

## SB 863 BRINGS SWEEPING CHANGES TO THE CALIFORNIA WORKERS' COMPENSATION SYSTEM

On September 18, 2012, Governor Jerry Brown signed SB 863, a bill which was introduced and pushed through the legislature in the last few weeks of the legislative session. This law, which will become effective on January 1, 2013, enacts the most sweeping change to the workers' compensation system since SB 899 was passed in 2004.

SB 863 came about as a result of negotiations between the California Labor Federation and several large self-funded employers. In the brief debate over the bill, it garnered the support of the Governor, the Department of Industrial Relations (DIR) and various employer and labor groups, though it was criticized by those representing injured workers and medical provider groups.

In essence, the law tackles two major issues:

1. It raises permanent disability (PD) payments to injured workers by approximately \$740 million a year.
2. At the same time it also enacts a series of changes in the ways that claims are handled, with the aim of streamlining the process and lowering costs within the system.

While savings estimates have not been fully determined, the DIR and others have estimated savings of anywhere from \$1.3 billion to \$2.7 billion annually to offset the increase in PD costs. There will be more discussion of the savings estimates in the coming days, as regulations are developed to support implementation of the new law.

**Permanent Disability (PD) Increase** – This law increases aggregate PD benefits by approximately \$740 million per year, phased in over a two-year period. It will also do the following:

Effective For Injuries On Or After January 1, 2013			
Rates Increase To			
Date of Injury	PD Percent	Minimum Rate	Maximum Rate
January 1, 2013	1% - 54%	\$160.00	\$230.00
January 1, 2013	55% - 69%	\$160.00	\$270.00
January 1, 2013	70% - 99%	\$160.00	\$290.00
January 1, 2014	1% - 99%	\$160.00	\$290.00

- Eliminate sleep disorder and sexual dysfunction "add-ons" to primary injuries that do not include these injuries when calculating the level of PD, while still requiring appropriate medical treatment for these injuries. However, this elimination is not applicable to catastrophic injuries or claims involving a violent workplace incident.
- Changes in PD does not eliminate the Almaraz/Guzman Supreme Court decision which established that the presumption that an AMA Guides rating is correct is rebuttable by evidence presented by the injured worker.

- Creates a return-to-work program based on a \$120 million budget that is annually derived from the Workers' Compensation Administration Revolving Fund (WCARF) for making supplemental payments to workers whose PD benefits are disproportionately low in comparison to their earnings loss.

**Medical Provider Networks (MPNs)** – The new law makes several changes to the statutes governing MPNs. It eliminates the requirement that 25% of the physicians in a MPN be non-occupational medicine specialists. It also:

- Requires all MPNs to have a "medical access assistant" staff person or persons to aid injured workers in obtaining appointments or referrals within the MPN. That person must be on staff from 7:00 a.m. to 8:00 p.m., Monday through Saturday, to respond to injured employees, contact physicians' offices, and schedule appointments for injured workers. **This provision will go into effect on January 1, 2014.**
- Requires an MPN to obtain a written acknowledgement from a physician that the physician agrees to be in the MPN.
- Provides that the approval of an MPN by the AD is conclusive in a matter before the Workers' Compensation Appeals Board (WCAB) that the MPN is valid, subject to proof that there was a specific failure as to a specific injured worker.
- Limits the reasons that can be used to seek treatment outside of the MPN and establishes an expedited process to resolve any disputes about whether the injured worker is required to be treated within the MPN.
- Requires a physician who knows or should know that the patient is suffering from an occupational injury to notify the employer within five (5) days that the injured worker is being treated outside the MPN and prohibits payment by an employer or insurer for any treatment provided to the injured worker when the notice requirements have not been complied with.

**Independent Medical Review (IMR) System** – The law establishes a new system for adjudicating certain medical treatment disputes, similar to one already in use by the Department of Managed Health Care (DMHC). Those disputes directed to the IMR process will no longer be adjudicated by the WCAB and the results of the IMR process will be binding on all parties, absent clear and convincing evidence of fraud or discrimination. Specifically, the IMR provisions in the new law:

- Eliminate the WCAB's authority to adjudicate medical treatment disputes that are directed to the IMR process.
- Allow an employee to appeal a utilization review (UR) decision by requesting an IMR either immediately after the UR decision or after getting a second UR with additional information.
- Provide a timeline for approval of treatment after the UR of 2 to 3 months, rather than the current judicial timelines which can take up to 18 to 24 months.

- Makes the results of the IMR process binding on all parties, absent clear and convincing evidence of fraud or conflict of interest, that the AD acted in excess of his or her authority, that the decision was the result of bias relating to protected classes, or that the decision was the result of a plainly erroneous express or implied finding of fact that is a matter of ordinary knowledge and not a matter that is subject to expert opinion. **Many applicants' attorneys have argued that this provision is unconstitutional in California. We expect this to be one of the provisions in this law that will be subject to court challenges in the coming years.**
- Establishes penalties up to \$5,000 per day for the employer's failure to notify an injured worker of his or her right to IMR, or failure to implement a decision by IMR favorable to the injured worker.
- Provides for the AD of the DWC to contract with qualified organizations to implement the IMR functions, subject to detailed conflict of interest rules. Qualified Medical Evaluators (QMEs) and Agreed Medical Evaluators (AMEs) will not be able to work as Independent Medical Reviewers (IMRs.)

**Qualified Medical Evaluators (QMEs)** – The new law reduces the scope of evaluations that QMEs perform by establishing an IMR system. QMEs will no longer weigh in on disputes relating to UR or the diagnosis and treatment recommendations made by the MPN's treating physician. It also streamlines the AME and QME process.

**Independent Bill Review (IBR)** – In addition to the IMR system, the new law establishes an IBR process to take mere billing disputes out of the jurisdiction of the WCAB.

**Utilization Review (UR)** – The new law specifies that a UR decision to modify, delay or deny a treatment recommendation would remain in effect for 12 months from the date of the decision without further action by the employer unless there is a documented change in the facts material to the basis of the UR decision. It also provides that UR of a treatment recommendation shall not be required while the employer is disputing liability for treatment of the condition.

**Supplemental Job Displacement Benefits (SJDB)** – The new law modifies the SJDB rules to limit the amount of the voucher to \$6,000 regardless of PD percentage; prohibits cashing out the voucher settlements; establishes which schools are qualified to be paid by retaining the voucher; limits the period of time during which the voucher is valid to two (2) years; and specifies that an injury that occurs during training does not constitute a compensable injury.

**Liens** – The new law establishes a \$150 filing fee for new liens and \$100 activation fee for liens filed prior to January 1, 2013. It establishes a time limit for filing liens of three (3) years after the date of injury or 18 months after the date services are provided. Furthermore, it prohibits the filing of a lien against an award for matters that are subject to IMR and IBR.

**Explanation of Review** – The bill requires employers to provide an Explanation of Review upon payment, adjustment or denial of a complete or incomplete itemization of medical services.

**Fee Schedules** – The new law removes all references to the American College of Occupational and Environmental Medicine's Occupational Medical Practice Guidelines and requires the AD to adopt a fee schedule methodology based on Medicare's Resource-Based Relative Value Scale (RBRVS) system. It also

adopts a fee schedule for ambulatory surgery centers, authorizes the AD to adopt a home care services utilization and fee schedule, copying services and interpreters.

**Financial Interest in Referrals** – This law enacts a very broad prohibition on referrals for service if the party making the referral has a financial interest in the service provider. While there is an exception in the law for claims administrators, the law may still prohibit health care providers from referring injured employees within their own health system or to affiliated providers.

**Private Self-Insured Employer Security Deposit** – The new law changes the calculation of the security deposit the DIR requires of private self-insured employers and groups.

**Public Self-Insured Employers** – The new law dictates several changes for self-insured employers. It requires public self-insured employers and groups to report detailed information that the Department of Industrial Relations (DIR) determines necessary to evaluate the costs of administration, benefit expenditures and solvency and performance of those programs. The scope of the information to be reported is not specified in the new law.

## **NEXT STEPS**

Keenan will be monitoring the development of regulations to support SB 863 very closely and will keep all our customers informed on how they will impact the operational and economic aspects of their workers' compensation program.

In addition to the series of comprehensive training sessions that we are implementing for our experienced claims staff, Keenan in partnership with Michael Sullivan, will be hosting a webinar for our customers in early October to review the reform and impact this will have on your workers' compensation program. Michael Sullivan, of Sullivan & Associates, participated in the authorship of SB863 and was also co-author of *Sullivan on Comp*, the leading industry resource guide for application of California workers' compensation laws. We will be announcing dates for our webinars shortly.

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