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## THE ACTUAL EXPENSE OF CARVE-OUTS TO INJURED WORKERS

By Scott A. O'Mara

The California Workers' Compensation system mandates that employers must provide reasonable medical treatment to cure or relieve injured workers of the effects of their injuries, as set forth in the California Constitution, Article 4, Section 4. As most readers are aware, changes in medical treatment may be required, as an injured worker may become more symptomatic or disabled over time.

In one very significant case we handled, the injured worker had a job-related medical condition which caused a stroke, as a result of which the worker eventually needed home health care to assist with his activities of daily living. The change in his condition was of such magnitude that his employer was forced to renovate the worker's house, provide ramps, change doors, and ultimately provide transportation as well.

Because of the unique nature of this person's situation, one of the options not available to him was to have an outside provider come in and provide in-home health care — preparing meals, bathing him, performing house cleaning, providing transportation, etc. A major concern relative to these activities was the exposure the injured worker would have to other people who might be adverse to his role as a law enforcement officer. Therefore, the injured worker and his wife decided that she would provide the in-home health care.

However, the employer did not agree that they had an obligation to pay for such care. Their position was that the injured worker should move into an elder facility to receive the care he needed as opposed to the employer having to paying the worker's spouse to provide same. The issue of having home health care service provided by the worker's wife was an issue that I litigated.

The issue was this: *Is an injured worker entitled to have his wife provide home health care and be paid for same?* I litigated this major issue, and it was determined that the employer was liable for the past and current cost and expense involved in having the injured worker's wife provide the care needed by the worker. To date, the cost for the employer mandated responsible for the injured worker's home health care has totaled more than \$900,000, and this expense continues. Of significance also is the fact that the Court's finding in this case has created case law for other similar cases.

An injured worker typically has access to medical care, but employers typically seek to limit the provision of in-home health care provided by the worker's spouse.

In addition, an injured worker has five years from the date of an injury to reopen a case for new and further disability if a change has occurred in the worker's overall impairment as stipulated by the parties, or if a judge has issued a new Findings and Award. This becomes a pivotal point for the injured worker and his/her attorney to review the change in medical care needed, as well as any potential change in the worker's level of disability.

If there is a change in disability within five years of the original date of injury, the worker can receive an increase in compensation for his/her impairment. Equally if not more important, if there is a change in the need for medical care, the five-year limit does not apply, and compensation for the services needed extends for the life of the injured worker.

An injured worker must articulate successfully to the doctor any changes in subjective complaints and, in doing so, make sure those complaints are commensurate with the concept of good days and bad days, as opposed to focusing entirely on the bad days. Putting the emphasis solely on the bad days empowers the employer to question the worker's veracity.

The level of impairment can be increased within five years, but home modifications — such as getting a van or providing in-home health care — are not subject to the five-year limitation. As these changes occur — which unfortunately is the case in many medical situations — if the worker has entered into a stipulated finding or received a trial award instead of settling for a Compromise and Release, the case can be reopened for new and further disability within the five-year window from the date of injury, and there is no limitation regarding the medical care to cure or relieve.

Sometimes, the medical care which is provided under Workers' Compensation causes ancillary problems. If this occurs, the ancillary problems also become the responsibility of Workers' Compensation. For example, if an injured worker takes prescribed medication which causes another medical problem relative to the work-related condition, the ancillary problem becomes the responsibility of Workers' Compensation as well. If this problem occurs within five years of the date of injury, the case may also be reopened relative to any change in earning capacity.

Injured workers must be made aware of the five-year reopening rule, and understand that it does not have application to ongoing medical care. In the case I have referred to, major house renovations, special transportation and compensation paid to the spouse very quickly reached the level of more than \$72,000 per year.

The adjusters involved with a case may be aware of the change in the injured worker's medical condition, but they are not going to be proactive in obtaining compensation for the spouse; in having home modifications made, such as ramps and new bathrooms and showers; or in providing

transportation. The unique knowledge which the injured worker has needs to be documented in doctor reports to substantiate whatever assistance is needed. With this documentation, Applicant’s Counsel can then go forward and obtain a Court order granting either payment to the spouse or significant other, and/or payment for any home modifications and revamping needed.

As the case goes forward, the injured worker may be tempted by a settlement offer – called a Compromise and Release – made by the Defendants. This offer will be in the form of a monetary amount which the Defendants are willing to pay to the injured worker to settle and close out his/her case permanently. Typically, however, the employer/insurance carrier/ adjuster gain the most from this type of settlement – not the injured worker.

Therefore, as your case develops after a trial or a stipulated award, remember that you have five years to reopen the case for new and further disability if you experience an increase in residual impairment, but there is no five-year limit regarding the need for medical care to cure or relieve the effects of your injury, as set forth in the California Constitution.

Communication with your counsel is imperative. An attorney who has been involved with your case since its onset is in the best position to evaluate the case and determine what evidence may be necessary to obtain a court order granting the above-mentioned benefits relative to an increase in disability or the expansion of medical care.

This then brings up the concept of the challenges created by carve-outs. Carve-outs attempt to minimize counsel involvement, empowering employers because injured workers are deprived of the opportunity to speak with someone who is objective about the benefits available and what can be done. Simply put, carve-outs are a powerful tool for employers at the expense of injured workers and their families.

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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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