

California Workers Compensation Permanency Reform: Providing the Tools for Cost Containment

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The 2004 amendment to the California Workers Compensation Law (SB 899) has several ambiguous substantive and procedural changes, some of which are already under judicial review, with more to come. Even with these outstanding questions, the new law contains statutes with clear and valuable cost-containment tools that became effective on April 19, 2004, the date of enactment.

Carriers and employers must learn how to use these new cost-containment tools as soon as possible to create the savings that the law intended. They should not simply rely on the new law to reduce costs without re-evaluating how information is obtained and used during the claims process.

Apportionment of Permanent Disabilities

One of the major cost-containment tools afforded by the law is the new legal standard for potential entitlement to permanent disability benefits once a claimant's condition becomes permanent



and stationary.¹ For claims where there was no existing order for permanent disability benefits before April 19, 2004, new Section 4663(a) applies, stating, "Apportionment of permanent disability shall be based on causation."

More specifically, Section 4663(c) states in part:

A physician shall make an *apportionment determination* by finding what approximate percentage of the permanent disability was caused by the *direct result* of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries (emphasis added).

Previously, apportionment was based more on disability than impairment. Therefore, a carrier would be fully liable for the permanent disability of an employee who had a previous permanent disability rating (e.g., 50 percent) if that employee was "medically rehabilitated" and was working in his usual and customary job at the time of the most recent injury.

The new law is meant to relieve the carrier and employer of any permanent disability not directly caused by the new work injury. Obvious cases are those when a claimant had a prior permanent impairment to a specific body part (e.g. knee) and now receives a new injury to the same knee. There will also be many less obvious cases needing an expert eye to identify and prove apportionment.

AMA Guidelines

To achieve a more uniform system, the new law also requires physicians to use the fifth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairments* on a prospective basis when determining permanent impairment and apportionment.² Claims personnel should not underestimate the importance of a physician's understanding and proper use of the AMA guides when evaluating permanent impairment and apportionment. Even on those claims where the AMA guides may not be required, a physician that understands the AMA guides will not be tied to a claimant's subjective complaints when determining permanency and making apportionment determinations in the absence of objective findings.

It is noteworthy that physicians are not making the final determination of a claimant's permanent disability or "diminished future earning capacity"³ but simply triggering the process to make that determination. As the AMA guides state, impairment ratings are "not intended to be used for direct estimates of work disability," *AMA Guides*, at 9.

How to Use the Cost-Containment Tools

To make the most accurate impairment determination (with or without the AMA guides), a physician should be provided with as much information as possible, including, but not limited to, the claimant's pre-injury medical information (work- and non-work-related). A physician should use this information to fully evaluate the proper time for a permanent and stationary determination and the direct cause of any permanent impairment as a result of the work injury. An accurate determination of when a claimant is permanent and stationary and to what degree the permanent impairment rating is related to the work injury is crucial because it is the first step of a calculation used to determine the claimant's permanent disability rating.

To maximize the new law's benefits, an integrated system is required to analyze and effectively use the expertise of claims professionals, medical professionals, and attorneys. Proper documentation must be obtained in a timely manner, and the physician responsible for ultimately writing the final permanent impairment opinion must have this documentation plus a solid understanding of apportionment and the AMA guidelines. Only then will a claims staff be able to secure a proper permanent impairment and apportionment opinion that will expedite the resolution process. At the very least, an expert opinion based upon solid objective evidence will leave little room for subjectivity if the case needs to be litigated.

Conclusion

Workers compensation carriers, self-insureds, and TPAs must understand that maximizing the tools provided in the new California statute requires new systems to recognize a "total cost" savings. Simply sitting back and relying on the same process and personnel will not achieve the cost-saving measures that the law intended. ■

Endnotes

1. "Permanent and stationary status" is the point when the employee has reached maximal medical improvement meaning his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment.
8 CCR 9785(a)(8)
2. "In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee and his or her age at the time of the injury..." Sec. 4660 (a)
"For purposes of this section, the 'nature of the physical injury of disfigurement' shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) *Guides to the Evaluation of Permanent Impairment* (5th Edition)" Sec. 4660(b)(1).
3. Sec. 4660(a)