



*Selected Reforms and Court Rulings for Workers
Compensation
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All statements of fact and opinions are those of the author and do not necessarily represent the opinions of CNA.

Key Areas of Consideration

Eclectic Set of Topics

- Challenges to Workers Compensation Reform in California*
- Obesity Treatment as Precursor to Treatment of Work-Related Injury*
- Health Care Reform and the Medical Marketplace*

Key Areas of Consideration

Overarching Issues

- Rules versus Individual Exceptions*
- Outliers versus Trends*
- Obesity in the United States*
- Changing Medical Marketplace*

California – Challenges to Workers Compensation Reform

SB 899 – The 2004 Workers Compensation Reform

- First Day Medical Treatment – Up to \$10,000*
- Utilization Review Guidelines – Medically Necessary Consistent with CCOEM Guidelines*
- Medical Provider Networks – Care consistency with CCOEM Guidelines*
- Medical Disputes and the use of Qualified Medical Examiners*
- Temporary Disability Caps*
- Return to Work Incentives – plus or minus 15% depending on RTW to pre-injury job or modified duty*

California – Challenges to Workers Compensation Reform

SB 899 – The 2004 Workers Compensation Reform

– Permanent Disability Determination – objective and uniform permanent disability rating schedule

- *Researchers at Rand Institute for Civil Justice had conducted modeling with the intent of reducing disparities among losses for different types of impairments. This was accomplished by adjusting disability ratings to reflect diminished future earnings capacity.*
- *In the historical system, impairment ratings did not necessarily reflect earnings losses.*

California – Challenges to Workers Compensation Reform

- *The reform in SB 899 was designed to create an objective and uniform disability rating schedule based upon the American Medical Association Guide to the Evaluation of Permanent Impairment, 5th Edition.*
- *Questions raised in the Suzman / Almaraz cases challenging the method of permanent disability determination:*
 - *Rebuttable Presumption: Can the impairment assessment of the permanent disability rating formula be rebutted with substantial evidence?*
 - *Are the AMA impairment guidelines the only resource to be used in the establishment of impairment and what areas within the AMA guidelines can be used?*

California – Challenges to Workers Compensation Reform

- AMA Guide: Should the AMA Guide be applied as written and intended even though the AMA Guide's criteria and methodology cannot cover all potential impairments?*
- Evaluating Physician: May the evaluating physician use any applicable chapter, table, or method in the AMA Guides to accomplish an accurate description of the injured worker's impairment?*
- Evaluating Physician: May the evaluating physician use clinical judgment, expertise and materials from outside the AMA Guides to support his/her conclusions?*

California – Challenges to Workers Compensation Reform

- Will the rebuttable presumption only apply in complex and extraordinary cases?*
- Will what constitutes appropriate materials be determined on a case by case basis?*

“If the explanation fails to convince the WCJ or WCCB that departures from strict application of the applicable tables and measurements in the Guide is warranted in the current situation, the physician’s opinion will properly be rejected.” (Source: Milpitas Unified School District v WCCB (Suzman), Court of Appeal of the State of California, H034853, August 19, 2010).

California – Challenges to Workers Compensation Reform

- *Future Questions*

- *Where will the rule of what constitutes a complex and extraordinary case be drawn?*
- *Will the concept of a complex and extraordinary case be drawn in regards to the disability rating guidelines or the impact upon the individual?*
- *Will the challenge to the California approach to disability rating impair their future use in other states?*

Obesity and Workers Compensation

Facts of the Case –

- Worker was age 25, six feet tall and weighed 340 pounds at the time of the accident. He smoked approximately 30 cigarettes per day.*
- BMI = 46.1 $BMI = (weight * 703) / (height\ in\ inches)^2$*
- Worker employed as a cook was accidentally struck in the back by a freezer door and sustained a back injury.*
- Worker immediately reported the accident and was sent for medical treatment.*

Source: PS2, LLC, d/b/a Boston Gourmet Pizza, Appellant – Defendant v. Alan Childers, Appellee – Plaintiff. No. 93C02-0902-EX-176. Court of Appeals of Indiana. August 6, 2009. Rehearing Denied Oct. 13, 2009.)

Obesity and Workers Compensation

Facts of the Case – Continued

- Worker was treated by physician; but disc degenerated and pain intensified.*
- Worker wanted to proceed with back fusion surgery.*
- Independent Medical Evaluation recommended against the surgical intervention due to the workers weight and age.*
- Worker's weight increased to 380 pounds within six months of the accident. BMI = 51.5*
- Treating physician believed spinal fusion surgery presented a "high risk" for failure because of the current weight.*

Obesity and Workers Compensation

- Holdings

- “Claimant was entitled to receive secondary medical treatment, in form of lap-band surgery designed to help claimant lose weight, as precursor to back fusion surgery to treat work-related back injury”; and*
- “Employer was not relieved from obligation to pay temporary total disability benefits while claimant was preparing for, undergoing, and recovering from precursor lap-band surgery and back surgery”.*

Source: (PSZ, LLC, d/b/a Boston Gourmet Pizza, Appellant - Defendant v. Alan Childers, Appellee - Plaintiff, No. 93002-0902-EX-176, Court of Appeals of Indiana, August 6, 2009. Rehearing Denied Oct. 13, 2009.)

Obesity and Workers Compensation

Judicial Reasoning

- *“Evidence supports the Board’s conclusion of the requisite causal relationship between {the worker’s} work-related injury and the need for lap band treatment.”*
- *“Evidence supports the Board’s conclusion that {the worker} met his burden of proof in establishing that his weight at the time of the injury, the blow to his lower back, and the immobility resulting from the injury resulted in an overweight condition with back pain – i.e., a single injury which required the lap band procedure.”*
- *{The worker’s} “weight at the time of injury made him more susceptible to the immobilization that resulted from the workplace injury, thereby requiring the lap band procedure as part of the necessary treatment for that injury.”*

Source: (PSZ, LLC, d/b/a Boston Gourmet Pizza, Appellant – Defendant v. Alan Childers, Appellee – Plaintiff, No. 93C02-0902-EX-176, Court of Appeals of Indiana, August 6, 2009. Rehearing Denied Oct. 13, 2009.)

Obesity and Workers Compensation

Illinois and Oregon also have had cases in which courts or administrative bodies have found carrier responsibility for treating a preexisting condition that must be cured in order to treat the compensable work-related injury.

- Implications

- Applications to other preexisting conditions?*
- Application to physical degeneration associated with aging?*
- The interesting calculation - quick treatment of preexisting condition compared to the added severity to the work-related injury?*
- Obesity's (and other types of preexisting conditions) impact on reserving?*
- Impact on the concept of right medical providers?*
- Additional liability - is a whole new claim created?*

Healthcare Reform and the Medical Care Marketplace

- Healthcare Reform - an uncomfortable topic for some given the political feelings surrounding it.*
- There is the basic practical question of healthcare reform's implementation.*
- We do know that workers compensation will be impacted; if not directly, then indirectly.*
- Workers compensation represents between 1.6% and 2.2% of medical spending in the United States (Source: 2009 National Health Expenditure Survey, CMS)*

Healthcare Reform and the Medical Care Marketplace

- *NCCI has discussed the impacts of Healthcare Reform on Federal Black Lung Entitlement provisions, and that changes to Medicare Reimbursement Rates may flow through to Workers Compensation Fee Schedules.*
- *Conning Research and Consulting has discussed the implications for medical malpractice insurance.*
- *Second order implications of health care reform:*
 - *Assumptions:*
 - *Healthcare reform, if implemented, will increase the demand for healthcare.*
 - *Healthcare reform introduction to the marketplace is likely to coincide with a tightening of physician supply.*

Healthcare Reform and the Medical Care Marketplace

- In 2014, the share of the US population with health insurance is projected to increase from 84.1% to 92.1% - an increase of just over 30 million individuals.*
- There will be a shift in coverage as those covered under public programs - Medicare, Medicaid and other public will increase by 23.3 million individuals - an increase of 18.2%*
- Since provider reimbursements tend to be lower under public plans, providers are likely to attempt to recoup greater amounts from commercial coverage, including from P&C carriers.*

Healthcare Reform and the Medical Care Marketplace

Physician Supply

- *Ageing of the physician workforce – according to the American Association of Medical Colleges, as of 2008, 36 percent of physicians are over the age of 55 and most will retire by 2020. Anecdotal evidence suggests a further depletion of the ranks of primary care physicians.*
- *Beginning in 2012, the US will be graduating approximately 18,000 physician and surgeons per year whereas the prereform needs were 26,000 per year.*
- *There is approximately a 10 year lag between a decision to increase the supply of physicians and the supply being realized in the marketplace (domestic production).*
- *Bureau of Labor Statistics estimated that the US would need over 260,000 physicians and surgeons to meet population growth and replace retiring physicians between 2008 and 2018.*
- *Graduates of international medical schools entering US residency programs number approximately 7,000 per year.*

Healthcare Reform and the Medical Care Marketplace

Physician Supply

- General consensus is that we have had a surplus of physicians since approximately 1980, but that surplus will become a shortage during this decade.*
- Many of these projections were made prior to the adoption of health care reform.*

Healthcare Reform and the Medical Care Marketplace – Other Indications

- Medical tourism, although very small yet, could siphon away certain services from the medical marketplace, and thereby change profitability dynamics.*
- High volume – low cost hospitals.*
- The importation of techniques developed for developing countries into the US*
- We have an “industrial model” with heavy emphasis on hospital delivery whereas the consumer need is more diverse. New models of medical delivery are moving away from the capital intensive hospital centered model.*
- Continued cost pressures on hospitals. Fewer customers to whom costs can be shifted.*

Healthcare Reform and the Medical Care Marketplace

- Physician Supply and Demand*
- The underlying assumption of Preferred Provider Organization has been that there is a surplus of physicians and a surplus of hospital beds in the medical market.*
- Where permissible by statute or regulation, patients would be directed to certain providers in exchange for discounted prices.*
- Where regulations did not support active direction, PPO organizations were still in place with the hope that some injured workers would utilize the contracted facilities and providers.*
- Preferred provider organizations have been a featured part of cost management for workers compensation carriers for the past 15 years or more.*

Healthcare Reform and the Medical Care Marketplace - Possible Extremes

Shortage Dominated System

- Preferred Provider contracts become very different and are driven to assure access as discounted prices become minimal
- State fee schedules become more favorable to providers as fewer and fewer providers are willing to treat injured workers under the traditional fee schedule discounts.
- Appointment availability will decline and it will take longer for an injured worker to be released to modified or full duty.

Changed Delivery System Dominated System

- Medical tourism and offshore competition siphon off profitable lines of service from hospitals and hospital centered physicians.
- Some specialists areas will be looking for other treatment areas; but primary care physicians will be less impacted as they are less susceptible to off-shoring and medical tourism.

Closing Comments

Overarching Issues

- Rules versus Individual Exceptions*
- Outliers versus Trends*
- Obesity in the United States*
- Changing Medical Marketplace*

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Questions

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