



WORKERS' COMPENSATION COMMENTARY



November—December 2003

Volume 13, Issue 6

WHAT WE TOLD THE GOVERNATOR

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[We were afforded a unique opportunity to offer some thoughts to the new administration about practical changes that could be made to the current workers' compensation system that would result in making it a more cost effective and efficient benefit delivery system. The following were the recommendations we developed.]

In the 1970s, the California Workers' Compensation system was regarded as a model benefit delivery system, well known and respected, not only nationally but internationally. Unfortunately, however, the role of the workers' compensation system as an important element in making California attractive to business was little understood and entirely underappreciated.

In the more than 30 years that have passed since I became a workers' compensation attorney, numerous "reforms" have been made within the workers' compensation system, most of the time by individuals who really didn't understand the dynamics of the system, strongly influenced by groups who were out to achieve their own objectives with no thought as to the elements of balance and common sense that had been built into the system.

Many of these "reforms" have rendered the system vulnerable to horrible abuse and, overall, have led to a perception in many quarters that our system is so flawed that the

only practical solution is to do away with it entirely and substitute an entirely different system.

We respectfully suggest that the California Workers' Compensation system could be adequately readjusted to largely restore its former stature as a model system with just a few well thought-out changes. We therefore, submit the following list of internal adjustments that could be made within the system to restore its efficiency and effectiveness and make it work for all parties including employers:

1. WORKERS' COMPENSATION PREMIUMS.

Until December 1, 1994, the Workers' Compensation Insurance Rating Bureau (WCIRB) reviewed the claims payouts and the relative payment of benefits, both medical and indemnity, for various industries, and set a minimum rate for workers' compensation premiums for employers who employed individuals in the various categories. Workers' compensation insurers were free to charge more in the way of premiums if they so desired, but could not charge less.

The mid 1990s, however, was a period during which forces in various economic areas touted the benefits of free markets and believed that if rates were allowed to "float", then market forces would force lower premiums for employers and greater

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economies within the insurance companies. It worked in connection with lowering workers' compensation insurance premiums.

In fact, a number of insurers literally cut their own throats, offering bargain basement premium rates to acquire a greater share of the market. They, of course, were not terribly worried at the time, because even though the chance of showing an underwriting profit entirely evaporated, the investment return in the rising markets more than made up for the lack of an underwriting profit. It was believed that the liabilities incurred by the insurers would be adequately covered by the increased coffers of the company, due to the rising market.

And so it was that during those fat years, not only were sufficient funds produced to pay the liability, but the earnings of the companies also went up.

Of course, markets do not always go up and, of course, do not always stay up. When, as was inevitable, the dot.com boom busted, the carriers found themselves with ever escalating liabilities incurred for indemnity and treatment, necessitating a rise in premiums.

In an era of tremendously explosive growth in medical costs, higher indemnity rates, and a Legislature seemingly dedicated to making it as easy as possible for claimants to obtain benefits, many, if not all carriers, began to experience serious financial problems. This resulted in a string of bankruptcies and financial reorganizations unprecedented in the entire history of the workers' compensation system since 1917.

The underfunded liabilities of these carriers then fell upon the claims payor of last resort, the California Insurance Guaranty Association

(CIGA). When that agency became overwhelmed with liabilities greater than its budget could handle, an infusion of tax dollars into the system was needed to keep benefits flowing to injured workers. The State Compensation Insurance Fund has written an increasingly large number of policies with the disappearance of private carriers, stretching the limits of that entity.

Hopefully, we learned from that lesson that workers' compensation insurance is not a commodity like an orange. It is not something that an employer can decide that they do not want to buy this year because it is more expensive than it was the year before. It is mandatory social insurance, not a free market commodity.

SOLUTION: RESTORE THE MINIMUM RATE.

Repeal the legislation permitting workers' compensation rates to "float" in the open market utilizing the WCIRB premium rate as "advisory," and reimpose the statutory obligation that workers' compensation insurers charge at least a minimum rate for workers' compensation, consistent with industry and loss experience as computed by the WCIRB.

2. MEDICAL CONTROL.

From the inception of the workers' compensation system up to January 1, 1975, employers had medical control throughout any case in which liability was accepted. If an employer denied liability for the injury, then employees could self procure medical treatment with a doctor of their own choosing on a lien basis. The claim would then be heard by the Workers' Compensation Appeals Board to determine whether or not liability should be imposed upon the employer.

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Employees had the ability to request a change of physicians on an informal basis with the adjuster handling the claim, or to formally petition for a change of treating physician, in which case the employer was obliged to furnish a panel of doctors to the employee from which they could make a selection.

In 1974, the Legislature enacted a "reform" that provided that the employers would have medical control only for a limited period of time, resulting in a current 30-day period of medical control. Thereafter, the employee has the power to select his or her own treating physician.

Now that sounds very egalitarian and fine, and seems to generally work in the field of health and accident insurance, but in workers' compensation, there are far too many potential abuses associated with this power.

In the first place, those unacquainted with workers' compensation had visions of an injured employee turning to his personal physician or a medical practitioner of known quality to acquire the very best in care and get back to work as rapidly as possible. That, of course, is the way it may have worked in a few cases; however, when it came to litigated cases, it rapidly became apparent that the choice of treating physicians was not being made by the injured worker, but by the injured worker's attorney.

The applicant is referred to liberal treating doctors (*and medical mills, in many circumstances*), resulting in tremendously excessive medical costs. Chiropractors joined the fold, employed by orthopedists who referred the patients to them for chiropractic manipulation and physical therapy extending for months, and in some cases, years. Outpatient surgery centers have flourished

with billings for epidural injections issuing for \$8,000.00 each in series of three. Enormous bills have been generated for transportation expenses, with the treating doctors prescribing the transportation as a medical necessity.

What the Legislature did not appreciate about the original system was that, while the employers maintained medical control, the employee had access to the Workers' Compensation Appeals Board with a liberal mandate and that the Board was likely to take an overly conservative treatment regimen to task in favor of the injured employee. There was a balance in that system.

This scenario contrasts vividly with the circumstances prevailing over the past 25 years, during which the employees have had medical treatment rendered by their lawyer-selected physicians, who share the same liberal attitude that the WCAB has toward the injured employee. This is a recipe for a system ripe for abuse, and has resulted in hundreds of legislative amendments trying to tweak the system in one fashion or another in order to avoid this abuse, while the balance has largely remained askew.

In the final analysis, an advocate physician will always have a tendency to over-treat and exaggerate findings. While an employer-selected doctor might, on the other hand, tend toward under-treatment, the WCAB will generally serve to equalize the relative balance by carefully scrutinizing the treatment.

**SOLUTION: RESTORE
MEDICAL CONTROL
TO EMPLOYERS**

Repeal those Labor Code Sections providing medical control to the injured worker with respect to admitted cases, and give the medical control over to the employer.

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maintain the right of an employee to petition for a change of treating doctor.

3. PENALTIES.

The workers' compensation system has always had, and needs, a device to penalize employers or insurers who do not carry out their statutory obligations to provide timely medical treatment and benefits to the injured employee. In the California system, however, the abuse of penalty provisions has created a cottage industry of applicant's attorneys who wait for an error on the part of the employer, then assert a penalty to enhance the employee's recovery (and, of course, collect a fee).

One of the reasons for this is that the penalties are structured in such a manner as to create a tremendous windfall in certain situations because they are measured as a percentage of the entire specie of benefit. The statutory penalty for delay or refusal to provide benefits is ten percent, but it is not ten percent of the sum delayed or denied; it is ten percent of the entire specie that benefit pertains to.

Let us take a circumstance where the employer delayed reimbursement of mileage to an employee for travel to and from medical treatment. Mileage has been construed to be part of the medical treatment specie. If, for instance, the sum to be reimbursed is in the amount of \$200.00 and a total of \$50,000.00 in medical treatment expenses had previously been incurred, the employer might face imposition of a \$5,000.00 penalty for the delay of that \$200.00 travel reimbursement. Not only that, but the penalty is prospective as well and therefore, that employee would receive ten percent of the value of all future medical services, even if they were always timely paid thereafter.

There is, of course, a need for a penalty provision. An employee should have a remedy if an employer unreasonably delays the furnishing of a benefit; however, as illustrated, under the current system, the amount of the penalty may reach absurd proportions. This does not serve anyone's interest in the long run.

SOLUTION: ELIMINATE EXCESSIVE PENALTIES.

Perhaps penalties should be capped. For instance, a 10 percent penalty up to a maximum of \$500.00 for the first time that there is a delay with respect to a particular claimant, or a requirement that the employer be notified of the delay, with a reasonable time provided for the employer to cure that defect and only pay a penalty based upon 10 percent of the delayed benefit.

4. REBUTTABLE PRESUMPTIONS.

There exist in the workers' compensation laws certain presumptions that particular diseases have arisen out of the employment if certain criteria are met.

There is a place for some rebuttable presumptions in the workers' compensation law. For example, let us consider a case involving a fire fighter developing a lung problem or cancer. The nature of the work performed by fire fighters leads them into contact with combustible chemicals and other items that cause them to be exposed to a higher percentage of carcinogens than the average citizen. They also carry very heavy weights, pull hoses, and perform other activities that quite often lead to intra abdominal pressure and occasionally cause hernias. These are all presumptions that make at least some medical sense.

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On the other hand, some recently enacted presumptions make little or no sense. For instance, police now share the cancer presumption. The exposure of police officers is negligible, compared with that of fire fighters, and yet, the Legislature has granted that presumption.

Additionally, the requirement that the police officer demonstrate that the carcinogen to which they were exposed causes the type of cancer that has manifested itself has been removed. Now, if the officer shows some exposure to a carcinogen (type unidentified and duration unstated), the employer can only rebut the presumption by demonstrating that the carcinogen identified does not cause the type of cancer affecting the officer. Thus, we see a legion of police officers with prostate cancer all linking it to their employment without medical proof.

Most recently, the police officers had enacted a presumption of a back injury if they were required to wear a police utility belt in the course of their employment. While there exists no serious scientific evidence that the wearing of a utility belt causes low back problems (*and indeed, the belt rests upon the hips, not the low back*), the employer must show that there is a non-industrial cause for that back problem in order to rebut it.

**SOLUTION: ELIMINATE
PRESUMPTIONS THAT
MAKE NO MEDICAL SENSE.**

Limit presumptions of industrial injury to those that have some scientific basis.

**5. TEMPORARY DISABILITY
FOR SAFETY OFFICERS.**

Under a number of different sections in the Labor Code (4800, 4850, et al.) the highway

patrol, municipal police officers, fire fighters, etc. receive the benefit of full pay in lieu of payment of temporary disability benefits for a period not exceeding one year.

The first of these provisions went into effect in 1937; however, in 1937 there was no withholding tax and therefore, an employee in those days received his or her gross paycheck. The check that individual took home when disabled, therefore, was exactly the same as the check received while on active duty. Now, because of withholding for Federal income tax, social security, payroll taxes, state and local levies, a police officer, while on active duty, is receiving net pay of perhaps two-thirds of his overall wage.

When that individual is out on temporary disability under one of the above-cited Labor Code sections, however, that individual receives his or her gross wage but it is not subject to taxes because it is a disability payment. Thus, that safety member receives a pay raise of 50 percent above their net wage to stay off work! There is no reason in equity or law that that should be the case.

**SOLUTION: ELIMINATE
PAYMENTS OF GROSS WAGES
IN FAVOR OF NET WAGES.**

Labor Code § 4816 governs the temporary disability payments for police officers associated with the state university system. That section provides for a payment to that officer of net wages so that individual neither receives a decrease or increase in their pay during the period of temporary disability.

While it does not provide an incentive to get off disability, it certainly does not, like the other sections, provide an incentive to stay on temporary disability and not return to active duty. Moreover, the liberal doctors are well

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aware of this provision and, quite frequently, an officer is kept on temporary disability until the expiration of the year, at which time they have miraculous recoveries and are able to return to work. It is proposed, therefore, that all safety members receive net wages while off on temporary disability.

6. APPORTIONMENT.

This is a case law principle that has been established in workers' compensation. It is based on the idea that an employer should not have to pay for disability that was not caused by the injury on the job and that an employee brought with him or her to the job. If, however, after an injury on the job, an employee is discovered to have a physical condition that would have caused disability under certain circumstances but had not made itself known prior to the industrial injury, the courts have ruled that the employer cannot use that evidence of an inability to compete in some aspect of the labor market to reduce their liability. That is called "apportionment to pathology".

SOLUTION: ESTABLISH A MEANS OF APPORTIONING TO PATHOLOGY WHEN APPROPRIATE.

Some statutory means should be adopted to allow employers to reduce their liability because of that pre-existent medical problem.

7. VOCATIONAL REHABILITATION.

Vocational rehabilitation was voluntary on the part of an employer from the inception of the system in 1917 up to 1975. In 1975, a mandatory vocational rehabilitation program was established which became so abused that 20 years later, a cap was placed on vocational

rehabilitation services at \$16,000.00.

Still, abuses occurred in the system, particularly if there was a dispute over entitlement to vocational rehabilitation, which resulted in the employee receiving a payment of temporary disability from the time that their condition became permanent and stationary, up until the dispute was resolved, even if resolved against them. Delays in the resolution of those issues has resulted in tens of thousands of dollars of liability being saddled on employers.

The latest wave of "reform" legislation has eliminated the vocational rehabilitation provisions and, instead, enacted a provision providing for issuance of a "voucher," with the total sum of that voucher being dependent upon the degree of disability ultimately found. The vouchers range in value from \$4,000.00 for a disability in the range of one to 15 percent up to a \$10,000.00 voucher for disability over 50 percent. It is considered a job displacement payment. That was supposed to be the role of permanent disability indemnity.

Additionally, this new system may also act as an additional incentive to treating doctors to increase the level of permanent disability, in order to assist the injured worker in obtaining the largest voucher possible.

SOLUTION: ELIMINATE THE RETURN-TO-WORK VOUCHERS AND FUND THE STATE DEPARTMENT OF REHABILITATION.

Instead of employers funding this voucher program, it is suggested that the funds that would have been spent on it be transmitted to the State Department of Rehabilitation, and that that department then contract with

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independent vocational evaluators to assist employees in a return to work. During the time that an employee is training to reenter the labor market, they could then draw benefits from their state disability which, in effect, in most cases would result in some degree of self-funding on the part of the employee bringing the concept of personal responsibility into play.

There are number of other issues to be dealt with in enacting a system that is Fairer, as well as more cost and time efficient. Improvements are needed with regard to the rating system, awards of future medical treatment, etc. If a majority of the foregoing suggestions were enacted into law, however, they would go far toward balancing the system and convincing the citizens of California that it is unnecessary to eliminate the current system and replace it with another. With just some few common-sense changes, balance and reasonableness can be restored.



*ALL OUR VERY
BEST WISHES
FOR A HAPPY
HOLIDAY
SEASON AND
PROSPEROUS
NEW YEAR.*

JON C. McNUTT

We are happy to announce that Jon C. McNutt was admitted to practice as an attorney at law on December 3, 2003, and are proud to announce his association with our firm. We are very pleased to welcome this bright and talented young attorney to our practice.



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.