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THE PRESUMPTIONS AND RETIREMENT CONSIDERATIONS

By Scott O'Mara

PROACTIVE STEPS TO PROTECT YOU AND YOUR FAMILY

People of the state of California have long acknowledged the unique harm faced by safety officers because of the nature of their work. Many times this harm is immediately apparent because of a specific incident (called a "specific injury" in Workers' Compensation). Other times, the awareness of the harm does not occur for a long period of time because it takes many years to develop, as in the case of cancer, for instance (this is called "cumulative trauma" in Workers' Compensation).

However, you can take proactive steps to protect you and your family through:

1 — Predesignation of a treating physician;
2 — Awareness as to the presumptions of work-related injury applicable to safety workers;
3 — Expanded medical coverage; and
4 — Uninsured/underinsured motorist coverage.

PREDESIGNATION OF A TREATING PHYSICIAN OR MEDICAL FACILITY

You have the right to predesignate a treating physician or medical facility to be your doctor or medical facility in the event you sustain a job-related injury. This physician or facility would be a doctor or medical group that has previously seen you or has agreed to treat you in the event of an industrial injury.

If you exercise the right to make such predesignation, it will protect you from having to go through the employer's medical provider network ("MPN"). If you have not predesignated a doctor, you will be required to see a physician in the employer's MPN, thereby limiting your choice of doctors and enabling your employer to control the course of your medical treatment.

Unfortunately, the quality and attitude of doctors within the MPNs can be disturbing, as many physicians are required to share a substantial portion of their normal fees with the vendor who created the MPN. For example, in a well-established group in Southern California, a doctor who would normally receive $100 for services provided on his or her own would typically receive only $60 for services provided through the MPN, with $40 going to

the network's administrators. With this economic disincentive, MPN doctors are motivated to take an assembly-line approach to their practice so they can see as many patients as they can to maximize their profits. This is called a "*treat-and-release*" approach.

As a result of these factors, some MPN physicians are not patient advocates and do not spend sufficient time with their patients. Because of the fee-sharing involved, the focus of these doctors is shifted to the quantity of patients seen rather than the quality of care provided.

With the *treat-and-release* approach, the doctor will diagnose an injury — a strain, for example; charge for reviewing your case; and then return you to full or modified duty without conducting a full examination or providing physical therapy. This approach ensures a good flow of income for the medical group, but minimal medical care for you.

However, if you are proactive and have taken the time to predesignate a doctor and/or medical group, you can avoid being caught in a *treat-and-release* program. Instead, you will be able to see a physician who is a patient advocate and has a genuine concern for your well-being, rather than a doctor who must appease the employer and yield to any pressure the employer might apply.

If you go to the www.law1199.com website, you can obtain a copy of the medical predesignation form. The best interests of you and your family will be preserved by completing this form, having your chosen physician or group sign it, and then submitting it to your employer. You should maintain a copy for your files, as it is not uncommon for employers to misplace these documents. *Why?* Because maintaining these forms is not a high priority for the employer.

PRESUMPTIONS OF WORK-RELATED INJURY

Because of the unique nature of the work of safety officers, and the dangers inherent in their work, the California Legislature has determined that certain injuries and illnesses sustained by these workers are presumed to be job-related. These are commonly referred to as the "presumptions". However, these presumptions are rebuttable. Therefore, it is important to develop properly all claims relevant to the presumptions to ensure that injured safety officers receive the benefits intended.

The injuries and illnesses applicable to the presumptions include: heart trouble, hernias, pneumonia, cancer, tuberculosis, blood-borne infectious diseases, illnesses arising from exposure to biochemiical substances, meningitis, and — for certain safety workers — lower back injuries. As these presumptions cost employers money, they would prefer to shift the financial burden to you and your family — which they can do, and will attempt to do, by rebutting the presumptions.

It should be noted also that the above-listed presumptions provide only a narrow perspective as to their true application. The reason for this is that in many instances the presumptions may extend to cover other body parts or systems. For

example, the heart presumption might be thought to have application only to the heart.

However, if an injured worker has hypertension/high blood pressure, and there is evidence of end-organ change — specifically hypertrophy of the left ventricle — established case law allows the heart presumption to include the hypertension/high blood pressure as well. Therefore, in certain situations, the presumptions may extend to other body parts or systems.

The prevailing concept had been that the presumptions were subject to a time limitation and were valid only for a period up to five years following a safety officer's last day worked. However, recent legislation has extended applicability of the cancer presumption up to 10 years.

"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."

Even with the limitations placed, in many cases a condition has been shown to be job-related well beyond the 5-year/10-year limit. The facts of each individual case, as well as the type of disease and the different periods of latency and manifestation, are factors as to whether the member can go outside the artificial time limitations placed on the applicability of the presumptions.

The unfortunate reality is that many people who have sustained job-related injuries in the past do not connect their ongoing medical problems — such as heart trouble and cancer — with their past employment. They go through life, do their work and then retire, placing economic burdens upon their families simply because of their lack of knowledge about the presumptions — and the ability to apply these presumptions many years post-retirement.

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

All safety members who are retired or are considering retirement should have a good 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 protection 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.

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 paralysis (*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.

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 physicians. 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.

As stated previously, work-related presumptions do exist, but they require the worker or retiree to provide substantial evidence showing the connectivity between his/her job and the illness or injury. If the worker or retiree cannot or does not develop such substantial evidence, the presumption will fail.

Another consideration is that the legislation creating the presumptions upon first review indicates the presumptions apply only within a period of 60/120 months past the cessation of employment, and the injured worker who develops a condition after the conclusion of that 60/120- month period cannot benefit from the presumption.

However, the relevance of the 60/120-month presumption actually depends upon the facts of each individual case, as each disease has a different period of latency and manifestation, and these factors in many situations do not allow the imposition of a 60/120-month statute of limitation.

Recently, I completed a case where the individual member was 15 years beyond his last day of employment, yet I was able to establish the application of the work-related presumption. The success of this case had a tremendous positive economic impact upon the worker and his family. The medical care and home health care coverage go well beyond the parameters of what would have been offered through a Blue Cross, Kaiser or PacifiCare plan.

All safety members who are retired or are approaching retirement must examine and be candid with themselves about their various medical conditions. Many members have spent many years denying that they have a serious medical condition, or that their condition may have connectivity to their work. This denial will have severe economic consequences, not only for themselves, but also for their families.

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 ensuring that sufficient insurance money is available to cover the responsible third party's wrongful act and pay adequate compensation to the injured party

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 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 under-insured.

This coverage also protects your household members and yourself up to the limits of your coverage. This umbrella of protection 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, which 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 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 you and your family against uninsured/underinsured motorists by communicating with your broker regarding obtaining the proper coverage.

PROTECTION FROM UNINSURED AND UNDERINSURED MOTORISTS

Perhaps the single most important coverage in your automobile insurance policy is protection from uninsured and underinsured motorists. It applies when bodily injury is caused by a vehicle driven by a motorist who has little or no insurance. The purpose of uninsured/underinsured motorist coverage (known as "U/UM" coverage) is to ensure that you and your family, if injured by a financially irresponsible driver, are protected to the extent you would have been protected if the driver at fault had carried sufficient liability insurance.

U/UM coverage is only required to be offered in primary automobile liability policies. It is not required for excess or umbrella policies, unless specifically endorsed in such policies. An excess or umbrella policy is a liability policy which goes beyond your primary automobile policy.

The parties covered under the policy would include the named insured on the declaration page; the spouse of the named insured; relatives of the named insured if they are residents of the same household; and any other person or persons present in or upon the insured vehicle.

U/UM coverage is a relatively inexpensive way of securing expanded protection for you and your family. The general rule is to purchase as much of this coverage as your budget will allow. It can be obtained by comparing the policies that different insurance companies sell and what they cost, and then deciding what is right for you.

In the event a safety member suffers a job-related condition caused by an uninsured/ underinsured driver, the member may be able to draw upon U/UM coverage for this purpose. The general thinking is that you should purchase at least $1,000,000 in coverage, and even more if economically possible. In the unfortunate scenario where you were to suffer a career-ending injury, you most likely would need coverage of between $1,000,000 and $5,000,000. Therefore, the more you are willing to purchase, the greater your coverage will be, and the greater the protection for you and your family.

The essential factors in evaluating third-party cases relative to auto accidents are:

1 — Liability against a third party must be established.
2 — The third party must have sufficient insurance or assets from which the settlement or judgment can be obtained.
3 — The damage sustained must be of such a nature as to make development of the case economically sound.

With the purchase of U/UM coverage, you again extend more protection to you and your family.

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