



## FIRE AGENCIES SELF INSURANCE SYSTEM

### Legislative and Industry Updates – January 28, 2010

**Activity in the workers' compensation industry is well underway in 2010. Major case-law decisions that have delayed or increased settlements remain under appeal and new proposals have been submitted for the Legislature to review. The following is an update on some of the bills that have been presented, as well as current discussions or actions in the industry.**

#### Case Law Decisions –

##### **Duncan v WCAB**

The 6<sup>th</sup> District Court of Appeal issued a decision November 25, 2009 which established January 1, 2004 as the starting date for Cost of Living (COLA) increases per Labor Code 4659© relating to Permanent Total Disability (PTD) and Life Pension regardless of the date of injury or when the injured worker became eligible for the benefit. The case was appealed to the 6th District Court of Appeal on the issue of whether or not the COLA increase should be applied from the date of injury forward. However, the Court of Appeal, considering an amicus brief filed by the California Applicant's Attorneys Association (CAAA) rendered their decision indicating that the COLA increase should begin January 1, 2004 and every January 1 thereafter based upon the Legislative language (statutory language). The application of the COLA increase back to January 1, 2004 requires an increase each January from 2004 forward in which PTD or Life Pension benefits become payable and will likely lead to benefit rates in excess of the employee's wage at the time of injury.

The Department of Industrial Relations Director, John Duncan, has asked the California Supreme Court to review the case due to the negative impact to the workers' compensation industry. Unless, or until the case is overturned by the Supreme Court, benefits are now due retroactively at the higher rate, imposing a COLA increase back to January 1, 2004 for all cases in which PTD or Life Pension are payable. A failure to pay the benefits at the higher rate will expose the payee to the potential for self-imposed increases in benefits (penalties) and possible assessments for failure to accurately provide benefits.

**Potential Impact:** Increased benefit payments and increased reserve estimates for each applicable claim.

## **Industry Discussions –**

### **WCIRB Realignment of Medical Payments**

As stated in prior updates, the Workers' Compensation Insurance Rating Bureau (WCIRB) had proposed amending the Uniform Statistical Reporting Plan (Unit Stat Reports) as of July 1, 2010, and moving costs associated with utilization review (UR) and medical bill review out of the "Medical" category for payment on workers' compensation claims and placing them in the "Adjustment" (or Allocated Expense) payment category. The Unit Stat Reports are used to establish experience modifications (X-Mods) for insured programs based on loss history. The WCIRB issued Member Notice #2010-01 January 12, 2010 which indicated their proposal has been approved by the Insurance Commissioner.

The transition to posting these former "Medical" payments in the "Adjustment" category has not been adopted for self-insured programs at this time. Staff has continued to follow up on this issue to determine if Self-Insurance Plans (SIP) intends to adopt a similar proposal. According to Jim Ware/Chief, Office of Self-Insurance Plans, this "has attracted our attention and we are considering how the change would affect security deposits." We can anticipate a request for public comments and possible revision to the Annual Report.

Potential Impact: Necessary computer data adjustment and revised reporting requirements to SIP and possible impact to associated SIP assessments or security deposits.

### **Medicare Reporting Requirements**

Registration for required Medicare reporting was required by December 31, 2009 and those required to report should be conducting data testing to meet the reporting timeline of July 1, 2010. Medicare reporting is required on all workers' compensation claims. Reporting will require all primary payers to verify Medicare beneficiary status on all claims quarterly, reporting of all claims involving Medicare beneficiaries quarterly and the reporting of settlements, judgments and awards for all claims involving Medicare beneficiaries.

The Centers for Medicare and Medicaid Services (CMS) has already begun pursuing reimbursement requests or "recoupment actions" from parties that failed to protect its interests and made settlement agreements involving medical care without setting aside specific funds for the payment of this care. There remains a dispute and litigation regarding the period of time in which CMS can pursue reimbursement from primary payers with opinions ranging from three years to no statute of limitations.

Potential Impact – The impact of this new requirement may be felt in many ways including: penalties incurred for late reporting (example: \$1,000 per claim per day); a need to review and possibly renegotiate TPA contracts to consider reporting agreements; the extended life of future medical claims and the potential for retroactive reimbursement claims from Medicare.

Legislative Updates -

**SB 3 – Cedillo. Supplemental Job Displacement Benefits**

This Supplemental Job Displacement Benefit bill was the first workers' compensation bill submitted in last year's session and is seeing new life in this session. Existing law provides for supplemental job displacement benefits (SJDB) for injuries from January 1, 2004 forward in the form of vouchers for education-related services for employees with permanent disability if they do not return to work for the employer within 60 days of the end of Temporary Disability (TD). These vouchers are now only available once the level of permanent disability has been established.

SB 3 proposes an additional SJDB voucher of up to \$6,000 would be available to cover re-education and skill enhancement expenses and would expire two years after date of issuance or five years after the date of injury (whichever is later). Information regarding the right to benefits will be provided to the employee within ten days of the end of TD. This benefit would be payable to the employee once they have reached a permanent and stationary status. This determination is often disputed and may pre-date the eventual determination of a level of permanent disability by several months.

This bill was opposed last year by the employer communities.

Potential Impact – Claim settlements may be increased by the additional \$6,000 without verification of use for its intended purpose.

**SB 403 – Benoit. Lien Claims.**

This bill has also been removed from inactive status in the last session and proposes to prohibit medical lien claim expenses from being filed more than one year from the date the health care provider or their agent was sent an Explanation of Benefits (EOB) or Explanation of Review (EOR) paying the bill pursuant to fee schedule or fee agreement. A common practice is to receive requests for payment or negotiation of payments from lien claimants (or their agents) years after a case has resolved. This practice can result in additional legal and medical expense on cases which had been closed.

This bill is sponsored by the California Joint Powers Authority (CAJPA).

Potential Impact – Reduced medical and legal expense and timely resolution of all issues.

**AB 615 – Niello. First Aid Clarification.**

Employers are currently required to provide a claim form and a notice of potential eligibility for workers' compensation benefits within one working day of receiving notice of an employee's injury that resulting in lost time or medical care beyond First Aid.

First aid is defined to mean any one-time treatment, and any follow-up visit, for the purpose of observation of minor industrial injuries that do not ordinarily require medical care.

This bill would change the definition of First Aid and would authorize the administrative director to adopt regulations to define various terms, as specified, while allowing the language in the bill to define medical treatment and first until the regulations are adopted. The intention of the bill is to ensure consistent treatment of First Aid claims and medical claims and reduce the under-reporting of injuries.

Potential Impact – There will be an increase in the number of reportable claims.

**1603 – Solorio. Temporary Disability and Offers of Work.**

AB 1603 is the first new bill of 2010 and proposes to require payment of Temporary Disability (TD) benefits up to 60 days AFTER the employee has been notified their condition is permanent and stationary until the employer has made a decision on offering regular, modified or alternative work. TD benefits were established to pay an injured worker for their temporary time loss from work during recovery. The payment of this benefit AFTER an injured worker's recovery will depend upon not only the employer's prompt offer of work, but also rely upon more timely preparation of final medical reports outlining work restrictions from which the employer can make considered decisions on offering appropriate work. Currently, final medical reports, providing sufficient information to make an offer of work may take weeks to months to receive.

Potential Impact – Automatic payment of additional TD benefits and increased claims costs.