjunctivitis, contact dermatitis or burns, either acute or chronic, caused by exposure or aggravated by exposure." These sorts of skin conditions do not take years to develop.

“Qualifying condition” means any of the following diseases or conditions resulting from a hazardous exposure during participation in World Trade Center rescue, recovery or cleanup operations:

(a) Diseases of the upper respiratory tract and mucosae, including conditions such as conjunctivitis, rhinitis, sinusitis, pharyngitis, laryngitis, vocal cord disease, upper airway hyper-reactivity and tracheo-bronchitis, or a combination of such conditions;

(b) Diseases of the lower respiratory tract, including but not limited to bronchitis, asthma, reactive airway dysfunction syndrome, and different types of pneumonitis, such as hypersensitivity, granulomatous, or eosinophilic;

(c) Diseases of the gastroesophageal tract, including esophagitis and reflux disease, either acute or chronic, caused by exposure or aggravated by exposure;

(d) Diseases of the psychological axis, including post-traumatic stress disorder, anxiety, depression, or any combination of such conditions; or

(e) New onset diseases resulting from exposure as such diseases occur in the future including cancer, chronic obstructive pulmonary disease, asbestos-related disease, heavy metal poisoning, musculoskeletal disease and chronic psychological disease.

The Legislature passed Article 8-A to eliminate obstacles to receiving workers' compensation benefits for RRCU workers by extending the deadlines for those suffering from diseases, such as the common World Trade Center-related psychiatric, respiratory and gastroesophageal diseases that would normally be treated as occupational diseases rather than accidents.<sup>49</sup> The legislative history notes that the Board traditionally has broad discretion to select a date of disablement so that such claims are covered and comply with statute of limitations. The normal progression of such diseases often involves some early symptoms experienced well before the disease fully manifests itself. Such early appearance of symptoms was not intended to bar application of 8-A and its more relaxed filing deadlines.

The legislative modifications that were adopted in August 2008 should go a long way to reducing litigation over statute of limitations defenses. With the recommended modification to Section 161, the application of Article 8-A should be clarified and the amount of litigation over 8-A, and correspondingly over the statute of limitations, substantially reduced.

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<sup>49</sup> See Sponsor Memo to Senate Bill 8348 (June 22, 2006), 2005 Legis. Bill Hist. NY S.B. 8348.

### **3. Further Monitoring of Causal Relationship Issue**

The Committee spent considerable time discussing whether a statutory presumption of causality, such as exists in the state disability system, is warranted. There were strong arguments on both sides, but ultimately the Committee declined to recommend creating such a presumption at this time. Rather, it recommends continued monitoring of the issue, particularly in light of the information received from claimants whose claims are currently closed due to NPFME or FTP in response to the Board's notice (Recommendation 1) and the impact of the suggested revision to the definition of qualifying condition (Recommendation 2).

Equity is the strongest argument in favor of establishing a presumption. The Committee is troubled by the fact that some workers who are covered by the state pension system have the benefit of a statutory presumption, whereas RRCU workers subject to workers' compensation who were doing similar work and may have endured equal or greater toxic exposure lack such presumption.

However, there is little evidence that the lack of a presumption is an obstacle to establishing claims for RRCU workers suffering from 9/11-related diseases. One tenth of one percent of RRCU claims were disallowed for lack of causal relationship. In reviewing a sample of appeals, none involved questions of causal relationship that would be resolved by a presumption. The Board and its WCLJs appear inclined to accept causality of common 9/11-related diseases where there was a history of exposure and no prior history of the condition.

DC 37 suggests that a presumption might indirectly reduce the number of claims that are closed for NPFME because it would make doctors more comfortable stating a causal relationship. The Committee, however, could not find evidence in support of this assertion. Furthermore, the Committee notes that the new Streamlined Adjudication regulations do not

require a statement of causal relationship to satisfy PFME.<sup>50</sup> In addition, if the Board adopts the Committee's recommendation to contact claimants whose cases are closed as NPFME or FTP, the Board should learn whether the lack of a presumption is an obstacle to establishing a valid claim. In such communication, the Board should also direct those claimants to the specialized 9/11 medical clinics whose medical staff are most qualified to state whether a disease is causally related to exposure as a result of one's RRCU efforts.

The Committee's doctors also noted that the scientific questions surrounding a presumption are complicated. The common respiratory and gastro-esophageal diseases associated with 9/11 exposure appear commonly in the absence of toxic exposures and have multi-factorial causation. Common triggers include smoking, allergies and environmental factors. The epidemiological data are sufficiently developed to draw only initial conclusions about the relationship between the extent of exposure to WTC dust (as defined by duration in some relevant time period and relevant location) and the likelihood of selected health conditions. Pre-existing conditions and the existence of significant non-WTC risk factors further complicate the issue of causal presumptions.

The Committee should remain in effect to monitor developments in RRCU claims. By the end of 2009, the Committee should meet again with the Board's MIS department to review updated data and develop additional measurements to determine what changes have occurred and the impact of any legislative changes. The Committee should also review the results of the Board's efforts to contact claimants whose cases were closed as NPFME or FTP, including any information provided by claimants regarding barriers to pursuing RRCU claims at the Board. In

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<sup>50</sup> "Prima Facie Medical Evidence means a medical report referencing an injury, which includes traumas and illnesses," from 12 NYCRR § 300.1(a)(9).

January 2010, the Committee should report to the Task Force any additional recommendations it has.

#### **4. Reduce Inappropriate Controversion and Appeals**

Carriers and self-insured employers are rarely successful in challenging causal relationship in 9/11 cases. In fact, more non-controverted claims are disallowed than controverted claims. Yet, the decision to controvert a claim adds an average of over seven months to the time required to establish the claim. An appeal adds another three months.

The Committee recommends that New York City and other self-insured employers and carriers review their internal practices and avoid inappropriate controversion of claims and appeals. While injured workers who pursue their claims ultimately prevail at a hearing at a high rate and on appeal at an even higher rate, the delay associated with litigation generates additional system costs and can create significant problems, financially and health-related, for the injured worker.

Self-policing by carriers and self-insured employers, however, may be inadequate to change such ingrained practices. Therefore, the Board should take an active role in deterring carriers and self-insured employers from needlessly controverting and/or appealing RRCU claims. The Board's recent reforms have achieved some initial success in reducing the rate of controversion and the time required to resolve controverted claims. The Board should continue in this vein, consider other ways of reducing the high rate of controversion among RRCU claims, and report on this effort to the task force.

The Board has considerable authority to penalize carriers and self-insured employers who controvert or appeal a claim without justification. Workers' Compensation Law § 25(2)(c) authorizes a \$300 penalty if objections "were interposed without just cause." In 2007, the Board

gained the power to impose the cost of the proceedings plus reasonable attorneys' fees against the attorney if the proceedings were "instituted or continued without reasonable ground." WCL § 114-a(3). The Board should consider utilizing these penalty provisions to discourage carriers and self-insured employers from controverting and appealing claims without good reason. At a minimum, this should discourage parties from taking unsupported positions in areas that the Legislature has acted to clarify, such as eligibility for Article 8-A and the recent suspension of the filing and notice deadlines for a significant group of 8-A claimants.