Workers' Compensation

Caution Needed to Balance Fair Benefits, Minimize Costs, Pressures on Employers

California's 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 as the "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.

WORKERS' COMPENSATION CLAIMS AND COVID-19

When COVID-19 began to spread through California, many companies took a toll financially and were forced to lay off employees or find ways to transition their workforce to teleworking if possible. Many industries, such as health care providers, first responders, restaurants and grocery stores, scrambled to find ways to continue operating while doing all they could to protect workers from exposure to COVID-19.

Companies started to receive workers' compensation claims from workers claiming that they contracted COVID-19 at work. While many employers were accepting COVID-19 claims, some were denying claims because there was no evidence the diagnosis was work-related and some claims lacked any diagnosis or positive test of COVID 19.

According to the California Workers' Compensation Institute, a review of claims filed on or before April 30, 2020 shows that approximately 69.7% of claims that were denied were due to negative results on a COVID-19 test. These included claims filed by workers because their co-workers had shown symptoms even though they themselves showed no symptoms and had not tested positive for COVID-19.

In May 2020, Governor Gavin Newsom signed Executive Order N-62-20, which created a disputable presumption that employee COVID-19 diagnoses between March 19, 2020, and July 5, 2020 were contracted at work and therefore covered by workers' compensation

On September 17, 2020, the Governor signed SB 1159 (Hill; D-San Mateo; Chapter 85), which codified Executive Order N-62-20 and also extended the rebuttable presumption to COVID-19 illnesses diagnosed after July 5, 2020 by certain emergency responders and health care professionals who had worked within 14 days of the positive test as well as employees who performed work at a worksite within 14 days of an outbreak of COVID-19. SB 1159 defined "outbreak" as 4 employees testing positive for COVID-19 where the employer has 100 or fewer employees or 4% of employees testing positive where the employer has more than 100 employees. Not only does SB 1159 shift the burden to the employer to dispute the claim that the contraction of COVID-19 was work-related, but the bill also shortens the time to accept or reject a claim to 30 or 45 days, depending on the circumstances.

The Workers' Compensation Insurance Rating Bureau of California has indicated SB 1159 may result in between $2.2 billion and $33.6 billion in increased costs per year to the workers' compensation system.

WHAT'S COMING IN 2021

Even though SB 1159 was just recently enacted, there is concern that there will be additional efforts to change the workers' compensation system even further in the next legislative year. Below are several trends the California Chamber of Commerce expects to see in 2021.

• **Expanding Presumptions of Workplace Injury**. Perhaps the most prevalent issue has been the increased effort to add disputable and even conclusive presumptions to workers' compensation claims. To succeed on a workers' compensation claim, the injured worker generally has the burden to present some medical evidence that the illness is related to work. The employment need not be the sole cause of the injury, but there needs to be evidence that the injury arises out of and in the course of the employment. In other words, the employment and injury must be causally linked.

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A rebuttable presumption that the injury is compensable places the burden on the employer. The employer must accept the claim unless it can show that there is no causal connection between the claim and the employment. This places a tremendous burden on the employer, which now must conduct discovery into the employee's other nonwork activities and whom the employee interacted with to try to demonstrate that the employee did not contract COVID-19 at work.

Although some employers may have the means to try to trace the exposure or hire companies to administer tests on site, many employers do not as a result of the current economic recession. The employer's burden also applies equally for all employees who work at a worksite for the next three years, even if some employees have very little risk of exposure given the nature of their position or precautions taken by the employer.

Historically, presumptions have been applied only in rare circumstances, such as to claims brought by public safety workers who hold hazardous positions with great risk of injury, such as firefighters and peace officers. Even then, the presumption applies only to certain alleged injuries.

Although COVID-19 presents a unique situation, there is concern that more presumptions will begin to be applied to other types of workers' compensation claims in the future involving infectious diseases, which are difficult to trace. Indeed, SB 893 (Caballero; D-Salinas), as introduced in 2020, would have created a presumption of industrial causation for all hospital employees who provide direct patient care and manifest any one of many identified infectious diseases. As noted in the report issued by the California Workers' Compensation Institute, "[i]nserting presumptions disrupts the normal process of determining whether the injury is related to employment" and they therefore should be used sparingly.

• **Shortening Claims Review Periods**. SB 1159 and other bill proposals also made efforts to shorten the window of time for employers to review potential claims. An employer and its claim adjuster usually have 90 days to review a claim to determine whether to accept or deny coverage. During that time the claim is investigated, including gathering and reviewing medical evidence.

SB 1159 sets precedent for shortening that time frame to just 30 or 45 days, depending on the date of the alleged injury and worker's job title. That time frame is especially short where the employee may be ordered to quarantine for a minimum of two weeks, severely limiting the ability to investigate the claim.

• **Cumulative Injury Claims**. Due to the current economic recession and COVID-19's impact on the ability to access medical care quickly, the Workers' Compensation Insurance Rating Bureau (WCIRB) of California expects to see a rise in cumulative trauma claims. (*See* WCIRB REG-2020-00014.)

A cumulative trauma claim occurs when a series of incidents is found to be one single cumulative injury. The most common diagnoses include carpal tunnel syndrome and sprains of the neck, wrist, shoulder/arm and lumbar region. Almost half of the cumulative trauma claims filed in the workers' compensation system are filed after an employee's employment has ended, whereas less than 10% of specific injury claims are filed after employment has ended. (*See* WCIRB, *The World of Cumulative Trauma Claims* (2018)). Cumulative trauma claims increased during the "dot-com recession" in the early 2000s as well as the Great Recession in 2009.

Cumulative trauma claims are overall more costly than single injury claims, both in payments for medical care and legal fees, for a number of reasons. The claims are much more likely to involve multiple claims filed by the same claimant and involve multiple body parts. Cumulative trauma claims also are more likely to have a psychiatric or mental stress component. Applicants for cumulative trauma claims are represented by an attorney about 90% of the time, increasing legal costs associated with these claims, especially when cumulative trauma claims generally remain open for years. With claim frequency expected to rise due to COVID-19, it would not be surprising to see legislation dealing with these types of claims in the coming years.

CALCHAMBER POSITION

The workers' compensation system was created to provide a cost-efficient and expedited way to compensate employees for workplace injuries. Once an employee establishes that an injury is work-related, the employee is entitled to compensation, regardless of fault. Adding "rebuttable" or even worse, "conclusive" presumptions that an injury is work related, limiting an employer's ability to investigate claims, or expanding the injuries resolved in the workers' compensation system could overwhelm the system and significantly increase costs.

The Legislature must be cautious when proposing changes to the workers' compensation structure so as to maintain a balanced system that provides fair benefits to workers while minimizing costs and unfair pressures on employers.

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