

Commission on Health and Safety and Workers' Compensation
DRAFT MINUTES OF MEETING
October 17, 2013
Elihu M. Harris State Building
Oakland, California

In Attendance

2013 Chair, Martin Brady

Commissioners Doug Bloch, Christine Bouma, Robert Steinberg, Angie Wei

Acting Executive Officer D. Lachlan Taylor

Absent

Commissioners Faith Culbreath, Sean McNally and Kristen Schwenkmeyer

Approval of Minutes from the June 13, 2013 CHSWC Meeting

Report on Copy Services Fee Schedule Study

Greg Nachtwey, Berkeley Research Group

Mr. Nachtwey stated that the mission of the study was to assist DWC to create a reasonable, simple, transparent and unambiguous fee schedule which considers the interests of all stakeholders in the workers' compensation system and provides fair market value compensation for copy services. He stated that simplest definition of fair market value is the price at which buyers and sellers with a reasonable knowledge of pertinent facts and not acting under any compulsion are willing to do business.

Mr. Nachtwey stated that the statutory authority for the Copy Services Fee Schedule is in Labor Code Section 5307.9, created by Senate Bill (SB) 863, and he emphasized the portion describing a schedule of reasonable maximum fees payable for copy and related services and the exception of a contract between the employer and the copy service provider. He stated that he was directed by DWC to use a fair market value for the maximum fees payable.

Mr. Nachtwey stated that the study needed to come up with a definition of "Copy and Related Services," and he identified two different tiers in the market: one is an uncontested market where payment is prompt and uncontested and where all services contained in the defense invoices relate to a single subpoenaed document production; and the other is the contested market where payment is not made within 60 days and/or is contested and all services are contained in the applicant invoices relating to a single subpoenaed document production.

Mr. Nachtwey stated that the study conclusions found that in the contested market, where payment is prompt (within 60 days of the mailing of an invoice), the fair market value of a single

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

copy event is \$103.55. He stated that this figure will be adjusted upward by DWC for subpoena preparation and service and witness fees. He stated that in the contested market, where payment is not received within 60 days of invoice mailing, the fair market value of a single copy event is \$251.20.

Mr. Nachtwey then stated that a flat rate payment system is intended to be simple and to reduce potential conflict. Four reasons behind the flat rate system are that: it minimizes the need for the high-cost lien system; it simplifies the payment system; it attempts to reduce opportunities for conflict by providing a safe harbor from disputes; and it is more efficient for all parties, including the providers because any losses suffered on the exceptionally large case are more than made up for by the far more frequent smaller cases. Mr. Nachtwey stated again that his summary was based on the report submitted to the DWC.

Acting Executive Officer Report on Public Comments

Chair Brady asked Acting Executive Officer Lachlan Taylor to provide both a summary of the written comments received from the report and a recommendation to the Commission. Mr. Taylor stated the public comments received add up to 60 or more pages which were distributed to the Commissioners in advance of the meeting. He stated that a three-page digest of the comments was also distributed. The commenters generally had concerns about the \$103 level recommendation. He stated that BRG recognized that that was not an all-inclusive fee. He stated that if the Commission recommends forwarding the report to the Administrative Director (AD) of the DWC to take into consideration, the AD would need to evaluate what was not included and that this could probably be done during the rulemaking process. He stated it was important to recognize that the \$103 flat fee was a starting point and that some adjustments by the AD would be needed.

Mr. Taylor stated that commenters did not have much of a problem with the \$251 fee, but that there were some questions as to whether it included sales tax or reimbursement of a witness fee, which the AD could sort out. He stated that given that this was the average actually accepted, it appeared to be a pretty bullet-proof idea for fair market value in the situation of contested cases. He stated that the two-tier fee makes a lot of sense because the first thing applicants copy services told DIR was that their business was more expensive than the defense because of disputes.

Mr. Taylor stated that the comments frequently opposed the flat fee. BRG has given a rationale for it, and it is something that the AD can certainly consider. The AD would also consider other scenarios that might be proposed. He stated that the staff recommendation is that the Commission would refer the BRG report to the AD to take into consideration during rulemaking, as well as any other alternatives that may be proposed. It would certainly include what might be added to that \$103 base fee, if the AD proceeds with the flat fee structure. He stated that the staff recommendation is also that the Commission post the BRG report and the collected comments as part of the permanent record on the website. Mr. Taylor stated that his hope was that by giving a short overview that he can shortcut some of the necessity for repetitious comments. He stated that Commissioners may wish to ask their own questions of the presenter before he has to leave for another appointment.

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

Questions from Commissioners

Commissioner Bouma stated that she was concerned by emotional words in the comments such as “delayed discovery” and “injured workers’ files not being complete.” She asked what the fee schedule was actually supposed to address: either the action of making copies; or other services that have been deferred to copy service providers, i.e., enhanced services that may have been otherwise done by the attorney. Mr. Nachtwey responded that the study looked at all services contained in both the defense and applicant copy service invoices. He stated that he agreed that taxes, possibly subpoenas and witness fees appeared not to be included. He stated that the invoices presumably included all services for each tier for the market. Commissioner Bouma asked whether some cases take more or less effort and whether the fee schedule captured that and whether there would be allowances for. Mr. Nachtwey responded that the mean does capture it, but that the median does not; he stated that is why the study used the mean, i.e., as a way to capture all the outliers.

Commissioner Bloch stated that he appreciated how the study laid out the tensions of the two sides involved. He asked why there is a disparity of invoices considered of almost 600,000 pages for applicant copy services and just 1,600 for defense copy services. He stated that his union represents people in the entertainment and retail food industries, and that the union pays a good amount of money to obtain information from these industries. Mr. Nachtwey stated those were the data that could be secured after a number of attempts. He stated that there were a number of reasons why. Some of the systems on the defense side were not set up to break out the information the way the studied needed it. He stated that he concurred with the observation of the discrepancy. Commissioner Bloch asked whether because it was difficult to secure the information from the defense side that that validates the arguments that are happening on the applicant side that it is difficult to get information. Mr. Nachtwey stated that he cannot speak for the applicants, but that BRG worked hard to get the 1,647 invoices.

Commissioner Bloch stated that his follow-up question is also for Commission staff. He stated that the question he had after reading the study was where each side came down on the proposed regulations as to what the impact will be on each side, and does each side think that it is fair. He said the public comments, many on the applicant side, said that it was not fair and it would run them out of business. There was not much public comment from the employer side. He stated that as they moved forward on the regulation, he would like to get to the point where both sides are a little bit unhappy, because, from his experience from negotiations, that is probably about the sweet spot for finding a deal. He stated that what they have now seems to be that one side is particularly unhappy with it, and there is the limited feedback from the other side, especially the Chamber of Commerce, and maybe some feedback on the defense side was that they were happy with that.

Commissioner Wei asked whether there were an average number of copy events per case. Mr. Nachtwey responded that there may be, but that there was no way for the study to look into that. Commissioner Wei asked whether a particular file could have 10 separate copy incidents connected to it. Mr. Nachtwey responded that he would be speculating to say that one could have any number of separate copy events for a case. Commissioner Wei asked whether a work-around

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

for such a flat fee schedule is that you just break up your copying into smaller batches? Mr. Nachtwey responded that he did not know and that he would defer to Mr. Taylor. Mr. Taylor stated that the report suggested that the AD would have to address splitting jobs, what was appropriate and what was not. Commissioner Wei stated that it was not just splitting jobs but how many times you called for the job.

Commissioner Wei asked Mr. Nachtwey to explain the term “safe harbor” in the presentation as one of the reasons for going to a flat fee. Mr. Nachtwey responded that while he is not a lawyer, a lawyer from his staff did assist him in preparing the report and presentation. He stated for the flat fee to work, there has to be some sort of sense of certainty for the applicant firms that they are going to get paid. There has to be some sense of certainty that when they submit an invoice that is “clean,” and then the burden is on the payor to demonstrate that it is not reasonable. That is the intent of “safe harbor.”

Commissioner Wei stated that one of the slides indicated that the longer a payment is delayed, the higher the cost and asked what the rationale for that was. Mr. Nachtwey responded that this relates to safe harbor. Sixty days is a proxy (short-hand) way for saying that this is a contested market. A date certain for paying invoices is set up to be a standard. Commissioner Wei asked whether the size of job determined whether it was contested. Mr. Nachtwey responded that from interviewing executives at copy services, his recollection was that jobs were rejected across the board; some big jobs were paid promptly and others were not, and some small jobs were paid and others delayed. He stated that he has no evidence of correlation between the size of the invoice and the time to payment.

Mr. Taylor stated that one of the rationales given by the copy services for the applicants’ services for having higher rates was the higher cost of doing business when they had to pursue collection. He stated that they described how their rates were not comparable to defense rates because the defense presumably gets paid without having to go through with all of that collection. Mr. Nachtwey stated that the difference was collection costs and most importantly, the uncertainty of resolution. He stated that the goal of the flat fee is to make payment as certain as possible, that there can be a transparent resolution to these issues.

Commissioner Wei asked whether the disparity of applicant and defense invoices represents the ratio in the real world, or whether it is a skew in the reporting of the data. Mr. Nachtwey responded that the study could not secure invoices from the defense in the same order of magnitude as from the applicant. Mr. Taylor stated that Commission staff worked to try to make information available. He stated that the applicants copy services industry had pulled together a large database and made that directly available to the researchers. He stated that there was no similar level of cooperation from the defense side of the industry. Mr. Nachtwey stated that he agreed with Mr. Taylor and that the applicant copy services were well-organized in this effort, and that BRG had to go to a greater number of defense services or employers.

Chair Brady asked about partial payments, whether an invoice comes in and only certain services are paid, but the complete bill is not paid. He asked whether there is partial payment for contested bills. Mr. Nachtwey responded that the study data were for paid services not for what

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

was billed. Chair Brady stated that there could be a contested payment within 60 days if there were additional services.

Commissioner Steinberg stated that judging from the response to the report, apparently what is recommended is somewhat of a serious departure from present and past practice. He stated that he was not that aware of current practice and not aware of exactly what the recommendations seek to resolve in terms of current abuses in the system and savings. Mr. Nachtwey responded that it was extraordinary level of contentiousness in the system, the lien system, and sending in professionals at professional fees to negotiate a copy services bill. He stated that there is an order of magnitude difference there that simply does not make economic sense, so this is an effort to find a simple, transparent and useful way for people to transact. He stated that as a result of simplifying things, it is well known in financial economics that markets work best when you eliminate uncertainty and when you provide clarity. He stated that this was his recommendation to DWC with their knowledge of the copy services market to say that we can simplify this process from this high-friction market of contested bills into a low-friction market of uncontested bills. He stated that as an economist, he believes that there should be gains, particularly to the workers, as a result of eliminating these burdensome costs. He stated that that was the study's intention and recommendation, and whether or not a flat fee system will work is up to the Commission to decide.

Commissioner Steinberg stated that that question remains open. He stated that he suggests that if they go with what amounts to a serious departure from current practice, the gains have to be more obvious than what they appear to be right now. He stated that once you accept that there are two markets, which apparently the study does, and you cannot get around that, he stated that he did not see how the system benefits from going to a flat fee as opposed to current practice. He stated that from BRG's analysis, it seems that in the occasions for copy services, the costs are less with the per-page with the copy service fee than they would be for a flat fee. Mr. Nachtwey responded that they would be less than they are now and they would be intended to be similar to what the defense market is now, except for the fact that there would be a flat fee for each invoice.

Chair Brady stated that he believed that this was consistent with all of the efforts to drive in more knowns than unknowns and to try to be more efficient with each dollar. He stated that this was just one area under review. He stated that the escalating costs per indemnity claim over time are shocking, and that he did not believe that they were at any form of status quo. Costs are continuing to rise and the need is to evaluate and review ways to be more efficient. He stated that he thought that they need to go through this motion, and he stated that he appreciated Mr. Nachtwey's effort to bring some clarity and usher in some options.

Public Comment

Dianne Cohen, Director from MacroPro, Inc., stated that she has been a proponent for change from the defense side for a long time; however, she objects completely to the proposed proposal because it is neither fair nor right. She stated that the facts are that the laws used from other states do not apply to what is done in California. The laws were for patient advocacy rights: patients are allowed to go into hospitals or doctor's offices and get a copy of their records. She

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

stated that that is not what is done in the workers' compensation copy field; what they do is far more time-intensive, and it is a field which is litigated and therefore requires extreme accuracy. In addition, she stated that they need to remain HIPAA-compliant. She stated that she previously forwarded a three-page description of what it takes for a copy service to be HIPAA compliant and that that was not included in the study. She also stated that there was no mention of using records for a claim. She then stated that she wanted to describe the workflow. She stated that the study used a three-step workflow: a request for records; the custodian either pulls the records and makes a copy of the records or makes it available for the copy service to copy; and then they get their payment; there is no collection because they are paid at the time. She stated that in the lifecycle of a claim that copy services do, there are 19 steps. They have to receive an order, review it, enter in the information from the injured worker, confirm the accuracy of the information, requiring research, generate legal documentation, issue a check to pay custodial and witness fees, etc. She stated that this flat fee is not going to make anyone happy; no one believes it is good for either applicant or defense. She stated that she will work with the DIR Director Christine Baker for a solution that will work.

Commissioner Wei asked if she submitted data for review in the study. Ms. Cohen stated that she was not asked for data; no one contacted them. She stated that she did hear that information was sought, but by the time they heard about it, there was no time to redact the information so that the injured workers' personal information would not be viewed per HIPA purposes. She stated that none of her colleagues were contacted for their invoices either. Commissioner Wei stated that the researchers described that the invoices received and reviewed have pricing which reflect all of the 19 potential steps. Mr. Nachtwey stated that that is correct. Ms. Cohen stated that the referenced laws from other states did not reflect the work that they do in California. Mr. Nachtwey stated that the 27% adjustment was meant to partly reflect the difference, and that the defense data for uncontested claims do presumably include the 19 steps. Ms. Cohen stated that on the defense side, there are problems collecting money. She stated that she has submitted written comments.

Jim Butler of the Applicants' Attorneys Association stated that from their perspective, this is not just about copies. It is about evidence which the injured worker is required to get to prove his/her claim. He stated that the Constitution of the United States requires due process under law which requires that the applicant has the opportunity to discover the evidence to prove his claim. He stated that when he gets a certificate of no records from a defense copy firm and he sends in what he calls an applicant's copy firm and he gets a full set of records, he discerns that things are not entirely equal. He stated that where they have to rely on opponents to provide the evidence they need to prove their claims, it is like David asking Goliath for stones. He stated that he represents people, and every day he sees clients who are not there just with medical issues but also serious and willful misconduct petitions by the employee where the allegation is that the employer did nothing about a hazard and someone got hurt as a consequence. He stated that this also applies to Labor Code Section 132a claims, where the employer is alleged to have discriminated against the employee because the employee filed a workers' compensation claim. He stated that is the same thing: he sends out a subpoena for records and the employer, for whatever reason, says that there is no record. He stated that they send in their copy service and they get witness statements, the employee's disciplinary history, and the evidence they need to prove their claims. He stated that

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

he believes that the data are skewed. He stated that the workers of the state have the right to dignity, respect and fair treatment under the law.

Debra Russell stated that she was Director of the Workers' Compensation Program at the Schools Insurance Authority, a claims administrator in a self-insured, self-administrated program. She stated that she had some observations and concerns. One is the definition of a contested claim. She stated that there are a number of different reasons that are valid in this process that someone might object to part of a bill or the entire bill. She stated that the study seemed to label all applicant bills as contested bills, whereas you could have contested bills of either applicant or defense. She stated that she is concerned that the study is considering an additional fee for a subpoena and witness fee when the data that are based on paid invoices would have already been included in that value. She stated that the study is suggesting a duplicate payment for those two parts of an invoice. She also stated that a separate penalty structure would be confusing as there are already other penalty schedules for workers' compensation. She stated that when a bill is late, it should be increased, but a two-and-half time increase is extreme. She stated that some of the dispute in the claims operation has to do with what is a basic copy service action or retrieval of records. If there is a list of billable items, there are 29 items that are received from a copy service firm of different services that they offer and can add to a bill. She asked if that means that defense or the employer has to pay for all 29 of those billable services. She stated that this is where the big disputes and contested claims come from. She stated that they receive bills from defense firms billing A through F, a basic copy retrieval service. On the applicant side, the bills tend to have a lot of value-added services. They are valuable services and she sees the benefit, but the benefit is to the applicants' attorneys and the defense should not have to pay for value-added services. She asked that they define what services are required to be provided on each copy service event.

Greg Weber stated that he was CEO of MedLegal, one of the leading applicant copy services serving the workers' compensation industry, and that he had also submitted written feedback to the Commission. He stated that MedLegal believes that overall, the report is a step in the right direction. The researchers have taken on a challenging subject and put some foundational perspective in place. He stated that he has every confidence that the DWC will carry forward and adjust the recommendations appropriately as they continue the rulemaking process. He stated that he wanted to focus comments in three areas. First, they accept the merit of the simple flat rate and the tiered payment structure. However, they feel that the timely payment discount cuts too deep; not all of the friction identified by BRG is simply the result of collection, payment or calendar friction. He stated that some of it is simply the result of the fact that attorneys supporting the injured worker start out less connected to the material facts in the case and have to conduct a deep round of discovery. He stated that they believe that the lump sum payment recommended in the report must be increased by the DWC to account for that friction. Second, they believe that there is clear need, as pointed out in the report, for the DWC to provide appropriate payment to copy services for related services necessary to search, retrieve, copy and, most importantly, protect the integrity of the records in accordance with the rules of law and evidence. Third, MedLegal believes that economic incentives matter and provide the best clues for required performance by all parties. He stated therefore that they recommend that the DWC consider a stronger connection between the actual cost of record-retrieval by properly including the factor of location in the fee schedule, and they also recommend that the DWC adjust the

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

baseline page count appropriately to be effective above a more realistic average in the fee schedule.

Chair Brady stated his thanks to Greg Nachtwey for the work on the study. Chair Brady stated that a vast majority of comments have been submitted and are online and available for everyone to review. He stated that he knows that everyone wants to create efficiencies in the system as that it is a very expensive system in California but delivers some of the lowest benefits to injured workers, and he stated that they are committed to asking better questions and getting more traction for each dollar spent.

Stewart Soto stated that he was owner of AAA Copy and Copy Review Services. He stated that at AAA Copy, he was a registered professional photocopy technician. He stated that he obtains records for defense and applicant attorneys. He serves as a copy service expert witness at the Workers' Compensation Appeals Board (WCAB), and he has participated in over 50 trials in the last two years on the specific issue of the problem with photocopy and subpoena bills. He stated that he wanted to voice his support for the work performed by the Berkeley Research Group and provide additional solutions that will stamp out the fraud and abuse in the system and eliminate the excessive billing practices from ever tying up the judges at the WCAB. The proposed fee schedule is fair and contains reasonable pricing that allows for any copy service, defense or applicant, to make a modest profit in the workers' compensation system. He stated that they fully support the requirement to be a lawful and legitimate, registered professional photocopy service, as required by the California Business and Professions Code 22450, in order to qualify for payment for services. He stated that the requirement for signed declarations under penalty of perjury to validate subpoena requests is a good start to combat the fraud and abuse in the subpoena and photocopy service. He stated that while many issues of abuse have been addressed, additional measures still need to be implemented that go beyond the recommendations of the Berkeley Research Group.

Mr. Soto stated that the first recommendation is that invoices submitted for payment should be accompanied by original referral forms sent to the copy services by the applicants' attorneys specifying the name of the person requesting the records and not just the firm name. He stated that if they have the actual name of the person in the law office that allegedly requested records, they can verify the truthfulness of the request and ask that person for the basis if they have any doubts about the validity of the referral. The second recommendation is that no payment should be made for services where the subpoena is defective or invalid. He stated that many of the subpoenas issued in the workers' compensation system are defective and invalid. Subpoenas are issued with dead judges' signatures or missing ADJ numbers, and the basis for many of the subpoenas is questionable. He stated that earlier this year, the DWC tried to pass rules requiring valid subpoenas to possess wet signatures from requesting attorneys, but the rules were not approved. Therefore, if the incentive of possible payment or nuisance payment at a lien trial for shoddy and unprofessional subpoena work is removed, it will dramatically reduce the cost. The third recommendation is that no payment will be made if the copy service does not obtain signed declarations from the custodian of records and the professional photocopier as required by the Evidence Code Section 1561. The fourth recommendation is that copy bill disputes should be bound by the Independent Bill Review (IBR) rules adopted by SB 863. He stated that these rules require lien claimants to provide missing documentation to substantiate contested invoice items

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

in a timely manner. The fifth recommendation is that multiple subpoenas to the same location for different types of records shall be treated as one location for billing purposes. He stated that the Berkeley Research Group indicated an additional allowance for document preparation and services may be added to the recommended fee for uncontested payments as well as reimbursement of witness fees advanced. The sixth recommendation is that the recommended fee for a document preparation and service of either a subpoena or authorization is \$35, which matches the fee that is paid to sheriffs serving subpoenas in the civil and family law courts. He stated that in addition, there should be \$15 for the witness fee, and \$2 service charge to cover the cost of processing check requests and interest. Mr. Soto stated that he submitted written comments to the Commission.

Dan Mora with the California Workers' Compensation Services Association (CWCSA) stated that the Commission should have received CWCSA-submitted written comments sent by email Tuesday, October 15th. He stated that it is the Association's mission to assure that California's injured workers have full access to their rights and benefits by promoting professionalism and fix the performance of all support services as required by the California workers' compensation system.

Mr. Mora stated that they want to thank BRG for its willingness to meet with CWCSA and its representatives and for recognizing, as did the Legislature, the vast differences between the copy and related services provided under contract for defendants and those provided on behalf of the injured worker. He stated that in BRG's zeal for simplification and lacking adequate real life background in workers' compensation and the copy services industry, the report recommendations actually compromise injured workers' rights to due process. Unfortunately, as a direct result, the Commission should return the report to BRG for further research. He stated that he wanted to give two examples of why, and Commissioners will find others in the written comments. First, the Legislature clearly states that its intention in Labor Code Section 5307.9 where it states in part that the fee schedule shall not be applicable when there exists a contract between an employer and the copy service provider. He stated that contrary to the statutory instruction, BRG erred by instead heavily considering contracted services in its methodology. As a result, its recommendations to the Commission are directly contrary to the statute. Second, pursuant to the "notification of the intent to award," BRG was obligated to interview stakeholders in the workers' compensation system to summarize participants' issues. He stated that they know of several large stakeholder groups that should have been contacted in connection with the study, but were not. Among them are the state's largest custodians of records and those who represent injured workers and who must depend on copy services in order to obtain the evidence needed to support the injured worker's claim. Among those not contacted are: the California Applicants' Attorney Association; California Hospital Association; Kaiser Permanente; US Healthworks; California Ambulatory Surgery Association; the California Orthopedic Association, and nine more. He stated that these were just two of the glaring issues that must be corrected before the BRG report is properly completed. He stated that an oversimplified and frankly unrealistic view of how discovery should be conducted in the California workers' compensation system is the result of this report. He stated that they respectfully request that the Commission return the report to BRG for more research and accurate fulfillment of the statutory and contract terms under which this research was to have

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

taken place. Mr. Mora stated that, as before, they are ready to help add to BRG's foundation of information and thus proactively add value to the report and resulting fee schedule.

Commissioner Bloch stated that he did want to recognize the people who traveled from throughout the state to come give testimony today and to recognize that they are talking about the livelihood of many people, not just people in the copy services profession but also injured workers. He stated that he was particularly happy to hear from folks today on the defense side and would hope to have an opportunity for more comment on this in the process of developing the regulations. He stated that he would encourage Commission staff to try to find the "sweet spot" where everybody likes a little bit of what they have and is unhappy a little bit. He stated that he wanted to share his only recent experience with copy services, not in a workers' compensation setting, but in a CEQA lawsuit. They looked far and wide for a copy service that could help them in an economically sound way to go down and sift through an incredible amount of information and find the information needed in support of that litigation. He stated that he lastly wanted to recognize that this is a professional industry and that he appreciates all the work that everybody does.

CHSWC Vote

Chair Brady stated that there was a summary and recommendation by staff in terms of referring this, and he stated he wanted to ask for a motion to have this approved and an action item to have the report transferred to the AD for further analysis because as based on the testimony today, there are some additional things that need to be considered.

Commissioner Wei moved to approve the "Copy Services Fee Schedule Report" and Commissioner Bouma seconded.

Discussion

Commissioner Steinberg asked what the motion was, and Chair Brady stated that it was to recommend that the AD consider adopting this fee schedule and that there be some additional fine-tuning that is done, but really pass this to and have the AD fine-tune the details that go with this, but leave it up to her to incorporate that into the next step. He stated that in other words, they want to have this passed to the AD's office. Commissioner Wei stated that it was to inform the rulemaking process that would come forward. Commissioner Steinberg stated that he did not want at this time for the Commission to relinquish its participation in this process. He stated that he would prefer to adopt the comments provided by Commissioner Bloch that Commission staff keep working with the participants in the system to find that "sweet spot" that everyone seems to be focused on. Chair Brady stated that he believes that is the intention. Mr. Taylor stated that the question is whether this is continued under the Commission or whether this is put before the AD and the Commission and staff continue to facilitate the process under the direction of the AD, or whether Commissioners want it back before relinquishing the issue. Mr. Taylor stated that they had some voices primarily from the applicant copy services early in the year urging that they move as quickly as possible; on the other hand, they do not want to see the regulation adopted that is incomplete, so they are looking for the best way to get to an acceptable balance, an appropriate balance, without delay. Given the fact that the Commission does not meet that often, it might be faster if it is passed over to the AD, but it is up to the Commissioners. Commissioner

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

Wei stated that the Commission is not a rulemaking body. She stated that they do not have any authority to adjust the rule or promulgate the regulation for the fee schedule. She stated that the work that the Commission has been doing has been done by contracting for the research and having this process inform the rulemaking process. She stated that she feels comfortable at this point in time, that she appreciates of the work that has happened as this does inform rulemaking, handing the report off to the AD with Commission staff being in contact and being a facilitator of all the public comment going to the AD. She stated that she assumes then that the AD on her timetable will take it through the Administrative Procedures Act and go through another public comment period there as rules come out. Chair Brady asked if this will then come back. Commissioner Wei stated that this goes and they take the ball and go through rulemaking. She stated that they cannot bind the AD for what those rules look like; she stated that they cannot say that it has to be based on this research, but they can pass on the research to inform that process.

Mr. Taylor stated that perhaps he could recast the motion to be: does the Commission wish to pass this report and the public comments to the AD for her consideration in rulemaking together with other alternatives that she may consider which she receives from other stakeholders in the course of the rulemaking? Commissioner Wei stated that she would move that version.

Commissioner Bloch stated that he would like a point of clarification, that this motion then gives the different stakeholders the opportunity to be engaged in the rulemaking process. Mr. Taylor stated that they have that opportunity no matter what happens here today. Mr. Taylor stated that the Commission is not trying to tie the AD's hands but merely to provide resources for the rulemaking process.

Commissioner Steinberg stated that perhaps he does not understand or share the idea of the role of the Commission in this process. He stated that listening to Commissioner Wei, it appears that the Commission has done its job to date by hiring the consultant, receiving the report, and passing it on. He stated that he is looking to Mr. Taylor as Acting Executive Officer to inform them of the role of the Commission in this process. Mr. Taylor stated that Labor Code Section 5307.9 states that the AD, in consultation with the Commission, shall adopt after public hearing a schedule." He stated that consultation could be construed as a specific recommendation, or to follow the BRG report closely, or it could be construed to consider the report and move on. Commissioner Steinberg stated that he wanted the motion to understand that the Commission wishes to continue its consultative role with the AD in adopting the final resolution. Mr. Taylor stated that if this is passed along to the AD now, the staff will continue to be looking for that "sweet spot" that Commissioner Bloch described. He stated that if the Commissioners wanted to have another look at it, then you probably do not want to pass the motion today. He stated that it was up to them.

Chair Brady stated that there is a lot on the docket that needs to get done and that he would be in favor of passing this today, in consultation. Commissioner Wei stated her agreement and that without that next step, in reading the statute, that the Administrative Director would not be able to go forward with rulemaking, and that that is not in anyone's best interest. Commissioner Wei stated that passing it today does not mean that she is going immediately to rulemaking either. It just advances the ball in order to get to the next step. She stated that she did not want to overstate, as much as they might like to, what their authority is at the Commission.

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

Commissioner Bouma stated that she believes that they all embrace the concern of Commissioner Steinberg that they want to make sure that all of the comments made today by the Commissioners and by the public carry some weight. She stated that she is willing to put her faith in the AD that that weight will be born in the rulemaking process, and that is why she would support moving forward today.

Commissioner Bloch stated that he concurs with his colleagues; he stated that he is not in a position to negotiate copy service fees, nor does he know anything about the industry, nor does he have the time to get into that, and that he respects the role of staff versus the role of the Commission. He stated that he agrees that as long as the comments made today and the questions and concerns the Commission had about this and the recommendations coming out of the BRG report that it is clear that it is very unsatisfactory to both sides and more work needs to be done on finding the sweet spot. He stated that he is therefore prepared to pass the motion before them.

CHSWC Vote

Commissioner Wei moved that the “Copy Services Fee Schedule Report” be passed along to the AD of the DWC. Commissioner Steinberg opposed the motion.

Ms. Baker stated that the Commission needed at least two labor and two employer representatives to vote in favor of any motion for it to pass. Chair Brady stated that the motion did not pass under the circumstances. Commissioner Steinberg stated that he wanted to see the staff work with the AD to arrive at a result as soon as possible, but he wanted to be sure that the Commission continued to have some input in the process. Commissioner Wei stated that she wished to make a friendly amendment to the motion that the Commission directs the staff to remain engaged in the rulemaking process and report to the Commission on a timely basis. She stated that she understands Commissioner Steinberg wants to make sure that the Commission remains engaged with the rulemaking process as that goes forward and that she shares that interest. She stated that she believes that they could direct their Acting Executive Officer to be engaged and to report back to them as that process unfolds. Commissioner Steinberg stated that he would accept that motion in the form presented by Commissioner Wei.

CHSWC Vote

Commissioner Wei moved that the “Copy Services Fee Schedule Report” be sent to the AD of the DWC and that the Commission direct Commission staff to remain engaged in the rulemaking process and report to the Commission on a timely basis. The motion passed unanimously

Report on Department of Industrial Relations

Christine Baker, Director, Department of Industrial Relations

Destie Overpeck, Acting Administrative Director, Division of Workers’

Compensation

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

Ms. Baker thanked the Commissioners for the opportunity to provide an update on Department of Industrial Relations (DIR) activities. She stated that she wants to ensure that the Commission remains totally engaged in the examination of the efforts of the Department and the workers' compensation system, as it is the labor-management advisory group.

Senate Bill 863 Reforms

Ms. Baker stated that DIR staff are totally dedicated and are making dedicated efforts to implement the reforms of Senate Bill (SB) 863 and handle day-to-day operations. She stated that more collaboration and partnerships will be evident, as well as modernization efforts, to respond to the public needs. This in turn allows DIR to be more transparent and data-driven and to improve service to the public, which is both labor and management.

Ms. Baker stated that SB 863 did enact historic reforms for workers' benefits: to enable obtaining timely and medically necessary and appropriate treatment; and to provide access to appropriate medical providers. The reforms are ensuring that medical decisions are made in an evidence-based manner and that providers are paid appropriately and that there is transparency in all of our systems. SB 863 also delivered major savings to employers by eliminating unnecessary litigation over liens and billing disputes.

Ms. Baker stated that there has been an increase in the price of workers' compensation insurance premiums; the price was bound to go up. People who watch the industry knew that insurance companies could not continue to charge less than their cost of paying and adjusting a claim. For two years before 2012, the industry's combined loss and experience ratio was about 1.4 times the premium. The question was never whether the 2012 reforms would bring down the cost of insurance, only whether it could slow the inevitable rise. The Rating Bureau estimated that the 2012 reforms would reduce costs for 2014 and later policies by 2.7%, compared to what they would have been without the reforms. For policies in 2013, the savings would be 5.8% compared to what the cost would have been without the reforms. Ms. Baker stated that it takes years for the cost of claims to develop, so it will take years to fully evaluate the impact of the reforms. Some of the reforms were designed to resolve issues sooner and get benefits more quickly. If there are increases in cost early on, that does not mean that the increases will stay over time. Things may go up initially, but overall, hopefully, the system will settle down. Therefore, we should not jump to the conclusion that the post-reform system is costing more. That would be the case if new data were plugged into old models. Disputes are getting settled and ultimately the costs of claims will be held in check.

Independent Medical Review and Independent Bill Review

Ms. Baker stated that Independent Medical Review (IMR) and Independent Bill Review (IBR) will result in timely determinations made by independent medical and billing experts based on evidence-based and transparent criteria. There has been a steady rise in IMR applications, particularly because after July 1, 2013, the law requires IMR for all dates of injury. There were some 14,000 IMR requests filed in August. This required a huge number of medical decisions to come through within one month. DIR is seeing that approximately 27% of requests are being approved which were denied, and 73% of requests are going through utilization review (UR). The top three types of treatment requests are medications, radiology services, and physical or occupational therapy services. All decisions are redacted and posted on the website to create

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

transparency. It was not clear what was going on in the QME process before this. Ms. Baker stated that the DIR team has moved over 11 sets of regulations, and the IT team of the department won a national award for its digital improvement in lien processing. What would take ordinarily years was done in 3 months. People were working day and night to get the system up and running so it could be seamless. There were steep learning curves for everyone. Implementing a brand new and involved concept like IMR required considerable infrastructure, expertise and attention to detail. There have been daily calls with the contractor, Maximus, to see how problems can be resolved and how the system can be more efficient.

Ms. Baker stated that it is critical that the public support IMR by providing information is critical. IMR represents a major paradigm shift for all stakeholders in the workers' compensation community. It takes medical decision-making out of the judicial system and places it where it belongs, in the hands of appropriately qualified physicians. This shift in practice is necessary to ensure timely delivery of the highest-quality medical care for ill and injured workers. IMR determinations are required to be evidence-based and based on a hierarchy of evidence, as specified in statute. Dr. DAS of the Division of Workers' Compensation (DWC) Medical Unit is dedicated to spearheading this effort. We understand and recognize that change is hard and requires a new way of practice. Ms. Baker stated again that DIR is making all the results transparent. All determinations are redacted and posted. In addition, there are Frequently Asked Questions (FAQs) on the DIR website. Since January, there have been 41,000 applications for IMR, with 95% received after July 1. Currently, the number of applications per month seems to be leveling off.

Ms. Baker stated that the IBR process is working through some glitches, and more efforts to streamline the process will be made soon.

Qualified Medical Evaluator (QME) Panels

Ms. Baker stated that all able bodies in DIR are working on QME panels. Recently, 37,000 appeals came in. DIR is looking at doing a thorough evaluation of work processes and hopes to change regulations that will allow the department to streamline. It is a short-term strategy to do overtime to fix these problems; the Department is working on structural and technological changes to ensure that it is effective and efficient. Ms. Baker stated that most (about 95%) of the QME panel requests come in incomplete with no name of injured worker, no treating physician, and no listing of the specialty needed. Ms. Baker stated that the QME panel process is a fundamental part of the delivery of benefits to injured employees in the workers' compensation system. If there is a delay in this process, then there is delay for the injured worker getting a decision. DWC is simultaneously reviewing not only the method of processing panel requests by developing technical solutions, but also the statutes and regulations concerning QMEs. Ms. Baker stated that currently, DIR is caught up to August with QME panel requests, and within the next two weeks, DIR should be completely caught up.

Enforcement

Ms. Baker stated that in the enforcement arena, DIR is ensuring effective inspections and payment of owed wages. The goal is to increase compliance with labor law and not to punish employers who want to abide by the law, so that honest businesses can thrive and profit in California. The Governor just signed a bill that would put DIR in a leadership role to coordinate

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

on the underground economy with several other departments and agencies, including Department of Justice and Bureau of Equalization (BOE), to share data. California cannot sustain an underground economy; it is not fair to workers and employers who are in compliance.

Partnerships

Ms. Baker stated that DIR has initiated several partnerships. One partnership is with the roofers association, the roofers union and the insurance industry (State Compensation Insurance Fund and others) to identify employers who may be cheating on their workers' compensation. Another partnership is with a working group of loss control experts from the industry which is identifying ways to prevent injuries and minimize risk. DIR is also partnering with the UC Berkeley Labor Occupational Health Program (LOHP) and the UCLA Labor Occupational Safety and Health Program (LOSH), DOSH and small business to increase Injury and Illness Prevention Program (IIPP) training across the state. Ms. Baker stated that DIR's Self Insurance Plans Unit is constantly in a continuous improvement mode to provide transparency.

Budget

Ms. Baker stated that DIR is in the process of correcting many technical budget problems through a combination of efficiencies and realignment. Emergency regulations were recently issued on refineries that will provide the Process Safety Program with additional resources.

Increased Inefficiency and Effectiveness

Ms. Baker stated that across DIR there are efforts to break down the silos that lead to inefficiency and ineffectiveness. There are also ongoing efforts to step up the use of technology and focus on data. She stated that across DIR, departments are working tirelessly to put out regulations and serve the public, and she stated that she would like to acknowledge Destie Overpeck, George Parisotto, Kathy Zalewski and staff, the IT teams, the Division of Apprenticeship Standards (DAS), and Dr. Rupa Das who are all incredibly dedicated.

Return to Work

Ms. Baker stated that return to work is an important part of benefits for injured workers and it benefits employers. Many workers' compensation benefits are determined on the basis on return to work. Any delays to return to work set the worker back in recovery from injury or illness. DIR is working closely with RAND on the Special Earnings Loss Supplemental Program to target the appropriate audience, which is workers with excessive losses, and to provide the appropriate payments. This is a pilot to see how a system of delivery payments by DIR to workers at low cost works. RAND has finished the study, and she stated that she is grateful to their technical expertise in identifying the workers who qualify for payments. Workers who qualify will have already received the supplemental job displacement benefit (SJDB). Ms. Baker stated that the first draft of the regulations will be done soon.

Resource-Based Relative Value Scale

Ms. Baker stated that with comprehensive work on the part of Barbara Wynn of RAND and the DIR/DWC team, DIR has moved boldly forward with Resource-Based Relative Value Scale (RBRVS) regulations. Fee schedules have not been changed for 20 years. These regulations will put in place a fee schedule for physicians with the right incentives for appropriate care and return

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

to work. DIR will keep pace with updates and ensure that all the changing technologies are available.

Ms. Baker stated that she is committed to continue to put measures in place to ensure that DIR is accountable. The Department is focused on evaluating how things are being done and how they can be done better in all areas, including health and safety.

Report on the Division of Workers' Compensation

Destie Overpeck stated that she would like to provide an update of DWC regulations.

QME Panels

Ms. Overpeck stated that DWC is caught up on QME panel requests that came in up to August 1st and expects to be completely caught up soon. She also stated that the process for online submission of panel requests will be implemented which will be more streamlined. Incomplete panel requests will be returned before filing. Also, there will be fewer duplicates, since DWC will be up-to-date. A QME webinar for the public on how to fill out panel requests was presented recently and will be posted on the website by next week. This webinar is only one hour long but is very helpful as it walks through the process.

Regulations

Ms. Overpeck stated that 6 sets of regulations have been completed on including: Ambulatory Surgery Center Fee Schedule; Inpatient Fee Schedule; Interpreter Certification; Qualified Medical Evaluator Regulations; and the Physician Fee Schedule. Also, the Supplemental Job Displacement Benefit regulations are pending with the Office of Administrative Law (OAL) and are expected to be completed in November.

Ms. Overpeck stated that three emergency regulations are still in process: electronic document filing and lien filing fee regulations, which should soon be ready for OAL review; IBR regulations are in a comment period which is closing on October 23rd; and IMR regulations just finished a public comment period and it is expected that there will be another one.

Ms. Overpeck stated that there was just public hearing for Medical Provider Network regulations on September 30th; comments are being reviewed, and it is expected there will be another 15-day comment period. In addition, the public hearing for the pre-designation and chiropractor visit limits was held.

Ms. Overpeck stated that work will begin on the Copy Service Fee Schedule regulations after review of public comments that have come in. An Interpreter Fee Schedule is still needed and a study is out on that. A Home Health Care Fee Schedule is needed and there is also a study out on that. A Vocational Expert Fee Schedule is also needed.

Updates

Benefit Notice regulations will be updated as a result of SB 863 to reflect all of the changes as a result of the reform legislation; Worker's Compensation Information System (WCIS) penalties

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

need to be implemented; the Medical Treatment Utilization Schedule is under ongoing updating; and Audit regulations will be reviewed and changes will be made.

IBR

Ms. Overpeck stated that 530 IBR applications have been received since January 1, 2013. 72 IBR determinations were issued. 60% of the determinations of billing disputes have been decided in favor of the provider, and 13 IBR applications were deemed ineligible.

Comments from Commissioners

Commissioner Wei stated that she would like to request that Commission staff develop a plan to evaluate IMR over the next 12-18 months. Commissioner Bouma stated that in looking at IMR, it would be important to provide detailed information on all the steps needed to get to IMR. This is important because of expectations that the process will be shortened and because there is concern over utilization review (UR) denials. Ms. Baker responded that a lot of tracking of the IMR process is going on. A lot of the requests are missing a UR document and that needs to be submitted on time and all together to eliminate delay. The Commission is contracting on a major study on UR, and there will be an independent evaluation of the IMR process. Commissioner Steinberg asked who would be working on that, and Ms. Baker responded that there will be a Request for Proposal (RFP) and evaluation of those bidding on the contracts. Ms. Baker stated that improvement of the process may be able to be achieved through regulations.

Commissioner Bloch stated that he wanted to thank Ms. Overpeck for negotiations on the Copy Service Fee Schedule and for work on the underground economy. He also stated that there has been deep disappointment about the passage by the Governor and the Legislature of AB 1309 which will deny benefits to athletes injured out of state but living in California. He stated that they represent truck drivers who now reside in California, and they are concerned about this legislation setting a precedent for other legislation for workers in other industries.

Update on Return-to-Work Program Study

Seth Seabury, Associate Professor USC and Adjunct Economist, RAND

Mr. Seabury stated that the RAND study was conducted to help DIR and the Commission work through issues to set up a return-to-work benefit program. The passage of Senate Bill (SB) 863 introduced sweeping changes to the workers' compensation system which included a return-to-work fund as stated in Labor Code Section 139.48 of the California Labor Code:

“There shall be in the department a return-to-work program administered by the director, funded by one hundred twenty million dollars (\$120,000,000) annually ... for the purpose of making supplemental payments to workers whose permanent disability benefits are disproportionately low in comparison to their earnings loss. Eligibility for payments and the amount of payments shall be determined by regulations adopted by the director, based on findings from studies conducted by the director in consultation with the Commission on Health and Safety and Workers' Compensation...”

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

Mr. Seabury stated that discussion has been focused on the impact of injuries “on average,” but many people do worse than average and their compensation is disproportionate to their earnings losses. It is an admirable although not easy goal to deal with workers who have injuries that are worse than average and to appropriately direct compensation to them. There are some challenges to implement and design this type of system. The fund is intended to provide additional compensation to workers whose losses are “disproportionately” high. Key questions that need to be answered include: who is eligible for benefits; how to identify them; and how much compensation they should receive.

Mr. Seabury stated that the study did not address how to determine the level of benefits, although this is an important consideration. The focus will be on eligibility criteria. Mr. Seabury stated that there are five issues in particular: determine the basis for calculating the losses; identify the period over which to evaluate them; tie benefits to return-to-work; relate benefits to the disability rating system; and the history of monitoring and updating which are critically important to this program because there is so much that is not known at this time. The study provides a preliminary estimate of the potential size of the beneficiary pool, which is not a forecast that should be held to a few years from now but it will give a general sense of what the potential size is and how it changes with different ways of tweaking the eligibility rules.

Mr. Seabury stated that the assumptions and guiding principles for the policy issues for this study have been discussed in previous studies. The system for compensating injured workers should be as adequate, equitable and efficient as possible, but also affordable. An equitable benefit targets compensation to injured workers whose losses most exceed expectations or those who have disproportionately high losses. Mr. Seabury stated that when benefits are directed towards actual losses, there is a potential for adverse work incentives, so an efficient system has to minimize any adverse incentives that may arise. Mr. Seabury stated that based on discussion with Commission staff and DIR, the study operated under the assumption that the program will be to base compensation on eligibility on an individual’s actual earnings loss compared to what would be expected for them. This is important for how to evaluate and identify people. There is an inherent trade-off between generous eligibility requirements and generous benefits. When there is a fixed budget constraint, the basic decision is to whether to give more money to fewer people or lots of money to many people. If the potential size of the eligibility pool changes, the level of benefit given changes, and the challenge is to still maintain the eligibility pool.

Mr. Seabury stated that focusing on actual earnings losses changes the way earnings losses have been considered in past RAND studies. The theoretical definition of earnings loss is the difference between what an injured worker made after an injury compared to what would have been made if the worker had not been injured. The problem is that you can never actually observe an individual’s true earnings loss because the counterfactual or the hypothetical of what would have happened cannot be predicted. In the past, RAND estimated the expected earnings losses for a population based on averages. The studies used the control method of finding uninjured workers with similar expected earnings paths and comparing injured workers to uninjured workers and then estimating the expected losses. This methodology only works for averages and is not a valid measure of any individual’s earnings losses. Therefore, the earnings loss method that has been used in the past cannot be used to determine what an individual’s

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

actual earnings losses are; this method only states what earnings losses would be expected to be based on some observed characteristics.

Mr. Seabury stated that a lot of the numbers in the study do not compare well to numbers in past studies because the current study is using a different method. The most practical way to compare an individual's actual experience is to compare the individual's actual earnings experience before the injury to the actual earnings after the injury. This is a practical alternative as you can see what the injured worker made before an injury to what he/she made after the injury. This is relevant to the individual's experience, but it has conceptual limitations as it attributes all the differences before and after the injury to the injury itself. In addition, it potentially creates incentives for individuals with potential earnings losses to stay at home from work. The classic criticism of a wage loss system is that you give injured workers incentives for staying home from work; if they have the ability to control their own time for return to work, that gives them incentives for not returning to work.

Mr. Seabury stated that to look at pre-post difference in earnings, it is critical to look at the specific period when the actual losses are going to be observed. The time immediately leading up to the injury is the most important time for the pre-period; however, the question is how long after the injury should be considered, and that depends on what the goal is. The actual losses of an individual can only be identified after it has been realized. The time period before an injury can only be estimated; immediately after an injury, actual losses cannot be observed. Focusing on the permanent component of losses, not the losses you experience from the time you are actually recovering from the injury, means waiting for the permanent component of the losses to be realized. This can only happen after the injury has occurred; otherwise, you are only looking at the expected losses. Mr. Seabury stated that in prior work, RAND has looked at what point the permanent losses tend to be realized, or at what point injured workers stop recovering from their injury on average. Prior RAND work suggests that this takes a significant period of time. If it takes three years to observe somebody's actual earnings loss, then if we want to compare a year's worth of earnings after an injury to a year's worth of earnings prior to the injury, benefits cannot be delivered until several years after the injury occurs. This creates controversy about the timing of when benefits are being provided and the impact of that timing on injured workers return to work.

Mr. Seabury stated that another issue is to tie return-to-work benefits to return-to-work offers. There are several advantages to using return-to-work offers as an eligibility criterion. Early and sustained return to work at the at-injury employer is a strong predictor of earnings losses. Tying eligibility to the offer of return to work also reduces adverse work incentives. There are several systems in place to monitor these offers already, as this is a requirement for the supplemental job displacement benefit (SJDB), which provides a tool for determining the eligibility criteria as return-to-work offers are already being monitored in the system.

Mr. Seabury stated that another question addressed in the report is how benefit eligibility should relate to the disability rating. The challenge is that the disability rating is already a tool used to predict eligibility and is used to determine permanent disability benefits. A key challenge is what to do about workers with low ratings but high observed losses. These are cases where it can be difficult to determine the causality losses and whether the losses have resulted from the actual

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

disability or if there is some other aspect to it. Workers with lower ratings have been shown to have lower replacement rates of lost income, and the benefits provided in the permanent disability system are non-linear; people with higher disability ratings have much higher benefits. People with low disability ratings receive lower benefits. However, some of those workers do have high losses. On average, the replacement rates for these workers tend to be relatively low. The workers with the higher ratings are the workers the fund would like to target. This is a policy challenge to tie eligibility to various ratings.

Mr. Seabury stated that to identify eligibility and the number of potential beneficiaries of the fund, it is important to look at the pre-post earnings difference after the injury. This was done using data in past RAND studies and by comparing a worker's injury prior to injury and in the fourth year after injury, thereby allowing the three-year period for earnings losses to stabilize. The analysis then compares the fourth year after injury earnings to earnings that they made in the year immediately leading up to the injury. These are data from the unemployment insurance rolls and data from quarterly earnings which are added to a full calendar-year's worth of data. Looking at pre-post difference in the fourth year after injury and compare it to the average pre-injury earnings of \$45,000, there are large declines, with averages of \$31,000 for even low-rated claims or about 30% less than pre-injury. The average earnings decline across all workers in the samples is quite large, around \$26,000 or 42% less than the year prior to injury.

Mr. Seabury stated that the key factor is that the study compared different earnings losses than in the previous studies. The study compared estimates of pre-post injury declines in earnings to a few different groups of all workers. The workers rated one to four in the SB 899 system had losses of 30%. If this is compared to control workers who did not have an injury to estimate the effect of an injury, then the uninjured worker in the year prior to when they were matched to an injured worker prior to the injury did not see an injury but there is still a decline of 15% decline in earnings in the fourth year after injury. This difference may be due to these people being more likely to exit the labor market as people retire or lose their job; in fact, there is different reasons peoples' earnings decline over time. This approach is going to make earnings losses look greater than they actually are. This is the same for temporary workers with no permanent disability who look like people with low disability ratings, which is what might be expected. Mr. Seabury stated that this indicates a limitation of the pre-post injury earnings loss analysis. If we look at injured workers in the prior year that they were matched to the injured workers and look at those same workers a year later, then after that date, they did not experience injury but experienced a 15% decline. This might be useful for people whose decline is greater and who have worse outcomes. Those are people who do not return to the at-injury employer. When we look at people who did not go back to the at-injury employer and who receive the SJDB, we can see how their losses compare to the average losses. One would expect, on average, those losses to be higher. One has to determine how many people who do not go back to work who would have losses higher than average might be eligible. The 85% percent of injured workers who do not return to work at the at-injury employer have higher average losses. If one uses this pool of people to identify who the beneficiaries are, it is a large portion of them.

Mr. Seabury stated that the study tried to identify what it means to compare average losses to total losses and identify persons who qualify for the SJDB who do not go back to work at the at-injury employer. To estimate this number, a few assumptions had to be made. The first is who

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

might be eligible for the SJDB. To estimate this, RAND made some assumptions and looked at the following: a fixed annual program budget of \$120 million, with all \$120 million spent on benefits; 60,000 permanent disability cases per year, a figure that may change from year to year; and estimated SJDB receipt using numbers from the Workers' Compensation Insurance Rating Bureau (WCIRB) of 20%. The old vocational rehabilitation system was much higher than that. There is concern that the SJDB receipt currently is less than it could be, and there is a pool of people who would receive the SJDB if they had an additional incentive to claim it. If looking at the 20% of those who are receiving the SJDB, then those people are missing who might receive the SJDB if they had the additional incentive to claim it. The study used two numbers, the current estimate of 20% and then an estimate of 40% which is closer to the rehabilitation estimate for permanent disability claims. The study compared the implication of these different assumptions to the number of possible people who could receive the benefit. If one looks at the eligible population of all the workers who received SJDB, then according to the 60,000 permanent disability places per year and the different rates of utilization of SJDB benefits, then the number of beneficiaries ranges from 12,000 to 24,000 people per year. If the pool is limited to those people whose earnings decline is above average, the number of beneficiaries goes down.

Mr. Seabury stated that all the differences have important implications for what the average supplemental payments would be based on the number of beneficiaries and the \$120 million total aggregate benefit amount. The average payment could range from close to \$5,000 with the most expansive eligibility requirement to about \$12,000 with the least expansive eligible requirement. Mr. Seabury stated that it is impossible to measure the true effect of the injury with any certainty. In addition, there could be adverse work incentives. In addition, losses can only be evaluated over a sufficiently long time period after an injury. SJDB receipt provides a tool for determining eligibility, especially when combined with other criteria such as actual earnings losses observed. Mr. Seabury stated that the design of the fund would require close monitoring moving forward. The numbers provided by this study are rough estimates of the potential number of eligible workers. One cannot say with certainty that these are the workers that would actually be seen in the system. Many factors that could be used to determine eligibility can be monitored on an ongoing basis. One can survey injured workers about their outcome to see how many are going back to work and use their earnings losses on an average basis to predict the potential size of the beneficiary pool. Over time, policymakers (DIR, the Commission) should monitor the potential number of beneficiaries and, if necessary, update the regulations.

Comments from Commissioners

Commissioner Steinberg stated that making a \$120 million-a-year benefit available to people who seem to have fallen through the cracks of the existing permanent disability system has generated a monstrous job of identifying who is eligible and how to pay them. Commissioner Steinberg asked how from an administrative standpoint, Mr. Seabury sees how a system like this would work. One of the objections strongly made by the employer community is that they do not want more attorneys meddling with this fund and creating more administrative friction costs than already exist. Mr. Seabury responded that the details of the system will be important and that will depend in part on what is set up in the actual regulations. He also stated that reporting criteria about earnings would need to be set up so that when an injured worker applies for the benefits, earnings are related to the earnings in the pre-injury period. After that, it would be necessary to

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

report the earnings in the post-injury period that is set, and then it will be important to track some of these items so that there is a system in place, whether they receive an offer of return-to-work, and the whether SJDB is reported, and then apply the formula between the pre- and post-injury workers earnings, which is the other benefit eligibility criteria. This would determine whether the injured workers will receive the benefit or not. Commissioner Steinberg asked whether all of details of eligibility would be handled within the office of the DWC, and Mr. Seabury responded that he did not know where the details will be administered.

Commissioner Steinberg stated that when RAND was hired 15 years ago, there was a mandate for the Commission to look at the permanent disability system that had not been amended for over 50 years. The criticism of the system at that time was that the system delivered uneven results for similar injuries, and RAND's answer at that time was put together a system-based primary yardstick on wage loss. Then SB 899 came up with its own system of American Medical Association (AMA) guides. Mr. Steinberg asked whether for the purpose of this fund, the system could go back to what was proposed prior to SB 899. Mr. Seabury responded that the challenge is what RAND has always advocated with its studies which is that you can take data on injured worker outcomes and use that as a tool to evaluate the impact of injuries and identify factors that predict who is doing better and who is doing worse. The data can also be used to evaluate the actual outcomes and the system and the reforms. The challenge is that that is an expectation of what one is expected to lose which is based on one's injury such as a back injury and its AMA rating. The return-to-work fund is a different approach as it states that sometimes those expectations are going to be wrong. Therefore, one wants to identify why it is wrong and target those people for higher benefits. It is a very admirable goal but it is also very hard to do that in an aggregate sense and formulaic manner. RAND is suggesting that a different approach for actual losses is needed because in the past you are predicting expected losses. The statute requires a different approach.

Commissioner Steinberg stated that changing one word in the statute from actual losses to expected losses, the results would be approximately the same. Mr. Seabury stated that if one focused on expected losses, then a different approach is needed. The study would then use expected losses, disability ratings, other strong predictors of losses, a formula related to actual disability ratings, and the replacement rates. That would be a completely different system from what he is talking about. Commissioner Steinberg stated that he thought that the expected loss calculation was what the study was getting to with the \$120 million dollar fund, and he stated that good work was done by Frank Neuhauser who pointed out the shortcomings of the permanent disability system under SB 899 and what it would take to restore some of the losses that seriously injured workers suffered at the time. Now, due to the language of the statute, there are many difficulties, with a major one being a three-year delay. If there is going to be a three-year delay, then why not use a five-year or 10-year assessment of loss, and if so, then the benefit becomes illusory. Mr. Seabury stated that what the study did find is that failing to return to the at-injury employer is a strong predictor of poor economic outcomes down the line. There are aspects of tying benefits to things known to be predictors of bad outcomes and are consistent with approaches that have been suggested in the past. The overall approach is different because they are looking for actual evidence based type solutions. Chair Brady stated that the study is looking for actual losses and evidence-based losses. Mr. Seabury agreed that the study uses data and predictions from the data but the injured workers' circumstances dictated that they

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

experienced a different outcome; therefore, a different system of identifying those people is needed.

Commissioner Bloch stated that the past studies demonstrated that it took three to four years for injured workers' earnings to stabilize, and RAND suggests that for this return-to-work fund, "eligibility can only be determined after several years after injury and compensation can only be paid out several years after injury." Commissioner Bloch stated that his concern is the situation where an injured worker has completely exhausted his/her funds and gets paid four years after the injury when they have clearly demonstrated that that worker is going to suffer a severe impact on earning ability whether or not they return to work. He stated that the fear is that a system is being created where someone is completely financially bankrupt before they are able to avail themselves of the \$120 million dollar fund. Commissioner Bloch stated that it is like being upside down on his house but he can make his mortgage payments; therefore, he does not qualify for any type of mortgage assistance unless he does not make his mortgage payments and is on the verge of losing the house. He stated that his question is about expected losses versus actual losses and whether we creating a system where people have to reach financial insolvency before they can avail themselves of some of these benefits. Mr. Seabury stated that he does understand the concern and does not think that that is anyone's intent, but it is a challenge about the way the system is set up, so if one wants to base the losses and benefits on actual losses, then he is not sure how to do it except to wait until actual losses are realized.

Commissioner Bloch stated that he understands that the system does not want to incentivize a worker not to return to work because of the promise of disability benefits. He gave an example of a teamster who was injured on the job and who was making \$120,000 with an 8th-grade education. He stated that there is no way this member will find another job with an 8th-grade education making a \$120,000 a year, and there is no incentive for him other than to return to work as soon as possible. He stated that he recognizes that using return to work as a chief eligibility criterion is important, but he has to register his concern that the study suggests that workers would have to be bankrupt before they can receive the benefits that they need.

Commissioner Wei stated that when this program was conceptualized, her sense was that they were going to target a more significant and substantial benefit to a smaller number of people who suffer a severe and catastrophic wage loss. The idea of using SJDB as a proxy will be that up to 40% of people would be getting this added benefit. She stated that this does not seem to be what the design of the program intended. If 40% of the 66,000 permanent disability claimants receive the SJDB benefit and get \$5,000 per claim, that claim amount would not make a significant actual difference to anyone's day-to-day life; it would cover approximately two months of living expenses. Commissioner Wei stated that she thought that when the fund was conceptualized, it was targeted for more catastrophic wage loss-suffering individuals with larger benefits because they are not going to be able to get back to that earning level, rather than it was to give a smaller added earning benefit to more people. She stated that that does not speak to the study, but she appreciates that Mr. Seabury was able to crystallize the notion that if you give more people benefits, one gets smaller benefits and it is a zero sum game. She stated that this should be considered when rule making begins, as the design of the fund is important.

Chair Brady stated that was his opinion as well. He stated that when a Permanent and Stationary

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

injured worker (PNS2) loses a finger, it is a catastrophic event. The RAND study is good and the presentation was clear about its limitations and the time frames that have to be used. However, it has the same language that the actuarial community gives when discussing data that cover 12 to 24 months and considering that data as green data.

Commissioner Bloch stated that the assumption about the fund is that the \$120 million is going to be spent every year, and he stated that assurance about that is needed. Mr. Taylor stated the role of the Commission staff is to consult with the DIR director and recommend that the regulations that are to be adopted by the DIR Director be based on findings by the study and in consultation with the Commission.

Commissioner Steinberg stated that he takes Mr. Taylor's comment to mean that the Commission has a joint involvement with the final product. Mr. Taylor stated that they will probably have a chance to talk about it again at the next meeting. Commissioner Steinberg stated that he wanted to pick up on Commissioner Wei's point and that it is his understanding that the payment from the fund should be targeted to a smaller group that is catastrophically impacted. Mr. Taylor stated that this means the recommendation to the DIR director would be that there should be some threshold beyond merely the receipt of the SJDB. Commissioner Steinberg stated that if the SJDB program is used as a proxy, then many more people will claim eligibility. Mr. Taylor stated that in order to meet the expectations voiced at this meeting about a larger benefit to a smaller pool, eligibility would probably require more than just SJDB eligibility, and that that is one of the challenges for the DIR director and those from the Commission in consultation with the director.

Commissioner Bloch stated that for future studies, it would be helpful to have life examples of what the different disability ratings are in order to understand the disabilities of injured workers. He stated that one needs to both have live examples and understand individual claims but also to look at the aggregate impact so a program of outliers is not created. Chair Brady stated that one needs to have examples and understand the needs of the individual claims but also the aggregate impact so we do not create a program of outliers.

Chair Brady asked Mr. Taylor for a summary of the recommendation for the Commissioners. Mr. Taylor stated that the motion would be to have Commission recommend that the DIR director should consider the report "Identifying Permanently Disabled Workers with Disproportionate Earnings Losses for Supplemental Payments" and to have the Commission publish on its website the Return-to-Work Program Study, when RAND has finished its final editing, as well as publish the public comments received by October 7, 2013, and comments presented at the Commission meeting.

Public Comments

Jim Butler, President of the Applicants Attorneys' Association, stated that he would like to see the Commission make the recommendation that the return-to-work money be paid as soon as possible without delay. People are driven into the poor house -- and these are people he sees every day, such as somebody who loses their job, loses their house, and loses their marriage, and that person becomes flotsam and jetsam. Mr. Butler stated that there is empirical evidence from

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

the study that those who lose their jobs are the most proportionately impacted. He stated that they would like to see a simple system. The more complicated the system -- and remember, he stated, that there are also unrepresented workers -- each additional requirement put on could lead to additional litigation, and nobody wants to see that. The intention was to help those people who are incapacitated. Mr. Butler would like to see way more than \$120 million set aside for this fund, especially given how much was given up in terms of job retraining years ago. According to the RAND report, if there are 20,000 people who are not going to return to work, the evidence is clear that they are going to lose, because the injured worker will receive \$6,000 per person from this fund. This benefit is going to result from having a job where an injured worker could be earning \$50,000 per year before injury to merely get \$6,000 after three years. He stated that that does not make sense.

Mark Gerlach, California Applicants Attorneys' Association, stated that the points that Commissioner Wei raised are also of concern to him. This is a program designed to provide benefits to workers with catastrophic earnings losses. He stated that in Table 4 of the report, that across the board, whether this is a low rating or a high rating, the workers who qualify for this benefit are workers who qualify for the SJDB and have higher-than-average earnings and are losing between 90-99% of their earnings. That is catastrophic, and this fund should be targeted to people in this catastrophic effects category. Unfortunately, the evidence is that that may be a large number of people, so, by necessity, each person would get a smaller benefit, but it will be a huge number of workers who will be affected by this benefit. Wage loss of 95% is catastrophic by any measure. Mr. Seabury responded that this is a point of confusion. He stated that that 80-90% is not a percent of earnings, but a percent of the number of people with above average earnings losses. Mr. Gerlach stated that Table 4 of the presentation states that that is the fact about average decline in earnings.

Commissioner Wei asked what the sample size consisted of. Mr. Seabury stated that there are a large number of workers who go back to work with small earnings losses and others who never return to work, as evidenced by 15% earnings losses who never had an injury but are no longer working. People who are above average in the data are significantly above average, and people who are below average are far below average. Conditional on being above average, one has to have high average losses. That is exacerbated by the pre- and post-method used. Commissioner Wei stated that regardless of the percent of disability, the likelihood of suffering major wage loss is high; therefore, it may mean that the benefit goes to more people but with smaller benefit.

John Griggs said that he was speaking on behalf of himself, not his employer, and he thanked the Commission for bringing out the information about the return-to-work fund. He stated that he echoes Commissioner Wei and Chair Brady's comments about the concept of the target population for this fund. The immediate effect of SB 863 was an immediate increase in benefits. He stated that he felt that the prior reform went too far in reducing the permanent disability benefit. He stated another concern is that this fund has the ability to grown into a super fund, especially if funds are held back for three years. He stated that he believes that there should be an oversight commission. He sits on the Fraud Assessment Commission and therefore believes that it is critical to see that the funds are spent according to the intent.

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

Commissioner Bloch stated that he has a question about the \$120 million and whether it would be collected every year regardless of what is paid out. Mr. Taylor stated that that has not yet been determined. Commissioner Wei stated that the statute says it is supposed to be \$120 million per year and anything that does not get spent gets rolled over, the goal being to spend the money every year and not to roll over any of it.

CHSWC Vote

Chair Brady rephrased the wording of the vote expressed by Mr. Taylor, that the Commission recommends that the DIR director should consider the report “Identifying Permanently Disabled Workers with Disproportionate Earnings Losses for Supplemental Payments” and that the Commission should publish on its website the Return-to-Work Program Study, when RAND has finished its final editing, as well as publish the public comments received by October 7, 2013, and comments presented at the Commission meeting. The motion passed unanimously.

Approval of Minutes from the June 13, 2013 CHSWC Meeting

CHSWC Vote

A motion to approve and post the revised Minutes from the June 13, 2013 CHSWC meeting in Oakland was presented and passed unanimously.

Acting Executive Officer Report

D. Lachlan Taylor, CHSWC

Update on Commission Studies

Mr. Taylor stated that Commission staff has been working on a number of projects, including projects to support implementation of SB 863 and evaluate its effects. Mr. Priven’s study on public safety employee cancer death cases was not received in time to be on today’s agenda but is posted on the Commission’s website for public comments and future action. Mr. Mendeloff’s study of Cal/OSHA inspection targeting also was received too recently to put on today’s agenda, but it is on the Commission’s website for public comment. There is a successful bidder on the study of Public Sector Self Insurance and the contract is now in the process for DGS approval. Commission staff has also assisted with the interpreter fee schedule and the vocational expert fee schedule studies, both of which were pushed back by the priority given to the copy service fee study.

Effect of Medical Reforms Study

Mr. Taylor stated that Commission staff prepared the Request for Proposal (RFP) for evaluation of the effect of medical reforms which will soon be released. This will be a multi-year study to examine how the changes to medical delivery, dispute resolution, and payment are affecting workers and employers.

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

Lien Filings Report

Mr. Taylor stated that the Commission has begun to receive data on lien filings and is in the process of testing the data set to make sure it is useable for the purpose. An initial report is expected to be posted on Commission's website well in advance of the next meeting.

Anniversary of Workers' Compensation Law in California

Mr. Taylor stated that 2013 is the 100th anniversary year of the first workers' compensation law in California, and the Commission will be putting a copy of the original statutes (1913) on the Commission's website.

Commissioner Steinberg commented that the Federal Income Tax law and the California Water Project should also be acknowledged.

Mr. Taylor stated that the next Commission meeting is scheduled for Friday, December 13, at 9:00 a.m., in the Auditorium of the State Building, in order to allow Commissioners to attend a labor gathering in San Francisco after the meeting.

Commissioner Bouma stated that the presentation on public safety officer cancer death benefits at the previous Commission meeting noted that having National Institute of Occupational Safety and Health (NIOSH) data would be instructive for policy making. She stated that the NIOSH study referenced has been released, and she asked Mr. Taylor if the data of the public officer death benefits study could be refreshed. Mr. Taylor responded that he would look into whether the report was released for comment and whether the report it would be augmented or whether it was final.

Other Business

None.

Public Comment

None.

Adjournment

The meeting was adjourned at 1:15 p.m.

Approved:

Martin Brady, Chair

Date

MINUTES OF CHSWC MEETING
October 17, 2013 Oakland, California

Respectfully submitted:

D. Lachlan Taylor, Acting Executive Officer

Date