

# CALIFORNIA LEGISLATION, REGULATORY, AND BRIEF CASE LAW UPDATE



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## Today's Presenter

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## AGENDA



- Bills passed or are still alive
- Failed bills likely to come up again
- Regulatory update: HHC, interpreters & copy services
- Case law: Angelotti, South Coast Framing, and a look ahead



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## Where can I find this info?

- California Legislature website:  
<http://www.leginfo.ca.gov/bilinfo.html>
- WorkCompCentral: (subscription required)  
[www.workcompcentral.com](http://www.workcompcentral.com)



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## Bills still alive: AB 1124



- AB 1124: "THE FORMULARY BILL"
- Would create a committee to help DWC establish a formulary. A smashing success for payers in TX, OH & WA.
- Formulary: list of drugs approved for various treatments.
- Would require "weaning" ("detoxification plans") to taper applicants off addictive drugs. Wisconsin has similar plan.



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## Bills still alive: AB 1124



- Formularies may be inclusive or exclusive. May be a list of drugs ok to prescribe without preauthorization. Or, may be a list of drugs not okay to prescribe without preauthorization.
- If CA adopts AB 1124, committee created by the bill would decide if "inclusive" or "exclusive".



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## Bills still alive: AB 1124

- TX formulary saved payers hundreds of millions.
- TX has list of drugs that do not require preauthorization. Based on drugs classified by the Official Disability Guidelines (ODG).
- Ex: Codeine does not require preauthorization in TX.
- Ex: Fentanyl lollipop does require preauthorization in TX.



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## Bills still alive: AB 1124

- Washington formulary is "stricter" than Texas. It lists fewer opioids and name-brand drugs.
- Formularies can promote use of cheaper generics.
- Per CWCI, Washington-style formulary would remove 96% of name-brand drugs from California system.



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## Bills still alive: AB 1124

- AB 1124 would require weaning of potentially addictive drugs.
- Proven in other states to promote conversations between patients and doctors about drug danger, leading doctors to prescribing less.



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## Bills still alive: AB 1124

- CA Workers' Compensation Institute (CWCI): Est a formulary could save California payers \$102 million to \$420 million/year in pharmacy payments.



See:



[http://www.cwci.org/press\\_release.html?id=414](http://www.cwci.org/press_release.html?id=414)

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## Bills still alive: AB 1124



- Workers' Compensation Research Institute (WCRI): est CA may reduce prescription drug spending by 14% with a TX-like formulary.

See:

[http://www.wcrinet.org/studies/public/books/tx\\_formulary\\_book.html](http://www.wcrinet.org/studies/public/books/tx_formulary_book.html)



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## Bills still alive: AB 1124

Things to watch out for if AB 1124 passes:

- Who is on the committee?
- What style of formulary (inclusive or exclusive)?
- Compound drugs addressed?
- Generics encouraged?



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## Bills still alive: AB 1124

Potential formulary problems:

- Some doctors will try to ignore.
- Some doctors are “too busy” to learn.
- Could make more difficult for applicants who are “the exception to the (formulary) rule”.
- Requires slow implementation and promulgation of potentially lengthy regs.



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## Bills still alive: AB 1124

AB 1124 takeaways:

- Creates a committee to help DWC create a formulary
- DWC would write formulary into CA Code of Regs
- Committee's deadline = 12/31/16
- Mandates gradual detox plans for potentially addictive drugs



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## Bills still alive: AB 305



- AB 305: "GENDER-BIAS PD BILL"
- Would increase max PD rating for mastectomy from 5% to 16%.
- Why? Increases the maximum PD value for a woman's breast so that it is equal to the PD value of a man's prostate.
- Will get its own special hearing from Senate Appropriations after budget is proposed.



## Bills still alive: AB 305

AB 305:

- Backed by CAAA
- Likely to increase litigation, per employer lobbyists, (more disputes over impairment ratings)
- Greatest impact likely on first responders (who are subject to the cancer presumptions)



## Bills still alive: AB 305

- Reminiscent of labor and CAAA efforts to pass legis. preventing apportionment based on race, gender or nationality (previously been vetoed by Gov. Brown).
- There is case law prohibiting apportionment to genetic makeup.



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## Bills still alive: AB 305

The latest version prohibits apportionment:

- To sexual harassment contemporaneous with psych disability
- To pregnancy, menopause, or osteoporosis related to menopause



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## Bills still alive: AB 305

### Takeaways:

- Breast = 16% PD ( not 5%)
- Biggest impact: first responders with cancer presumptions
- Would bar apportionment to pregnancy, menopause, osteoporosis related to menopause, and sexual harassment
- Would apply to DOIs after 1/1/16



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## Bills signed by Gov: AB 202



- AB 202: "THE CHEERLEADER BILL"
- Requires sports teams to classify cheerleaders as "employees", making them eligible for WC benefits.
- Arises from lawsuits alleging NFL teams misclassified cheerleaders as indep. contractors.



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## Bills signed by Gov.: AB 202

AB 202 Takeaways. Would require teams to:

- Pay min. wage to cheerleaders,
- Reimburse work/travel expenses,
- Provide WC to cheerleaders.



## Bills signed by Gov.: AB 202

- Has survived House and Senate.
- Recently signed into law by Gov. Brown.



## Bills signed by Gov.: AB 822

- "THE CIGA BILL"
- A claim does not have to have a final determination, ("final order"), before insolvent insurer's claim can be submitted to CIGA.
- Non-W/C claims: Creates 1-yr. SOL to appeal CIGA's denial of claim.
- Signed by Gov. Brown.



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## Bills still alive: AB 1542

- AB 1542: "THE NEUROPSYCHE BILL"
- Would allow neuropsychologists to serve as QMEs.
- Arose when DWC proposed rules eliminating neuropsychology from QME list (effectively barring neuropsychs from being QMEs).



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## Bills still alive: AB 1542

- Per the American Neuropsychiatric Association, neuropsychology is a subspecialty of clinical psychology (they hold a Ph.D. or a Psy. D)
- Neuropsychologists typically involves featuring headaches, cognitive deficits and issues re: brain function. They study how brain and nervous system influence behavior.



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## Bills still alive: AB 1542

### Takeaways:

- Allow neuropsychologists to act as QMEs.
- Approved by Assembly 79-0. Likely approval from Senate and governor.



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## Bills still alive: AB 621

- AB 621: "THE TRUCKER BILL"
- Would allow port companies employing truckers to enter into agreements with DIR to pay all wages and benefits owed to previously misclassified truckers.
- In exchange, port companies avoid statutory or civil penalties.



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## Bills still alive: AB 621

- Arose from successful misclassification suits.
- Impact: Does not affect work comp with much, but trend of lawsuits does. With more rulings that port truckers = employees, employers are more likely to provide WC to truckers.



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## Bills still alive: AB 621

### Takeaways:

- Impacts prior trucker misclassifications.
- Won't affect day-to-day WC much.
- Indicative of potential trend employers to declare truckers as "employees", not independent contractors.



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## Bills still alive: AB 438

### AB 438: "THE TRANSLATOR BILL"

- Would require DWC and DIR to comply with a 1973 law requiring state agencies to provide materials from English into languages more than 5% of population speaks.



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## Bills still alive: AB 438

- Originally had “Easter Egg” for AA’s in it. “Easter Egg” would have extended SOL one year, whenever DIR or DWC failed to translate docs.
- Easter Egg was removed from the bill.



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## Bills still alive: AB 438

### Takeaways:

- Require CA to translate forms into any language that 5% or more of the pop speaks (Currently Spanish).
- Lawmakers removed language bill that AA’s would have seized upon.



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## Bills still alive: SB 623

SB 623: "THE UNINSURED EMPLOYER WHO EMPLOYS UNDOCUMENTED IMMIGRANTS BILL"

- SB 623 would prevent the UEF or Subsequent Injuries Fund from denying benefits solely because of immigration status.



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## Bills still alive: SB 623

Takeaways:

- Might impact uninsured employers more (by ensuring UEF pays benefits to undocumented workers). UEF recoups benefits paid from uninsured employers.
- Could lead to more SIT benefits, which helps employers willing to take a chance on hiring disabled workers.



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## DEAD BILLS: AB 1170

AB 1170: "FARMERS MEET OBAMACARE BILL"

- Would have created Workers' Fund, financed by assessments on farms.
- Would have financed group health for industrial and nonindustrial injuries.



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## DEAD BILLS: AB 1170

AB 1170 takeaways:

- More group health care for agricultural workers may have meant fewer WC with sketchy facts.



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## DEAD BILLS: SB 563

### SB 563: "BARS UR ON FINAL AWARDS"

- Would have barred UR on medical care specified in final awards, in most cases.
- Ex: WCJ issues a final award stating that "epidurals are necessary", UR could not deny them.



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## DEAD BILLS: SB 563

- Exception stated if MTUS or ACOEM guidelines disagree with the WCJ's decision, do a quick UR and send to IMR.
- If IMR agreed with UR denial, would lead with eval by a doctor.
- If doctor recommends different treatment, parties could stip to instead.

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## DEAD BILLS: SB 563

- Ex: WCJ issues F&A stating epidurals are necessary. MTUS contradicts. Carrier issues UR denial. IMR agrees Parties see Dr. Jones, who recommends PT instead. Parties may be able to stip to PT instead of epidurals.



## DEAD BILLS: SB 563

### Takeaways:

- Would have barred UR in final awards in most cases.
- Created to ensure applicants get care specified by WCJ.
- Would have req'd many new regs by DWC to monitor "exceptions to the rule."



## DEAD BILLS: AB 511

### AB 511: "EXPANSION OF THE DEFINITION OF 'PEACE OFFICERS' BILL"

- Would have expanded "peace officers" to include security officers, correctional officers, custody assistants, and others.



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## DEAD BILLS: AB 511

- Would have increased exposure for municipalities and counties.
- Ex: Security guard would be entitled to same cancer and cardiology presumptions police officers enjoy.



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## DEAD BILLS: AB 511

- AB 511 died in committee. Gov. Brown has vetoed stuff like this before.
- While covering all 50 states in my prior career as a journalist, we saw labor try to expand rights and protections of gov't workers year after year. Usually vetoed by governors, absent a compelling reason.



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## DEAD BILLS: AB 511

AB 511 takeaways:

- Would have expanded "peace officers" to include many others.
- Would have likely been vetoed.
- Expect a similar bill next year.
- Expect a similar bill when Gov. Brown leaves office.



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## DEAD BILLS: SB 281

### SB 281: "SLASH SALARIES OF WCAB COMMISSIONERS"

- Would have slashed salaries of nonelected members of state boards –WCAB–to \$12,000/year.
- Current salary = \$79,122 for most commissioners; chairperson = \$81,635.



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## DEAD BILLS: SB 281

- Aimed at reducing corruption.
- Failed to recognize WCAB commissioners page through thousands of recons/removals each year. It's a difficult job.
- Failed to understand we need superb commissioners. Our current WCAB commissioners are already being paid far less than they are worth.



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## DEAD BILLS: SB 281

SB 281 takeaways:

- Would have slashed salaries to \$12,000/yr.
- Aimed at reducing corruption, but would have reduced incentive for qualified attorneys' to become a commissioner.
- Died in committee.



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## DWC REGULATIONS: SB 863

- Called for new regulations, including three fee schedules:
  - Home Care Fee Schedule
  - Interpreter Fee Schedule
  - Copy Service Fee Schedule



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## PROPOSED HOME CARE SCHEDULE



- Still being developed by DWC.
- Based on fee schedules used by Medi-Cal and federal Office of Workers' Compensation Programs.
- Labor and Payers disagree with many terms, trying to influence the DWC language. Last public comment period = May 2015. DWC will likely issue a new proposal shortly.



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## PROPOSED HOME CARE SCHEDULE

- Reimburses HHC providers based on a Medicare formula. Depends on
  1. type of work done
  2. average cost of that work, and
  3. average cost of malpractice
- In the past, doctors complained reimbursements were too low.
- No cookie-cutter example. Costs will vary by type of services needed and who provides it.



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## PROPOSED HOME CARE FEE SCHEDULE



- Labor's criticisms:
- Don't want home care to be subject to UR or IMR. Instead, they want it deemed "authorized" until there is a denial.
- Don't want HHC workers being subject to assessments per CMS standards ("OASIS" program).



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## PROPOSED HOME CARE FEE SCHEDULE



- Employers/Carriers say:
- Should only apply to unskilled care. Fees for RNs, LVNs, and "professionals" to be addressed by OMFS.
- Should require RFAs for all services (allow carriers to perform UR).
- Want language stating HHC provider is not your "employee", lest they get injured on the job and file WC claim against carrier.



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## PROPOSED INTERPRETER FEE SCHEDULE

- STILL BEING DEVELOPED BY DWC.
- Would set price caps for half days, full days, and hourly rates.
- Received an unusually-high level of comments from interpreters (who opposed schedule in its entirety).
- Could reduce the “two-hour minimum” to “one hour,” making the proverbial \$90/DOS worth \$52.50 instead for a one-hour office visit.



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## PROPOSED INTERPRETER FEE SCHEDULE

- Criticisms:
- Doesn't include regulatory controls for multiple appearances (interpreter who sits at the board and bills 2 hours per case, and works on 10-20 cases a day. They are not working 20 - 40 hours/day).
- Allows for “provisionally certified” interpreters, (deemed by a physician, WCJ, or payer capable of translating). Some are concerned about quality of ability to interpret.



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## PROPOSED INTERPRETER FEE SCHEDULE

- Would reimburse Spanish at \$210 for half-day and \$388 for full-day.
- Would reimburse non-Spanish language interpreting at \$240 for half-day, and \$418 for full-day.
- Some claim this is discrimination. Lower rate is likely based on theory of supply and demand (much greater supply of Spanish interpreters than exotic interpreters.)



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## COPY SERVICE FEE SCHEDULE

- Approved by DWC, applies to DOS o/a 7/1/15.
- "Think \$180" for most services: flat fee of \$180 covers records of 500 pages or less.
- Every page exceeding the 500 = \$0.10 a page.



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## COPY SERVICE FEE SCHEDULE

- Bills must include
  1. professional photocopier numbers,
  2. claim numbers,
  3. billing codes, and
  4. provider's tax number.
- Extra copy = \$5, if requested w/in 30 days of original subpoena. If requested more than 30 days, additional set = \$30.

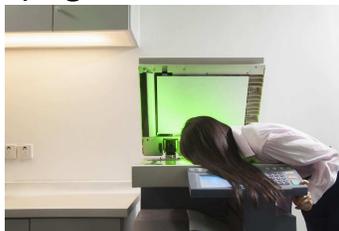


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## COPY SERVICE FEE SCHEDULE

- Absent showing of "good cause", payers are not liable for records previously obtained by subpoena or authorization by the same party and served from the same source.
- DWC transcripts of 33 pages and less = \$100. More than 33 pages = an additional \$3 a page.



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## COPY SERVICE FEE SCHEDULE

- Confusion over \$15 fee carriers charge copy services.
- Per copy service fee schedule, claims managers may continue to charge \$15 per subpoena, where their administrator or carrier is not party to subpoena's case title. Need more explanation? See my BLOG article at:  
<http://bradfordbarthel.blogspot.com/>



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## BIG CHANGES: ANGELOTTI

- Angelotti: 9<sup>th</sup> Circuit has spoken, and upheld SB863's "lien activation" fee!
- SB 863 had required:
  1. \$150 filing fee payment of a fee for new lien filed o/a 1/1/13.
  2. \$100 fee payment on any liens filed pre 1/1/13.
  3. All liens filed before 1/1/13, to pay \$100 fee to be "activated" by 1/1/14. (\*Many lien claimants did not do this.)



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## BIG CHANGES: ANGELOTTI



- The 9<sup>th</sup> Circuit ruled in payers' favor.
- However, lien claimants have asked the 9<sup>th</sup> Circuit for en banc review, which would require all 9<sup>th</sup> Circuit justices to re-review.
- Extraordinarily rare for the 9<sup>th</sup> Circuit to grant en banc review. Many think the 9<sup>th</sup> Circuit will definitely deny the petition for en banc review. That would leave it up to the U.S. Supreme Court, which is also unlikely to grant review.



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## BIG CHANGES: ANGELOTTI

- Lien claimants may file new and different challenges. Depends on how deep their pockets are. If this happens, could leave activation fee issue unresolved for some time.



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## BIG CHANGES: ANGELOTTI

- WCAB admonished WCJ for dismissing liens (for failure to pay the activation fee) shortly after 9<sup>th</sup> Circuit's ruling. Reasons:
  1. Lower court must still—technically—invalidate its injunction.
  2. DWC's payment tool was deactivated. Must be setup after injunction is formally lifted.



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## BIG CHANGES: ANGELOTTI

What happens next?

- Once injunction is lifted, DWC likely to announce a "grace period" of 1-2 months. Will allow lien claimants with DOS prior to 1/1/14 to pay fee. DWC will likely clarify which lien DOS will have to pay which fee (some will pay \$100; others will pay \$150).



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## BIG CHANGES: ANGELOTTI

What should payers do?



- Wait for further direction from the DWC. Anticipate will happen in August, if not sooner. If DWC grants a one-month extension, you have to wait another month before using the “failure to pay the lien activation fee” argument for dismissal.



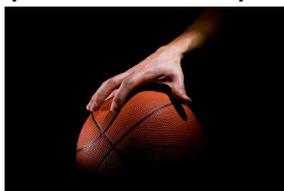
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## UPCOMING: CASE LAW

Looking forward, DCAs will consider:

- Multiple due process challenges to UR/IMR.
- Apportionment to genetic predisposition (applicant’s father’s medical history showed DDD).
- Whether WCAB had jurisdiction to apportion a basketball player’s CT solely to NY Knicks.



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## UPCOMING: CASE LAW

Looking forward, DCAs will consider:

- Questions about 100% PD based on AME's opinion applicant can only work from home.
- Whether WCJ should have first considered an applicant's CalPERS death benefit before awarding WC death benefit.



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## RECENT CASE LAW

CA Supreme Court issued opinion in South Coast Framing (May 28, 2015).

- High court: applicant's family was entitled to death benefits, after applicant overdosed from combo of industrial and nonindustrial drugs.



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## RECENT CASE LAW

High court said:

- Correct causation standard = “Was the work injury a contributing cause of death?”
- Lower court had asked the wrong question: “Did the work injury play a material or significant role in contributing to applicant’s death?”



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## RECENT CASE LAW

South Coast Framing:

- We would have liked court to address the Labor Code’s use of “proximate” as they evaluated the causation of injury standards. Unfortunately, the high court did not.
- If the high court had addressed that, could affect how judges view whether a WC carrier could be liable for a death that is arguably nonindustrial.



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We will continue to blog about these and other issues at:

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