



Legislative and Industry Updates – June 4, 2019

Workers' Compensation activity has continued in Sacramento in the Legislature, with May 31, 2019 the last day for bills to pass out of their House of Origin, with Summer Recess beginning on July 13, 2019. A review of active bills provides that several may have a significant impact for the BCJPIA program. An update on those which may impact the Workers' Compensation program is provided.

LEGISLATIVE ACTIVITY

AB 5 Independent Contractor Status (Gonzalez)

A recent California Supreme Court unanimous decision (*Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, (2018) 4 Cal.5th 903) regarding misclassified workers, established an "ABC test" to determine if the workers were actual employees or independent contractors. The ABC test states an employer must meet all 3 of the following to prove that a worker is NOT an employee:

- a) The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- b) That the worker performs work that is outside of the usual course of the hiring entity's business; and
- c) That the worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.

While AB 5 proposes to exempt certain professions from classification as employees, it will define its application to additional employment benefits, including workers' compensation which will in turn have a fiscal and resource impact on the Department of Industrial Relations and Employment Development Department.

STATUS – Passed to Senate.

AB 749 Settlements (Stone, Gonzalez and Reyes)

This bill proposes to prohibit employment settlements entered in to on or after January 1, 2020 from including a provision the employee is restricted from returning to work for the employer. Employment status may be important to the resolution of a Workers' Compensation claim and can determine when benefits are payable. There can be instances where the specifics of a Workers' Compensation settlement depend upon employment status. While the settlement of Workers' Compensation claims does not directly involve termination of employment agreements, there is

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concern that underlying personnel issues resolved by agreement may complicate and/or delay Workers' Compensation case resolution.

Staff will continue to monitor this proposal for impact to the Workers' Compensation program.

STATUS – Passed to Senate.

AB 932 Firefighter Injuries Out of State (Low and Petrie-Norris)

Similar to AB 1749 from the last session which expanded out of state coverage for Peace Officers **IF** the employer had passed a resolution agreeing to provide coverage, this proposal expands out of state coverage for Firefighters, including those which may have been injured during the Las Vegas shooting 10/01/17. At this time, one of the primary differences in the bill as proposed is that it DOES NOT require a resolution from the employer to provide coverage.

The Legislative Analysis provided April 26, 2019 states: *“In order to obtain workers' compensation benefits under the bill, injured firefighters would have to prove that they were engaging in rescue and protective actions, as opposed to merely being one of the many innocent bystanders shot by the sniper. This is true of virtually all workers' compensation claims – the burden is on the employee to show that the injuries grew out of activities that are job/duty related.”*

STATUS – Passed to Senate.

AB 1107 Medical Treatment (Chu and Reyes)

All employers are required to have an approved Utilization Review (UR) process in place to review, approve, modify or deny medical care. This review relies upon the medical expertise of UR and application of the Medical Treatment Utilization Standards. UR disputes can be escalated by the physician or employee to the Independent Medical Review (IMR) process as established in SB 863. Analyses of the IMR process shows over 90% of the IMR reviews uphold the original UR findings.

As amended, this bill proposes to allow to allow the Workers' Compensation Appeals Board (WCAB), to determine if application of the UR and IMR processes has “unreasonably delayed” provision of medical care (regardless of if the IMR process has upheld the UR decision on appropriate medical treatment when applying the Medical Treatment Utilization Standards (MTUS).

The penalty imposed by a determination of “unreasonable delay” of medical care is the financial amount of the delayed care increased by 25% or \$10,000, whichever is less. Returning the decision of medical care to a legal, rather than medical opinion, will result in increased claims costs to employers and delayed medical care to injured workers as they wait for litigation to resolve.

STATUS – Passed to Senate.

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AB 1400 Fire Service Personnel (Kamlager-Dove)

Existing law provides for a presumption of compensability for cancer arising from the employment of active firefighters. This bill as amended would expand that presumption to “Fire Fighting Operations: Civilian Employees”.

There is no current definition within the bill for “Fire Fighting Operations: Civilian Employees”, other than “whose job duties cause the employees to be regularly exposed to active fires or health hazards directly resulting from firefighting operations, such as exposure to toxic chemicals deposited on firefighting equipment”. Without clarification, this presumption can apply to any and all staff and volunteers of a Fire Station, who may or may not have any more DIRECT exposure to carcinogens than the general public.

This expansion of the cancer presumption significantly increases the financial exposure for Public Entities.

STATUS – Passed to Senate.

SB 542 PTSD Presumption (Stern)

This bill will add to the 10 current presumptive injuries for Safety Officers, coverage for “mental health condition or mental disability that results in a diagnosis of post-traumatic stress or mental health disorder”, and further states this provision would apply to claims filed or pending on or after 01/01/17, even if previously denied. Effectively, applying a presumption to a claim 2 years after it was filed.

Appropriate medical and psychiatric care is to be provided to all injured workers as it relates to their employment. While this bill does reference the care provided, it first addresses determination of compensability through the presumptive injury. Combining post-traumatic stress (PTSD) and a general mental health disorder as one presumptive injury opens up the psychiatric injury to wide interpretation, leading to increased costs to Public Entities which may not relate to actual employment injury.

The Senate Appropriations Committee has stated: “extending coverage of presumptive injuries to specified mental health conditions would likely result in increases to workers compensation premiums. Thus, the bill will result in higher workers compensation premium costs for state departments, as the State is a direct employer. The magnitude is unknown, but potentially in the millions of dollars annually across all state departments.” As with the State expectations of potential financial impact, BCJPIA members can expect to follow suit.

STATUS – Passed to Assembly.