

California Commission on Health and Safety and Workers' Compensation

MINUTES OF MEETING

Friday, February 26, 1999

Los Angeles, California

In Attendance

Chair Kristen Schwenkmeyer
Commissioners Jill A. Dulich, Gerald O'Hara, Leonard C. McLeod, Tom Rankin,
Robert B. Steinberg, Darrel "Shorty" Thacker, John C. Wilson
Executive Officer Christine Baker

Call to Order / Introduction of New CHSWC Members / Adoption of Minutes

Chair Kristen Schwenkmeyer called the meeting to order at 10:00 am and introduced two new CHSWC members. In December 1998, the outgoing Governor appointed Jill A. Dulich, Regional Manager with Marriott International, to represent employers, and John C. Wilson, Executive Director of the Schools Excess Liability Fund, to represent public sector employers.

Commissioner O'Hara moved to adopt minutes of December 16, 1998 CHSWC meeting, Commissioner Dulich seconded, and the motion passed unanimously.

Remarks: Stephen J. Smith, Director, Department of Industrial Relations

Ms. Schwenkmeyer introduced Stephen J. Smith, the new Director of the Department of Industrial Relations, who has an extensive background in public sector labor relations including nine years with the California State Employees Association. Director Smith served on Governor Gray Davis' staff when Governor Davis was Lieutenant Governor and was also Governor Davis' Deputy Campaign Manager for the gubernatorial general election campaign.

Ms. Schwenkmeyer thanked Director Smith for assisting the Commission with extra clerical support and observed that he knows how to get things done within the workings of state government.

Director Smith noted that the Commission's reports have been extraordinarily helpful in terms of getting a perspective on what is going on and where DIR might need to go. He said he would like to concentrate on improving the coordination between CHSWC and the rest of DIR. Director Smith also commended the Commission for working 'almost outside the bounds of politics' by grappling with tough issues and achieving workable solutions – a notable achievement in state government.

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Discussion of the Labor Code Section 5814 Issue

Charles Lawrence Swezey, Esq., Legal Consultant
Thomas J. McBirnie, WCAB Deputy Commissioner (retired)

Background

Last October, the Commission issued a 'call for information', requesting input from the workers' compensation community and the public for an issue paper on the Section 5814 penalty provisions. The Commission received eleven written responses.

Commission consultant Larry Swezey developed a briefing memo recommending further work through a legislative roundtable, and retired Workers' Compensation Judge Tom McBirnie, also a consultant to the Commission, performed research and analyses of the history and development of Section 5814.

Findings

Labor Code Section 5814, adopted as part of the 1945 Reforms, provides when payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the full amount of the ordered decision and award shall be increased by ten percent. The question of delay and reasonableness of the cause thereof shall be determined by the Appeals Board in accordance with the facts.

The purpose of the statute was first to provide incentive to claims administrators to pay benefits promptly by making delays costly, and secondly to some extent, to compensate the injured worker for the hardships resulting from the delay. Except for a minor amendment as part of the 1965 Reforms transferring the jurisdiction of the Industrial Accident Commission to the WCAB, Section 5814 has not been modified by the Legislature.

As early as 1959, however, the appellate courts began a continuing series of decisions interpreting and reinterpreting the section. Some of the results of the judicial interpretation can find no direct support in the language of the statute. The problems that the workers' compensation community continually encounters with Section 5814 have been discussed over the years but no serious legislative efforts have been made to resolve them.

Community Response

Comments are still being received in response to the Commission's 'call for information'. Thus far, comments include the following:

- The current penalty structure is insufficient to compel claims administrators to act promptly and efficiently. This is based on anecdotal information but the audit results tend to support this complaint, as do complaints from doctors and other lien claimants.
- As currently interpreted, Section 5814 does not provide adequate penalties for bad faith in delays but unduly punishes inadvertent delays. Subsequent to the enactment of 5814, audit penalties, self-imposed penalties for late payments of disability indemnity, penalties

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on late payment of medical bills and other penalties have been added to the Labor Code. These penalties have the potential of penalizing the claims administrator up to three times for the same offense.

- Current case law differs from the literal language of the statute. There is no Statute of Limitations on claims for penalties. There is no limit on the number of penalties that can be imposed on a single claim. Penalties can be imposed for delays about which the claims administrator is unaware -- for example, if the file is lost or the award is misdirected.
- Penalties can be imposed for delays over which the claims administrator has no control. The primary source of complaint in this respect is that banks put holds on large benefit checks causing a delay for which claims administrators are sometimes penalized.
- When claims administrators know that they have been guilty of unreasonable delay and will be penalized, sometimes they delay indefinitely knowing that the penalty cannot be greater. There is no incentive to make prompt payment they once have been guilty of an unreasonable delay.
- It has been suggested that adoption by the courts in the workers' compensation community of the term 'penalty' to describe the ten percent increase benefits provided by Section 5814 suggest criminal conduct and makes claims administrators reluctant to accept liability even when there is no valid excuse for the delay.

Recommendations

The urging of the appellate courts and the leading authorities in the field plus these various responses indicate a need to study Labor Code Section 5814 with an aim for providing an adequate deterrent against unreasonable delay or refusal, but at the same time providing penalties that bear some relationship to the claims administrators' culpability. The injured workers, doctors and applicant's attorneys want more effective penalties. But the specific recommendations from the insurance industry included such things as limiting the penalty to the amount delayed. Workers' compensation judges would appreciate penalty provisions that can be fairly applied to meet the crime.

It is therefore recommended that the Commission convene an advisory committee representing all segments of the workers' compensation community to develop penalty provisions that (1) provide an adequate deterrent against unreasonable delay but at the same time provide penalties that bear some relationship to the claims administrators' culpability; (2) to encourage sound claims practices; and (3) to discourage unjustified or vindictive withholding of benefits.

CHSWC Action

Ms. Baker suggested that the Commission compile the materials – the Larry Swezey and Tom McBirnie papers and the responses to-date – which identify the issues, and invite the public to provide the Commission with any legislative recommendations. The Commission could function as a clearinghouse for such input. This was moved by Commissioner Rankin, seconded by Commissioner Thacker, and passed unanimously.

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Presentation on the Incomplete Physician Report Study

Frank Neuhauser, Survey Research Center, UC Berkeley

Background

In the 1993 reforms, the role of the treating physician was reinstated in the workers' compensation process, and was required by legislation to report on all medical issues necessary to determine eligibility for compensation. In addition, whenever a second or third medical report is obtained, the findings of the treating physician are presumed to be correct. This set a much higher standard for the findings of the treating physician which required rebuttal by preponderance of evidence. The intention was that this would reduce cost of medical-legal reports and give less biased opinions.

Community concerns

The community raised a number of concerns, which led to the Commission undertaking this project. Many people felt that the reports submitted by treating physicians in the main were unratable, leading to much duplicative action by both the Disability Evaluation Unit and by insurers. Second, even when the reports weren't unratable many felt that these reports were of poorer quality than those supplied by forensic doctors -- qualified medical evaluators as regulated and registered by the Industrial Medical Council -- and giving these poor quality reports presumption of correctness made for additional problems for the insurer, the employer and the worker. And finally, since the treating physician has a presumption of correctness that has to be overcome, there was a feeling that parties might shop for a doctor at the time the forensic report was going to be issued.

So, consequently the Commission undertook to evaluate the quality of medical-legal reports and to recommend, if necessary, corrective measures to be taken. And also to evaluate any benefits in terms of cost savings that might result from these reports. Specifically, if these reports are -- are found to be of poor quality are the cost savings connected with the process of presumption strong enough to outweigh any problems that result in the quality of reports.

Methodology

First, a random sample of closed files was drawn from four different WCAB offices. The Commission worked with the IMC and the Disability Evaluation Unit to develop a set of criteria upon which to judge the quality and adequacy of these reports. These reports were then evaluated by the Disability Evaluation Unit managers and raters, against the set of criteria that were developed. Finally, the WCIRB Rating Bureau's Permanent Disability Claim Survey was used to evaluate the impact presumption on the frequency of reports and the total cost of medical-legal reports.

The reporting physicians were classified into various groups -- Agreed Medical Evaluators, Qualified Medical Evaluators that were chosen from a panel by unrepresented workers, applicant QMEs, defense QMEs, and primary treating physicians (and whether or not the primary treating physician was also a QME). The purpose was to determine whether the reports submitted by the treating physician are poorer than the reports submitted by other doctors acting in a forensic role.

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Preliminary Findings

Preliminary findings were categorized into 'minor' issues (often dealt with early in a workers' compensation claim before the injured worker reaches permanent and stationary status) and 'major' issues (dealt with at the time the worker reaches permanent and stationary status when a report on issues related to compensation would be produced). For minor issues, the preliminary findings indicate that treating physicians -- both those who are QMEs and those who are not QMEs -- answer inadequately compared to forensic doctors. For major issues, treating physicians who were also qualified medical evaluators perform similarly to doctors acting in a forensic role.

The DWC Disability Evaluation Unit (DEU) assessed the ratability of reports on three standards: whether the report was unratable, whether it was ratable without qualification, or whether it was ratable only with qualification. Here again the reports of treating physicians were of lower quality than the reports of doctors acting in a forensic role. But as with the major issues, treating physicians who were Qualified Medical Evaluators performed on the same level in comparison with doctors reporting in a forensic role.

Although there is a decline in both the number and total costs of reports, there is nothing to indicate that the application of presumption has affected that trend.

Recommendations

"Minor" issues may be corrected by notification by insurer or use of the DWC reporting forms proposed by the Industrial Medical Council. "Major" issues are likely to require extensive educational efforts aimed at the many primary treating physicians who do few evaluations.

Preliminary Conclusions

- Primary treating physician reports compare poorly with reports completed by Qualified Medical Examiners (QME).
- Most of the problem is with report by primary treating physicians who are not also QMEs.
- There is no evidence to demonstrate reductions in medical-legal costs result from the 'presumption'.
- Consideration should be given to eliminating the 'presumption' or replacing it with a lower standard.

Questions and Comments

Michael Stolzberg, President of the Association of Retired Workers' Compensation Judges, announced that a committee is studying how the workers' compensation process can be improved. The committee believes that in place of the presumption of correctness, Section 4062.9 should be amended to provide that the opinion of the treating doctor's entitled to great weight, giving consideration to the doctor's medical qualifications, to the period of treatment, to

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the opportunities the doctor has had to observe and evaluate a patient, and lastly, to the accuracy and consistency of the history of injury and of the disability deriving therefrom. The committee would recommend the support of this Commission for action that would result in that particular amendment to Section 4062.9.

Commissioner Steinberg inquired what was the reason for the enactment of the presumption in the first place. Mr. Neuhauser's understanding is that there was a sense that giving presumption to a report that possibly was less informed and less biased would discourage other parties from going out and obtaining competing reports. Consequently, would reduce the number and expense of these reports at a time when that was considered a major issue.

CHSWC Action

Commissioner Rankin moved that the report be circulated to the public for public comment, and then make it available to the parties and the legislature as an informational package. Commissioner O'Hara seconded the motion, which passed unanimously.

Status Report on the Self-Insured Component of the Permanent Disability Study

Robert T. Reville, Ph.D., RAND

This self-insured data collection and analysis effort was undertaken to supplement the original RAND report. This data was needed to have an accurate assessment of the outcomes for disabled workers in California.

Since this data did not exist, RAND began an unprecedented data collection effort with 300 employers in California and is pleased to have had a response rate of well over 50 percent. The data in these 167 different data bases has been verified and made comparable. RAND believes that the data are high quality, permitting an analysis of the wage loss to self-insured firms and an analysis of the public self-insured, including Labor Code 4850.

RAND has also been working with the Employment Development Department to link the data received from 167 employers to the EDD data and to insure confidentiality. A preliminary report is expected in August 1999. RAND reported that the project is already attracting national attention and expressed gratitude to the Commission, to DIR Self-Insurance Plans and to the self-insured community for their support of this project.

Status Report on the California Study Group on Young Worker Health and Safety

Robin Baker, Labor Occupational Health Program, UC Berkeley

A new national report called 'Protecting Youth at Work', commissioned by the National Academy of Science, called on the states to take a number of steps to take a coordinated approach to protecting young people in the work place. California is on the cutting edge due to the vision of the Commission in supporting the establishment of the California Study Group on Young Workers Health and Safety.

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The study group represents all of the state agencies that have a role to play in protecting and educating young people in terms of safe work practices including the Labor Commission, Cal-OSHA, the Education Department, Apprenticeship Council, the EDD, as well as other representatives such as the Chamber of Commerce, Private Industry Councils, Labor Unions, and school representatives, statewide PTA.

In the first year the group prepared a report listing recommendations to better protect young people in the work force. In the second year, the group prioritized four areas to work on:

1. Improve the student work permit process. Oftentimes young people either have no work permit when they should or have an improper permit. Each school district is empowered to give out work permits and there is a great variability.
2. Develop an interagency working team to identify interagency strategies.
3. Design a 'Safe Jobs For Youths Month' public awareness campaign to publicize the protections that are or should be in place for young workers.
4. Develop a resource network of centers that can provide the tools that would allow teachers, youth employment programs and employers do a better job of teaching safety.

CHSWC Action

LOHP submitted a proposal to augment the contract by \$20,000. Christine Baker recommended a \$10,000 augmentation now with a review of accomplishments later in the year. Commissioner O'Hara so moved, Commissioner Dulich seconded, and the motion passed unanimously.

Update and Discussion Regarding Commission Studies and New Proposals

Christine Baker, Executive Officer

CHSWC Study of DWC Audit Function

In April 1998, the Senate Industrial Relations Committee and Assembly Insurance Committee jointly requested that the Commission conduct an evaluation of the effectiveness of the DWC Audit function. The Commission submitted its report to Legislature in December, and Commission staff have since met with DWC representatives regarding their comments on the report, and determined that they were non-substantive concerns that would not affect the findings or recommendations. The audit report stands as submitted.

Tracking Illegally Uninsured Employers

At its December 1998 meeting, the Commission approved a report entitled "Commission's Recommendations to Identify Illegally Uninsured Employers and Bring Them Into Compliance." The Commission study found that the most effective way was through records and notification of employers in targeted industries.

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On February 5, 1999, the Commission convened a meeting of the Legislative Roundtable and a report of that meeting along with suggested alternatives and recommended legislative language was distributed to the Commission members.

Ms. Baker reported that she and Commissioner O'Hara met with representatives from the Department of Motor Vehicles (DMV) to discuss their problem of trying to bring into compliance truckers or trucking operators who are the worst performers. There was legislative intent to try to get records sent between DMV and the insurance carriers, but the effort is pretty ad hoc and nothing's being done. With a little bit of further study, Ms. Baker believes the Commission can make some concrete recommendations so that the intent of the legislation could be accomplished.

CHSWC Action

Commissioner Rankin moved that the Commission recommend to the Legislature the Legislative language developed by the Commission staff as a result of the Legislative Roundtable meeting on February 5, 1999. Commissioner O'Hara seconded, and the motion passed unanimously.

The Commission will send a letter to the DIR Director recommending that the department submit a Budget Change Proposal to establish a unit work that would focus on matching records.

Evaluation of Statutorily-Required Safety efforts

Ms. Baker discussed a proposal for an evaluation of statutorily required safety efforts in California -- including an analysis of the High Hazard and Loss Control programs of the Division of Occupational Safety and Health -- and survey of such programs in other states. This would also form the basis for developing methodologies to evaluate such programs nationwide or on an ongoing basis. The estimated cost of this project is \$67,000.

As Chair of the Safety Committee of the International Association of Industrial Accident Boards and Commissions (IAIABC), Ms. Baker will present the proposal at the IAIABC All Committee meeting later this month in Austin. Should the other states wish to participate and conduct their own evaluation they would pick up the cost of their participation.

CHSWC Action

Commissioner O'Hara moved to accept the study proposal, Commissioner Rankin seconded, and the motion was passed by unanimous vote of the Commissioners present.

Summary of the Current Predictors and Measures Used to Evaluate Return-To-Work

The Commission has been asked to participate in a conference sponsored by the National Institute for Occupational Safety and Health to be held in mid-June in Denver, Colorado. This conference will address performance measures for health services delivered to prevent or treat

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occupational injury or illness, measures of the economic and social impact of occupational injury or illness, and research that integrates these areas.

Dr. Nicklas Krause, who has done work for the Commission with RAND, has formulated a proposal for a project to develop a summary of the current predictors and measures used to evaluate Return-To-Work after work-related injury or illness. This paper would be presented at the NIOSH conference and would be useful for the Commission work on return-to-work issues.

CHSWC Action

Commissioner Rankin moved that the Commission fund \$8,000 for this project, Commissioner O'Hara seconded, and the motion carried unanimously (Commissioner McLeod was absent at the time of voting).

Information for Injured Workers

As part of the Commission's work on information to injured workers, LOHP has identified areas in which there is confusion or lack of information to injured workers. Ms. Baker inquired if Commission staff should begin to draft legislative recommendations in this area.

CHSWC Action

Commissioner O'Hara moved that Commission staff begin to draft legislative recommendations to improve information provided to injured workers, Commissioner Rankin seconded, and the motion passed unanimously.

Legislature Request for Presentation

The Commission received a request from the Honorable Jack Scott, Chair of the Assembly Insurance Committee, to present an overview of workers' compensation issues at a committee hearing on March 10, 1999 in Sacramento. They have also asked that the presentation include information from the RAND study of permanent disability and Bob Reville will do that.

Legislature Request for Background Information on Reform Impact on Costs and Benefits

CHSWC Chair Kristen Schwenkmeyer received a letter From the Honorable Hilda L. Solis, Chair of the Senate Industrial Relations Committee and the Honorable Jack Scott, Chair of the Assembly Insurance Committee. They jointly requested that the Commission prepare background information on the impact of the reform legislation on workers' compensation costs to employers and benefits to injured workers. They also indicated that they would appreciate the Commission's future assistance in evaluating other workers' compensation issues that may come before their committees this year.

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CHSWC Action

Commissioner Rankin moved that the Commission comply with the Legislature's requests, Commissioner Wilson seconded, and the motion was passed unanimously.

Workers' Compensation Research Institute CompScope Study

Commissioner Dulich requested that the Commission look at feasibility of providing partial funding to the Workers' Compensation Research Institute Compscope project. Ms. Baker noted that WCRI had made a presentation last year and indicated that Commission staff will take a look at the request to see if it is in line with our interests or if it is a duplication of some of the efforts that are being made already.

Other Business/Public Questions/Comments

Michael Stolzberg, President, Association of Retired Workers' Compensation Judges

Mr. Stolzberg announced that the ARWCJ committee on how the workers' compensation process can be improved had additional concerns that it wanted to bring to the attention of CHSWC.

That ARWCJ committee notes that whenever workers' compensation legislation is enacted, its effectiveness is dependent on the date of injury, thus creating several different 'tracks' for workers' compensation claims. The committee recommends that the effective date be dependent on the date of injury only for those changes that are substantive, and universally applied for changes that are merely procedural.

The committee also recommends that the so-called 'Baseball Arbitration' be terminated. The Workers' Compensation Judge does not have judicial discretion to evaluate the medical, evaluate the testimony and come to a conclusion of reasonable permanent disability, but is compelled to accept either the rating proposal of the defendant or the rating proposal of the applicant.

In addition, the committee is looking at alternative dispute resolution and the provisions of Labor Code Section 4060 is in the process of seeking to simplify the language of how medical issues are resolved.

N.K. (Keith) Newman, Department of Insurance, Fraud Division

Mr. Newman presented an update on the Department of Insurance's anti-fraud activities. Insurance Commissioner Quackenbush has requested CEOs and high level personnel from every insurance carrier licensed to do business in California to attend a one-day anti-fraud seminar in Los Angeles on March 15, 1999, regarding the effects of fraud activities on California consumers, California businesses and the insurance industry.

Commissioner Quackenbush has also sent a personal letter to every District Attorney in the state asking for their cooperation and increased focus on fraud in all lines of insurance, including

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workers' compensation. Mr. Newman also introduced Mr. Bill Zachary, a new member of the Fraud Assessment Commission.

Adjournment

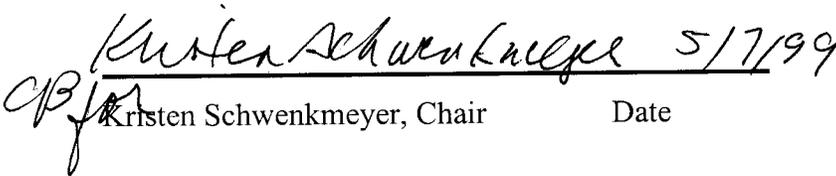
Chairperson Schwenkmeyer adjourned the meeting at 12:10 p.m.

Future Meetings

The next meeting of the Commission will be held on Thursday, May 6, 1999 in Sacramento.

Approved:

Respectfully submitted,


Kristen Schwenkmeyer, Chair Date 
Christine Baker, Executive Officer