



### UNDERSTANDING THE RETIREMENT SYSTEM AND THE IMPORTANT DISTINCTION BETWEEN ACTUAL AND PROPHYLACTIC RESTRICTIONS

By Scott O'Mara

The State of California and other governmental entities — such as the counties, school districts, college districts and cities — recognize the unique work associated with law enforcement, along with the unique harmful exposures of that occupation. This work requires special education and training which is limited in its transferability to other employment opportunities they might pursue post their work in law enforcement. This fact has been recognized in the provision of benefits under disability retirement systems for workers who have a condition which is job-related and precludes them from being able to perform their substantial duties in law enforcement.

By and large, disability retirement systems benefit both injured officers, by providing an economic blanket of security when a work injury impairs their ability to perform their law enforcement activities, and society, by encouraging and allowing the law enforcement field to bring in high-caliber people to perform law enforcement activities,

At times, the Workers' Compensation system has an overlay with retirement systems, as some retirement systems will accept the Work Comp system's determination as to whether a worker's condition is or is not job-related, while other retirement systems have their own independent standards to determine causal factors in relation to a worker's employment.

An unfortunate theme which is used from time to time by all agencies — whether it be the State, a county, a city or a

particular district — is the attempt to intimidate workers who sustain a job-related injury. In these instances, the protocol is to utilize the level of residual impairment as an indicator as to whether a worker can or cannot perform his or her substantial duties. This threat is used to dissuade and discourage some safety workers from seeking benefits to which they are rightfully entitled under the Workers' Compensation system. The fear is that if they go forward and file a Work Comp case, and their level of impairment is a number which is not acceptable to the employer, the employer may use this figure as a vehicle to force the worker into a disability retirement.

A disability retirement may only be granted when certain parameters are met. One of the most significant parameters is whether the restrictions imposed by the worker's doctor in relation to a worker's disability are actual or prophylactic. An actual restriction means the worker is unable to perform a particular activity, while a prophylactic restriction means the worker can perform the activity, but doing so may cause discomfort or produce other symptomatology. Thus, a critical factor is whether the worker's impairment clearly precludes the ability to perform a particular activity, or whether it simply is a matter of the activity causing discomfort. An important factor also is whether the activity in question is crucial to the worker being able to perform his/her substantial duties.

A second factor sometimes used by employers to force a worker into a disability retirement when he/she has merely a prophylactic restriction is the assumption that based on the current level of a worker's medical problems, continuing to perform any activities in question will place the worker at increased risk of further injury. This in itself does not create the medical necessity for a disability retirement. Case law has reviewed and considered this issue,

and safety members need to be aware of the very significant difference between actual and prophylactic restrictions.

The vast majority of safety workers — in fact, over 95 percent — want to continue with their careers after a work injury. However, when faced with this decision, officers need to consider three elements — their health, their family and their career. If a worker's health jeopardizes their family relationship, they should give consideration as to whether they want to retire. If the worker decides to pursue a retirement based on disability which is defined in terms of a prophylactic restriction, the retirement will *not* be granted. The same holds true if the employer is the party seeking to force a worker's retirement — they cannot do so successfully if the worker's restrictions are merely prophylactic.

The next factor to consider is the worker's usual and customary duties, which can change from time to time. In fact, there are many situations where a safety officer can continue to perform his/her work because the restrictions imposed do not significantly impact the worker's ability to perform his/her usual and customary duties.

Therefore, safety workers who feel threatened by the possibility of losing their employment (and their employability) because of having filed a Workers' Compensation case should speak with their doctor and attorney to learn whether their restrictions are actual or prophylactic. As noted above, if the restrictions are prophylactic, that allows great latitude for the worker to continue with his/her employment.

On the other hand, if the restrictions are actual, then the ordered priority of health-family-career needs to be considered. If successful modifications can be made,

an injured worker can then potentially continue with his/her career. However, if such modifications cannot be made, the venue of a disability retirement protects them and our society as well.

The pivotal case involving the CalPERS retirement system and setting forth this issue is *Willie Starnes v. Department of California Highway Patrol*. In this case, Sgt. Starnes wanted to return back to work, but the CHP refused to take him back, even though his restrictions were prophylactic. I successfully litigated this case, which was considered to be of precedential value because it reinforced the concept that *actual* restrictions are the standard necessary to either obtain or be forced into a disability retirement, and *prophylactic* restrictions are not a sufficient basis for retirement in either scenario.

Restoring health is an injured worker's foremost goal. Therefore, it is important that workers who hesitate to file a Workers' Compensation case (and obtain the health care they need) based on the fear of losing their jobs should be aware that although some employers might attempt to force them out, they cannot do so when the worker's restrictions are merely prophylactic.

Many employers will determine a worker cannot perform his/her substantial duties because of the level of permanent impairment resulting from a job-related injury. Permanent impairment is determined by three factors: the injured body part or medical condition; the worker's occupation; and the worker's age. These factors are placed into a formula which ultimately produces a percentage value of impairment.

The determination as to impairment is based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment*. In this 613-page book, the authors set forth that the impairment evaluation is only one aspect of the disability determination. Other factors include the injured worker's skills, education, job history, adaptability and age, as well as environmental require-

ments and modifications. Of significance is that the *AMA Guides* specifically state:

"Impairment percentages derived from the *Guides* criteria should not be used as direct estimates of disability. Impairment percentages estimate the extent of the impairment on whole person functioning and account for basic activities of daily living, not including work. The complexity of work activities requires individual analyses. Impairment assessment is a necessary *first step* in determining disability."

This paragraph makes clear and concise that levels of impairment in the *Guides* are not directive as to whether a worker can or cannot perform his or her substantial duties.

As previously articulated, restrictions, for retirement purposes, must be *actual*, not *prophylactic*. The Physician's Report on Disability — which must be completed by the injured worker's physician as part of the CalPERS Disability Retirement Election Application — is very direct and consistent with the case law established by the *Willie Starnes* case when the Report states on page 2:

"To qualify for a disability retirement, the CalPERS member must be substantially incapacitated from the performance of the usual duties of his/her position with the current employer. This 'substantial incapacity' must be due to a medical condition of permanent or extended and uncertain duration. Disability is not necessarily an inability to perform fully every function of a given position. Rather, the courts have concluded that the test is whether the member has a substantial inability to perform the usual and customary duties of the position."

The paragraph concludes with this highlighted statement:

**"Prophylactic restrictions are not a basis for a disability retirement."**

Again, this statement is very direct in setting forth that a prophylactic restriction is *not* a sufficient basis for either granting a disability retirement or forcing a worker

to retire. Therefore, the use by some employers of prophylactic restrictions and the level of permanent impairment as justification for the determination that a worker is unable to perform his/her substantial duties is inappropriate and inconsistent with established case law.



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