



WORKERS' COMPENSATION COMMENTARY



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WHAT IS, AND WHAT MAY BE: WORKERS' COMP LEGISLATION 2001-2002

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A new year opens before us and it is time to take stock of a few changes that have been instituted by those all-knowing and all-seeing folks up in Sacramento, changes that will affect various aspects of our field this year. We will then review the proposed legislation most favored by the Governor, now that he is faced with a potentially embarrassing and destabilizing pair of initiatives that are threatened to be placed on the ballot by his erstwhile supporters.

The first change that we will address, implemented in the waning days of last year, was the enactment of Labor Code §3209.10. That section permits physician's assistants and nurse practitioners to actually treat a work related injury under the review or supervision of a treating doctor. This is a continuation of a trend that has been largely encouraged by health maintenance organizations in order to lower the cost of providing medical assistance. The theory is that if the cost gets low enough they can't afford to provide medical assistance to their policyholders so therefore they simply won't. Under the umbrella of "medical treatment" will be treatment administered by a person who need not have much in the way of formal education but who will be shown a treatment technique and be trained in its administration.

What "review or supervision" means is very little in practical terms. These individuals now can authorize up to three days off and co-sign the doctor's first report along with the physician. While these individuals can't determine that an individual is temporarily disabled, I am sure that those exceedingly popular medical treatment mills will continue to employ at least a handful of actual physician who will then jog up and

down the corridor visiting the various treatment rooms and making the necessary pronouncements. We can only hope that the official medical fee schedule recognizes a difference in the price of such treatment.

There was actually a section enacted that made a lot of sense this year, the addition of Labor Code §3212.11. That section provides a rebuttable presumption that skin cancer detected during the service of a public agency lifeguard or for a given period following employment arose out of and occurred in the course of employment. If any presumption of injury is going to be provided, that certainly makes some common sense. The vast majority of other presumptions are based, in my opinion, not on scientific evidence but on raw political power. I have already discussed the Sam Browne belt back presumption in a previous issue.

Finally, of interest to our public agency clients, there was a modification to Labor Code §4850 that provides that, to the extent that Labor Code §4850 payments are utilized to cover periods of temporary disability, that period of time cannot be credited by the employer toward exhausting the 12 weeks of family medical leave act allowance. The FMLA period would therefore only begin to run after 4850 is exhausted and regular TD is being paid. That assumes that the city has adopted a policy that TD and FMLA run concurrently. (A policy we strongly urge all employers to adopt!). This will require a modification of the benefit programs within some public agencies.

Now, as to the proposed changes in the current workers' compensation law, first let us take a brief look at the political picture.

Gray Davis was elected governor with wildly

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enthusiastic support from unions, particularly the public employee unions, one of the strongest (and rapidly growing!) voting blocks in the state. He also was strongly backed by liberal legal interests including the applicants' attorneys who rose to the occasion en masse filing the prospective governor's coffers with contributions. This, of course, was done with the understanding that once he was in office, the days of the parsimonious Republican policy of holding the line on benefits would be swept aside. Instead, during his first term of office Governor Davis has vetoed a bill to increase benefits on two occasions leaving his formerly enthusiastic supporters seething.

In fact, one prominent group of state employee union members recently pledged a quarter of a million dollars to Governor Davis' probable opposition.

After the most recent veto, the applicants' attorneys and organized labor determined that they could put together an initiative to raise benefits that could be designed to draw public support. Two initiatives are now being "vetted" by the legislative analyst prior to being circulated for signatures. Both provide for a formula for the establishment of indemnity rates on a basis similar to the formula utilized in most of the states and by the federal government. The maximum indemnity is set at a percentage of a state or national average of compensation and is adjusted thereafter by means of a cost of living index factor. This would spell an end to the very unique California indemnity system that has been in existence for 85 years.

Well, this is an embarrassing development for the Governor particularly if these matters get on the ballot and organized labor is pushing them largely on the basis that they had to spend their money to launch these initiatives for the "working families" of this state because the Governor opposed increasing benefits for injured employees.

But for this effort on the part of the applicants' attorneys and their labor allies we rather doubt that Governor Davis would have been working on any initiative this year to increase benefits in the face of the recession. However,

he has no choice now and his allies in the legislature principally Senator Burton and Assembly member Calderon have proposed SB1156.

There are a number of changes that will directly affect the handling of workers' compensation cases if this bill is enacted with these features in it. I thought that it would be a good idea to outline just a few of the significant proposed changes.

- One proposal that has been advanced would be to authorize a represented employee to settle that individual's right to prospective vocational rehabilitation services by means of a Compromise & Release under certain conditions, eliminating the need for a *Thomas* finding as an exclusive means of settling that benefit.
- This bill resurrects the concept of an appointed court administrator who would essentially be charged with the responsibility of providing for more effective adjudication of claims at the WCAB.
- At the present time, an employer is prohibited from being provided with medical information including the diagnosis of an illness or residuals from an injury unless it affects the employers' premium. This legislation would permit information to be provided to the employer if such information will affect the employer's reserves as well as the premium.
- Currently, if an unrepresented employee has an evaluation by a state panel QME because of a dispute over the treating doctor's report or findings, no further medical report can later be obtained by that individual if they become represented by an attorney. This bill would change that and provide that even with that QME evaluation, the employee might still be able to obtain another evaluation after seeking representation.

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- This bill would eliminate the treating doctor's presumption unless an employee had pre-designated a treating physician before the industrial injury took place. That doctor's opinion would still be accorded the presumption of correctness.
- Well, every once in a while, the Solons of Sacramento come up with something that makes sense and with this point they have. This legislation provides that if drugs are prescribed they will be generic drugs where available. Presumably, if an individual wants brand names, they can pay the differential price. The bill also provides that the Administrative Director will have to, by July 1, 2003, develop an official pharmaceutical fee schedule. The Administrative Director also would develop an outpatient surgery facility fee schedule for services not performed under contract. That means that those series of three epidural injections that are now being given with bills ranging from \$21-30,000 for the series would be subject to a fee schedule. (Presumably somewhat lower.)
- Of course, one of the biggest features insofar as the proponents of the initiatives are concerned is the need for increased rates of temporary disability indemnity and permanent partial disability. This bill provides for an increase in benefits but not on the same basis as proposed in the initiatives. Under this scenario, the permanent disability weekly indemnity would rise to \$405 per week maximum and for temporary disability, the maximum would rise to two-thirds of \$976.50 per week. (Over \$650.00 per week.)
- With regard to death benefits, the existing law already provides that if a child is under the age of 18, they will continue to receive the dependency benefit until they reach the age of 18. Now, under this new bill, if passed into law, a child who is incapacitated physically or mentally from earning will continue to receive the benefit until the date of their death.

- The new legislation seeks to establish time frames during which lien claimants have to file liens against compensation otherwise those liens will be adversely affected.
- This bill also deletes the requirement for the arbitration of disputes that, under current law, require mandatory arbitration.

This, of course, is just a glimpse of the provisions and the details contained in the proposed legislation contained in 68 pages of single spaced type. The final bill may differ in many respects but, it appears quite certain that the threatened initiatives will force the passage of a bill this session. If any of our readers would like to review the proposed Senate bill in its current form, please contact this office by letter, telephone, fax or e-mail and we will be happy to furnish a copy.

The end of the treating doctor's presumption by and large will be very salutary particularly here in Southern California where, hopefully, the treatment mills will shrink to some extent. The increase in indemnity is going to enhance the value of each and every case requiring even more heightened scrutiny and attention to detail.

NEW ASSOCIATION

It is with great pleasure that we announce the association of the law office of John G. Newport with our firm. We have known John for many years and appreciate the fine reputation he has built in the workers' compensation community.

Mr. Newport's practice is centered in Long Beach and this now enhances our presence in that area.

This newsletter contains only personal opinions and suggestions by the writer which may be of general application in the subject area being discussed. This letter is not intended as specific legal advice as applied to any fact situation and it is recommended that if legal advice is desired concerning the application of any of the information contained herein to a particular factual situation that direct contact with an attorney be sought.