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Dear Subscriber,

RATE CHANGE REMINDER FOR JANUARY 1, 2008

A brief reminder to our subscribers that several changes will be made to indemnity rates and reimbursements effective January 1, 2008.

As posted on the Division of Workers' Compensation website:

"The medical mileage rate for medical and medical-legal travel expenses will increase to 50.5 cents per mile. This rate must be paid for travel on or after Jan. 1, 2008, regardless of the date of injury."

"In addition to the mileage rate increase, the temporary total disability (TTD) rate for 2008 increases to \$916.33 per week on Jan. 1, 2008, and the period during which injured workers are eligible for TTD benefits has been expanded from two years to five.

This increase to the maximum TTD rate marks the second year in a row that the TTD rate will be affected by a change in the state average weekly wage (SAWW).

Beginning in 2006, Labor Code section 4453(a)(10) required the rate for TTD be increased by an amount equal to the percentage increase in the SAWW as compared to the prior year.

The California SAWW for the 12 months ending March 31, 2007 was \$914.60. For the period ending March 31, 2006, this figure was \$880, amounting to an increase of 3.932 percent. Applying this percent increase to the prior year's maximum benefit of \$881.66 brings the 2008 maximum benefit to \$916.33. Applying the increase to the minimum benefit brings it from \$132.25 to \$137.45.

Under Labor Code section 4659(c), workers with dates of injury on or after Jan. 1, 2003 who are receiving life pensions (LP) or permanent total disability (PTD) benefits are also entitled to have their weekly LP or PTD rate adjusted based on changes in the SAWW. Claims administrators should be aware that many LP and PTD awards are reduced (by uniform reduction) in order to produce a lump sum for paying attorney's fees. To adjust for the SAWW in cases where there's been a prior commutation

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the SAWW in cases where there's been a prior commutation of attorney's fees, the new rate should be based on the previous year's rate before deduction for attorney's fees, multiplied by the percentage change in the SAWW.

In addition to the increase in the TTD benefit rate brought about by changes in the SAWW, a bill signed this year by Gov. Schwarzenegger increased the window of time during which temporarily disabled employees are eligible to receive TTD benefits.

Reforms passed in 2004 made changes to the Labor Code that limited TTD payments to 104 weeks within a two-year period for a single injury occurring on or after April 19, 2004, except under certain limited conditions. The two years of eligibility were counted from the date of the first payment of temporary disability. Beginning Jan. 1, 2008, employees injured on or after that date will be eligible to receive the 104 weeks of disability payments within a five-year period. The five-year period is counted from the date of injury."

It is emphasized to our subscribers that the DWC has advised that the indemnity rate change applies not only to temporary disability, but also to life pension awards and permanent total disability awards. The calculation process for making appropriate adjustments where there has been a lump sum commutation (for, by example, attorney fees) is set forth above. For our subscribers working in claims, it is essential that all appropriate adjustments be made to indemnity payments. For specific questions or guidance, please consult your attorney at Floyd, Skeren and Kelly.

WCAB En Banc Overrules Wilkinson

In an En Banc opinion, *Benson v. The Permanente Medical Group* (cite pending) released on December 14, 2007, the WCAB ruled that the principles of combining the permanent disability of successive injuries that became permanent and stationary simultaneously are no longer applicable under SB 899.

In *Benson*, a common factual scenario existed wherein the applicant sustained a specific injury to her cervical spine on June 3, 2003 while she was removing a bin from a shelf over her head when she felt sudden onset of pain. Ultimately, the applicant underwent a three level cervical spine fusion. Following her recovery, the parties elected to utilize an AME.

The AME issued a report dated October 4, 2005, wherein he opined that the applicant sustained both a specific injury and a cumulative trauma injury which both became

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permanent and stationary for a total disability of sixty-two percent. The AME further concluded that the injury was caused fifty percent from the specific injury of June 3, 2003 and fifty percent due to the cumulative trauma from June 3, 2002, through June 3, 2003.

Based thereon, a findings and award issued awarding the applicant with sixty-two percent disability.

Defendant petitioned for reconsideration contending that the Wilkinson doctrine allowing for the combining of multiple consecutive injuries that become permanent and stationary simultaneously did not apply under the law and legislative intent of SB 899.

The WCAB, en banc, agreed with defendant and rescinded those portions of the WCJ's award addressing permanent disability and substituting two awards for 31 percent disability.

In reversing the WCJ, the WCAB reasoned that the clear language of newly implemented Labor Code Section 4663 required the physician to discuss all causes of disability and apportion accordingly. The WCAB primarily relied both on the additional statement of the legislature that SB 899 was emergency legislation designed to alleviate the workers' compensation crises in California, and also upon the language of the California Supreme Court in Brodie. The WCAB noted that the Supreme Court stated '[t]he plain language of new section 4663 and 4664 demonstrates they were intended to reverse [certain] features of former section 4663 and 4750'. Ultimately, the WCAB concluded that under SB 899, it is necessary to look at the overall disability and then parcel out all of the causative factors with 'consideration of past injuries, not disregard of them.'

In sum, under Benson where an applicant sustains several consecutive injuries that become permanent and stationary simultaneously, each date of injury should be apportioned to for a separate permanent disability award. The WCAB did note that there may be some rare cases where the permanent disability should still be combined, though did not comment further.

***Editor's Note:** Many observers believe that the Benson decision will be subject to further appeal and it may be some time before finality is assured on this issue.*

Finally, we at FS&K Publishing would like to take a moment to thank our subscribers for our continued success and wish you Happy Holidays and a wonderful New Year!

Sincerely,
The FSK Newsletter Team
Jason C. Hilfrink
(Chief Legal Editor)

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