ASAP™

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On Monday April 19, 2004 Governor Schwarzenegger fulfilled his promise to prioritize workers' compensation reform by signing into law a bill providing sweeping changes to existing workers' compensation laws.

Governor Schwarzenegger Signs Workers' Compensation Reform Bill

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Recent History of Workers' Compensation Reform

In recent years, workers' compensation costs have risen dramatically, leading to the demise of many of the state's workers' compensation insurance carriers. According to prevailing opinion, many employers also responded to the spike in workers' compensation premiums by closing their doors or moving operations out of California to states with more employer friendly workers' compensation laws. This trend was exacerbated by 2002 legislation signed by former Governor Davis, which dramatically increased workers' compensation indemnity benefits payable to industrially injured workers.

As the crisis deepened, in the fall of 2003, Governor Davis approved two additional pieces of workers' compensation reform legislation, AB 227 and SB 228. This legislation primarily targeted increased medical costs by providing limitations on chiropractic and physical therapy visits, as well as requiring that medical treatment be provided in accordance with the MediCal and Medicare fee schedules. Few employer advocates viewed these reforms as sufficient to stop or even slow ever increasing workers' compensation costs.

Enter Governor-Elect Schwarzenegger, who vowed to reform the workers' compensation system in order to roll back costs to employers and carriers. On Monday, April 19, 2004 Governor Schwarzenegger in response to his promise signed SB 899 (R-Poochigian) into law. Set forth below is a summary of the most significant reforms contained in SB 899. Consult our website (Littler.com) for a more complete synopsis of the reform legislation.

Choice Of Treating Physician From Employer/Carrier Provider Network

The reform legislation authorizes an insurer or employer, on or after January 1, 2005, to establish a medical provider network for the provision of medical treatment to injured employees, and requires the Administrative Director of the Division of Workers' Compensation to approve the plans for these medical provider networks. More important for employers, this legislation would require an injured worker to select a physician from the provider network to provide treatment for the injury. This legislation would also permit an employee to obtain 2nd and 3rd opinions regarding treatment from physicians within the network and would establish an independent medical review process to resolve any disputes regarding whether the treatment desired is medically necessary.

Once these provisions become effective as of January 1, 2005, they will apply to all industrial injuries regardless of the date the injury occurred. It will be very important for employers and their carriers to act quickly to identify and designate physicians who will be part of their network. It will also be critically important to know the background of each physician in the network. It is expected that advocates for industrially injured workers will be working very hard to get employee-friendly physicians into employers' networks. Because employees can choose any provider within the network,

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a single employee-biased physician could eliminate any real advantage an employer receives from creating a network.

Once an employee chooses a physician from the network, the employee will be able to continue treating with that physician, even if the physician is terminated from the network, unless the physician is terminated for refusing to provide services at scheduled rates or has otherwise been subject to disciplinary action for professional misconduct.

The new legislation also provides that the Administrative Director shall contract with individual physicians or an independent medical review organization to perform independent medical reviews of treatment provided by any physician who treats an industrially injured worker.

There is some concern as to how these medical provider networks will be created. A ready made network may exist for those employers who already utilize Health Care Organizations (HCO's). The new legislation is not clear whether such existing networks will be approved by the Administrative Director without a showing that they otherwise meet the qualifications of a network provider under the new legislation.

For those employers who do not already utilize a provider network of some kind for industrial injuries, creating such a network and presenting it to the Administrative Director for approval may be a chore. Obviously the first source for such a network will be any network of providers already in place for the purpose of providing regular health benefits for employees (e.g., authorized providers under an employer-sponsored PPO or HMO health insurance plan) even if outside the workers' compensation system. In the absence of such a network, the employer and the carrier will have to start from scratch.

Permanent Disability

Prior to this new legislation, permanent disability status was determined following an evaluation of several factors including the nature of the physical injury and an employee's diminished capacity to "compete in the open labor market." Thus, evaluations of permanent disability status did not necessarily consider an employee's ability to perform the duties of his or her former job. Likewise, there was no consideration given for lost earning capacity when an employee was able to return to his or her former occupation or to employment at or near his or her former salary.

The new legislation eliminates the requirement to consider the ability of the injured worker to "compete in the open labor market" and instead requires that consideration be given to an employee's "diminished future earning capacity." An employee's diminished earning capacity would be computed as a numeric formula based upon "empirical data and findings that aggregate the average percentage of long term loss of income resulting from each type of injury for similarly situated employees."

Permanent disability ratings will still take into consideration the nature of the physical impairment as well as the age and occupation of the employee. The permanent disability schedule will be revised so that descriptions and standard ratings for disabilities conform with the American Medical Association Guides to the Evaluation of Permanent Impairment (5th Edition).

Apportionment

Apportionment rules govern how permanent disability is divided up between prior or preexisting illnesses and injuries and the current industrial injury. Old rules prohibited "apportionment to pathology" which meant that even if an injured worker had a preexisting pathology, any subsequent permanent disability attributable to an industrial injury could not be reduced by virtue of the preexisting pathology unless the pathology had been actually work - disabling prior to the occurrence of the new industrial injury.

New rules permit apportionment to causation and require the reporting physician to comment upon causation. Presumably then, a preexisting injury, illness or pathology which actually causes some of the permanent impairment can act to reduce the permanent disability award given to an industrially injured worker.

Furthermore, the reform legislation provides that a previous workers' compensation disability award, to the same part of the body, or resulting in overlapping disability will be conclusively presumed to constitute a preexisting disabling condition for apportionment purposes. Previously, industrially injured employees could avoid apportionment to previous awards if they could prove through medical or factual evidence that they had "rehabilitated" themselves, i.e. that their work impairment had lessened notwithstanding the fact that it had been deemed permanent in nature. This law would effectively eliminate this argument.

Vocational Rehabilitation

For injuries after January 1, 2004, all vocational rehabilitation benefits are eliminated. For injuries prior to January 1, 2004, previous vocational rehabilitation statutes which were repealed by 2002 and 2003 reforms are reenacted until 2009. After 2009 there will no longer be any vocational rehabilitation benefits. These benefits are ostensibly replaced by provisions governing permanent disability, which provide for a 15% increase in permanent disability if the employee is unable to return to his usual and customary occupation. Conversely, if the employee is returned to work these benefits are decreased by 15%. If an employee unreasonably refuses a modified or alternative job, his or her benefits will also be reduced by 15%.

Return to Work Fund

Senate Bill 749 passed in 2002 created the Return To Work Fund which provided for wage, premium and workplace modification reimbursement for employees who are brought back to work following an industrial injury either temporarily and permanently. While the Return To Work Fund remains, specific reimbursement provisions are repealed and new legislation simply provides that reimbursement will be made if funds are available. The new legislation also provides that the Return To Work Program will be funded by penalties paid by employers and carriers for unreasonable delays in providing benefits.

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Presumption Of Correctness Of Treating Physician

The legislation also completely eliminates the treating physician's presumption of correctness for all dates of injury. Legislation in the fall of 2003 had eliminated the presumption, but only for employees who had not pre-designated their treating physician. This legislation effectively eliminates this presumption regardless of whether or not an employee has pre-designated his or her treating physician.

Further Limitation Of Number Of Visits For Occupational Therapy

Legislation in the fall of 2003 had provided limitations on chiropractic treatment and physical therapy, limiting such treatment to 24 visits for the life of the claim. This legislation adds occupational therapy to the list of treatments limited to just 24 visits for the life of the claim.

Limitation on Temporary Disability Payments

Previously an employee who was injured and unable to work due to an industrial injury could receive no more than 240 weeks of temporary partial disability within a five year period. There was no limit on the amount of total temporary disability an injured worker could receive. The new legislation now limits an employee to 104 weeks of total temporary disability within a period of two years. The 104 week limitation will not apply to specifically designated conditions which are of a more serious and long term nature including Hepatitis B and C, HIV, amputations, and/or pulmonary disease.

Medical Care To Be Provided By the Employer In All Cases Until Case Is Denied

Previous rules permitted an employer to delay payment of any workers' compensation for a period not to exceed 90 days from the date of the employer's knowledge of a claim of industrial injury. New rules require the employer to provide all medical benefits until such time as the claim is accepted or rejected as industrial in an amount not to exceed $10,000. Under this new rule, it will behoove carriers and employers to investigate claims as quickly as possible to identify those claims that can be legitimately denied, before too much money is paid in medical benefits. These provisions of the new legislation are designed to ensure that the employee will receive appropriate medical care during this initial investigation period, and also encourage employers and carriers to act quickly to accept or deny a claim of industrial injury.

While this would appear to be a rather pro-employee provision of the reforms, it does represent a positive opportunity for employers. Previously, carriers and employers, having delayed payment of any benefits, including medical care, would lose control of medical care because, by the time the claim was accepted or denied, the employee would have transferred care to his own chosen physician. Once a claim was transferred to another physician, some measure of control would necessarily have been lost as the employee will already have embarked upon a course of medical treatment, which could not easily be derailed. If the carrier or employer is responsible for the medical care, there will be a need and an incentive to control and carefully monitor this treatment. Therefore, it will be more difficult for claims to slip out of control at the outset of the case.

Penalties For Delays In Providing Benefits Reduced

Carriers have long suffered under the draconian nature of Labor Code Section 5814 which provided that when a benefit payment of any type was delayed there would be a 10% penalty assessed on the entire class of benefit and throughout the life of the claim, not just on the amount delayed. This created fundamental unfairness in that in large liability cases, small delays could result in huge penalties. The new legislation provides that there will be a single 25% penalty on just the amount delayed up to a maximum of $10,000, whichever is less. The new legislation further provides that if the carrier/employer pays an automatic self-imposed penalty of 10% within ten days of their discovery of the delay, there will be no further penalty assessed. Finally, the new legislation also provides that where payment for medical services is delayed solely because of a dispute over the amount a physician charged there can be no assessment of a penalty for unreasonable delay.

What The Future Holds

These reforms are certainly a step in the right direction, but whether they yield the kind of hoped for savings is still very much up in the air. While employer-chosen physician networks may be helpful, it remains to be seen whether such networks will actually yield more "employer friendly" medical opinions, given that employees will still ultimately gravitate towards physicians within the network who have proven to be employee friendly.

The greatest opportunity for positive change for employers undoubtedly resides in the changes to the way permanent disability is computed. Any standardization of this process should yield positive results.

Employers should view the implementation of these reforms as an opportunity to take a more proactive role in the management of their workers' compensation claims. In the end, the best way to reduce workers' compensation costs is to vigilantly monitor claims administration from the date a claim is filed until it closes in order to avoid losing the potential benefits of the new legislation.

Carolyn Sue Jenkins is a shareholder in the San Francisco office of Littler Mendelson, P.C. Ronald A. Peters is a shareholder in the San Francisco office of Littler Mendelson, P.C. With nearly 400 attorneys in 28 offices nationwide, Littler Mendelson is the largest law firm in the United States practicing exclusively in employment and labor law, representing management.

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