

February 17, 2004

Hon. Bill Lockyer
Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814

Attention: Ms. Tricia Knight
Initiative Coordinator

Dear Attorney General Lockyer:

Pursuant to Elections Code Section 9005, we have reviewed the proposed constitutional and statutory initiative regarding workers' compensation (File No. SA2004RF0002).

KEY PROVISIONS

The workers' compensation system compensates individuals for work-related injuries. Workers' compensation covers medical bills for treatment and pays a portion of lost wages from time off work through temporary and permanent disability benefits. Businesses, as well as the state and local governments, must purchase workers' compensation insurance or self-insure to pay these expenses. This measure changes a number of provisions relating to liability for injury, medical care, disability determinations, penalties, and other matters.

Determination of Liability

Stricter Application of Law. This measure makes significant changes in the way state law is interpreted regarding workers' compensation claims. Under the proposal, all parties would be considered "equal before the law." By contrast, workers' compensation laws are currently "liberally construed" to the benefit of injured workers. That is, the workers' compensation court system generally gives injured workers the benefit of the doubt on disputed issues.

Cause of Injury. Under the measure, an employee must prove that work is the major cause of a "cumulative" injury (that is, conditions that develop over time) to be eligible for workers' compensation. Also, an employee would have to prove that work contributed at least 10 percent to a "specific" injury (that is, occurring from one

incident). Under court interpretations of current law, an employee must in most cases only show that work is a “contributing factor” to an injury.

Medical Care

“Objective” Medical Treatment to “Cure and Relieve.” The measure allows medical care that is “reasonably required to cure *and* relieve” (emphasis added) injured workers’ conditions. This would apply to previous injuries as well as those following approval of the measure. The measure would require doctors to certify injuries and medical conditions “using medical evidence based on objective findings.” Objective findings must be verifiable and could include tests of range of motion, atrophy, muscle strength, and muscle spasm. Current law authorizes treatment that *either* cures *or* relieves. Thus, medical care that only relieves symptoms without improving the underlying condition is permitted. Current statute also does not specify objectivity of findings to establish a work-related injury.

Choice of Doctors. Under current law, an injured worker may predesignate a physician and change doctors once after 30 days past an injury without employer approval. Under the measure, an employer would have to approve an employee’s choice of doctor prior to injury. For employees not predesignating a doctor, an employer would have to approve an injured worker’s change of doctor 30 days or more after reporting an injury. Alternatively, an employer could fulfill these obligations by contracting with a health care organization (HCO) to provide medical care for workers’ compensation.

Treatment Guidelines. For disputes regarding treatment, the measure strengthens the evidentiary influence of treatment standards in establishing appropriate medical care. The measure also extends the deadline for the state to develop its own treatment guidelines to supplant existing published standards (used on an interim basis beginning in spring 2004). These state guidelines would be based on scientific evidence, as specified, and rely mainly on the published standards. At least every two years, the state would be required to update the treatment guidelines and identify any unapproved treatments. Under current law, the state’s guidelines are to be developed under less specific direction to incorporate accepted standards of care.

Fee Schedules. Under current law, payment for all providers except doctors is based on Medicare fee schedules. In addition, prescription drugs are reimbursed at 100 percent of Medi-Cal rates. The measure moves payments to doctors to a Medicare-based fee schedule. In addition, prescription drug reimbursements would increase to 110 percent of Medi-Cal.

HCO Requirements. The measure eases the process and requirements for certification as a workers’ compensation health plan, or HCO, by relying more on

existing regulatory provisions of the Department of Managed Health Care (DMHC) and Department of Insurance (DOI). Specifically, the measure eliminates current application specifications, fee regulations, and periodic medical and administrative exam requirements adopted by the Division of Workers' Compensation (DWC). In addition, the measure eliminates a current requirement for union approval to contract with an HCO for employers subject to collective bargaining. Under current law, health plans providing workers' compensation care also must be separately licensed and examined by DWC and their principal regulatory agency—either DMHC or DOI.

Treatment With an HCO. Under the measure, an employee would be able—within an HCO network of doctors—to predesignate a doctor, change doctors once, get a second opinion, and continue care for 90 days after an employer ended the plan contract. Medical treatment would be consistent with existing licensure as a health plan and would be presumed appropriate for curing and relieving a work-related injury. The measure would also eliminate from the court system's jurisdiction issues to be determined through a plan contract. Under current law, predesignated doctors do not have to be within the contracted network of physicians and the courts have jurisdiction over all disputes.

Independent Medical Review. The measure establishes a binding system for independent medical review (IMR) to handle disputed medical issues such as treatment and medical condition. Under current statute, the workers' compensation court system handles all disputes, including medical issues.

Permanent Disability

Permanent Disability Benefits. The measure significantly increases the number of weeks of benefits for injured workers with a permanent disability rating of 70 percent or higher. Specifically, injured workers would receive 14 weeks of payment instead of nine weeks for each percent of disability at 70 percent and above.

Rating Factors. Under current law, there are no restrictions on the use of four factors—type of injury, occupation, age, and diminished ability to compete in the labor market—when rating permanent disabilities. The measure replaces the current, broad requirement to consider diminished ability to compete in the labor market with a factor to consider adaptability to perform a particular job instead. If an injured worker were able to return to the same job, however, only the type of injury could be considered when rating permanent disability. Other adjustments would not be permitted. Similarly, if an injured worker could return to modified or alternative work, as specified, adaptability to perform a particular job could not be considered for rating purposes.

Apportionment. The measure requires doctors to determine the extent to which work is responsible for permanent disability versus other factors. The employer would only be responsible for the work-related portion. This is commonly known as “apportionment.” Under implementation of current apportionment provisions, permanent disability awards are not always reduced to account for previous injuries. In addition, current law prohibits attributing the cause of injury to preexisting conditions, even if those conditions may have contributed to the injury.

Penalties

Court interpretation of current law requires a 10 percent penalty on all future payments in an entire class of benefits, even if one payment is late. There is no current statute of limitations on penalty claims. Under the measure, a late or improperly denied payment for medical treatment or disability would be subject to a 15 percent or \$500 penalty, whichever is greater, on that payment only. An injured worker would have to notify an employer of the claimed late or denied payment and give the employer the opportunity instead to pay a 10 percent penalty. In addition, penalty claims would have to be filed within one year of the disputed denial or payment.

Other Provisions

Inmates. The measure authorizes inmates to receive only medical treatment for work injuries that occur while incarcerated. Temporary and permanent disability benefits would be prohibited. Current law allows inmates to receive both medical and disability workers’ compensation benefits.

Job Displacement Benefit. The measure establishes a 30-day time limit for an injured worker to respond to an offer of modified or alternative work. Current statute does not include a time frame.

Chiropractic Care and Physical Therapy. Under the measure, chiropractic and physical therapy visits above an existing 24-visit cap would be permitted with employer approval. Visits above specified caps currently can occur with approval of the insurance company, rather than the employer.

Qualified Medical Examiners. The measure changes various requirements for selecting a “qualified medical evaluator,” who evaluates an injured worker’s condition when disputes arise.

Easier Access to System Alternatives. The measure eliminates current restrictions on the types of industries that can establish alternative systems for handling workers’ compensation claims in collective bargaining agreements.

Injury Protection Plan. The measure deletes the current requirement that insurance companies review policyholders' injury and illness prevention programs for completeness.

FISCAL EFFECT

Interpretation of Provisions Could Significantly Affect Savings. Court interpretations of the measure's provisions would likely determine how they are implemented and the subsequent impact on workers' compensation costs. Such litigation might include (1) how to implement the new "equal" application of law versus the current "liberal" application in favor of the injured worker, (2) how to demonstrate that work is the major cause of cumulative injuries and contributes at least 10 percent to specific injuries, (3) what medical treatment is permitted under the new cure and relieve standard, (4) what constitutes objective medical findings, and (5) how to implement the new apportionment provisions.

Impact on System Costs. Workers' compensation costs for private and public sector employers have risen dramatically in recent years and are expected to be roughly \$25 billion in 2004. The provisions in the proposal—especially the equal application of law standard, the limitations on medical treatment, and the higher standards for showing injuries are related to work—would likely result in a net reduction in the cost of workers' compensation claims and/or the number of claims. The magnitude likely would be major—potentially in the range of a few billion dollars annually.

State and Local Government Costs for Workers' Compensation. The state and local governments currently spend approximately \$4 billion annually in workers' compensation costs for their own employees. State and local governments would experience proportionate claims savings relative to the overall system. These savings would potentially total in the hundreds of millions of dollars annually.

State Administrative Costs. There would likely be some level of additional state administrative costs to implement the measure. Specifically, the proposal would require revisions to the state disability rating schedule to eliminate subjective factors, as well as additional time for state evaluators and/or judges to review injury claims for work-relatedness and apportionment. Under current law, the state assesses insurance companies and self-insured businesses on a proportional basis to pay for the administrative costs of the system. As a result, any increased state administrative costs from the measure would result in somewhat higher assessments.

Impact on Revenues. The impact on governmental revenues would depend on how the measure affected system costs. Workers' compensation savings would improve business profitability, thereby increasing income tax revenues. Partially offsetting this

gain would be a reduction in the gross premiums tax paid by insurance companies. The net effect of these impacts is not possible to estimate.

Potential Shift of Costs. It is also possible that claims denied or reduced under the measure's provisions would result in a shift of costs to private health insurance and/or state health and disability insurance programs (like Medi-Cal). To what extent this would occur is not known, but such a shift could result in additional state and local costs for various programs.

Fiscal Summary. This measure would have the following major fiscal impact:

- Annual savings—potentially in the hundreds of millions of dollars—in state and local government workers' compensation expenses.

Sincerely,

Elizabeth G. Hill
Legislative Analyst

Donna Arduin
Director of Finance