

# CAAAmments

JUNE 2009

The Voice of the  
California Applicants'  
Attorneys Association

## FEATURE ARTICLES

### AMICUS Committee Special Report

By Mark Gerlach  
and Joe Capurro, Esq.

### The Five Year Anniversary of Senate Bill 899

By Adam Dombchik, Esq.

### EAMS and Electronic Filing: An Early View and Five Tips for Success

By Martin L. Dean, Esq.  
with help from Andrea Jones

### Frank Russo, Esq. Honored



A commemoration to the many California workers who have become the casualties of SB 899, state budget delays and cuts, and the state legislators who have redefined the meaning of 'permanent disability'.

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Serving California's Injured Workers Since 1966

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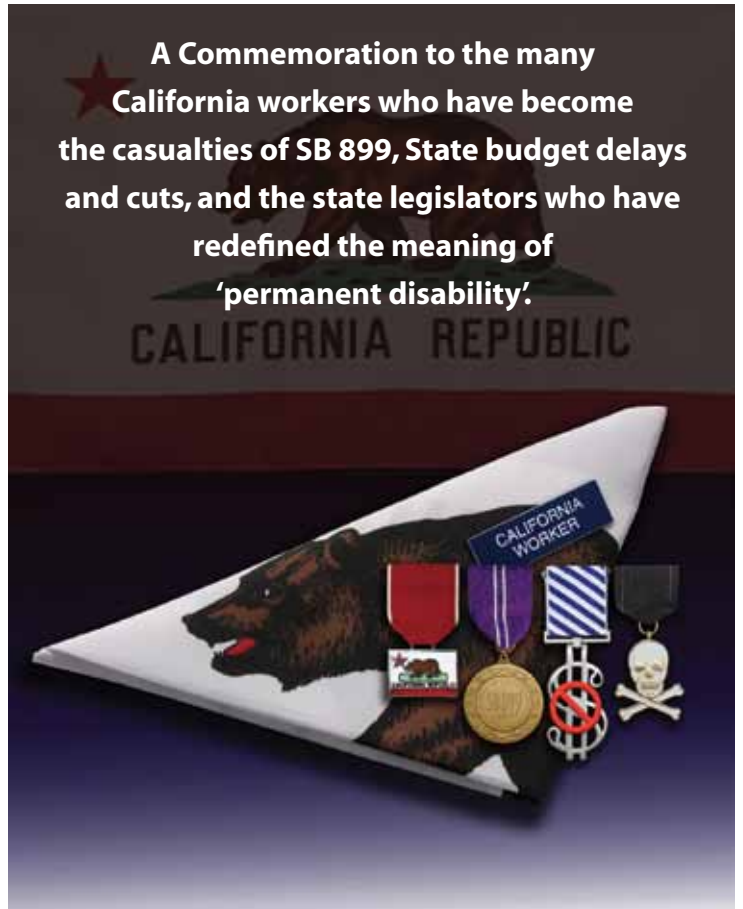
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Your Key  
to the  
Workers'  
Compensation  
Community

By Adam Dombchik, Esq.



April 19, 2009 marks the fifth anniversary of Governor Arnold Schwarzenegger's assault on Workers' Compensation benefits to injured workers. Upon signing the 100 plus page Senate Bill 899 (SB 899) into law, the Governor changed almost every part of the workers' compensation system. During the last five years, it has been a struggle for injured workers. The "reform" has meant fewer benefits, less treatment and longer delays. The California Applicants Attorneys Association and its members have helped lead the fight for a fair interpretation of the law and fair benefits for injured workers through the work of its many committees (899, Regulations, AMA, Diminished Future Earning Capacity, and Amicus). Looking forward through the conclusion of 2009, and into 2010, we will see many post SB 899 issues decided by the appellate courts.

The following is a recap of how Senate Bill 899 affected Workers' Comp benefits and how subsequent interpretations and changes of the law continue to affect injured workers five years later.

**Temporary Disability:** Senate Bill 899 set out to limit temporary disability benefits to 104 weeks (two years). For injuries between April 19, 2004 and December 31, 2007, case law has interpreted this limitation to mean that these benefits are to be paid for no more than two years from the first date of a temporary disability payment. This law had the harsh result of preventing an injured worker from even collecting a full two years of temporary disability if they did not collect it in the two years immediately following the first date of temporary disability payment. A new law was enacted in 2007 that extended this benefit to allow for a maximum of two years of temporary disability to be paid within five years from the date of injury for all injuries after January 1, 2008. The two year cap continues to be a significant reduction in benefits to the most seriously

injured workers with injuries that require them to be off work more than two years. This limitation on temporary disability benefits has resulted in public resources such as Social Security Disability and California State Disability Insurance having to pay injured workers while they recover from a work injury.

**Permanent Disability:** Senate Bill 899 threw out the old permanent disability rating schedule which physicians, attorneys, injured workers and judges all relied upon in determining an injured worker's level of permanent disability, and created a new schedule in part based on the *American Medical Association Guides to Permanent Impairment, 5th Edition (AMA Guides)*. Because of the way the law has been interpreted by the Governor and the administration, permanent disability benefits have generally been greatly reduced.

Issues first arose as to which cases were to be rated under the old law and which cases were to be rated under the new law. Although the medical condition does not have to have been declared permanent and stationary before January 1, 2005, the doctor must have reported that there was evidence of permanent disability prior to January 1, 2005. Case law is still developing as to exactly what language in a medical report will suffice to support a rating under the old schedule.

Litigation is still continuing regarding efforts to void the new rating schedule claiming it does not follow the legal requirements of the new law and is not equitable. (*Boughner*).

Over the last five years, physicians and judges have gained greater familiarity with the *AMA Guides*. A recent court decision (*Alvarez/Guzman*) expanded the scope of information upon which both a physician and judge can rely upon in determining an injured worker's overall level of permanent disability. This case allows more discretion by the doctor in assessing permanent disability. If the *AMA Guides* rating is unfair and

inequitable, the doctor can assign a different rating. This case was appealed by the defendants as the WCAB granted reconsideration. We expect case law to further develop on this issue throughout 2009, starting with the findings of the WCAB after reconsideration.

Other cases have attacked the mathematical formula for determining the final level of permanent disability. The recent *Ogilvie* case allows for an adjustment to this formula considering diminished future earning capacity, and in some cases can lead to an increase in the overall level of permanent disability. This case was appealed by both parties, and again the WCAB granted reconsideration. We expect case law to further develop on this issue throughout 2009, starting with the findings of the WCAB after reconsideration.

Through a better understanding of the use of the *AMA Guides* and application of this new case law, injured workers hope the future will bring more fair and accurate permanent disability Awards.

Over the last three years, the Governor has vetoed bills that have been passed by the legislature to increase permanent disability payments. These bills were drafted and passed in an effort to fix, in part, the unintended reduction of permanent disability benefits resulting from Senate Bill 899's implementation. We hope another bill will be presented to the Governor for review and consideration in 2009. Furthermore, January 2010 is the five year anniversary of implementation of the 2005 Permanent Disability Rating Schedule. By statutory mandate, the Administrative Director must review the Schedule every five years. In light of the administration's recommendation for an increase in permanent disability per the Schedule proposed last summer, which was a clear admission of the need to adjust and increase permanent disability benefits, we expect the administration to make some adjustment of permanent disability in a revised Schedule.

# sation Reform: The Five-Year Anniversary of Senate Bill 899

**Apportionment:** The new law changed the law of apportionment, relaxing the standard allowing for greater apportionment to nonindustrial factors, thus lowering permanent disability payments to injured workers.

The most important case interpreting the new law, *Escobedo*, listed a very strict standard for doctors to follow when addressing apportionment. Skilled advocates for injured workers holding the doctors to this strict standard have tried hard to limit the negative impact of this new apportionment law. Subsequent case law determined that the new apportionment law applied to all pending injury cases, regardless of the date of injury.

The *Benson* case, which is pending an appeal to the Supreme Court of California, changed the law on apportionment between industrial injuries. Again, this case used the new law to conclude that more than one industrial injury may not be combined to produce one larger permanent disability award, but instead the permanent disability must be split up into smaller separate awards if due to separate injuries. An exception to this harsh rule remains, and skilled advocates for injured workers have succeeded in obtaining a combined permanent disability award in some cases. There WCAB has reaffirmed many decisions where the exception applied, in cases where the doctor's apportionment determination was that the permanent disability could not reasonably be parceled out among the industrial injuries.

**Return to Work Benefits:** In 2003, during the recall campaign of Governor Davis, a bill that abolished vocational retraining benefits to injured workers' was signed into law, leaving a rarely used benefit called a "supplemental job displacement voucher." This is a monetary sum that ranges between \$4000 and \$10,000 that an injured worker can apply towards an educational school in an effort to assist in returning to the

workforce. Unfortunately, Governor Schwarzenegger's administration has not been able to successfully implement rules that would allow for better access for injured workers to the supplemental job displacement voucher. There have been legislative attempts to create rules that would allow for better access to this rarely used benefit. There are two bills pending the legislature in 2009 that seek to improve access to obtaining the voucher or alternative return to work assistance.

**Medical Treatment:** Prior to the enactment of Senate Bill 899, there had already been some changes in how injured workers were provided medical care. The Legislature put caps on the amount of physical therapy, chiropractic care, and occupational therapy that an injured worker could receive subsequent to an injury. Also, a program called "utilization review" was created to review and authorize medical treatment requests submitted by a physician. Senate Bill 899 did nothing to amend these new rules. Over the last five years, there have been no legal cases or change in the law that has "softened" the hard cap on physical therapy, chiropractic, and occupational therapy. However, a 2008 California Supreme Court case entitled *Sandhagan* concluded that a workers' compensation insurer had to request utilization review of treatment requests, but this process must be completed in most cases, no less than fourteen days from receipt of the medical treatment request. The Supreme Court recognized that a strict timeline as required by law was necessary to insure that injured workers receive prompt and efficient medical treatment. Despite the *Sandhagan* case, advocates for injured workers continue to observe significant delays in authorizing medical treatment. In the near future, as the courts enforce the timelines mandated by the *Sandhagan* case, injured workers hope to get relief from the delays and unreasonable denials in medical treatment.

The new law also allowed employers to create a Medical Provider Network (MPN), which is a list of approved treating doctors. If an MPN is established with proper notice, the employee must seek medical treatment from a doctor on the list. There are strict notice requirements for an employer to require treatment with a doctor in the MPN. Case law (*Knight*) supports the right to receive treatment outside the MPN if these requirements not met.

The California Applicants Attorneys Association continues to be active in educating the Legislature in Sacramento and the public about the existing inadequacies in the workers' compensation laws subsequent to enactment of Senate Bill 899. Even though five years have passed since the enactment of Senate Bill 899, there remain many questions regarding interpretation of the law. It is anticipated that over the next five years there will be further development of the law through the local and appellate court process, and CAAA and its members will be there to help preserve injured workers' rights to workers' compensation benefits. If you are a CAAA member and you wish to get more involved in a committee, please feel free to email me at [adam@geklaw.com](mailto:adam@geklaw.com).

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