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RETIRED OR CONSIDERING RETIREMENT? THEN DON'T FORGET TO CONSIDER THIS!

By Scott O'Mara

All safety members who are retired or are considering *retirement* should have a good under-understanding of the following three factors: their medical care; the importance of the Workers' Compensation presumptions as they apply to work-related injuries; and the value of maintaining sufficient insurance coverage to ensure adequate protecttion for themselves and their families in the event of a vehicular accident. A lack of knowledge in these areas can severely impact the quality of life for a safety member and his/her family and result in dire economic consequences.

MEDICAL CARE

The medical care that can be obtained under the Workers' Compensation system, albeit not as all-encompassing as it once was, still provides a means whereby both current and retired safety members can maintain financial solvency if their medical condition has connectivity to their work. The medical care available can actually be expansive when a work-related injury is involved

Take, for example, the case of a worker who has a job-related cardiovascular problem which is made worse, or could be made worse, by another medical condition that is not work-related. If an individual with a cardiovascular problem becomes diabetic, the only way to adequately and properly control the cardiovascular condition is to control the diabetes. As a result, the diabetes then falls within the parameters of Workers' Compensation.

Another example would be a worker who takes medication for a job-related condition, but that medication creates another medical problem. For example, medications can create esophageal reflux, gastrointestinal problems or erectile dysfunction. My advice is to go to a website such as WebMD and, one by one, place the name of each medication taken in the search box to learn the side-effects of these medications. If in fact the member has an additional medical problem caused by medication taken for a job-related injury, the ancillary medical problem then becomes the responsibility of Workers' Compensation as well.

A more extreme example would be a worker who develops parlaysis (*i.e.*, experiences a stroke) as a result of a job-related condition, and the paralysis requires 24-hour home health care. Because of the connectivity between the paralysis and the work-related injury or illness, Workers' Compensation will cover the home health care.

While some health policies place a cap of $3-or-$4 million per body system or part, Workers' Compensation does not have this limitation. Therefore, if a connection exists between a job-related injury or illness and the care required for a serious medical condition, one can easily see the advantage of establishing that connectivity.

MEDICAL PROVIDER NETWORKS

However, even with the expansive nature of Workers' Compensation coverage, the injured worker needs to be aware of how to deal with providers under the Medical Provider Network ("MPN"). MPN doctors need to be reminded that they are physicians and have an ethical and moral responsibility to the injured worker. They should not be simply an extension of the insurance carrier adjuster and what the adjuster wants in the Workers' Compensation case.

When necessary, an injured worker can access the Medical Quality Control Board, which is the licensing board for physi-

cians. This option can be of value in certain situations in redirecting a doctor's or medical group's priorities to ensure the provision of adequate medical care for the worker.

THE PRESUMPTIONS

As some safety members are aware, California, through speciallegislation, has created a number of work-related presumptions. That is, if certain medical conditions evolve or develop, they are *presumed* to be job-related. These conditions include heart trouble, hernias, pneumonia, cancer, tuberculosis, blood-borne infectious disease, injury or illness resulting from exposure to biochemical substances, meningitis and lower back injuries. *(The presumption for lower back injuries applies only to specified peace officers — not all safety members.)*

While all the above conditions may be *presumed* to be job-related, it should be noted that these presumptions are *rebuttable*. That means that if an employer can demonstrate the proper fact pattern, the presumption that an injury or illness is job-related may no longer apply, and medical care under Workers' Compensation may be denied.

TIME PARAMETERS: THE 60/120-MONTH* LIMIT

**The extended limit applies only to the cancer presumption.*

Also, upon the first reading of the statutes establishing these presumptions, they appear to be limited by time parameters based upon the length of employment of the safety member and the date when he/she ceases that employment. According to the Labor Code:

"The presumption shall be extended to a member following termination of a service for a period of three calendar months for each full year of requisite service, but not to exceed 60/120 months* in any circumstance, commencing with the last date actually worked in the specified capacity."

In the vast majority of cases, as most safety members are aware, the development of various medical conditions does not occur with one particular exposure, but with sustained exposures throughout the period of employment. Also, the latency period between the exposures and the actual manifestation of a particular illness may well be beyond the 60/120-month* limit. That has led to the misconception that because the manifestation of the illness — or the death of the safety worker from that illness — occurs outside the 60/120-month* window, the safety worker or his/her family may be denied a full cup of justice. *However, that is not necessarily true.* Each individual case must be reviewed on its own merits, with emphasis on exposures and manifestations.

For example, we recently completed a safety member's death benefits case where the death actually occurred well outside the 60/120-month* window. However, based upon the facts presented, which were consistent with particular case law, the court ruled that the widow was still eligible for the death benefit of $250,000.

THE VALUE OF LEGAL COUNSEL

An interesting note also about this case (and many others) is that had the widow not sought legal counsel and merely followed the employer's recommendation, she would have received a death benefit settlement of only $125,000. However, because of concerns raised by a fellow worker, this family came to our office, and their case was settled not for the $125,000 inappropriately offered by the employer, but for $250,000, as noted above. That means the family received an additional $125,000 of much-needed money as a result of taking the initiative to obtain legal counsel. Although death benefits are on the rise, the increase has not occurred fast enough to accommodate the tremendous needs of most injured workers' families.

While death benefits are a very important aspect of work-related injury/illness presumption, perhaps more relevant to most

safety members is the provision of medical care for presumptive injuries. Again, by proper development of the record, the safety member, once his/her condition is shown to be job-related, is able to receive medical care under the California Workers' Compensation system for the presumptive body parts.

Obtaining medical care may require overcoming some hurdles, but the resulting benefit can be expansive. For example, care can include 24-hour in-home care for the member. Also, care can be extended to other systems that impact the job-related body part(s). For example, if a safety member has a heart condition and also is or becomes diabetic, and the only way to control the heart condition is to control the diabetes, the diabetes then falls within the scope of Workers' Compensation.

As you may have read in many articles, Workers' Compensation benefits other than death benefits have been minimized in the last several years. The creative counsel will look for other ancillary medical problems that emanate from your job-related medical condition or the medications you take for it, whether those problems are in the realm of pulmonary, renal, continence, potency or other conditions. Counsel will then ensure that you have medical coverage, not just for the job-related condition, but also for any condition caused or made worse by the job-related injury or illness or the medication you take for it.

THE ADVERSARIAL POSITION OF THE EMPLOYER

I would strongly warn the worker and his/her family to realize that the employer is in an adversarial position when it comes to Workers' Compensation benefits. *Their role is to minimize, mitigate or deny benefits*, no matter how long you have been employed or what your political connectivity is to the employer. Therefore, regardless of the position you hold with your employer, and regardless of the social interaction you may have with Human Resources, the Board of Supervisors, the City Council or the Mayor, it is important to recognize that their role is different when it comes to providing full coverage under Workers' Compensation.

Your goal as the worker or family member is to ensure that you receive coverage and/or monies because of a job-related condition, and the only way this can be achieved is by building a proper foundation of factual material supporting the reality of the exposures, and establishing that the latency and manifestation period for a particular condition are supported by current case law which allows for the extension of benefits and coverage beyond the 60/120-month* limit defined in the Labor Code.

If you unfortunately develop a medical condition which potentially is connected to your work — and you are not within the 60/120-month* limit set forth by the Labor Code — *it is important that you seek counsel so the foundation on which your case ultimately will be determined is full and complete*. If you seek medical opinions without having the proper legal knowledge, the doctors you select, as well as the doctors to whom you are sent, while sharing social niceties with you, may not be placed in the best position to help you if you do not have or understand the proper history of exposures and symptomatology to share with them. *The result?* You and/or your family members may not receive your full cup of justice — *i.e.*, the medical care and money you rightfully deserve under the Workers' Compensation system.

THIRD-PARTY LAWSUITS

Besides Workers' Compensation and retirement, our law practice also involves third-party lawsuit cases when an allegation is made against someone other than the injured worker's employer or co-workers. Such lawsuits are based upon negligent conduct by a third party which causes injury to the person making the allegation. When successful, third-party lawsuits involve damages which include compensation for medical expenses, wage loss, and pain and suffering.

A significant difference between a third-party case and a Workers' Compensation case is the potential for unlimited recovery in third-

party lawsuits versus limited recovery in Workers' Compensation cases. The first obstacle in a third-party lawsuit, however, is ensuing that sufficient insurance money is available to cover the responsible third-party's wrongful act and pay adequate compensation to the injured party.

UNINSURED/UNDERINSURED MOTORIST COVERAGE

Many times, unfortunately, third-party negligence is perpetrated by uninsured or underinsured motorists. However, you can protect yourself and your family against such negligence through the purchase of uninsured/underinsured motorist coverage. This coverage is relatively inexpensive and provides financial security and protection in the event of an accident involving a negligent third party who is uninsured or underinsured. This coverage will protect your household members and yourself up to the limits of your coverage, and it applies whether you are the driver in the car involved or just a passenger, or a pedestrian who has been struck by the negligent driver.

This insurance typically is purchased through your auto insurance and usually mirrors your liability limits. However, you can purchase it through your homeowner's insurance or an excess/umbrella policy which has an auto uninsured/underinsured motorist endorsement.

The most recent policy I have seen provided $1 million uninsured/underinsured motorist coverage for a cost of approximately $300. Please note that this coverage is not marketed by carriers, but they are forced to provide it. Also, brokers many times do not have a full understanding regarding this type of coverage, yet its importance cannot be overstated. If your broker does not have such knowledge and understanding, feel free to contact Mike Padilla and he can assist you in either evaluating your present coverage and/or educating your broker as to the availability of uninsured/underinsured motorist coverage.

You, as a retiree or a potential retiree, have an opportunity to be proactive in your medical care. You also can be proactive in ensuring that any medical conditions which develop that may fall within the presumptions indeed are considered accordingly. Finally, you can protect yourself and your family against uninsured/underinsured motorists by communicating with your broker regarding obtaining the proper coverage.

Scott O'Mara is an attorney who has represented safety members for many years. A strong advocate of injured workers, he has served as Adjunct Law Professor at Thomas Jefferson School of Law and Assistant Professor at San Diego City College. Mr. O'Mara also has previously been appointed judge pro tem. He can be reached at 1-800-LAW-1199 or 619-583-1199; website:

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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.

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