Feedback/Comment Received by email

October 7, 2013

Lachlan Taylor, Acting Executive Officer

Commission on Health and Safety and Workers' Compensation

1515 Clay St., 17th Floor

Oakland CA 94612

RE: Identifying Permanently Disabled Workers with Disproportionate Earnings Losses for Supplemental Payments, RAND, August 2013

Dear Mr. Taylor,

The California Applicants' Attorneys Association offers the following comments concerning the above-titled RAND Working Paper posted on the Commission's website for public comment.

This Working Paper confirms the findings from all previous RAND wage loss studies; namely, that permanent disability benefits in California are grossly inadequate. Data in this study clearly show that California workers with permanently disabling work injuries experience high earnings losses and that permanent disability benefits replace only a small fraction of those earnings losses.

This study was undertaken to assist the Department of Industrial Relations and the Commission in the establishment of the supplemental benefit program created pursuant to Labor Code §139.48. The study provides important new data showing earnings losses for workers rated under the 2005 Permanent Disability Rating Schedule. As noted on page 1 of this Working Paper, in prior wage loss studies RAND documented the "questionable benefit adequacy under the old benefit levels." The results of this new RAND Working Paper vividly illustrate the appalling inadequacy of permanent disability benefits under the 2005 Rating Schedule.

Earnings Losses

Table 2 of the RAND Working Paper quantifies the significant earnings losses experienced by workers who suffer a permanently disabling work injury. Alarmingly, workers who are assigned the lowest ratings – 1% through 4% – experience an earnings loss of 30.9%, or almost one-third. Workers assigned higher ratings have even higher earnings losses, with workers assigned ratings between 30% and 34% experiencing a 50% drop in earnings. Workers with even higher ratings experience an almost total loss of earnings.

Translating these percentage reductions into actual wages, workers with ratings between 1% and 4% saw their annual earnings fall from $45,853 (pre-injury) to $31,673 (post-injury), a decrease of over $14,000. Thus, workers assigned the lowest ratings will lose almost $142,000 in wages over the 10 year period following their injury. Workers assigned ratings between 30% and 35% will have earnings losses of $245,000 over 10 years, while workers assigned ratings between 55% and 59% will lose over $305,000 in earnings over 10 years.

Even more disturbingly, Table 4 shows that workers who do not return to their at-injury employer experience an almost total loss of earnings. Importantly, this is true for workers with both low and high permanent disability ratings. Workers with the lowest ratings who do not return to the at-injury employer have an earnings loss of 86.8%, just a few percentage points under the average earnings loss of 91.9%. Workers with ratings of 35% and higher who do not return to the at-injury employer experience earnings losses over 95%!

Impact on "0%" Ratings

This Working Paper also provides important evidence concerning an often overlooked impact of SB 899. According to a recent report to CHSWC, "a conservative estimate" is that up to 25% of workers who would have received a permanent disability rating under the pre-2005 Rating Schedule do not receive an impairment rating under the AMA Guides. [Neuhauser, Frank, Impact of the Adoption of AMA-based Permanent Disability Rating Schedule in California, January 19, 2012.]

Although all parties have acknowledged that many workers were cut out of the system by SB 899, how that change affected workers has been basically ignored. Data in the new RAND Working Paper clearly demonstrates that many of these workers experience a significant earnings loss following their injury. Table 3 shows that workers who receive temporary disability benefits but do not receive a permanent disability rating have an earnings loss of more than one-third.

This is a very disturbing finding. Although the decline in earnings for this category of workers is lower than for workers with a permanent disability, the one-third drop in earnings is the average decline. Most workers who receive temporary disability benefits quickly return to work and experience only minor earnings losses. These workers don't receive a rating under the 2005 Schedule, but would not have received a rating under the pre-2005 Schedule either. However, it is likely that the 25% of workers in this group who would have received a rating under the pre-2005 Schedule have significantly higher earnings losses – probably comparable to workers with an impairment rating.

We recognize that the data underlying Table 3 are somewhat limited. Nevertheless, we believe that these data demonstrate that eliminating permanent disability compensation for a large number of workers was unwarranted, unreasonable, and unfair.

Benefit Inadequacy

Permanent disability benefit adequacy was not the subject of this study. However, the data on earnings losses included in this report can be used to examine the adequacy – or inadequacy – of permanent disability benefits. For example, as noted earlier, workers with ratings between 1% and 4% saw their annual earnings fall from $45,853 (pre-injury) to $31,673 (post-injury). These workers have lost earnings of over $14,000 annually, and that earnings loss will continue for the remainder of this individual's working lifetime. Yet in 2014 these workers will receive permanent disability benefits ranging from just $870 (for a 1% rating) to $3,480 (for a 4% rating).

Over 10 year following a disabling work injury, workers with ratings between 1% and 4% will suffer an earnings loss of almost $142,000. For a worker who receives a 4% rating, permanent disability benefits would offset just 2.5% of that earnings loss. Benefits for workers with a 9% rating would offset just 5% of their $155,000 earnings losses. Benefits for workers with a 14% rating would offset just 8% of their $170,000 earnings losses.

In fact, based on the distribution of ratings shown in Table 1 of the RAND Working Paper, at 2014 benefit levels permanent disability benefits replace just 12.5% of the average worker's earnings losses over the 10 year period following a disabling work injury.

A report by the Study Panel on Benefit Adequacy of the National Academy of Social Insurance defined benefit adequacy "as two-thirds replacement of wage losses over the duration of the disability." By that measure, the current permanent disability benefit level in California is grossly inadequate. [See: Adequacy of Earnings Replacement in Workers' Compensation Programs: A Report of the Study Panel on Benefit Adequacy of the Workers' Compensation Steering Committee, H. Allan Hunt, Editor, National Academy of Social Insurance, 2004.]

§139.48 Program Design

According to RAND, the purpose of this Working Paper is to "help DIR and CHSWC to develop a methodology for the eligibility determination and benefit amounts for the new Return-to-Work program." However, the Paper presents few specific recommendation regarding the new program, and provides only general comments concerning what it terms "policy challenges." Thus, at this time we can offer only a general response to the issues highlighted in the RAND Paper.

Issue #1: Determining the basis for calculating earnings losses. We believe the methodology proposed by RAND, which compares the pre-injury and post-injury earnings of individual injured workers, is a reasonable approach.

Issue #2: Identifying the time period over which to evaluate losses. We agree that for the limited purpose of developing empirical data on earnings losses, a three year period is reasonable. However, we strongly object to the suggestion in the RAND Paper that a worker's eligibility for this program can be determined only several years after the injury. That suggestion essentially dismisses the findings of this study. As noted above, this study found that virtually all workers who do not return to their at-injury employer – regardless of their assigned disability rating – experience an almost total loss of earnings. When it is already known that certain workers will experience a total loss of earnings, requiring those workers to wait several years to prove that earnings loss would be unconscionable.

Issue #3: Tying benefits to return to work. We agree that the failure of an employer to provide a qualified offer of return to work would be a reasonable standard for determining eligibility for this supplemental benefit.

Issue #4: Relating the new benefits to the disability rating system. RAND notes that its prior research has consistently shown that replacement of lost earnings in California is lowest for workers with the lowest disability ratings. However, we would also point out that according to Table 2 of the RAND Paper the actual loss of earnings is lowest for workers with the lowest disability ratings. Consequently, we do not agree with the suggestion offered in the Paper that a reasonable approach would be to make the size of the supplemental payment, on average, inversely proportional to the disability rating.

Issue #5: Monitoring and updating the benefit system as new information becomes available. As RAND notes, this is a new program and many aspects are both unknown and unknowable. Consequently, we agree that there must be a continual review of this program to make certain it meets its statutory purpose. However, we are strongly opposed to the suggestion that payments under this program will not be made for several years. The empirical data collected by RAND and outlined in its Paper provide the necessary blueprint for creating and implementing a program that distributes supplemental benefits as soon as possible, without delaying payments for several years. This program is intended to assist workers whose permanent disability benefits are disproportionately low to their earnings losses. As noted above, it would be unconscionable to require these workers to wait years before receiving the supplemental benefit.

We appreciate the opportunity to comment on this RAND Working Paper.

Very truly yours,

James G. Butler, President

California Applicants’ Attorneys Association