SACKS & ZOLONZ LLP

October 2010 Blog Posts

Current Budget Stalemate May Jeopardize Work Comp Benefits

Tuesday, October 5, 2010

In workers' compensation defense news, the current budget stalemate between the state legislature and the governor's office may result in nearly 2,700 Californians going without work comp benefits.

The constitution mandates that the state has a budget in place by July 1, the start of the new fiscal year. However, a strong difference of opinions among politicians regarding management of the state's $19 billion deficit has postponed a budget for well over 90 days (a new record). As a result of this budget gridlock, money is not being widely distributed to state agencies.

Chief of legislation and policy for the California Division of Workers' Compensation (DWC), Susan Gard, recently stated that the DWC has roughly one to two weeks of funds remaining to cover work comp benefits from the following funds:

• Uninsured Employer Benefit Trust Fund (UEBTF) - Pays work comp benefits to employees whose employers fail to carry state-mandated insurance

• Subsequent Injuries Benefits Trust Fund (SIBTF) - Pays work comp benefits to employees who were disabled prior to their job-related injury

UEBTF and SIBTF funds are gathered via assessments charged to employers throughout the state. However, the funds gathered through these assessments are nearly exhausted due to a large number of unforeseen claims.

While state officials use both past budgets and potential expenditures as a reference in determining assessments, the process is not entirely failsafe.

"We do these assessments very close to the vest because we're assessing employers," said Gard.

"We want to make sure we are prudent and have a bit of a buffer, but we don't want too much of a buffer because this is money employers have to pay. We don't want to over-assess, but we don't want to under-assess because we get into the situation we are in."

When faced with situations like this in the past, the DWC could borrow money from its own budget to cover potential shortages in work comp benefits. However, the agency currently has no extra money and cannot properly fund either the UEBTF or the SIBTF until the state budget is passed.

The DWC remains cautiously optimistic that the issue will soon be resolved.

"We still have a little bit of time. If a budget is passed soon, we can quickly shift money over from our budget to pay those benefits and then balance that out when we issues our assessment letters this fall," said Gard.

Stay tuned for further other developments in the area of workers' compensation defense ...

This post was provided for informational purposes only and is not to be construed as legal advice.

Related Resources:
• Calif. May Stop Paying Some Workers' Comp Benefits (Insurance Journal)

10/8 - A BRIEF SUMMARY OF CALIFORNIA WORKERS' COMPENSATION NEWS

Friday, October 8, 2010

Today's post will briefly examine workers' compensation defense news from around the state.

The amendments to the basic workers' compensation notice materials, authorized by state officials this past summer, are officially due today. (Basic workers' compensation notice materials are used to notify employees of both their rights and responsibilities under state law.)

Specifically, the following measures must have been implemented by both insured and self-insured employers:

• Employers must have provided all injured workers with an updated version of Division of Workers' Compensation (DWC)-1/Notice of Potential Eligibility

• Employers must have posted new medical provider network (MPN) notices (if the organization utilizes one)

• Employers must have posted amended workers' compensation employee posting notices

In addition,

• Employers must now provide all new employees (hired on or after October 8) with an updated version of the workers' compensation new hire pamphlet

Some of the more notable amendments to the workers' compensation notice materials include removing references to vocational rehabilitation, revising references to state web sites and mandating additional MPN-related information.

Any insured or self-insured employer that has failed to implement these amendments could potentially face the following consequences:

• Fines of up to $7000 for every violation of the new posting requirements

• Loss of medical control

• Tolling of the statute of limitations for filing claims

California state law enabled private employers to publish and utilize their own notice materials so long as they were approved in advance by the DWC. However, many of private employers simply relied on the California Workers' Compensation Institute (CWCI) to create the most current notice materials for them.

Stay tuned for further other developments in the area of workers' compensation defense ... This post was provided for informational purposes only and is not to be construed as legal advice.

Related Resources:
• California Workers' Compensation Institute Assists with Posting Requirements (Insurance Journal)

CASH COW CASE

Monday, October 11, 2010

A recent decision by a three member panel of the Workers' Compensation Appeals Board in California over a dispute involving just $56.25 could end up costing the defense industry countless thousands of times that sum annually, and embolden injured employee attorneys in their quest for larger deposition attorney fee awards.

In this case alone the dispute cost the defendant the original $56.25 plus $2,250.00 for wasting the Court's time, and resulted in a rare admonition by the Appeals Board to the defendant to take matters no further. The case was publicized to the entire California Workers Compensation industry. (Danny Alvarez vs. Moreno Valley Unified School District, PSI c/o Corvel Corporation)

History of the Case

This case arose out of a deposition of an injured employee, for which under California Labor Code section 5710 (b) (4) his attorney is entitled to a reasonable allowance for attorney fees to be paid by the employer or the insurer. By habit and custom, the attorney requests the fee from defendant at or shortly after the deposition, and if not agreed to or paid promptly thereafter, the attorney petitions for an award of fees from a judge.

In this case the attorney, a certified specialist in workers' compensation law by the State Bar, asked for $275.00 per hour. Defendant did not dispute the hours but chose to pay at $250.00 per hour instead, offering no evidence or basis for the payment of the lesser sum other than contending that the lesser sum was the reasonable rate. The worker's attorney then petitioned the Court for payment at the higher rate and thereafter the first judge awarded a reasonable attorney fee at that higher rate.
Matters did not end there with the payment of the $56.25. Defendant then objected to the higher rate petition and objected to the Order. A pretrial conference was then held before

another judge but with nothing on the record. Defendant did not resolve the matter at that time. The case then went to trial before the third and final judge.

During the course of the proceedings the injured worker's attorney prepared and served an extensive trial brief and offered evidence of other awards from other judges who had approved the sought after $275.00 rate. Defendant offered no hard evidence and only argument.

The final judge awarded the disputed $56.25 and an additional attorney fee of $2,250 for time spent in pursuing the original fee under Labor Code section 5813, infra. Sanctions against defendant were not raised at the time of trial.

Defendant petitioned for reconsideration, but the Appeals Board panel denied the petition based upon a three sentence opinion which included a warning to defendant to essentially stop there before it got worse.

Reasoning of the Court

The trial judge set out in great detail how determining what is a "reasonable attorney fee" referred to in Labor Code section 5710 varies. She emphasized that there was no uniform rate and there was not even agreement between judges at the various District Offices. Essentially, it is up to the individual judge, based upon the individual case, based upon the particular town, city or county and based upon the individual identity of the attorney seeking the fee.

Once that determination had been made, as was done here by the first judge it then became the burden of the defendant to successfully show unreasonableness of that judge's decision.

"Absent a showing of good cause, a judge's determination as to what constitutes a "reasonable" fee should be upheld....Defendant offered no rebuttal evidence, but even if they had offered evidence showing contemporaneous judge orders for payments at less than $275.00 per hour and proof of contemporaneous voluntary payments of less then $275.00 per hour being accepted, it still would not be persuasive that at the time....(the first judge)... awarded the $56.25 difference...that award of fees was unreasonable." (emphasis added).

If you stop to consider for a moment, the burden upon the defendant to show the unreasonableness of the first judge's opinion starts to look insurmountable, especially if you are talking of an incremental increase of just 10% above what the defendant thought to be reasonable, as was the case here. While defendant can still argue in other cases the skill level of the attorney to determine the hourly rate (newly admitted lawyer vs. certified specialist), that was not an issue here. Also, the language of the judge more than suggests that you have one shot and only one shot to convince the first judge of what a reasonable fee should be in the defense view, and it must be with something persuasive. That would be the time to offer evidence of lesser fee awards or acceptances Thereafter the "even if" language seems to foreclose pointing to that evidence again after the first decision on the issue.

Concerning the issue of the reasonableness of the fee, it is notable that defendant offered nothing "...other than their mere contention that the reasonable hourly rate at the time of applicant's deposition was $250.00 per hour." This turned out to mean something in terms of possible sanctions and added fees.

Sanctions

California Labor Code section 5813 provides for an award of attorney fees incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. On top of attorney fees there can also be sanctions up to $2,500.00. Because the case went as far as it did with no proof offered, the trial judge would have considered sanctions had the issue been raised at trial. When defendant sought reconsideration of the judge's decision, sanctions were then urged by the judge to be awarded by the appellate panel.

The warning by the three judge Appeals Board panel tells the tale:

"In addition, although we will not impose further sanctions/attorney's fees at this time, we admonish petitioner for continuing to assert a position that is without merit and for which it has provided no supporting evidence."

Lessons to be Learned

If you are going to argue about attorney fees have some evidence right from the start. Carriers and self insured employers will need to compile data bases of these judge awards or attorney acceptances (if not already doing so) to provide to counsel as evidence if a challenge is to take place.

Look forward to the hourly rate for California deposition attorney fees to inch upwards at least $25.00 to $35.00 per hour from where they presently are. If those higher rates are awarded the language in this case suggests it will be cited to discourage any challenge to the larger fee award and to raise the specter of sanctions. Hence, the significant cost to the defense industry.
As they say in poker: Know when to fold them.

10/12 - A BRIEF SUMMARY OF CALIFORNIA WORKERS' COMPENSATION NEWS

Tuesday, October 12, 2010

Today's post will briefly examine workers' compensation defense news from around the state.

A.B. 2490, the much-discussed workers compensation bill passed by California legislators this past summer, was recently vetoed by Governor Schwarzenegger.

Originally sponsored by Assemblyman Dave Jones (D-Sacramento), A.B. 2490 would have prevented work comp insurance companies from resolving their disputes with California employers in other states with more favorable arbitration provisions (unless both parties agree). In other words, it would have mandated that work comp insurers resolve disputes with California employers in a California venue in accordance with California law.

In addition, A.B. 2490 would have applied only to those employers that utilize California as their principal place of business, and generally affected agreements between work comp insurers and rather complex employers (i.e., those with a business presence in several states.

"The governor had a chance to protect California businesses and provide for these disputes to be resolved in California. Instead, he sided with out-of-state insurers and against California business," said Jones in a statement released to the media.

According to Governor Schwarzenegger's office, A.B. 2490 was unnecessary since there was no evidence to show that a problem even existed. Furthermore, the Governor's office indicated that the legislative proposal would have reduced competition in California's workers' compensation market and greatly increased regulatory costs.

"The high deductible contract negotiations the bill seeks to impact are conducted by sophisticated participants on both sides of the table that are well-versed in all aspects of workers' compensation and other insurance products," said Schwarzenegger in his veto message. "Therefore, I am not convinced the issue addressed by the bill will result in keeping workers' compensation costs down which is the most significant concern to California employers."

Stay tuned for further other developments in the area of workers' compensation defense ...

This post was provided for informational purposes only and is not to be construed as legal advice.

Related Resources:
• Schwarzenegger Vetoes Workers' Compensation Arbitration Restriction (InsuranceNews.net)
• Schwarzenegger Vetoes Workers' Comp Bill (Insurance Journal)

AUDIT REVEALS WIDESPREAD MISMANAGEMENT OF WORK COMP CLAIMS

Thursday, October 14, 2010

Yesterday, Los Angeles City Controller Wendy Greuel released the results of a long awaited (and long delayed) audit of the Workers' Compensation Division of the Los Angeles City Attorney's Office. The results? Systemic mismanagement of workers' compensation benefits and a host of other errors that potentially cost the city millions of dollars.

"The audit found that the City Attorney's Office management of its workers' compensation program was plagued with poor oversight, a lack of budgetary accountability and had the potential for millions lost to the city each year," said City Controller Greuel.

Specifically, the audit found the following:

• The Workers' Comp Division submitted only 4 percent of all claims to fraud investigators for further review (the industry standard for submitting claims to fraud investigators is 17-21 percent of all claims).This failure to properly investigate claims cost the city roughly $5.4 million a year in fraudulent workers' compensation benefits.

• The Workers' Comp Division collected reimbursement from third parties in only 6 percent of its cases, a practice that resulted in the potential loss of nearly $3 million in revenue for the city each year.

• The Workers' Comp Division took an average of 5.8 years to close cases (the industry standard for closing cases is 1-2 years).

It is worth noting that a previous audit attempt was successfully blocked by former City Attorney Rocky Delgadillo in 2008. Delgadillo claimed that then-City Controller Laura Chick did not have the requisite authority to audit an elected official and took the matter to court, where the judge ruled in his favor. (The decision is currently being appealed.)

However, current Los Angeles City Attorney Carmen Trutanich agreed to let the audit of the Workers' Comp Division proceed despite the previous ruling by the trial court.

"The Charter does not authorize this type of audit, but for me, I welcome it, because if you have two heads thinking about something, you come up with a solution," said Trutanich.

Trutanich also promised decisive action in the wake of the audit.

"We are restructuring the office organization and the Workers' Compensation Division to increase accountability and efficiency," he said. "We have also reassigned more attorneys to the division ... to reduce the backlog of cases."

Stay tuned for further other developments in the area of workers' compensation defense ...

This post was provided for informational purposes only and is not to be construed as legal advice.

Related Resources:
• Audit: City Attorney's Office Mismanaged Workers' Comp Claims (Los Angeles Daily News)
• Audit: Delgadillo's Workers' Comp Mismanagement Cost L.A. $3m (Contra Costa Times)
• Performance Audit of the Los Angeles City Attorney's Workers' Compensation and Subrogation Program (The City of Los Angeles: L.A. City Controller)

NO ONGOING BENEFITS FOR TELLER WHO SUFFERED CORONARY AFTER HOLDUP

Tuesday, October 19, 2010

Today's workers' compensation defense post will examine a very interesting case involving a bank teller who suffered a heart attack shortly after an armed robbery, a rare heart condition, and an employer's obligation to continue indefinite payments for medications.

The Facts of the work comp case

In December 2006, R. Abbott was employed as a bank teller at MainSource Financial Group when it was robbed by an armed man. During the robbery, the gunman held Abbott and several others at gunpoint, threatening to kill them before escaping.

Abbott suffered a heart attack shortly after the robbery and was taken to the hospital where a heart catheterization procedure was performed.

Physicians eventually diagnosed Abbott with Takotsubo syndrome, a rare condition that causes otherwise healthy people (i.e., those not suffering from coronary artery disease or arterial blockage) to experience symptoms of a heart attack following a stressful event.

Abbott was prescribed a lipid-lowering drug and a beta blocker as protection against a future heart attack. Her physician indicated that he was uncertain as to how long Abbott should take the medications.

Abbott's heart condition eventually improved and she returned to her former position. Subsequent to this return, however, MainSource Financial Group declined to continue paying for her prescription heart medications.

The IN Workers' Compensation Board and IN Court of Appeals

Shortly thereafter, Abbott took the matter to the Indiana Workers' Compensation Board, where it was subsequently determined that MainSource Financial Group did not have to pay the ongoing costs Abbott's heart medications.

The Court of Appeals of Indiana affirmed the decision of the Workers' Compensation Board this past summer. Here, the court held that any future heart attack suffered by Abbott because of her Takotsubo syndrome would "be related to a discrete stressful event and would not stem from the injuries she sustained as a result of the bank robbery."

Stay tuned for interesting news in the area of workers' compensation defense ...

This post was provided for informational purposes only and is not to be construed as legal advice.

Related Resources:

- Robbed of Compensation? (Risk & Insurance)
- Abbott v. MainSource Financial Group (Court of Appeals of Indiana)

COMMON CALIFORNIA CONSTRUCTION SITE INJURIES - IV

Friday, October 22, 2010

Today's workers' compensation defense post will continue to explore the topic of common injuries suffered by employees on construction sites. Please see "Common California Construction Site Injuries - III" for more information.

Visit any construction site around the state of California, and you will see workers performing a variety of physically challenging tasks requiring them to kneel, crouch, bend over or stoop forward for a prolonged period. While these types of actions are a vital element of job

performance, they can also result in potentially debilitating injuries to the knees or lower back, decreased production and increased legal fees.

However, employers who are aware of these potential knee and lower back injuries can take steps to implement the necessary safety measures, saving their organization both time and money.

The following safety measures, if implemented correctly, can reduce the incidence and/or duration of the aforementioned construction site injuries.

Safety Measures

User-friendly Materials

If economically feasible and permitted by the client, the use of certain "user-friendly" building materials can have a significant impact on knee and lower back injuries.

What exactly are "user-friendly" materials?

User-friendly materials are those that can be handled by workers without extensive exertion or repetitive motion, and which minimize uncomfortable body posture.

Please note, such an action is generally subject to approval by engineers, architects, contractors, clients, etc.

User-friendly Tools

Another potential method of reducing the number of serious knee and lower back injuries is to implement "user-friendly" construction tools and devices, meaning those that reduce the need for workers to use the floor as an improvised workbench.

The following tools/devices can help eliminate the need for workers to unnecessarily bend over, kneel, squat or crouch:

- Tables/workbenches
- Sawhorses
- Tools with extension handles
-

Again, such an action is generally subject to approval by engineers, architects, contractors, clients, etc.

In the event floor-level work must be performed, an employer should consider supplying workers with knee and elbow pads. Mandatory rest periods can also help prevent knee and lower back injuries.

This post was provided for informational purposes only and not to be construed as legal or medical advice.

Stay tuned for further developments in the area of workers' compensation defense law ...

Related Resources:
Simple Solutions for Lifting, Holding and Handling Materials (National Institute for Occupational Safety and Health)

A CLOSER LOOK AT THE BLS' FINDINGS ON 2009 WORKPLACE INJURIES

October 27, 2010

In workers' compensation defense news, the Bureau of Labor Statistics (BLS) released the 2009 Survey of Occupational Injuries and Illnesses last week.

The 2009 Survey reveals that the total number of recorded nonfatal workplace injuries and illnesses among private industry employers was 3.3 million, a rate of exactly 3.6 cases per 100 full-time employees.

This represents a significant drop from the 2008 Survey, which measured the total number of recorded nonfatal workplace injuries and illnesses among private industry employers at 3.7 million, a rate of 3.9 per 100 full-time employees.

In a released statement, Secretary of Labor Hilda Solis expressed enthusiasm over the decline in workplace injuries and illnesses, but stressed the need for further action to protect workers.

"While the reported decline in workplace injuries and illnesses is encouraging, 3.3 million workplace injuries and illnesses are 3.3 million too many... Complete and accurate workplace injury records can serve as the basis for employer programs to investigate injuries and prevent future occurrences ...We are concerned about the widespread existence of programs that discourage workers from reporting injuries, and we will continue to issue citations and penalties to employers that intentionally under-report workplace injuries... Even in these difficult economic times, we must keep in mind that no job is a good job unless it's a safe job."

Why are these figures so important for employers?

Employers in all industries should take the time to review the 2009 Survey and consider implementing the necessary measures to facilitate the reporting, investigation and prevention of injuries/illnesses.

The next post will continue to examine the 2009 Survey of Occupational Injuries and Illnesses ...
This post was provided for informational purposes only and is not to be construed as legal or medical advice.

Stay tuned for further developments in the area of workers' compensation defense law ...

Related Resources:

- Statement of Labor Secretary Hilda L. Solis on Reported Decline in Workplace injuries and Illnesses (U.S. Department of Labor)

- Workplace Injuries and Illnesses - 2009 (U.S. Department of Labor - Bureau of Labor Statistics)

A CLOSER LOOK AT THE BLS' FINDINGS ON 2009 WORKPLACE INJURIES – II

Friday, October 29, 2010

The previous workers' compensation defense post explored the Bureau of Labor Statistics (BLS) recent release of the 2009 Survey of Occupational Injuries and Illnesses.

According to the 2009 Survey, the total number of nonfatal workplace injuries and illnesses among private industry employers declined precipitously from the previous year.

To illustrate, in 2008, the total number of recorded nonfatal workplace injuries and illnesses among private industry employers was 3.7 million, a rate of 3.9 per 100 full-time employees. In 2009, however, the total number of recorded nonfatal workplace injuries and illnesses among private industry employers was 3.3 million, a rate of exactly 3.6 cases per 100 full-time employees.

(Please see "A Closer Look at the BLS' Findings on 2009 Workplace Injuries" for more information.)

Today's post will continue this discussion of the 2009 Survey...

The 2009 Survey is an extensive undertaking that encompasses a vast array of findings. For instance, it breaks the statistics regarding workplace injuries and illnesses down by industry/sector, occupation, types of incident, employer size and geography.

A complete analysis of the 2009 Survey is clearly beyond the scope of this blog entry. However, it is still worthwhile to examine a few of the survey's more noteworthy findings:

- Approximately 3.1 million of the 3.3 million injuries and illnesses were classified as workplace injuries. This breaks down by industry as follows: 75 percent of injuries occurred in service-providing industries and 25 percent of injuries occurred in goods-producing industries

- Roughly five percent of the 3.3 million injuries and illnesses were classified as illnesses. Overall, the rate of illness declined from 19.7 per 10,000 employees in 2008 to 18.3 cases per 10,000 employees in 2009.

Why are these figures so important for employers?

Employers in all industries should take the time to review the 2009 Survey and consider implementing the necessary measures to facilitate the reporting, investigation and prevention of injuries/illnesses.

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Stay tuned for further developments in the area of workers' compensation defense law ...

Related Resources:
Workplace Injuries and Illnesses - 2009 (U.S. Department of Labor - Bureau of Labor Statistics)