



WORKERS' COMPENSATION COMMENTARY



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SUMMARY OF RECENT LEGISLATIVE CHANGES

By: Jon C. McNutt, J.D.

Assembly Bill No. 227 (AB 227) and Senate Bill No. 228 (SB 228), recently passed by the Legislature and subsequently combined and signed into law by Gray Davis, involve complex changes to the California's Workers' Compensation system. The purpose of this document is to provide a brief outline of those changes. It should be noted that because the courts have analyzed none of these changes, presently there can be no certain interpretation.

Fee Schedule for Physician Services

Changes to Labor Code Section 5307.1(k): In 2004 and 2005 rates for physician services will be set at 5% below the current fee schedule. However, the Administrative Director will not reduce the rate for a procedure with a current schedule value below Medicare value.

Changes to Section 5307.1(l): On and after January 1, 2006, the Administrative Director (AD) will have the ability to adopt a fee schedule for physician fees. From 2006 until the AD adopts a schedule, the then existing, medical fee schedule will apply.

The changes to fee schedules apply to all medical services provided after the effective date of the change. This includes services on injuries that occurred prior to the effective date of the change.

Fee Schedule for Inpatient Procedures

Changes to Labor Codes Section 5307.1(a): As of January 1, 2004, and until the AD adopts an official fee schedule, maximum reasonable fees for inpatient procedures are set at 120% of Medicare rates. The code does not reveal which services are excluded from the schedule, however.

Pharmaceutical Fee Schedule.

Changes to Labor Code Section 5307.1(a): Pharmaceuticals will use the Medi-Cal Schedule.

Again, the Code is not clear as to which services are excluded from the schedule.

Changes to Labor Code Section 4600.1: *Any party* dispensing medication must dispense a generic drug equivalent, unless no generic is available or the prescribing physician specifically mandates that a non-generic drug must be dispensed. Prior to this, the rule required only pharmacies to dispense generics.

These amendments apply to all pharmaceuticals provided after the effective date, even for services or injuries that occurred prior to the effective date.

Outpatient Surgery Center Fee Schedule

Changes to Labor Code Section 5307.1(c): The facility fee associated with services performed in an ambulatory surgical center may not exceed 120% of the Medicare fee assigned to the same service if provided at a hospital outpatient facility.

Notice upon Termination of Temporary Disability Indemnity

Changes to Labor Code Section 4061: The employer must provide the employee notice upon the last TD payment of certain things. It must notify the employee either:

- a) that no permanent disability indemnity will be paid because the employer believes the employee has no permanent impairment,
- b) the amount of PD indemnity determined by the employer to be payable, or
- c) that the amount of PD cannot be determined because the applicant is not P&S.

Reimbursement of Medical Payments

Changes to Labor Code Section 4603.2(b): Medical

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bills must be paid within 45 working days of receipt of said bill. This was changed from 60 days. In addition, the penalty on late medical payments has been increased from 10% to 15%.

Changes to Labor Code Section 4603.4(c): An electronic billing system will be enacted by January 1, 2005 and employers must be able to accept bills in this format by July 1, 2006. Bills for medical services at or below the level of the fee schedule that are submitted electronically must be paid in 15 days.

Section 4903.05 creates a \$100 filing fee for medical liens.

Prohibition of Outpatient Self-Referrals

Changes to Section 139.3: Doctors may not refer their workers' compensation patients to outpatient surgery centers when the doctor has a financial interest in that center unless there exists no alternate provider.

Limitations on Chiropractor and P.T.

Changes to Section 4604.5(d): Chiropractic visits may not exceed 24 individual visits per claim. The number of visits may exceed 24; however, if there is employer authorization. Changes to Section 4604.5(d): Physical therapy visits also may not exceed 24 individual visits per claim.

Utilization Review

Changes to Section 5307.27: By December 1, 2004 the AD must create an medical utilization schedule pursuant to certain specified medical criteria.

Changes to Section 4604.5: The abovementioned schedule is presumed to be correct, however it may be rebutted by a preponderance of medical opinion. By July 1, 2004 and continuing until the Administrative Director establishes a Schedule, the standards of the American College of Occupational and Environmental Medicine Medical Practice Guidelines are presumed correct. Finally, relevant portions of medical protocols are admissible before the WCAB when published by medical societies.

Medical Dispute Resolution - Spinal Surgeries or P&S Status

Changes to Section 4062: A special process will be enacted. The process is designed to resolve disputes over medical treatment related to spinal surgeries. When there is a medical dispute regarding spinal

surgery or P&S status, a second opinion may be obtained from a QME or AME when one party objects within 20 days of the receipt of the report in question.

Vocational Rehabilitation

Mandatory vocational rehabilitation (Section 139.5) has been repealed in lieu of Labor Code Section 4658.5. This Section creates non-transferable education vouchers allotted for education retraining or skill enhancement based on the PD. If the injury causes PD and the injured employee does not return to work within 60 days of the end of temporary disability, vouchers will be disbursed as follows:

DOI on or after January 1, 2004

- a) Between 1% to 15% PD ---- up to \$4,000.
- b) Between 15% and 25% ---- up to \$6,000.
- c) Between 26% and 49% --- up to \$8,000.
- d) Between 50% and 99% --- up to \$10,000.

The employer will not be liable for the supplemental job displacement benefit if the employer offers, within 30 days of the end of TD payments, and the employee fails to accept, lasting modified work. The employer will also not be liable for the benefits if the employer offers and the employee fails to accept lasting work where the employee is able to perform the essential functions of the job and the compensation is within 15% of those paid to the employee at the time of the injury.

Primary Treating Physician Presumption

Prior to January 1, 2003, the findings of the primary treating physician were presumed to be correct whether or not that physician was predesignated. The presumption was rebuttable by a preponderance of medical opinion, and did not apply when both parties selected QMEs.

The 2003 amendment to Labor Code Section 4062.9 changed the law for injuries occurring on or after January 1, 2003. The new amendment required an employee to predesignate his or her treating physician in order for the findings of that physician to be presumed correct. This presumption was still rebuttable by a preponderance of medical evidence, and did not apply when both parties selected QMEs.

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The 2003 amendment further required the creation of educational materials by January 1, 2004. These materials are for the benefit of treating physicians and chiropractors, outlining the basic concepts of workers' compensation, including the role of the physician, permanent and stationary evaluations, and report writing.

The 2004 amendment to the Labor Code retains the premise that unless an employee has predesignated his or her treating physician, no physician's opinion is presumed to be correct on the issue of extent and scope of medical treatment. However, the 2004 amendment requires predesignation for all dates of injury, not only injuries occurring on or after January 1, 2004. Therefore, the amendment to Labor Code Section 4062.9 retroactively eliminates the treating physician's presumption of correctness in all cases where the treating physician was not predesignated.

Labor Code Section 4062.9(b) states that, except in the case where there is a pre-designated physician prior to the date of injury, "In all other cases, regardless of the date of injury, no presumption shall apply to the opinion of any physician *on the issue of extent and scope of medical treatment...*" [emphasis mine], either prior to or subsequent to the issuance of an award. This new section eliminates the treating physician's presumption regarding the extent and scope of medical treatment when a treating physician has not been designated prior to the date of injury.

That leaves open a few questions however. What does the legislature mean by the issue of extent and scope of medical treatment? Does the presumption still apply to other issues on which the treating physician makes conclusions? With regards to dates of injury occurring on or after 2003, only the pre-designated physician and personal chiropractor have the presumption on all issues.

In the past, when the legislature made changes to existing law that have retroactive effect, opposing parties have made detrimental reliance arguments. In this case, it is very likely that applicant's counsel will argue that the applicant detrimentally relied on the old law and in doing so was prejudiced when this new law applied retroactively.

The California Supreme Court ruled in part on this issue and has determined that the law in effect on the date of injury controls despite an intervening amendment of statutory authority, unless there is a clear legislative intent expressed to provide for retroactive application. (see *W. Sec. Bank v. Superior Court*, 15 Cal 4th 232 (1997))

Also, California Civil Code Section 3 states that no amendment to a code will be retroactive unless the legislature directly declares it to be retroactive.

In the present case though, the legislature did not specifically use the language "this will be retroactively applied," the code does say that the law applies regardless of the date of injury. Thus it would seem that when this law goes becomes active, it will apply to all WCAB cases even with a DOI prior to the application of the law.

However, Workers' Compensation law is stacked in favor of the applicant by design. As such, if an applicant can show that she would be prejudiced by this revised version of the code, it is likely that a WCJ would apply the PTP presumption in accordance with the old law.

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"THOSE RASCALS NEVER GIVE UP!"

By John C. Martin, Esq.

Just to add a little additional weight to the argument that the California Legislature is doing their darndest to make California as toxic an environment for business as possible, along with the foregoing described Labor Code changes, (some of which are quite salutary), Governor Davis just signed into law S.B. 796, that was proposed by a liberal legislator from Santa Ana, a measure that is called "The Labor Code Private Attorneys' General Act of 2004."

If you think that sounds ominous, well...it is!

What this legislation does is to empower every employee in the State of California to become a vigilante, on behalf of the State, to look for employer violations of the Labor Code. The statute allows individuals to sue the employer, with 25% of the proceeds going to those bringing the action, and also provides for them to be reimbursed for attorneys' fees and costs.

Now, of course, the Act says that these private individuals will take this action for violations that the State does not have the personnel to police. Since the State departments, however, might take action in cases where the violation of a rule does not result in a monetary penalty, but merely requires an individual, for instance, to acquire a license or take some other administrative action, and since the Legislature does not want to discourage any private individual from going after businesses, this law allows for the recovery of civil penalties, where otherwise, State law does not require

the assessment of a penalty.

If someone runs a business and employs no employees, but is in violation of some State law, the civil penalty is assessed at \$500.00.

On the other hand, this Act provides that, if one or more persons is employed, that the civil penalty is \$100.00 for each aggrieved employee per pay period for the initial violation, and \$200.00 for each aggrieved employee per pay period for each subsequent violation.

On a second violation (potentially of some Labor Code infraction that is not particularly egregious), an employer of 20 employees, who pays employees on a weekly basis, could be assessed a penalty in excess of \$200,000.00!

One would think that the Legislature would have learned from the predatory example set by The Trevor Group (a group of lawyers that was suing small employers all over the State for alleged false advertising and extorting money from them), that legislation like this is an open invitation to abuse. While it should be noted that the legislation specifically states that nothing in that legislation is "intended to alter or otherwise affect the exclusive remedy provided by the Workers' Compensation provisions of this Code for liability for compensation due to an injury or death AOE/COE," this provides a means of retaliating against an employer by an aggrieved employee outside of the strictly defined Workers' Compensation structure.

Hopefully, something will be done, at the very least, to limit the "Labor Code violations" that should be subject to this potentially very abusive law. Please keep on the lookout for lawsuits based on this theory and warn other employers of the potentials that this legislation creates for more economic blackmail.

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DO YOU HAVE SUGGESTIONS TO HEAL THE SYSTEM?

We have the good fortune to have the opportunity to submit thoughts to the incoming administration concerning salutary changes that might be made in the Workers' Compensation system to make it more efficient.

It is our belief that simplistic proposals to adopt Workers' Compensation plans from other states is not the way to bring about effective reform, particularly when California, 25 years ago, was considered a "model" system, and was studied by not only other jurisdictions within the United States, but by foreign countries, in order to better design their own systems.

The Legislature and past administrations effectively degraded the system and made it vulnerable to, or even encouraged abuse that has led to the current problems. What these forces created can be undone, and we can return this to being an effective model system once again, without having to resort to the extreme measures that will favor one group over another.

Please fax or e-mail your thoughts to our office. We look forward to receipt of this information.

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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.