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SENATE BILL 863: CHANGES ARE NEEDED, INCLUDING EXTENSION OF DEATH BENEFIT

By Scott O'Mara

California workers have both a benefit and a challenge as a result of Senate Bill 863, which was signed by Gov. Brown on 9/18/12 and became effective on 1/1/13.

SB 863 places some limitations relative to injuries occurring on or after 1/1/13, in that no increase in impairment is allowed for sleep dysfunction, sexual dysfunction or psychiatric disorder. As previously stated, for any California workers who were contemplating a claim for one or more of these conditions, filing needed to be accomplished prior to 1/1/13.

The initiation of the new system changes the timing of the commencement of permanent disability payments. Under the previous system which was phased out, the employer had an obligation to advance payments on the value of a case prior to the issuance of an award by the Court. The obligation of an employer to advance such money prior to a Court order allowed the first payment of permanent disability indemnity to be made within 14 days after the last date of payment of temporary disability. These permanent disability payments were to be made regardless of whether the extent of permanent disability had been fully determined at the date of last payment of temporary disability, and they were to continue until the employer's reasonable estimate of permanent disability had been paid. If they did not make these payments, the employer was subject to a penalty.

The amendment of Labor Code §4650(b) addresses pre-payments of permanent disability. It sets forth that if the employer has offered the injured worker a position which pays at least 85% of the wages and compensation he/she was paid at the time of injury, or the injured worker is employed in a 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 an award has been issued by the Court.

Under the former system prior to 1/1/13, there was a mandate potentially adjusting the payment of permanent disability by 15%, either up or down, depending upon the continuation or lack of continuation of the employee in his/her work situation. However, many employers tried to manipulate the system so they could meet the threshold for the 15% reduction.

This manipulation was dealt with in *City of Sebastopol v. WCAB and William Braga*, a decision filed on 8/28/12. In this case, the employee sustained a job-related injury and the employer provided the appropriate notice for the 15% reduction, but the employee lost

no time from work. The argument was that the City was not entitled to a 15% decrease, nor was the worker entitled to a 15% increase. While the City pursued the 15% decrease, the Court of Appeal ultimately opined that since the employee had lost no time from work and continued to work in his regular position — and considering that the legislative intent of the 15% increase/decrease was to provide an incentive for injured employees to return to work — the employer would not be able to reduce the value of the disability by 15%. To do so would simply have provided the employer a windfall, as they had no incentive to provide a worker who had not missed any time from work because of his/her injury.

This decision is reflective as to the ongoing problems with abuse related to the increase/ decrease scenario, but it also provides a very strong direction for all cases where the employer seeks a reduction. Such a reduction would be inappropriate, and, in this writer's opinion, this decision opens the door for workers to take corrective action in similar situations where the employer has unjustly obtained a reduction.

One benefit of the new legislation is an increase in permanent disability payments. If a worker has a whole person impairment of 40% for a 2007 back injury, the value — without taking age and occupation into account — would be $86,197.50 in 2013; and for that same injury in 2014, the value increases again to $92,582.50.

Yes, there is an increase in the level of payment of permanent disability with the new legislation, but the above calculations do not take age and occupation into account. Again, the enhanced benefits have application only to injuries occurring on or after 1/1/13. The Administrative Director is in a position to amend the Schedule, and such amendment will impact the modifier for age and occupation. Until this modification occurs, the current modifiers from the 2005 Schedule will be utilized. It is anticipated that any amendments made to the modifiers will be prospective from the date of the change.

There continues to be an acceptance that the *AMA Guides*, which are utilized for providing direction in determining the value of cases, have flaws. The case of *Guzman*, which allows for and sets forth a protocol for rebutting the chapter and table methodology used by the *Guides* to determine levels of disability, still is in place and can be utilized by either side.

As previously stated, there is a return-to-work program, which is to be funded by $120 million derived from the Workers' Compensation Administrative Revolving Fund. The Administrative Director of Industrial Relations is to adopt regulations to carry out this program, and any determinations made by the Director will be subject to Court review.

Supplemental job displacement benefits set forth time limits for vouchers issued after 1/1/13. The limit is two years from the date the voucher is furnished, or five years after the date of injury. This time-line could cause some injured workers to lose job displacement vouchers if they don't act in a timely manner. Vouchers for injuries occurring on or after 1/1/13 have a maximum value of $6,000.00.

The vouchers also depend on whether the employer makes an offer of regular, modified or alternative work. If in fact such offer is made no later than 60 days after the receipt of a report from a primary treating physician, Agreed Medical Examiner or Qualified Medical

Evaluator indicating the disability has become permanent and stationary, and the injury has caused disability, and the offer of work lasts more than 12 months, the employee is not in a position to obtain the voucher.

As the case law goes forward, as we discussed in the previous article, the drafters of this legislation anticipate some constitutional challenges. Senate Bill 863 provides an overview, but the specifics will develop through a pattern of growth defined by the Court's response to the legislative directive and intent.

Death benefit availability to surviving family members of safety officers currently extends to 240 weeks after the date of injury. Assembly Bill 2451 would have allowed these family members to collect death benefits up to 480 weeks following the date of injury. The rationale behind the longer period was that modern medicine has increased the life expectancy for workers with many diseases, yet there is a terminal point that doctors recognize. This is particularly true with cancer cases. *Unfortunately, however, the Governor vetoed this legislation* — penalizing those families who would benefit from being with their loved one while the disease continues to take its toll and ultimately the life of the family member.

Again, the intent of the vetoed legislation was a recognition that better medicine in the past 20 years has extended the lives of terminally-ill individuals. This issue needs to be revisited again, and the Governor needs to meet and be aware of those family members who love and care for their terminally-ill member, and recognize that the penalty imposed upon them is not only the death of the loved one from a job-related injury, but also the tremendous economic burden they should not be required to bear.

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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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