LAW1199.COM NEWSLETTER™

2013 ★ ISSUE #4

safetyofficerattorneys.com ★ www.law1199.com ★ SCOTT O'MARA, MICHAEL PADILLA, RICK PINCKARD & BRAD FIELDS

By SCOTT O'MARA

THE IMPACT OF SB 863 ON CALIFORNIA WORKERS: THE GOOD AND THE BAD

As all California employees are aware, Senate Bill 863 was signed by the Governor on 9/18/12, initiating a new system relative to the potential availability of benefits, access to them, and the level of same. As an example, workers who experience sleep dysfunction, sexual dysfunction and/or psychiatric/psychological disorder conditions developing from injuries occurring before 1/1/13 are eligible not only for medical care for those ancillary conditions, but also compensation. However, for injuries occurring on or after 1/1/13, workers who develop these ancillary conditions will be eligible to receive medical care only — *not* compensation — as no increase in impairment will be recognized for these conditions.

For workers sustaining injuries on or after 1/1/13, the full cup of justice may no longer be available.

The guiding force will be the date of injury. For workers sustaining injuries prior to 1/1/13, the full cup of justice will still be available. However, for workers sustaining injuries on or after 1/1/13, this unfortunately may not be the case.

Labor Code §4650(b) sets forth a new standard. If the employer has offered an injured worker a position which pays at least 85% of the wages and compensation he or she was paid at the time of injury, or if the injured worker is employed in any position which pays 100% of the wages and compensation he/she received at the time of injury, or if an offer of continued employment is not accepted by the injured worker, the employer can delay payment of permanent disability until the Court has issued an award as to the level of permanent disability. This change regarding the advancement of permanent disability is a significant change.

As a consideration in the legislative enactment, the Legislature recognized an important decision issued on 8/28/12 in the *William Braga* case.

Under SB 863, the 15% reduction or increase in permanent disability — depending upon the continuation or lack of continuation of the employee in his/her work situation — has been removed. Typically, the 15% program benefitted the employer substantially. Therefore, overall, the removal of the 15% benefits more workers.

An additional benefit of the new legislation is an increase in permanent disability payments. If an injured worker had 40% disability from a 2007 back injury, the value would be approximately $64,227.50. For that same injury occurring in 2013, the value increases to $86,197.50; and for the same injury in 2014, the value increases to $92,582.50.

The legislative changes to be implemented will be subject to numerous Administrative Director amendments to the Schedule. The amendments will include modifiers on the level of disability for age and occupation. These modifications, if done properly, will enhance the monetary compensation injured workers can receive. However, it is anticipated that the amendments will be prospective from the date of change and probably not retroactive.

The new system is also implementing a $120 million Return-To-Work Program. The Administrative Director of Industrial Relations is to adopt regulations to carry out this program, which hopefully will better compensate people receiving inadequate levels of permanent disability payments. However, the success in the implementation of this program is speculative at this time, and the time constraints imposed for the Administrative Director to create the regulations and carry out the program will pose a tremendous challenge.

Success of the $120 million Return-To-Work Program is speculative at this time.

As most employees are aware, some injured workers, because of the extent of their disability, cannot safely return to the performance of their substantial duties. If in fact they cannot return to their work because of a job-related injury, they are in a position to receive permanent disability payments and, potentially, enhanced benefits under the $120 million Return-To-Work Program. They also potentially could receive an industrial disability retirement from their agency, and, in the past, vocational rehabilitation training or vouchers for same.

As of 2013, a Supplemental Job Displacement Benefit Fund is being created for injuries occurring on or after 1/1/13. These vouchers — which have a maximum value of $6,000.00 — have a time limit of two years from the date the voucher is furnished, or five years after the date of injury. If not properly monitored, injured workers could lose job displacement vouchers if they do not act in a timely manner.

It is noted that the voucher program provides $500.00 for miscellaneous expenses, which can be paid without the need for itemized documentation or accounting. Another provision is for reimbursement up to $1,000.00 for the purchase of computer equipment, for which I anticipate receipts will be required for proof of purchase. Even though this amount — $1,500.00 in total — is *de minimis*, it may provide quicker access to these benefits.

Another significant change is the implementation of Independent Medical Review (IMR). This protocol creates a substantial issue as to constitutionality and due process. IMR is a system designed to remove and eliminate a worker's right to seek a judicial determination as to the adequacy (or lack thereof) of medical care provided.

Under the new protocol to be implemented, eventually for all cases, current and past, the treating doctor will share his/her opinion as to the necessity of care; utilization review (UR) will then make their determination as to the appropriateness of the treating doctor's recommendations; and if the UR determination is denial of the care recommended by the treating doctor, the injured worker can then request an Independent Medical Review of that determination. However, the worker does not have the right to know the identity of the physician conducting this review. Moreover, the reviewing physician does not need to be licensed in the state of California or reside within the state.

Senate Bill 863 specifically states that the worker and the employer do not have the right to litigate determinations made by IMR regarding access to medical care.

Furthermore, Senate Bill 863 specifically states that the worker and the employer do not have the right to litigate determinations made by IMR regarding access to medical care. This raises a substantial Constitutional issue as to due process rights denied California injured workers by the IMR protocol. This new procedure will apply to injuries occurring on or after 1/1/13, and to all dates of injury prior to that after 7/1/13.

Injured workers have a very restrictive timeline within which to request an Independent Medical Review, as the request must be made within 30 days after service of the UR determination. If a worker fails to meet that timeline, it can eliminate the ability of the worker to seek additional review.

Another change occurred in Labor Code §4610(g)(6), which states that UR decisions to modify, delay or deny treatment recommendations are to remain effective for 12 months from the date of the decision. Therefore, if the 30-day window is missed by an injured worker — barring some substantial change in medical condition — the worker is limited in his/her access to medical care.

According to the new legislation, injured workers do have the right to submit directly — or through their requesting physicians — documents relevant to the requested treatment. This opens up a door for injured workers to utilize treaters who are patient advocates. A treater who is a patient advocate will recognize the treater's responsibility to make available studies — from major organizations like the Mayo Clinic, the University of California medical facilities or other high-profile entities — justifying the care and treatment recommended. This avenue will require that injured workers and their attorneys have a substantial understanding as to the medical care recommended by treating physicians and be able to provide documentation and studies supporting their recommendations. This information should help IMR doctors to render appropriate decisions.

The determination of the IMR doctor has the presumption of correctness and can be set aside only by very high standards — *i.e.*, clear and convincing evidence that the Workers' Compensation Administrative Director acted without or in excess of his powers. This then delves into the due process issue, since the injured worker's counsel is unable to cross-examine the reviewing physician, or even be aware of that individual's identity. This aspect of the new protocol will be challenged, and the issue of constitutionality will be raised.

There are several other bases for challenging an IMR determination, including allegations of fraud; material conflict of interest; bias because of the race, national origin, ethnicity, religion, age, gender, sexual orientation, color or disability of the injured worker; and an erroneous expression of facts or a material factual mistake made clear by ordinary knowledge of the information submitted for review.

A successful challenge against the IMR still does not allow the Court to make a decision as to the necessity or lack thereof for the medical care recommended. Instead, the matter would be referred back to another IMR doctor.

Some changes have occurred relative to the new legislation. There are benefits, but there also are challenges. The proactive worker must continue to exercise a proactive role. The way to do that is to predesignate a doctor who is a patient advocate. This doctor can be of assistance in generating professional communication and documentation as to the necessity of care, thereby enhancing the likelihood of the injured worker accessing care through the IMR protocol if there is a utilization review denial.

Therefore, *be proactive; protect your family; predesignate a doctor.* Go to the website www.law1199.com and you will find a form for predesignation.

LAW1199.COM NEWSLETTER™

THE LAW OFFICES OF

SCOTT A. O'MARA

O'MARA & PADILLA

2370 5th Ave., San Diego, CA 92101
4200 Latham St. – Ste. B, Riverside, CA 92501-1766
12770 High Bluff Dr. #200, San Diego, CA 92130

1-800-LAW-1199 (1-800-529-1199)
619-583-1199
951-276-1199
www.law1199.com

BOBBITT, PINCKARD & FIELDS, A.P.C.

8388 Vickers St., San Diego, CA 92111
4200 Latham St. – Ste. B, Riverside, CA 92501-1766

858-467-1199
www.coplaw.org

NOTICE

Making a false or fraudulent Workers' Compensation claim is a felony subject to up to 5 years in prison or a fine of up to $50,000 or double the value of the fraud, whichever is greater, or by both imprisonment and fine.