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**WORKERS' COMPENSATION BOARD**  
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August 30, 2024

Senator Michael Tipping, Chair  
Representative Amy Roeder, Chair  
Joint Standing Committee on Labor and Housing  
100 State House Station  
Augusta, ME 04333-0100

Re: Resolves 2023, c. 139

## **I. INTRODUCTION**

In its Second Regular Session, the 13<sup>th</sup> Legislature passed Resolves 2023, c. 139 (“LD 1896”) which instructed the Workers’ Compensation Board (the “Board”) to review and analyze information from payors of workers’ compensation benefits together with any other information that is relevant to benefits paid to claimants under 39-A MRSA § 212 (total disability), § 213 (partial disability) and § 215 (death benefits). The Resolve lists criteria the Board must consider when analyzing data for each claimant. Additionally, the Board must evaluate the accuracy of the claims data, study how benefit amounts compare to the current cost of living as determined by the United States Department of Labor, estimate the cost of updating the annual cost-of-living adjustment (“COLA”) provision in § 212, and estimate the cost that a COLA provision would have on benefits payable pursuant to §§ 213 and 215.

Starting with this report, the Board will be providing monthly updates about its work to this committee and will submit a final report no later than August 16, 2025.

## **II. BACKGROUND**

During the First Regular Session of the 131<sup>st</sup> Maine Legislature, Senator Tim Nangle introduced LD 1896, “An Act to Index Workers’ Compensation Benefits to the Rate of Inflation.” LD 1896 was introduced to address the effects of inflation on workers’ compensation benefits.

Inflation is a natural phenomenon that affects all aspects of our economy, including the cost of living for workers. As the prices of goods and services increase over time, the purchasing power of workers’ compensation benefits decreases. This silent shrinkage places an undue burden on injured workers, who

are often struggling to cope with everyday expenses as their earning capacity is compromised.

LD 1896 proposes a simple yet powerful solution: index workers compensation benefits to the Consumer Price Index (CPI), a measure compiled by the United States Department of Labor, Bureau of Labor Statistics. This ensures that the real value of these benefits stays constant, providing much-needed stability for our workers when they are most vulnerable.

*Testimony of Senator Timothy Nangle introducing LD 1896, “An Act to Index Workers’ Compensation Benefits to the Rate of Inflation,” May 11, 2023. (Available at: <https://legislature.maine.gov/billtracker/#Paper/1896?legislature=131>.)*

As originally drafted, LD 1896 required that “[c]ompensation under this Act must be annually increased to account for inflation by the amount of increase in the Consumer Price Index compiled by the United States Department of Labor, Bureau of Labor Statistics for the most recent 12-month period for which data are available.”

Testimony and discussion about LD 1896 raised questions about how the proposal would operate if enacted and pointed to the need for additional information in order to request an estimate of the potential costs of the bill. LD 1896 was carried over to the Second Regular Session. Between Sessions, the Board facilitated meetings among stakeholders to see if consensus could be reached on how to proceed with Senator Nangle’s bill.

During the first meeting, a more specific proposal was outlined and the group agreed to meet again after a cost estimate was provided. Two participants then indicated they would not be able to reach consensus. During the second stakeholder meeting, in an effort to start a conversation that might lead to meaningful discussions, Senator Nangle asked what it would take for insurance companies to agree to change the existing COLA. There was no reply. Nevertheless, the stakeholder group agree to meet one final time to see if consensus would be possible. It was not.

Several important issues were raised at the meetings. They include: The impact of inflation on workers’ compensation recipients; the scope of the cost-of-living adjustment enacted in 2019; the concept of benefit adequacy; the cost of inflation adjustments to the workers’ compensation system; the extent to which workers’ compensation costs are being shifted out of the workers’ compensation system; and, whether to expand the scope of the 2019 COLA.

On December 11, 2023, the Board submitted a report to this Committee detailing its efforts with respect to LD 1896. Work sessions during the Second Regular Session did not yield a compromise bill. There was, however, interest in better understanding the impact of a COLA and, accordingly, Resolves 2023, c. 139 was enacted.

### **III. COST-OF-LIVING-ADJUSTMENT**

Studying the cost of updating and expanding the existing COLA starts with understanding who does and who does not qualify for it under Title 39-A.

#### A. Eligibility

##### *i. Who is eligible for the current COLA?*

Employees receiving total incapacity benefits pursuant to § 212 may be eligible for a COLA if they were injured on or after January 1, 2020 and have received 260 weeks of incapacity benefits pursuant to § 212.

There are two ways an injured employee can demonstrate entitlement to benefits pursuant to § 212:

First, an employee who demonstrates a total physical incapacity, that is, the medically demonstrated lack of the physical ability to earn, can prove entitlement to "total" incapacity benefits pursuant to section 212 without a showing of any work search or other evidence that work is unavailable. *Morse [v. Fleet Fin.]*, 2001 ME 142, P8, 782 A.2d [769] at 772.

Second, in limited situations, an employee suffering only partial incapacity to earn may be entitled to "total" benefits pursuant to section 212 if the employee can establish both (1) the unavailability of work within the employee's local community, and (2) the physical inability to perform full-time work in the statewide labor market, regardless of availability. *Id.*; *Alexander [v. Portland Natural Gas]*, 2001 ME 129, P19, 778 A.2d [343] at 351.

*Monaghan v. Jordan's Meats*, 2007 ME 100 ¶¶ 11-12, 928 A.2d 786, 791.

The § 212 benefit payments do not have to occur in consecutive weeks, but they must be made pursuant to § 212. Weeks for which benefit payments are made pursuant to § 213, even if they are for 100% of the employee's workers' compensation benefit, do not count toward the 260-week threshold, nor do weeks for which no benefit is due. It is, therefore, necessary to track both the number of weeks paid and the section pursuant to which each weekly benefit payment was made.

The date of injury criteria is straightforward: Employees injured on and after January 1, 2020 are eligible for the COLA if the above criteria are satisfied. Employees injured prior to that date are not eligible for a COLA under Title 39-A.<sup>1</sup>

##### *ii. Who is not eligible for the current COLA?*

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<sup>1</sup> Employees receiving the maximum weekly benefit, currently 125% of the state average weekly wage, may have their weekly benefit amount adjusted in July based on changes to the state average weekly wage.

An employee can receive 100% of their benefit entitlement under the partial incapacity section of the Act.

[A] partially incapacitated employee may be entitled to “100% partial” incapacity benefits pursuant to section 213 based on the combination of a partially incapacitating work injury and the loss of employment opportunities that are attributable to that injury. *Morse*, 2001 ME 142, ¶ 6, 782 A.2d at 771. In order to obtain the 100% benefit, it must be established, pursuant to the “work search rule” that work is unavailable within the employee's local community as a result of the work injury.

*Monaghan v. Jordan's Meats*, 2007 ME 100 ¶ 13, 928 A.2d 786, 791.

These employees, even though they are receiving their full benefit amount, are not eligible for a COLA because they are being paid under § 213, the partial incapacity provision. Hence, a partially disabled worker who cannot find a job after a diligent search is entitled to 100% benefits but is not entitled to an inflation adjustment.

Employees with a partial incapacity who are working may be entitled to partial incapacity payments based on the difference between what they earned before the injury and what they are earning after the injury.

Partially incapacitated employees who do not look for work or who do not conduct a good faith work search may receive partial incapacity benefits based on the difference between what they earned before the injury and what they are able to earn after the injury.

In the event a work injury results in the employee’s death, benefits are paid to the deceased workers’ dependents pursuant to § 215. These payments are not eligible for a COLA.

### *iii. Conclusion*

In summary, the COLA provision in § 212 only applies to benefits paid pursuant to that section. Receipt of benefits pursuant to § 213 (partial incapacity) and § 215 (death benefits) are not subject to adjustments and do not count toward the 260-week COLA threshold. This is true even if the amount of the benefit being paid pursuant to § 213 or § 215 is the same as it would be if paid pursuant to § 212.

#### B. How many injured workers may be eligible?

During the stakeholder meetings, the Board attempted to gather information on how many individuals will potentially be eligible for a COLA when it is first available in 2025. The Board was also interested in learning how many injured workers, or dependents, are receiving 100% of their benefit entitlement pursuant to a section other than § 212.

The Board’s attempt to gather this information in 2023 for the stakeholder group was unsuccessful. The Board initially asked for information from injury years 2018, 2019 and 2020.

Some entities provided data. Others asked the Board to reconsider the scope of its request. The Board did so and, in order to facilitate receipt of information, limited the request to injury year 2020. Several more entities then complied. Entities that accounted for the majority of injury year 2020 claims data still did not provide any data. The Board was informed that the data could not be produced in time for the stakeholder group's consideration.

This information will help the Board study the COLA and make an informed decision about whether the current COLA is adequate. Accordingly, in May, the Board again requested information. To facilitate compliance while still generating meaningful information, the Board again narrowed its request to injury year 2018 and only for cases where benefits were paid for more than 12 months.

The Board recently received information pursuant to this request and is analyzing what was received. Even though the information was just received, one problem has already come to light. Specifically, insurers and self-insurers are not tracking whether benefits are being paid pursuant to § 212 or § 213 in a manner that is readily identifiable.

#### IV. FRAMEWORK

While the COLA is a specific issue, it, like other issues that arise, should be viewed through a framework that balances the underlying goals of the workers' compensation system. The primary goals are adequate benefits for injured workers at a reasonable cost to employers.

In addition to benefit adequacy and costs to employers, the Board will also consider: what role, if any, interstate comparisons play in the overall analysis of the workers' compensation system; how effective the system is with respect to returning injured employees to their jobs; the effectiveness of employment rehabilitation; the extent to which costs are shifted out of the workers' compensation system and onto other payors (e.g. the injured worker, the employer, health insurance companies and other private and public benefit programs); and, how to measure the impact of proposals that have a retroactive impact.

#### IV. CONCLUSION

The Board has begun to study the impact that COLAs would have on Maine's Workers' Compensation system. Data has been requested, is being collected, and will be analyzed to better understand the role and impact of COLAs in the system.

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