

Law & Order



It's The Law

WCAB: TD Cap Starts Running from First Payment: Top [06/15/07]

California's two-year cap on temporary disability benefits commences when benefits are first paid, and not when they are first owed, the Workers' Compensation Appeals Board decided in an en banc opinion.

In *Valeri Hawkins v. Amberwood Products and State Compensation Insurance Fund*, SAL 0107814, the panel ruled that the two-year TD clock imposed by Senate Bill 899 started ticking on May 3, 2005 -- the date that State Fund made its first payment to Hawkins. State Fund argued that the two-year clock started on July 17, 2004, the date when Hawkins became eligible for temporary disability.

"Because the statutory language is not ambiguous, we will presume the Legislature meant what it said and, therefore, the plain meaning will govern," the WCAB said in its ruling. "We cannot and will not, under the guise of construction, rewrite section 4656(c)(1) or give its words an effect different from the plain and direct import of the terms used. Rather, we will enforce section 4656(c)(1) according to its actual terms."

Hawkins, who is 50, sustained a cumulative injury to her spine during a period that ended July 16, 2004, while working for Amberwood Products. But State Fund did not issue a check until May 3, 2005, covering the period from the date of her injury until May 2, 2005.

State Fund argued that Hawkins entitlement to TD expired on June 16, 2004, because she had been paid the full 104 weeks due. The workers' compensation judge, however, ruled that the clock continued running until two years after the

first payment, not the date of injury.

In its ruling, the WCAB pointed out that statutes adopted previously had placed time limits on TD payments commencing from the date of injury, whereas the provision put in place by SB 899 states the limit should extend "from the date of commencement of temporary disability payment."

"Obviously, by using such distinctly different language in subdivision (c)(1), the Legislature intended this language to have a distinctly different legal effect," the WCAB said.

The panel said that the statute encourages prompt payment, in keeping with the statutory scheme of the workers' compensation system, which imposes automatic late payments of 10% regardless of the reason.

In The News

Friday, June 15, 2007 SAN DIEGO -- California may have closed the repackaged drug loophole, but now "compounded" drugs are emerging as the next profit center in medical treatment, claims administrators told the state's top workers' comp official on Tuesday.

Carrie Nevans, acting administrator of the Division of Workers' Compensation, got a ground-level view of the system when she opened the floor for questions after giving an update on political and regulatory matters during the Association of Insurance Professionals San Diego luncheon.

Steve Napolitano, a bill review specialist for the ICW Group, told Nevans that some doctors are prescribing "compounded" drugs that are mixed at pharmacies and dispensed to injured workers, typically as topical rubs. Napolitano said some doctors prescribe such rubs to every patient they treat, and he suspects they are getting kickbacks from the pharmacies that mix them. He said one Los Angeles pharmacy charges \$230 for 60 doses of wasabi, the spicy Japanese mustard served with sushi.

"I want to say for that amount I could send the injured worker to a sushi restaurant and they'd throw in the wasabi with dinner," Napolitano said.

But Napolitano said in most cases his claims adjusters authorize payment, except in one case where he sent a compounded drug request to utilization review, where it was denied. He said in most cases it's simply not cost effective to order utilization review for such pharmacy requests.

Nevans said she heard about the compounded drug issue before. She said she's not surprised that providers have found new ways to pass along excessive charges considering that the DWC closed off one the lucrative repackaged drug avenue with regulations that became effective this year.

"The way I think about the system, it's like water," Nevans told the luncheon audience. "You close it off one place and its going to run down somewhere else."

Nevans told the audience that she wouldn't pay for compounded drugs back when she was a claims adjuster for the State Compensation Insurance Fund in the 1980s, but she advised them to follow whatever protocols are established by their companies.

Compounded drugs was just one of the issues discussed Tuesday where claims adjusters suspect provider gouging. Nevans elicited loud groans when she asked the audience if they would support adoption of a fee schedule for interpreting services during medical treatment visits.

Nevans said on one hand she's concerned about adopting a fee schedule for interpreting during treatment because nothing in the Labor Code requires insurers to pay for such services. However, she said many employers do pay for interpreters when their injured workers visit their doctors, so it makes sense for the division to put out some guidance on how much the service should cost.

Although Nevans did not mention it, interpreting services also has been a bone of contention before the Workers' Compensation Appeals Board. Interpreters have won some liens in cases where judges found that interpreting services were a medical necessity, but have lost other pay disputes in front of judges who found nothing in the law that required insurers or employers to pay for their services.

At least one interpreting firm in the audience said no fee schedule is necessary. In fact, Sal Alvarez, vice president of 3i Interpreting in Vista, Calif., said the state should abolish the provision of the Labor Code that requires insurers and employers to pay for interpreting services during medical-legal visits.

"My take on it is that you should use language services to improve business processes and improve customer service," Alvarez said.

Nevans delivered a wide-ranging presentation to the Association of Insurance Professionals membership, whose members packed a banquet hall at the Mission Valley Hilton. Among the topics:

Nevans said a committee of providers that is studying California's medical treatment guidelines will likely recommend using the Official Disability Guidelines for treatment of chronic pain. That would mark the state's second departure from the American College of Occupational and Environmental Medicine guidelines, which are deemed presumptively correct in the California

system.

The DWC is proposing to adopt acupuncture treatment guidelines developed by the state of Colorado in regulations that are pending final review by the Office of Administrative Law and will soon become final, Nevans said.

Although Gov. Arnold Schwarzenegger has promised not to roll back any of the provisions of Senate Bill 899, Nevans said there is room to compromise in areas of temporary disability, the 24-visit cap for chiropractic and physical therapy treatment and the timing of issuance of supplemental job displacement benefits.

Nevans suggested that the current cap on weekly permanent disability benefits may be set too low. When the minimum wage increases to \$8 an hour on Jan. 1, she said, workers will need to earn only 5% more than the minimum wage to qualify for the maximum benefit. She said if there is going to be any adjustment to permanent disability, it would make more sense to raise the weekly cap rather than increase the number of weeks of benefits.

Nevans said the DWC will amend proposed qualified medical evaluator regulations to require QMEs to give depositions in the same office where they treat the injured worker. She said that restriction would be placed in the rules instead of a cap on the number of satellite offices that QMEs could use. She said the DWC will also adjust the system it uses to select panel QMEs so that physicians who have a treating location near the injured worker are more likely to show up on the list than physicians who have a satellite office.

--By Jim Sams, WorkCompCentral Senior Editor

FLASH REPORT! 06/15/07 **ACOEM Guidelines Take Effect Today**

California's Division of Workers' Compensation will permanently adopt updated medical treatment guidelines today, including those from the American College of Occupational and Environmental Medicine (ACOEM). Since 2003, such guidelines have allowed doctors within the workers' compensation system to provide evidence-based medicine for injured workers.

"The ACOEM guidelines do provide a good baseline for a certain uniform consistency in how doctors treat injuries, particularly in the acute phases," says Linda Atcherley, president of the California Applicants Attorney Association. "Certainly as a guide, they are appropriate, though as a be-all-end-all, I would disagree that they are appropriate."

A number of doctors and the Division and Workers' Compensation have agreed with this rationale and have thus determined appropriate the adoption of

alternative guidelines to supplement weaknesses or absences within the ACOEM guides.

New additions to the guidelines include expanded language relating to acupuncture treatment maximums pulled from the state of Colorado. The 14-visit cap has been removed in exchange for continuous treatment based on the definition of "functional improvement," or a clinically significant improvement in activities of daily living.

ACOEM has also updated its hierarchy of evidence to be used when referencing published medical reports for use in workers' compensation claims, and those changes will also be included.

Earlier this month, ACOEM released an updated chapter on the treatment of elbow conditions which is expected to be adopted by the division. According to the college, other such rewrites are on the way, including a chapter each on hip and the lower back injuries, as part of a series of rolling updates,

The division will also address guidelines for the treatment of chronic pain this year based on recommendations from the DWC's medical review committee.

Prior to accepting the ACOEM guidelines, the DWC considered the Official Disability Guidelines and guidelines from the American Academy of Orthopedic Surgeons.

In The Making

There are several proposed bills floating around the capital that could impact the 2004 reforms. They range from extending the TTD benefits from 104 to 156 weeks (AB338), a law that would require an employer to reinstate an employee to his or her pre-injury job within 5 working days after receipt of a written statement by the treating physician that the employee is able to perform the essential functions of the employee's regular position (SB942) to increased permanent disability benefits (SB936).

All of these bills and more are making their way toward the different committees with hopes of eventually landing on the governor's desk. Rumor has it that the governor is not too keen on any of these bill that roll back the reform but there are no assurances that the reform will remain as currently written.

The following article in Work Comp Central summarizes the bill that are going to committee.

Four Comp Bills on Committee Agenda: *Top* [07/10/07]

The California Senate Labor and Industrial Relations Committee on Wednesday will consider four workers' compensation bills opposed by the insurance industry.

Bills scheduled for public hearing:

* Assembly Bill 338 by Joseph Coto, D-San Jose. The measure would extend the cap on workers' compensation temporary disability payments from 104 weeks to 156 weeks and would increase the weeks of temporary disability benefits in some cases when utilization review is conducted.

* AB 1073 by Pedro Nava, D-Santa Barbara. The bill would make the existing limits on chiropractic, occupational therapy and physical therapy visits inapplicable to visits for post-surgical physical medicine and rehabilitative services.

* AB 1269 by Ed Hernandez, D-West Covina. The bill would set a special reimbursement rate for certain inpatient burn treatments.

* AB 1636 by Tony Mendoza, D-Artesia. The bill would require the issuance of a supplemental job displacement voucher to an employee, even though the employee's percentage of permanent disability is not determined. The amount of the voucher would be based on a reasonable estimate of disability. If the percentage of permanent disability is later determined to be higher than the estimate, an additional voucher amount would have to be provided immediately.

The committee meets at 9:30 a.m. Wednesday in room 2040 of the Capitol in Sacramento.