



LEGISLATIVE ROUNDUP

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WHAT WE'LL COVER

- Elections: New governor, new insurance commissioner.
- Bills approved and vetoed by the governor.
- Topics that will most likely come up in future legislative sessions.
- Rulemaking update: Rules to supplement SB 863.
- Brief case law update, 3 things to know.



ELECTIONS

- Governor: Gavin Newsom in, Jerry Brown is out.



- Insurance Commissioner: Ricardo Lara in, Davy Jones is out.

GREAT. WHO CARES?

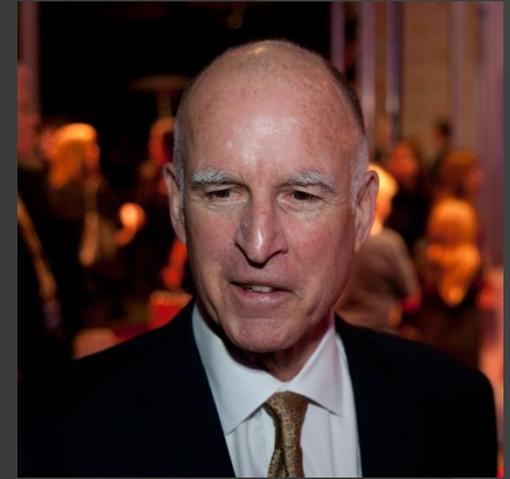


We do! Gov. Newsom appoints:

1. Admin Director of the Division of Workers' Comp and director of the Dept of Industrial Relations (aka "the Rulemakers").
2. Commissioners to the WCAB, who create our case law.
3. Has the final say on most legislation with his veto power, and can suggest legislation.
4. Can commission studies with CHSWC that can lead to change.



BUT BROWN WAS...



- ⦿ A pleasant surprise for employers/carriers.
- ⦿ Brown regularly vetoed legislation that would hurt defendants' ability to obtain apportionment to nonindustrial factors, ushered in IMR/IBR, and strengthened anti-fraud efforts via SB 863.
- ⦿ He ushered in a new era of anti-fraud grants for district attorneys.



NEW GOVERNOR



- ⦿ Gov. Newsom doesn't have much of a history in workers' compensation.
- ⦿ Lobbyists told WorkCompCentral in July that his impact on work comp could hinge on whether he tries to run for president in 2020.
- ⦿ At a recent event with applicant's attorneys, he reportedly said that he may take a look at temporary total disability.



NEW GOVERNOR

- Is a self-professed fan of single-payer health care.
- Said he will look at getting independent contractors in the “gig economy” the benefits they need, such as work comp (interview with KPBS on 10/5/18).
- Napa Valley Register’s editorial page predicted that Newsom will have to referee another major work comp legislative reform during his tenure.
- Biggest donor to his campaign: medical marijuana (LA Times).



NEW INSURANCE COMMISSIONER



- Ricardo Lara is the new insurance commissioner, and he defeated former Commissioner Poizner by just a few % points.
- As a state senator in 2017, he sponsored a single-payer health care bill that was held up because there wasn't a way to pay for it.
- Sponsored anti-ICE legislation that keeps immigration agents away from the WCAB.
- Has previously sponsored union-friendly bills.



NEW COMMISH – WHY SHOULD WE CARE?



- Because he can hold stakeholder meetings and promote legislation.
- Former commissioner Poizner held publicized meetings with stakeholders about topics like independent medical review and prescription drug formulary back in 2009. Those things became law less than two years after Poizner left office!

NEWSOM INHERITS A BOOMING CALIFORNIA

- Money men say: Business is booming
- CA accounted for 14% of the nation's new jobs between January 2017 and October 2018, according to Bloomberg co-founder Matthew A. Winkler. ([10/17/18, Bloomberg.com Op-ed](#))
- Per Winkler, subtract CA's job growth and market cap growth from national figures, and suddenly the national rates plummet to below average.
- Why? California has internationally-minded companies that benefit from global trade.



WHAT DOES THE BOOM MEAN FOR COMP?

- No need for emergency legislation, as was the case when Schwarzenegger took office and passed SB 899 in 2005.
- If there is going to be a push for change, perhaps more negotiating and less drastic change.



BILLS APPROVED BY THE GOVERNOR

- AB 1749: The Harvest Festival shooting bill.
- SB 880: Paying TTD via prepaid debit cards.
- AB 2046: Fraud fighters can get EDD info.
- SB 1086: Public safety workers' 420 weeks to file death claims.



APPROVED: AB 1749

- AB 1749: Allows employers (i.e. cities, counties) the discretion to accept peace officers' workers' compensation claims for out-of-state injuries. This arose after the tragic Oct. 1, 2017 mass shooting in Las Vegas, where many Californians were in attendance and injured.
- Permits local gov'ts to retroactively accept those claims.
- It only seems fair to give local governments the power to accept a claim filed by heroic peace officers who were injured while saving the lives of innocent people.



APPROVED: SB 880

- ⦿ AB 880: Creates a four-year pilot program to pay TD benefits with prepaid debit cards, as long as the applicant consents.
- ⦿ Eliminates those annoying questions about mailing to sketchy addresses, and excuses like “my neighbor’s dog ate my check and deposited it too.”



APPROVED: AB 2046

- AB 2046: Requires state agencies (ahem, EDD) to play ball with prosecutors who are investigating workers' compensation fraud.
- Ex: If the L.A. District Atty's office asks EDD for documentation of fraudulent benefits received, the EDD has to turn that information over to them.
- Also allows Dist Attys to carryover unspent fraud grant money into next year's budget.



APPROVED: SB 1086

- SB 1086: Permanently establishes the 420-week timeframe for public safety workers' dependents to file death claims.
- Without this bill, the 420-week timeframe would have “sunsetted” and reverted back to the 240-week timeframe to file death claims.



VETOED BILLS



Vetoed bills are like the Walking Dead - after being quiet for a while, they're nipping at your heels again.

- SB 899: Aimed at limiting apportionment
- AB 2496: Would have created a rebuttable presumption that janitorial service workers are employees
- AB 479: Called for a new analysis of impairment in breast cancer claims



VETOED: SB 899



- SB 899: Sought to overturn 3rd DCA's decision in City of Jackson v. WCAB
- What happened in that decision?
 - WCAB concluded that the defendant wasn't entitled to 49% apportionment to nonindustrial genetic factors, as the QME had apportioned to "impermissible immutable factors."
 - 3rd DCA reversed, determined that employer couldn't be liable for nonindustrial factors.
 - 3rd DCA found no difference between apportioning to standard preexisting conditions and preexisting heredity/genetic conditions.

VETOED: SB 899



- SB 899: What next?
- Expect lawmakers to send a similar version of this bill to Newsom's desk during the next few legislative sessions.
- The original language of this bill called the City of Jackson decision "abhorrent."

VETOED: AB 479

- AB 479: The latest in a string of bills attempting to increase the PD value of breast cancer claims (usually involves mastectomy). Usually rates 5% PD, and critics contend it should rate higher, around 16% PD.



VETOED: AB 479

AB 479: This year's version would have required doctors to take the following into consideration when crafting that impairment rating:

- Pain.
- Skin disfigurement.
- The presence or absence of the organ.
- Any loss of function of the upper extremity or extremities, including loss of the range of motion, neurological deficits, and lymphedema.
- Other impairments caused by the breast cancer, lack of the organ, or treatment related to the injury.



VETOED: AB 479

Brown vetoed the bill, but also ordered regulators to perform a study by March of 2019 that would analyze:

- The accuracy of impairment rating standards for cancer claims;
- Differences between the 5th and 6th editions of the AMA Guides to the Evaluation of Permanent Impairment;
- Whether the current impairment rating standards are biased for/against certain immutable characteristics, such as race, gender, or ethnicity.



VETOED: AB 479

Why would Brown do that?

- To help current and future lawmakers determine whether changes to breast cancer impairment ratings are warranted.



VETOED: AB 2496

- Would have created a rebuttable presumption that janitorial service workers are employees, and not independent contractors.
- Piggybacks on some new laws approved during prior sessions that require janitorial services to register with the Division of Labor Standards Enforcement. These services are receiving more scrutiny from regulators as of late.



VETOED: AB 2496

- Remember how earlier, we mentioned that the new governor was looking at jobs in “the gig economy” space?
- Wouldn't be surprised to see new legislation creating presumptions that those gig economy workers are employees for work comp and other purposes.



LOOK AHEAD: WHAT ABOUT SINGLE PAYER?

Many of us are nervous about the prospect of single-payer health care because:

- How would state address work comp? Would x-mods be unreasonable?
- Would carriers revolt, i.e. flee the state if forced to simply pay back the state for overpriced medical costs? CWCI analyzed this and believes it could increase carrier's willingness to litigate cases, which could deter the Legislature from doing this.
- Would doctors revolt? I'm sure many aren't thrilled about single-payer?



SB 562 FROM 2017

- ◎ This bill never made it out of the 2017 legislative session because of concerns about how the state would pay for single-payer group health. The state Senate Rules Committee wrote that “this bill is prohibited from becoming operative until the Secretary of Health and Human Services provides notification that he or she has determined that the Healthy California Trust Fund has revenues to fund the costs of implementing this bill.”



SB 562 FROM 2017

- SB 562 called for the creation of a 9-member board (appointed by governor and legislature) to:
- “Develop a proposal for HC coverage of health care services currently covered under the workers’ compensation system, including whether and how to continue funding for those services under that system and whether and how to incorporate an element of experience rating.”
- In other words, the bill deferred the work comp question to a random group of people, and lawmakers could willfully disregard that board if they didn’t like their proposals.



REGULATORY UPDATE

- SB 863 called for new rulemaking in a number of different areas, including for:
- Interpreters
- Home health care fee schedule
- Vocational rehabilitation counselors
- Copy services
- Of these, the only one that's been approved is the copy service fee schedule



INTERPRETER FEE SCHEDULE PROPOSAL

- First version of the rules that came out years ago had record number of comments and complaints.
- DWC sat on it for a year, redrafted, and issued a second version in April 2018.
- One of the biggest changes they made was to avoid billing at the same rate for multiple simultaneous hearings.
- Latest proposal still pending.



INTERPRETER FEE SCHEDULE PROPOSAL

- April 2018 version proposed the following for certified interpreters:
 - \$255 per half day at the WCAB (3.5 hrs)
 - \$448 per full day at the WCAB (up to 8 hrs)
- Additional hearings during the same time would be worth for certified interps:
 - \$191.25 per half day at the WCAB (3.5 hrs)
 - \$336 per full day at the WCAB (up to 8 hrs)
- These rates would also apply for depositions, arbitration, I&A, etc.



INTERPRETER FEE SCHEDULE PROPOSAL

- April 2018 version proposed the following for provisional interpreters:
 - \$141 per half day at the WCAB (3.5 hrs)
 - \$232 per full day at the WCAB (up to 8 hrs)
 - Additional hearings during the same time would be worth:
 - \$105.75 per half day at the WCAB (3.5 hrs)
 - \$174 per full day at the WCAB (up to 8 hrs)
 - These rates would also apply for depositions, arbitration, I&A, etc.



INTERPRETER FEE SCHEDULE PROPOSAL

- April 2018 version proposed this for medical treatment appointments for certified interpreters:
- \$86.50/hr, with 1-hr minimum.
- \$64.88/hr for additional during same time slot, with 1-hr minimum.
- Longer than 1 hour? Pro rata in 15-min blocks.



INTERPRETER FEE SCHEDULE PROPOSAL



- April 2018 version proposed this for medical treatment appointments for provisional interpreters:
- \$57.75/hr, with 1-hr minimum.
- \$43.31/hr for additionalists during same time slot, with 1-hr minimum.
- Longer than 1 hour? Pro rata in 15-min blocks.

INTERPRETER FEE SCHEDULE PROPOSAL

- April 2018 version proposed this for med-legal appointments for certified interpreters:
- \$86.50/hr, with 2-hr minimum of \$173
- \$64.88/hr for additional during same time slot, with 2-hr minimum of \$129.75
- Longer than 1 hour? Pro rata in 15-min blocks.



INTERPRETER FEE SCHEDULE PROPOSAL



- April 2018 version proposed this for med-legal appointments for provisional interpreters:
- \$57.75/hr, with 2-hr minimum of \$115.50
- \$43.31/hr for additional during same time slot, with 2-hr minimum of \$86.62
- Longer than 1 hour? Pro rata in 15-min blocks.

INTERPRETER FEE SCHEDULE PROPOSAL

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INTERPRETER FEE SCHEDULE PROPOSAL



- April 2018 version proposed:
- Defendants must try to find a certified interpreter three times and document it before going with a provisional interpreter.
- Certified interpreters want to make it even tougher to use provisional interpreters.

INTERPRETER FEE SCHEDULE PROPOSAL



What was the reaction?

- Lots of complaints!
- 394 pages of comments, complaints, and criticisms from both sides.
- Some didn't like the hourly and/or rates (interpreters wanted higher, defendants wanted lower).
- Interpreters wanted the rates to include travel time and prep time.
- Others didn't like the 15 min increments.

INTERPRETER FEE SCHEDULE PROPOSAL

What was the reaction?

- Some DAs pointed out that it still allows interpreters to overbook, and feels that interpreters can't do a good job with more than 3-4 hearings a day.



INTERPRETER FEE SCHEDULE PROPOSAL

What next?

- While I'm not inside the DWC, I suspect they want to let the new administration's appointees make the final call because the public is never going to agree.
- Why do that? Because the new admin is going to have to deal with any fallout from the new rules.



THAT'S GREAT, BUT WHAT ABOUT THE OMFS FOR

- Home health care fee schedule (proposed rules supposed to be arriving soon in 2018).
- Vocational rehabilitation experts (proposed formal rulemaking set to start sometime in 2019).
- Copy services OMFS (took effect in 2015).



COPY SERVICE OMFS

Pro-tip: Help head off those pesky petition for non-IBR determinations by:

- Head them off with EORs/EOBs within 60 days that contain your objections.
- If your bill review dept doesn't address those, some bill review companies are beginning to specialize in those.
- Motions to quash also help. If you get a subpoena, send it to us and ask us to quash it.
- Follow up with our offices for more information.



COPY SERVICE OMFS

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CASE LAW NEWS AND NOTES



Point #1:

- New case law makes it significantly harder to throw out a QME for issuing a untimely report.
- *Corrado v. Aquafine Corporation*, 2016 Cal. Wrk. Comp. P.D. LEXIS 318

CASE LAW NEWS AND NOTES

What does Corrado and the other case law say?

- The Labor Code doesn't automatically allow a party to get a new QME for being late. Instead, the aggrieved party must weigh the following five factors.



CASE LAW NEWS AND NOTES

- ◎ 1. Length of delay caused by the late report.
 - How many days?
- ◎ 2. Amount of prejudice caused by the delay v. the amount of prejudice caused by restarting the QME process.
 - If they've been late once, they've probably fudged in other areas before.
- ◎ 3. What efforts, if any have been made to remedy the late reporting?
 - Did you give them a second chance?



CASE LAW NEWS AND NOTES

- ④ 4. Case-specific factual reasons that justify replacing/keeping the existing QME, including: was there a waiver of objection?
 - This can relate back to the “amount of prejudice.” If QME’s been late or reckless before, they’ll probably do it again.



CASE LAW NEWS AND NOTES

- ◎ 5. The constitutional mandate to “accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character.” (Cal. Const., art. XIV, § 4.)
 - If they’re showing a pattern of being late, that thwarts the constitutional goals of “expeditiously” and “inexpensively” accomplishing substantial justice.



CASE LAW NEWS AND NOTES

- ◎ Takeaways for replacing a QME for late supplemental reporting:
 - Show a pattern of lateness with prior reports, and/or resistance to depositions.
 - Show a pattern of recklessness, such as not caring about subpoenaed records, willfully ignoring important facts.
 - Show that it won't prejudice the applicant. Saving time = faster litigation. Since when did taking forever benefit the parties?



CASE LAW NEWS AND NOTES

Point #2:

- New case law makes it significantly tougher for QMEs/AMEs to ignore Benson apportionment and say “it’s all inextricably intertwined.”
- Multiple (4+) decisions chastise doctors for ignoring Benson apportionment.



CASE LAW NEWS AND NOTES

Point #2:

- If the doctor is going to get away with saying it's inextricably intertwined, they better have a really good, non-conclusory explanation.
- If their explanation is lazy or conclusory, their opinion is not substantial medical evidence.



CASE LAW NEWS AND NOTES

Point #3:

- *California Department of Corrections and Rehabilitation v. WCAB (Fitzpatrick)*
- Says that LC 4662(b) does not provide an alternative route to find permanent total disability.
- Clarifies that the way to PTD is via LC 4660, which says to follow the AMA Guides.



CASE LAW NEWS AND NOTES

Point #3:

- Great, what the heck does that mean?
- Workers with PD ratings of less than 100% are not PTD, unless they fall under one of the major presumptions of PTD:
 - Loss of both eyes or sight thereof.
 - Loss of both hands or use of thereof.
 - An injury resulting in a practically total paralysis.
 - An injury to the brain resulting in permanent mental incapacity.



CASE LAW NEWS AND NOTES

Point #3:

- So if they aren't 100% PD, then they aren't PTD unless they have one of those exceptions.
- This makes it harder for a judge say, "Well it all rates out to 99% PD, but I think they're PTD for my own creative reasons."
- A judge can still create a record to get to PTD however, so there are still ways to get there. This decision just makes that harder.



Thank you for your time!

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