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SOME THINGS YOU NEED TO KNOW FOR 2008

Indemnity Rate Changes

Remember SAWW? That's the State Average Weekly Wage, a theoretical figure determined by annual analysis done by the U.S. Department of Labor. The SAWW has again increased for California; therefore, rates for temporary total disability will increase for maximum wage earners and payments of 100% PD awards and life pensions will likewise increase for dates of injury on or after 1/1/2003. Adjusters need to make sure necessary adjustments are done automatically on applicable cases, or be subject to potential penalties for unreasonable delay.

The maximum rate for temporary disability as of 1/1/2008 will be \$916.33. The current maximum rate is \$881.66. Minimum temporary disability rates also climb to \$137.45 from the current rate of \$132.25.

Payments for life pensions and 100% awards must be increased by 3.9% from the levels paid on these awards during 2007, but only if the

original date of injury for which the award was made occurred on or after 1/1/2003.

Expanded Limits for Temporary Disability

AB 338 was just signed into law by Governor Schwarzenegger. It has liberalized the time limits within which injured workers may receive temporary total disability payments. For injuries on or after 1/1/2008, the limit on such payments remains 104 weeks from the first payment of TTD, but the payments are receivable within 5 years of the date of injury.

Here's the new wording for LC 4656(c):

(2) Aggregate disability payments for a single injury occurring on or after January 1, 2008, causing temporary disability shall not extend for more than 104 compensable weeks within a period of five years from the date of injury.

The current law sets the limit at two years after the date of injury. By expanding the maximum time limit to five years, the concept of *aggregate* payments takes on new importance. Thus, an injured worker who is off for a few weeks and

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then returns to work receiving conservative treatment, and who then needs surgery in year three, may receive additional temporary disability payments up to the aggregate limit. This same scenario prevented receipt of additional temporary disability for injuries between 4/19/04 and 1/1/08.

There is another key change hidden in the wording of the new statute that benefits the employers: Temporary disability payments are limited to 104 weeks of compensable time lost. Gone is the requirement that counting begins on the day the first check is mailed out. Thus, it would seem that any retroactive payments count toward the aggregate 104 weeks, as would any period paid by EDD for which EDD has filed a lien.

Notice also that the limitation still has an envelope period after which TTD is not payable at all. Although the period is now expanded from 2 years to 5 years, TTD is not payable once you are more than 5 years from the date of injury.

New Exception to Physical Therapy Limits

AB 1073 was also signed into law, adding LC 4604.5 (d) (3) (1) to provide a new exception to the 24 visit cap on physical therapy, chiropractic and occupational therapy treatments. This new section provides that the limits will not apply to visits for “post-surgical” services provided in compliance with a post-surgical treatment utilization schedule established by the Administrative Director.

The Administrative Director has wasted no time in proposing guidelines to implement the new statute. These are in the early discussion and comment stage. The guidelines specify an expected maximum period of time for the patient

to make “maximum functional improvement” and then they specify the reasonable number of visits during that post-surgical period.

For example, the reasonable post-surgical period for a cervical fusion is proposed to be 6 months, with physical therapy visits limited to 6-12 visits over 4 months of that time. The proposed guidelines also have commentary typically noting such things as the need for the patient to cooperate with home exercise regimens. Some post-surgical guidelines propose to allow up to an additional 24 visits during the post-surgical period, and certain procedures such as spine surgery with myelopathy propose up to 60 additional visits. The entire proposal as it now stands can be reviewed at:

<http://www.dir.ca.gov/dwc/DWCWCABForum/1.asp>

We anticipate the possibility of new litigation over what constitutes “post-surgical” with such procedures as epidurals and discograms being at the center of controversy, with a companion argument that these and other non-scheduled procedures should take the case out of any limitations proposed by the new rules. Of course, at this point we do not know what the final version of the schedule will look like, or when it will be implemented. Stay tuned.

Changes to the PD Rating Schedule

This hasn’t arrived yet, but we have it on good authority (a speech by the Administrative Director herself) that there are some changes coming from the Administrative Director that are going to have a notable impact on the economic value of your cases. Some are expected to get more expensive, and some less.

The DWC will adjust the FEC and age

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multipliers. Apparently the occupational multipliers may also be adjusted in a later revision.

The FEC multipliers for all disabilities except for knees and psychiatric injuries will be adjusted upward. Hands will be increased from FEC one to FEC seven. Spines will be raised from a five to an eight, and elbows will increase from a two to a three.

The FEC for knees will be reduced from a two to a one. The FEC for psychiatric injuries will go down from eight to FEC two.

We wanted to know just what actual economic effect the proposal would have on a typical back case. Assume a 40-year-old laborer with a low back impairment, DRE II with a whole person impairment of 6%. In checking the effect of moving the FEC from a 5 to 8, we note absolutely *no difference* in the resultant rating.

On the other hand, when there are injuries resulting in whole person impairments in the neighborhood of 10% or more, the proposed rank adjustment change means the difference of anywhere from 1-4 percentage points in the rating for the same hypothetical laborer before modification for age and occupation. In the upper half of the rating table, the proposed change is very large, kicking cases with a WPI of 50% or more into the life pension category for a similar individual.

We do not know what the proposed change in the age modifications will be but it was previously revealed that those changes would be “revenue neutral.” We expect that there may have been an enlightened realization that the age charts are backwards, given that the definition of Permanent Disability was changed by SB 899 to provide compensation for future economic loss. Clearly,

the younger a worker is, the longer his or her expected work life is, and therefore the larger the projected lifetime economic impact of a disability. A simple “flip” of the chart would reflect the proper age analysis and would be expected to be essentially revenue neutral over the total population of the workforce.

The new proposed schedule has not been released yet, but we are given to understand that the DWC is trying to have it implemented as early as possible in 2008. As with the proposed post-surgical schedule discussed above, the process requires posting and comment period, then (possibly) revision, re-posting and new comment period, if necessary. The earliest expected date would be February 1st, but that really depends on just how much controversy and possible revision the proposal will require.

Article by Howard Stevens, Orange Office

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