

**California Coalition on Workers' Compensation
California Chamber of Commerce
California Association of Joint Powers Authorities**

October 7, 2013

Commission on Health and Safety and Workers' Compensation
1515 Clay Street, 17th Floor
Oakland, CA 94612

RE: **RAND Working Paper: Identifying Permanently Injured Workers with Disproportionate Earnings Losses for Supplemental Payments, RAND, August 2013**

To Whom it May Concern:

Thank you for providing the opportunity to comment on the RAND Working Paper, *Identifying Permanently Disabled Workers with Disproportionate Earnings Loss for Supplemental Payments* (RAND Working Paper). The passage of SB 863 (De Leon, 2012), which financed a much-needed benefit increase for injured workers with systemic reforms meant to reduce costs for employers, was helped over the final legislative hurdles by the creation of a "return-to-work program" (RTW Program) authorized by Labor Code Section 139.48. For some lawmakers, the substantial benefit increase contained in SB 863 was of questionable value for a very specific subgroup of injured workers with permanent disability benefits that were relatively low when compared to the earnings loss resulting from their industrial injury.

The RTW Program was important because it provided a sort of insurance policy for lawmakers who were concerned that this subgroup of injured workers was being left behind by the reform package. The addition and subsequent amendment of Labor Code Section 139.48 provided a basis for the establishment of a RTW Program with several key characteristics:

Department of Industrial Relations' Role

The Director of the Department of Industrial Relations (DIR) is responsible for promulgating regulations that establish eligibility criteria and payment amounts. In addition, the regulations are required to be "based on" findings from studies conducted by the DIR Director in consultation with CHSWC. The program will also be administered by DIR.

Funding Mechanism

The RTW Program will be funded by \$120 million per year from the Workers' Compensation Administration Revolving Fund (WCARF). LC Section 139.48 was amended during the 2013 budget process to ensure that \$120 million was assessed annually and that there was administrative flexibility with the timing of payments.

RTW Fund Application and Appeals

The RTW Fund applies only to injuries sustained on or after January 1, 2013. While this was added to LC Section 139.48 during the 2013 budget process it is consistent with our understanding of the program at the time of passage. DIR determinations are subject to review at the trial level of the appeals board “upon the same grounds as prescribed for petitions for reconsideration” (contained in LC Section 5903).

RTW Fund Purpose

LC Section 139.48 tells us that this fund is intended to provide “supplemental payments” to injured workers whose permanent disability benefits are “disproportionately low in comparison to their earnings loss”. The language contained in the labor code is relatively open to interpretation and we will provide our thoughts on what the words actually mean later in this letter.

The RAND Working Paper is a positive first step toward two important goals. First, the report does a good job of identifying some of the potential public policy pitfalls associated with the establishment of the RTW Program. Second, the report identifies potential empirical justifications for answering some of the public policy questions that are identified. Our coalition – which collectively represents tens of thousands of California employers and insurance companies – is pleased to offer the following comments on the RTW Program generally, as well as the RAND Working Paper specifically.

General Comments on the RTW Fund

Our coalition strongly believes that the RTW Program should be designed as an easily-accessed, dispute-free, and simple supplemental payment system that is focused entirely on injured workers that find themselves as outliers in the workers’ compensation system. When we agreed to this program in the closing days of the 2012 legislative session it was clear that the intent of this program was to serve as a sort of failsafe to ensure that injured workers weren’t “left behind” by the workers’ compensation system.

The RTW Program was absolutely not intended to simply serve as a routine benefit-amplifier for every injured worker that could demonstrate that their PD was insufficient to compensate them for the totality of their injury-related wage loss. We strongly urge the DIR to resist political pressure to design this program to do anything but serve as a safety net for a minority of injured workers that sustain life-altering injuries but were awarded little to no permanent disability benefits.

Employer Involvement in RTW Program

Employers, insurers, and third party administrators should have absolutely no involvement in any aspect of the notification, application, administration, or appeal of the RTW Program. Our coalition is unified around the idea that employers should have absolutely no direct or indirect role or responsibility relative to the RTW Program outside of funding through the annual assessment process.

Additionally, we'd suggest that the DIR should be careful to not construct the RTW Program in a way that would lead to an increase in the administrative overhead associated with workers' compensation claims. Specifically, we are concerned that attorneys for injured workers will attempt to use medical-legal evaluations, depositions, temporary disability duration, and other aspects of workers' compensation claims to establish a need for access to payments from the RTW Program. We believe that the program should be designed in a manner that makes this type of record development during the claims process inapplicable to the DIR determination.

Attorney Involvement in RTW Program

The RTW Program should be designed in manner that will make applicant attorney involvement unnecessary and, to the maximum extent possible, legally prohibited. The RTW Program was not intended to be another pinch point where applicant attorneys go to drive discontent, dispute, and litigation into an otherwise simple and amenable process. Applicant attorney involvement will have several negative consequences:

1. The cost of administration (applications, determinations, and appeals) for DIR will increase dramatically. Simply put, applicant attorney involvement will increase the complexity of administration lead to higher costs for DIR.
2. Applicant attorney involvement in this program will result in a dramatic increase in number of DIR determinations that are appealed to the appeals board. Our coalition has seen this first hand – every opportunity to squeeze another dime from the system is attacked aggressively, whether reasonable and necessary or not. If DIR defends every one of these appeals, the cost will be prohibitive. If the appeals are not defended, then applicant attorneys will learn that aggressive litigation will be the pathway to additional payments for their client (and attorney's fees).
3. Applicant attorney involvement will cause the RTW Program to bleed into the precipitating claim. To believe that an applicant attorney will not use the discovery process, medical-legal evaluations and other opportunities during the life of a workers' compensation claim to develop the record for an eventual RTW Program application would be foolish.

The RTW Program should not become a litigation free-for-all that drives expenses for employers. Our coalition would suggest that every reasonable effort be taken to keep the RTW Program free of applicant attorney involvement, including, if necessary, additional legislation to strengthen the department's regulatory authority in this area.

Injured Worker Access to RTW Program

Establishing a framework that can provide injured workers with easy access and meaningful compensation, but also limits administrative overhead and legal wrangling, will be will be a difficult undertaking. As we have stated earlier, we believe that this program should be focused on injured workers that are outliers in the workers' compensation system, and should be

designed in a manner that eliminates all involvement by employers, insurers, claims administrators, and applicant attorneys. We do not have a comprehensive recommendation for the establishment of an eligibility model, but we would like to offer the following observations for consideration:

1. Past research has demonstrated that the failure to return to the at-injury employer is the most significant indicator of wage loss. Ability to access fund should be, in some way, tied to eligibility for the SJDB. Similarly, if the injured worker was made a valid offer to return to work at the at-injury employer, there should be no eligibility for additional payments from the RTW Program. The injured worker should also have the burden of demonstrating how the SJDB funds were used (i.e. attending a Community College Class in Movie Appreciation versus a computer skills course).
2. Applications to the fund should only be considered after settlement of the underlying workers compensation claim by Stipulated Award or Compromise and Release.
3. If the DIR goes down the path of evaluating individual worker wage loss, then access to the fund will need to be several years after settlement in order to establish wage loss.
4. The program should take into consideration some portion of other potential payments and benefits being received by injured workers, whether social security, state disability, unemployment insurance, service retirement, etc.
5. Permanent disability benefits were just increased substantially for every category of permanently disabled injured worker. The RTW Program should focus on injured workers with little or no permanent disability to the extent possible.
6. Payments should be made in a lump sum and not as an annuity. This will be more useful to injured workers and it will reduce the complexity of administration for the DIR.

Additional Policy Questions

Our coalition believes that the RAND Working Paper does a good job of identifying the various public policy pitfalls that surround this program. However, we'd suggest that the DIR and CHSWC should consider the following questions as well:

1. How do we deal with Petitions for New and Further Disability after an RTW Program award has been received?
2. Will it be possible to apportion to supplemental payments received through the RTW Program?
3. Will the employers that fund the program have an oversight function similar to that of the Fraud Assessment Commission? Is it possible for the DIR to submit an annual report to the legislature on the performance of the program?

4. Who is responsible for defending DIR determinations at the appeals board?

Closing Comments

Thank you once again for the opportunity to comment on the RTW Fund and the RAND Working Paper. Our members stand ready to work with CHSWC and the DIR on the implementation of this aspect of SB 863. Should you have any questions about the contents of this letter please do not hesitate to contact any one of the signatories below.

Sincerely,



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Jeremy Merz
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Julianne Broyles
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cc. David Lanier – Chief Deputy Legislative Secretary, Office of Governor Brown
Christine Baker – Director, Department of Industrial Relations