

Workers' Compensation

Protecting Reforms Can Maintain System Balance, Provide Timely Benefits, Minimize Employer Costs

Summary

The California workers' compensation system is a 100 year-old constitutionally guaranteed system that provides workers the right to compensation for workplace injuries. This compensation includes medical treatment to "cure and relieve" the injury, and, when appropriate, indemnity benefits in the form of temporary or permanent disability. The system is rooted in an agreement between employers and employees, sometimes referred to as "The Grand Bargain," where employers accept responsibility for all injuries and illnesses that occur in the course and scope of employment, even when they would otherwise have no legal liability. The workers, in exchange for the guaranteed coverage, relinquish the right to sue their employers in civil court.

State of the System

California has had a multi-decade state of cyclical reform and re-reform of the workers' compensation system. Broad reforms in the 2002–2004 legislative sessions focused on delivery management and treatment cost containment while ensuring appropriate delivery of quality medical care. These reforms led to multi-year cost savings in the system. According to the Workers' Compensation Insurance Rating Bureau (WCIRB), insurance rates paid by employers dropped more than 60%.

The cost cycle began trending up in 2008. The average cost per indemnity claim was much higher than before the 2003–2004 reforms. Costs per claim were up 43% from the post-reform low in 2005 and up 14% from the pre-reform all-time high in 2003. Further, California was the third most-costly workers' compensation system in the nation, according to the biennial study conducted by the Oregon Department of Consumer and Business Services. The savings from the 2003–2004 reforms had been diluted and undercut by a combination of incomplete implementation, judicial activism, exploitation by vendors, and medical and litigation costs. These costs also drove rates up 19% between January 2009 and January 2010, and 3% between January 2010 and January 2011.

The post-2004 reform issues also had an impact on the injured workers. Benefits for permanent disability were reduced in response to the increasing costs. These issues were magnified by the never-used review mechanisms of the reforms. All system stakeholders acknowledged that permanent disability benefits needed proper augmentation.

In 2012, Governor Edmund G. Brown Jr. signed into law a workers' compensation reform package negotiated by employers and labor that sought to address both system costs and permanent disability. SB 863 (de León; D-Los Angeles, Chapter 363, Statutes of 2012) struck a balance between increased benefits to injured workers with cost-saving proposals. The benefit increases were projected to be offset by reforms that should reduce frictional costs, decrease litigation, stem abuses by vendors within the system, speed up the claims administration process, and make delivery of benefits more efficient.

A post-SB 863 law also is on the verge of being implemented. AB 1124 (Perea; D-Fresno, Chapter 525, Statutes of 2015) required the Division of Workers' Compensation to implement an evidence-based drug formulary. In December 2017, the Division announced that the regulations implementing the formulary had been adopted and would take effect on January 1, 2018. The formulary establishes a list of medications within the Medical Treatment Utilization Schedule (MTUS) that are appropriate to help injured workers return to work while reducing administrative costs. The formulary also should help continue the positive trends in combating the overuse of opioids by injured workers.

System Stable, But Still Most Expensive

The 2017 WCIRB Cost Monitoring Report projects that 2017 premiums will remain at a level comparable to 2016. Insurer rates have decreased 15% since the first half of 2015 due to the SB 863 reforms. California, however, is projected to still have the highest rates in the country due largely to the frequency of permanent disability claims, high medical cost per claim, prolonged treatment, and high cost of handling claims and delivering benefits.

The frictional costs also remain high and costs are geographically concentrated. Attorneys' fees account for two-thirds of all frictional costs. Further, the frictional costs exceed the amount of indemnity benefits paid. The Los Angeles region, source of 35% of all indemnity claims, is a major cost driver to the system. The claim frequency in the area is 25% higher than the statewide average. Further, one-fifth of indemnity claims involve cumulative trauma, which is more than double the amount in 2007.

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Issues on Horizon

Combating Fraud in California Workers' Compensation System

Workers' compensation fraud is one of the fastest-growing forms of insurance fraud and costs the state \$1 billion to \$3 billion per year. One fertile area of fraud is provider fraud, which involves the provision of medical services in workers' compensation cases. Provider fraud includes submitting claims for services not provided, ordering unnecessary or excessive services, taking kickbacks for directing patients to other providers, and using "runners" and "cappers" to solicit patients. The RAND Corporation released a thorough review of provider fraud in the California workers' compensation system (*Provider Fraud in California Workers' Compensation*, 2017). The report made four recommendations:

- Aggregate all the system data in one place;
- Use advanced analytics to detect fraud;
- Address cumulative trauma (CT) claims; and
- Follow the Medicaid model of suspending fraudulent providers.

One of the recommendations in the RAND report is that better use of the data which is already collected and possessed by various system stakeholders would help reduce fraud. To this end, the report suggests that there needs to be a more centralized workers' compensation data unit. If such a unit could collect data from the entire system supply chain, then big data advanced analytics could be used to detect fraud. Such modeling is not feasible now because of the dispersed "Balkanization" of the data across the system.

The RAND report also suggests that post-employment treatment and cumulative trauma claims are particularly burdened by fraud. Specifically, the report concluded that "there is reason to believe that the frequency and severity of CT claims in Southern California are being largely driven by intentionally fraudulent acts, rather than genuine instances of appropriate medical treatment." Roughly 95% of all CT scan claims are filed in Southern California and the top 10% of medical lien filers are responsible for 75% of the total value of liens.

Finally, the RAND report suggests that California should follow the Medicaid system of suspending providers suspected of fraud. The Medicaid model differs from the Labor Code mechanisms (Sections 4615 and 139.21) in various ways, but the biggest difference is that Medicaid allows suspension of providers upon a "credible allegation of fraud," while the California analogs require formal filing of criminal charges. Further, under the Medicaid model, all payments to the provider are suspended, which is somewhat broader than the California approach. The RAND report reasoned that the Medicaid model offers a "flexible, civil law-based" approach for combating fraud that does not depend on resource-limited criminal prosecutors.

Apportionment

The California workers' compensation system was designed to cure and relieve industrial injuries or, more simply put, injuries that occur at work. As such, when making permanent disability determinations, physicians may apportion between industrial and nonindustrial causes of disability. Apportionment of permanent disability claims has been part of the system since the Workmen's Compensation Insurance and Safety Act was adopted in 1917. Courts have long applied the principle. (*Tanenbaum v. Industrial Accident Commission*, et al. (1935) 4 Cal.2d 615.)

Legislation has been attempted, however, to undermine the principle of apportionment. Introduced in 2017, AB 570 (Gonzalez Fletcher; D-San Diego) would have required employers to compensate some injuries that occurred outside the workplace. AB 570 would have eliminated apportionment for certain conditions, thereby expanding workers' compensation beyond industrial injuries. The bill ultimately was vetoed by the Governor. Further, currently pending legislation, SB 617 (Bradford; D-Gardena) would narrow the bases by which apportionment determinations could be made. Apportionment will be the subject of many future legislative discussions.

CalChamber Position

Workers' compensation costs for California employers must decrease to become more competitive with employer costs in other states. The California Chamber of Commerce-supported cost-saving reforms were designed to both increase benefits and reduce overall system costs. These reforms must be protected from any attempts to dilute or undercut savings through subsequent legislation or judicial activism. The ultimate goal is a balanced workers' compensation system that efficiently provides timely and fair benefits to injured workers and minimizes administrative and frictional costs to employers.

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