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Are You Ready For Your Next DWC Audit?

According to LC 129, the Division of Workers Compensation is mandated to audit insurers, self-insured employers, and third party administrators every five years. The stated purpose of this process is "to make certain that injured workers, and their dependants in the event of their death, receive promptly and accurately the full measure of compensation to which they are entitled". As a result of these audits, unpaid compensation may be found, and penalties may be assessed. Detailed analysis of the results of past Audit Unit activity can be found on the Internet at <http://www.dir.ca.gov/dwc/dwcrep.htm>.

As reported on the Division of Workers Compensation website, <http://www.dir.ca.gov/dwc/AuditReport2005/AuditReport2005.htm>, 46 audits were conducted in 2005, reviewing a total of 3,168 claim files. As a result of these audits, 6,312 administrative penalties were assessed, totaling \$1,948,278. The Audit Unit waived \$696,125 of the assessable penalties pursuant to Labor Code

Section 129.5(c), (see below) resulting in total penalties subject to collection from claims administrators of \$1,252,153. At the time of this writing, the 2006 results were not yet available.

The first step in the audit process is known as a Profile Audit Review (PAR), in which claim files are reviewed and results tabulated in 5 key areas.

As noted in CCR 10107.1, these five specific key areas will impact results in a Profile Audit and are documented on the DWC website at, <http://www.dir.ca.gov/dwc/2007Perf.pdf>, as follows:

1. Unpaid Indemnity, both the frequency and amount unpaid
2. Late first payment of TTD, or first notice of salary continuation.
3. Late first payment of PD, VRMA, and death benefits.
4. Late subsequent payment of indemnity.
5. Failure or late provision of AME/QME notices or NOPE letters.

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If the claims administrator passes the Profile Audit Review, only the unpaid compensation found is issued to claimants. The resulting penalties are waived. However, if the claims administrator *fails* the Profile Audit Review, the audit will be expanded to a Full Compliance Audit (FCA). The “new math” formula for calculating the PAR result is noted in CCR 10107.1 (c) and (d). The pass/fail threshold is that the audit subject must do equal to, or better than the worst 20% scores of all final audits completed in the last 3 years (see “DWC Profile Audit Performance Standards and Full Compliance Audit Standards” on the DWC website). The actual pass rating is published in the Annual DWC Audit Reports as mandated in LC 129 (b) (1) and (2).

After a Full Compliance Audit, if the claims administrator met or exceeded the FCA performance standard, penalties only for unpaid or late compensation will be assessed per LC Section 129.5. The FCA standard is also in the “DWC Profile Audit Performance Standards and Full Compliance Audit Standards” report, page 2 on the DWC website. Basically, the FCA performance rating is calculated on the same criteria as the PAR, except that it is based on the combined results of the 1st and 2nd samples of files reviewed. However, after failure of a Full Compliance Audit, *all* penalties are assessed (not just those resulting from unpaid compensation), pursuant to the penalty schedule listed in Title 8 CCR 10111.2. These penalties are significant and expensive and touch on most, if not all, aspects of claim adjusting including failure to pay or late payment of benefits, required documents missing from claims files, failure to issue (or late issuance) of benefit notice letters, inaccurate benefit notice letters, failure to pay or object to medical bills, lack of attempts to obtain documents, etc.

Additionally, failure of a Full Compliance Audit will result in a repeat Full Compliance Audit within the following 2 years.

Claims adjusters must insure that per LC Section 4650, first payments of Temporary Disability are made not later than 14 days after knowledge of injury and disability. Per LC Section 4650, first payment of Permanent Disability must be made within 14 days after the last payment of Temporary Disability. Per LC 4650, adjusters should insure that periodic indemnity payments are made every two weeks on the day designated with first payment.

In addition to the above, timing of specific notice letters is of importance in calculation of Profile Audit Review results and is covered in CCR 9813 and in LC Section 4061. CCR 9813 requires a Notice of Potential Eligibility (NOPE) be issued within 10 days of knowledge of medical eligibility for vocational rehabilitation, or at 365 days of aggregate temporary disability. LC 4061 states that, together with the last payment of TTD, a claims administrator must provide one of several notices regarding Permanent Disability, with mandatory language including information on how to request a formal medical evaluation.

Regulation 10133.51(b) states: “Within 10 days of the last payment of temporary disability, if not previously provided, the claims administrator shall send the employee, by certified mail, the mandatory form "Notice of Potential Right to Supplemental Job Displacement Benefit Form" that is set forth in Section 101033.52.” Careful compliance with these and other notice requirements will help avoid audit failures.

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In order to avoid failing the time demands, and the financial implications of failing a Profile Audit Review, we recommend that every claims administrator set up quality assurance safeguards to insure compliance in the areas noted above. A few ounces of prevention, is clearly worth a lot of money saved from an audit compliance standpoint.

Article by Tim Claiborne, San Bernardino Office

From the Courthouse

Apportionment questions? Faced with conflicting decisions in various jurisdictions, the California Supreme Court consolidated and expedited consideration of two leading cases and three other relevant cases dealing with how apportionment should be calculated post SB 899. In these cases, captioned under the lead case of *Brodie v WCAB*, each injured worker's permanent disability was properly apportioned to one or more previous injuries or to non-industrial factors. The question was, does the employer get credit in dollars, or in PD percentages, for the amount of PD apportioned away,. In each case, the WCAB trial judge applied a formula to reduce the award by the apportioned amount under the so-called *Fuentes rule*, subtracting the percentage of apportioned disability and awarding the dollar value of the remaining Permanent Disability. Thus, for example, if the prior award was 30%, and the new disability from a new injury was 60%, the award was for the dollar value of 30% disability (60%-30%). This approach avoided excess liability for employers based on the graduated nature of the PD payment schedules.

The approach was dubbed "formula A" and was prevailing law until SB 899 passed, eliminating LC 4750 on which *Fuentes* was based.

Thereafter, decisions came down applying different formulas, all of which resulted in a higher dollar liability for employers in similar cases, and in some instances pegging employers whose work caused a relatively small percentage of PD with liability for life pensions or even 100% awards. This brand new unanimous decision by the Supreme Court puts the expensive and creative alternate approaches to rest once and for all. Formula "A" is the rule of law, and the employer gets to reduce the percentage of PD by subtracting the PD percentage of the amount apportioned away.

Got Training?

McDermott & Clawson, LLP is happy to assist with the training needs of your organization. Our education committee has extensive experience in providing seminars and discussions on Workers' Compensation topics of concern to adjusters and employers. We have worked with numerous carriers, third party administrators, and brokers to provide educational assistance, and would be happy to discuss your needs. Call Howard Stevens at (714) 288- 1700 or feel free to speak with any of our attorneys for further information.

Legal Briefs is provided free of charge as a service to our valued clients to provide general assistance in the day to day review of claims and cases. Comments and recommendations provided are not necessarily meant to apply to any specific case currently under review, as many cases present unique facts and circumstances which should be reviewed by legal counsel when litigation is involved. Please feel free to call our [Education Committee](#) with questions or comments. Contact [Howard Stevens](#) in the Orange office, 714 288-1700, or any of our [managing attorneys](#) for more information.

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