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REFORM OF WORKERS' COMPENSATION IN CALIFORNIA—PART IV

[by Bruce Boyer]

The six basic recommendations of the California Workers' Compensation Reform Coalition will be explained, discussed and analyzed at the Coalition's April 19 conference at the University Y, at Bancroft and Bowditch Streets, in Berkeley (the conference announcement is enclosed). This article reviews the Coalition's sixth and final recommendation, which is a response to the current campaign of some California employers who seek to institute a "wage-loss" system, similar to that established in Florida in 1979. (LCR's 136, 140, and 142, January—March, 1985, reviewed the Coalition's first five recommendations.)

What is a "Wage-loss" Work Comp System? In determining the percentage of a worker's permanent disability in California, the Labor Code requires that "account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his age at the time of such injury, consideration being given to the diminished ability of such injured employee to compete in an open labor market" (Labor Code, para. 4460). The Director of California's Division of Industrial Accidents has the authority to establish a schedule for rating the percentage of permanent disability. The rating schedule has been used and occasionally amended ever since 1914. It classifies every injury imaginable, and gives both a standard percentage rating and an upward or downward adjustment depending on the worker's age and occupation. These ratings constitute "prima facie" evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule. Each percentage point of permanent disability rating is in turn translated to a scheduled number of weeks of disability payments (i.e., a 5% disability rating gets a maximum of 15 weeks of payment; a 50% rating gets a maximum of 241 weeks; and a 95% rating gets a maximum of 581.25 weeks, or a little more than 11 years of payments.) However, the payment amounts are themselves subject to maximum limits ($140 a week as of January 1, 1984, but considerably less for disabilities rated in previous years, for which there are no adjustments for increases in the cost of living index, even for a total permanent disability which may have occurred 20 or more years ago).

As developed in Florida, the "wage-loss" approach relies instead on a benefit schedule which reflects only proven wage loss due to the injury or disability. The Florida system forgets the first 15% of wage loss, and then compensates the worker up to two-thirds of the remaining 85% of previous earnings. An injured or disabled worker in Florida receives wage-loss benefits according to this formula until his condition reaches a point of maximum medical improvement. Then he must be judged to have a permanent impairment in order to be eligible for further benefits, and must show on a monthly basis both his loss of earnings, and its connection to the on-job injury or disability. Benefit payments are subject to a maximum duration period of 10 years. Scheduled awards for impairment alone are limited to a few extremely serious types of injuries. At the time of enactment, in 1979, the Florida system also raised benefits, limited lump sum awards, and lowered insurance premiums, at least initially.

By 1982, experience under the Florida law showed a severe reduction in new claims filed (to about one-third of the 1978 level), a severe drop in lump sum settlements (to about one-fifth of the 1978 level), a substantial reduction in the amount of benefits awarded (to about two-fifths of the 1978 level), and a substantial reduction in attorney's fees (to about two-thirds of the 1978 level). Insurance costs of employers at first declined, and then increased rapidly. The rate of appeals increased. The amount of paperwork required to administer the system increased by a factor of about six. The requirements for filing claims were cumbersome and confusing, and workers faced substantial delays in obtaining benefits in the first three years of the program.

"Permanent Partial Disability" Experience in California—The following data indicates the significance of permanent partial disability in claims experience in California in a recent year. (This table omits "medical only" claims, for which there was no incurred indemnity for wage loss.)

Type of claim	All claims outstanding	Incurred indemnity	Incurred medical
Death	977	34,409,240	3,147,951
Permanent total disability	192	27,341,033	25,542,770
Permanent partial disability	64,574	586,639,151	352,072,139
Temporary disability	170,167	77,550,898	96,488,115
Totals	236,010	$ 725,940,322	$ 447,250,975

Source: Calif. Workers' Compensation Insurance Rating Bureau, 1979 Policy Year (3rd report).

In this data, incurred indemnity costs of permanent partial disability ($586,639,151) come to 80% of the total of incurred indemnity costs for all types of claims ($725,940,322), even though these permanent partial cases constitute only 27% of the total case load (excluding "medical only" cases). Clearly, some part of this huge indemnity cost would be "provable" wage loss, even in Florida. But probably the greater part (especially in cases of less than 25% disability) is the result of the determination of the value of the loss of future earning power resulting from the disability, as it emerges (very slowly) from the adversarial adjudication process.

Data from the Association of California Insurance Companies indicates that 75% of all permanent disability cases are litigated. Testimony from the California Workers' Compensation Institute indicates that 65% of these litigated cases are finally resolved by compromise and release, after an average period of 18-22 months, at an average cost of 35 cents for every dollar in litigated benefits. However authoritative the data from both of these sources may be, it does indicate the heavy burden of litigation costs in partial disability cases, which is carried by employers and employees alike. It also indicates the additional heavy burden of delay, which falls entirely on the injured or disabled worker. The high proportion of compromise and release settlements is directly related to this delay, which effectively reduces the "bargaining power" of the injured worker in litigated proceedings.

Positions on the "Wage-loss" Issue in Current Legislative Hearings—A coalition of employers, local governments, and business organizations called Californians for Compensation Reform has called for the legislation of a "wage replacement" benefit system based on "actual wages lost," and has introduced a "spot bill" to accomplish this goal. However, the CCR has not yet submitted a detailed proposal for such a system.

The California Labor Federation is opposed to any change to such a "wage-loss" system, unless there is also (1) a shift in the burden of proof from the employee to the employer, who would have to show that any wage loss suffered by a worker-claimant is not due to an on-job injury or disability; (2) removal of all statutory limits on duration of benefits; (3) indexing of all benefits to increases in the state's average weekly wage; (4) elimination of the current dollar for dollar reduction in compensation benefits when an injured or disabled worker attempts to return to work; and (5) adoption of a special schedule of compensation awards in cases of serious disfigurement, loss of member, or loss of bodily function.

The California Workers' Compensation Reform Coalition has endorsed the CLF position. But the Coalition is also concerned about the requirement in a "wage-loss" system to keep detailed records sufficient to track individual cases and assess the amount of wage loss involved, especially when a series of different job situations over long periods of time (as well as a possible series of related injuries or disabilities) may be involved in any individual case. No state agency presently involved in the California Work Comp system has the funding, staffing, and computerized record-keeping capacity sufficient to administer such a system.

In addition, the Coalition points to reliable data from the California Workers' Compensation Institute indicating that the system actually replaces less than 40% of post injury wage loss—primarily because of the effect of the maximum payment limits. The Coalition argues that these limitations can be overcome not by legislation of any conceivable "wage loss" system, but only by focusing instead on the primary need to establish an exclusive state fund (see LCR 136, January 1985).

LCR will report on further developments in California Work Comp legislation, as it will be affected in the current session by the positions of the primary groups involved—hopefully including the disabled workers involved—after the Coalition's April 19th conference in Berkeley.

--Bruce Poyer