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By SCOTT O'MARA

THE NEUHAUSER STUDY

Frank Neuhauser of the University of California-Berkeley has determined that the changed methodology for measuring impairment and permanent disability instituted by Senate Bill 899 has cost California workers 58% of the monies to which they previously had entitlement as compensation for permanent impairment or disability resulting from their job-related injuries.

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For many safety workers who do not have the benefit of Labor Code §4663(e), which greatly restricts apportionment regarding presumptive injuries, the new legislative changes in case law post-2005 have really impacted the level of compensation California workers should be entitled to receive. While the 58% reduction in compensation is extremely significant, even more telling is the impact these legislative changes have on people who have lost their jobs or have limited employment opportunities because of job-related injuries.

An interesting finding in the Neuhauser study also is that for those injured workers who did not have the benefit of an attorney to move them through the process, the loss in compensation has been even greater than 58%. This speaks to the fact that the represented California injured worker has the advantage of counsel who can maneuver a case around the various "land mines" which result in the reduction in compensation.

LABOR CODE §4658

Another change has occurred through the advent of Labor Code §4658, which allows the employer to unilaterally reduce the value of a case by 15% over a period of time if within a specified timeline they offer the injured worker regular or alternative/modified work within certain restrictions. This has become a charged area, and there are many situations where an employer fails to adhere to the protocol or the timeline but still seeks to reduce the value of a case by 15% if the worker is unaware of the protocol or timeline. This again was part of the legislative changes initiated by the enactment of Senate Bill 899 on 4/19/04.

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SIGNIFICANT JUDICIAL DETERMINATIONS

There have been significant judicial determinations which have impacted the level of compensation injured workers are entitled to receive. The Almaraz/Guzman cases have found that the vehicle used to determine the level of disability under SB 899 (*i.e.*, the *AMA Guides*) can be challenged and rebutted — an opportunity which was rarely available previously. This again is a reflection that the judicial branch recognizes the inadequacies of the compensation California workers can receive based on the Neuhauser study.

Thus, the legislative changes of 2004 have been mitigated to a certain extent by some creative case law which was not necessary or used prior to 2005, along with the recognition of the need for change in the current system.

GOV. BROWN VETOES NON-DISCRIMINATION LEGISLATION

Unfortunately, Gov. Brown vetoed legislation which would have dealt with one of the vehicles of reduction of value — the discriminatory application of apportionment. For those who do not benefit pursuant to Labor Code §4663(e) in presumptive cases, many doctors have gratuitously offered the opinion that ethnicity or gender may predispose someone for a medical problem. In doing so, these doctors have reduced the value of cases based on factors which are not only inequitable but also unconstitutional.

It is of great concern that some physicians embrace this concept and unilaterally attempt to reduce the assistance to a family based simply on whether someone is male or female, or whether they are of Caucasian, Afro-American, Hispanic, Asian or other descent.

There have been studies which indicate the factors of ethnicity and gender have been used by employers to decrease the value of cases or deny medical treatment.

THE SANDY BASTIAN CASE

In a current published case, Sandy Bastian, the employer attempted to rebut the cancer presumption established as the standard by the Walter Faust case (Faust v. City of San Diego (2003) 68 Cal. Comp. Cases 1822), a matter litigated by this writer (Scott O'Mara). The defendants tried to rebut the presumption by arguing that the applicant firefighter's work-related exposure to carcinogens was not reasonably linked to her cancer.

In this case, the doctor who issued his opinion was presented evidence by the employer that the applicant had a genetic predisposition for the breast cancer she incurred. The doctor stated that Ms. Bastian's abnormal Braca-2 gene was the non-industrial cause of her breast cancer.

Fortunately for the injured worker, the Court applied the Faust standard, indicating that even though the doctor had gone the extra mile to try to use genetic predisposition as a factor to deny the case as being job-related, the cancer *was* job-related and the defendants had not rebutted the standard set forth in the Faust case.

ILLUMINA — DNA SEQUENCING

The issue of genetic predisposition has been assisted by ongoing marketing. Illumina, a company in Southern California, has designed equipment and software to examine samples taken from patients to decode their DNA sequencing. This protocol is being pushed as an aid to doctors in treating their patients. This protocol also is being considered by employers in Southern California as a factor in profiling whom they might want to hire or not hire, and as a vehicle under the current Labor Code to reduce or deny compensation to injured workers, thereby preventing them from receiving their full cup of justice relative to job-related injuries.

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LOOKING TO THE FUTURE

In 2011, Gov. Brown vetoed legislative bills which would have rectified some of the current wrongs in the Workers' Compensation system by extending the 104-week limitation to accessing temporary disability benefits and eliminating the discriminatory application of gender and ethnicity as injury causation factors. Nevertheless, the Governor will be reviewing legislative amendments designed to right some of the inadequacies in the Workers' Compensation system. However, he would prefer to change the Work Comp system statewide rather than address individual elements of the system as it currently exists. A statewide change would require extensive awareness of the reform that is necessary, combined with an assurance that such reform will not cause further reduction in the benefits California injured workers are entitled to receive.

We must continue to anticipate a strong attack on the work-related presumptions. ***To fully protect themselves and their families, California injured workers must utilize the expertise of counsel to ensure the proper evidence is presented to doctors so the decisions they render will be appropriate relative to the workers' job-related injuries and the exposures they have had.***

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NOTICE

Making a false or fraudulent Workers' Compensation claim is a felony subject to up to 5 years in prison or a fine of up to $50,000 or double the value of the fraud, whichever is greater, or by both imprisonment and fine.