Handling of Presumptive Workers' Compensation Claims in California After SB 1127

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DISCLAIMER

Facts and law change frequently. Please consult your attorney for the most recent laws affecting your decisions and claims handling strategies.

TODAY'S DISCUSSION – SB 1127

1. **Extension of Temporary Disability Benefits (Amends LC 4656)**
2. **Reduction of Current 90-Discovery Window to 75 Days (Amends LC 5402)**
3. **Penalty for "unreasonably denied" claims (Creates LC 5414.3)**

SUMMARY OF SB 1127:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB1127

1. Extension of Temporary Disability Benefits

The extended disability payments for employees who have a presumptive injury covered by LC3221.1 (getting up to 240 compensable weeks). **This section applies to dates of injury on or after 1/01/2023.**

1. Salary continuation up to one year under LC 4850 still applies towards the 240 weeks. (*Knittel* case)
2. Still – an additional (up to) 136 weeks of temporary disability indemnity for generally high income employees is a very significant increase in exposure.

(Note: this section adds to existing LC 4656 and creates subsection (d)).

Temporary Disability Benefits cont.

Whereas LC 4656(a), (b), and (c) include a closed and limited timeframe for entitlement to temporary disability benefits, (d) does not. The implication is that the 240 weeks of potential temporary disability in presumptive cancer cases can be owed at any time into the future.

QUESTION - What is the impact on projecting exposure and proper reserving for LC 4850 benefits and temporary disability with such a prolonged – and indefinite window for benefits?

Temporary Disability benefits cont.

What about temporary disability periods following an Award where no petition to re-open has been filed – and the 5 year window has elapsed?

Will this encourage Applicant's attorneys to seek to extend the duration of WCAB jurisdiction over temporary disability under a General Foundry theory claiming cancer to be a progressive and insidious disease?

Impact of this diminished by employees already on PERS IDR (sorry, CERL members)?

2. Reduction of Current 90-Discovery Window to 75 Days

Here is the full text:

LC 5402(b)(2) Notwithstanding paragraph (1), for i**njuries or illnesses defined in Sections 3212 to 3212.85, inclusive, and Sections 3212.9 to 3213.2,** inclusive, **if the liability is not rejected within 75 days after the date the claim form is filed pursuant to Section 5401**, the injury shall be presumed compensable under this division. The presumption of this subdivision is **rebuttable** only by evidence **discovered subsequent to the 75-day period**.

75-Day Discovery Window

LIMITATIONS

The reduced period for decisions within 75 days only applies to specific presumptive claims

- - See next slide (LC 3212 – 3212.85 and LC 3212.9-3213.2)

WHEN IS IT EFFECTIVE?

This section appears to be effective 1/1/23 as the bill was not an urgency statute. ERs should try to assess earlier filed claims and try to get them decided within 75 days, but you could make an argument that it would be inequitable to retroactively apply this portion of the statute before it's effective date since it does not clearly indicate retroactivity (unlike the penalty provision).

AMENDED LC 5402

This section of SB 1127 adds to existing LC 5402 **and** creates LC5402(b)(2).

Presumptions Subject to 75-Day Discovery Window (LC 3212 – 3212.85 and LC 3212.9-3213.2)

Labor Code 3212 – CHP, City/County Police and Firefighters etc Hernia, Heart Trouble, Pneumonia Cases

Labor Code 3212.1 – Firefighter - Cancer/Leukemia Cases

Labor Code 3212.15 – Police and Firefighter - PTSD Cases

Labor Code 3212.2 – Dept. of Corrections - Heart Trouble Cases

Labor Code 3212.4 – UC Firefighter - Hernia, Heart Trouble, Pneumonia Cases

Labor Code 3212.6 – CHP, Police and Firefighters – Tuberculosis Cases

Labor Code 3212.8 – Police and Firefighter – Blood-Borne Infectious Disease/MRSA Cases

Labor Code 3212.85 – Police and Firefighter – Biochemical Exposure Cases

Labor Code 3212.9 – CHP, Police, Firefighter – Meningitis Cases

Labor Code 3212.11 – Public Lifeguards – Skin Cancer Cases

Labor Code 3212.12 – California Conservation Corps – Lyme Disease Cases

Labor Code 3213 – UC Police – Heart Trouble and Pneumonia Cases

Labor Code 3213.2 – CHP, City/County Police – Duty Belt Low Back Cases

The 30/45 day decision periods are still in effect for COVID presumption cases!

Refresher re: The COVID Presumptions

SB 1159 Established 3 Distinct Presumptions

- **Codification of the Executive Order (N-62-20, 5/06/20)**
- **Safety Officer and Healthcare Workers**
- **All Other Employees (Outbreak required)**

ANALYSIS:

1. Identify the date of injury
2. Identify the type of work / job duties
3. Determine which presumption might apply, then run through requirements of each.
4. Conduct thorough investigation and AOE/COE analysis to see if you can rebut the presumption
5. Consider if additional denial should issue.

75-Day Discovery Window

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DECISION-MAKING IN WORKERS' COMP

Accept

- **Medical treatment**
- **Liens – may still have "med-legal" per LC 4620; 5811 costs, non-IBR med-legal**

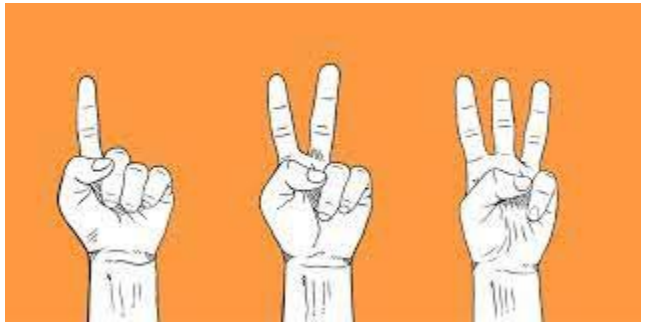
Delay

- **LC5402 – up to $10k.**
- **MPN can be enforced**

Deny

- **Factual, Legal, or Medical grounds**
- **Dispute treatment costs**
- **Deferred Requests for Authorization**

Notice of Injury



Responsibilities of ER:

- Provide claim form within 1 day of knowledge
  - Knowledge = Notice (LC 5402), *Honeywell*

Duties of EE:

- Return/File claim form

Next Action (by ER/TPA/Insurer)

- Set up Medical Treatment (LC 5402)
- Strategize with Team re: Accept/Deny/Delay

When do you notify of denial?

When should you notify the injured worker of the delay?

Under the CCR 9812(i) the **decision to delay shall be made within 14 days.**

If you decide to deny the claim, you shall notify within 14 days. CCR 9812(i). Prior to that, you should have advised the parties of your intention to delay the decision.

Document the Intent to Deny!

It's the **decision** not the notice (of the decision) that needs to be made within the first 90 days under LC5402.

Rodriguez v. WCAB (1994) 59 CCC 857.

When does the Decision Window period begin?

Upon the filing of a claim form by the employee. Honeywell v. WCAB (Wagner) (2005) 70 CCC 97, 102.

Honeywell describes a four step process:

- 1.The employee bears the initial burden of notifying the employer of an injury, unless such notice is unnecessary because the employer already knows of the injury or claimed injury from other sources.
- 2.The employer bears the burden of informing the worker of his or her possible compensation rights and providing a claim form.
- 3.The employee must determine whether and when to initiate a claim for compensation by filing the prescribed form with the employer.
- 4.When the form has been filed, the employer (or its insurer) must promptly investigate the claim and determine whether to contest liability. The investigation must be completed within 90 days.

When is the claim “delivered”?

Per LC5401, the claim form is deemed filed when it is “personally delivered to the employer or mailed to the employer by first class or certified mail.”

What if the last day is a holiday?

The time in which any act provided by law is to be done is computed by **excluding the first day, and including the last**, unless the last day is a holiday, and then it is also excluded.

- CCP 12&13

What about new body parts?

If a claim is denied, and Applicant adds other body parts, do you have to issue a second denial?

- Probably not. Wildermuth v. WCAB, 60 CCC 666 (W/D-1995), Buc-Perez v. WCAB, 64 CCC 595 (W/D-1999).
- But do you want to do so anyway to be abundantly clear? Can't hurt.

Arguably LC 5401 does not require that an employer provide a claim form for additional body parts.

What if claim is presumed accepted and subsequent body parts are added? Are the subsequently added body parts presumed accepted as well? Arguably no, but again, best to issue partial denial if intention is to dispute the claim.

What if the Decision Window has passed?

Can you still deny after 75/90 days? Yes.

LC 5402 is a **rebuttable** presumption.

This presumption can be rebuttable, but "**only by evidence discovered subsequent to the 90-day period.**"

**This probably also applies to the 75-day window decision cases under 5402(b)(2).

Red Flags

What are some things that may want to look out for to scrutinize a claim a bit more carefully?

1) Injury is not witnessed
2) Injury is not timely filed
3) Injury does not happen at the general work site

That's not to say a compensable claim cannot be unwitnessed or filed later, etc. But when that happens, you might want to look at things more carefully.

A Few Grounds for Denial

1. Not covered by the policy
2. Claim reported too late (SOL)
3. Application filed too late (SOL)
4. Affirmative Defense applies – eg: LC 3600(a)
5. Lack of substantial medical evidence
6. Employer's factual investigation
7. All elements of a presumption have not been satisfied.
   - Note: the claim may still be AOE/COE, but if not presumptive then SB 1127 does not apply.

FYI - This is not meant to be an exhaustive list, but a list of potential issues to guide review of a claim.

3. Penalty for “unreasonably denied” claims

Penalties provisions added a new Labor Code section 5414.3 related to unreasonable rejection of **presumptive claims covered by LC 3212 – 3213.2** with a penalty of 5 times the amount of benefits unreasonably delayed, up to $50,000.

WCAB has jurisdiction over “reasonableness” and over the amount delayed.

WHEN IS IT EFFECTIVE?

This section applies to all injuries, without regard to the date of injury or “whether the injury occurs before, on, or after the operative date of this section.” This section appears to be effective 1/1/23 as the bill was not an urgency statute.

That said, the retroactive portions of this section mean it will also apply to dates of injury that were filed before 1/1/23.

Labor Code 5414.3 Penalties: 5X Multiplier up to $50,0000

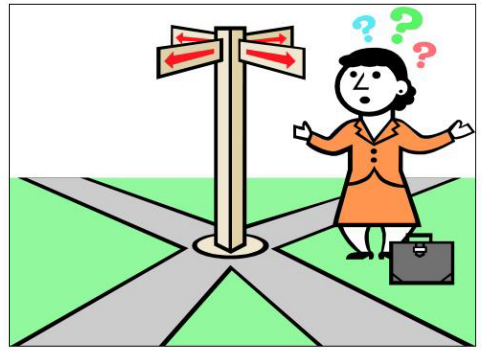
(a) Notwithstanding Section 5814, when liability has been unreasonably rejected for claims of injury or illness as defined in Sections 3212 to 3213.2, inclusive, the amount of the penalty shall be **five times the amount of the benefits unreasonably delayed** due to the rejection of liability, but in no case shall the penalty exceed fifty thousand dollars ($50,000). The question of rejection and the reasonableness of the cause shall be determined by the appeals board in accordance with the facts.

(b) Penalties issued pursuant to this section shall be reported to the audit unit within the Division of Workers' Compensation.

(c) This section shall apply to all injuries, without regard to whether the injury occurs before, on, or after the operative date of this section.

Labor Code 5414.3 Highlights (or Lowlights)

1. 1) Labor Code 5414.3 applies to the class of employees provided presumptions under Labor Code 3212-3213.2.
2. 2) Penalties SHALL issue and SHALL be taken at “five times the amount of the benefits unreasonably delayed due to the rejection of liability…” not to “exceed fifty thousand dollars ($50,000).”
3. 3) The question of rejection and the reasonableness of the cause shall be determined by the appeals board in accordance with the facts.
4. 4) Penalties shall be reported to the audit unit of the DWC.
5. 5) Labor Code 5414.3 applies retroactively.



Labor Code 3212-3213.2 Presumptions

Labor Code 3212 – CHP, City/County Police and Firefighters etc Hernia, Heart Trouble, Pneumonia Cases

Labor Code 3212.1 – Firefighter - Cancer/Leukemia Cases

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Labor Code 3212.8 – Police and Firefighter – Blood-Borne Infectious Disease/MRSA Cases

Labor Code 3212.85 – Police and Firefighter – Biochemical Exposure Cases

Labor Code 3212.87 – Certain Peace officers/Firefighters, Certain Healthcare Workers – COVID Case between 7/5/2020 – 1/01/2024

Labor Code 3212.88 – COVID Outbreak Presumption COVID Case between 7/5/2020 – 1/01/2024

Labor Code 3212.9 – CHP, Police, Firefighter – Meningitis Cases

Labor Code 3212.11 – Public Lifeguards – Skin Cancer Cases

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Differences between Labor Code 5814 and 5414.3

Labor Code 5814 allows an employer to remedy violation of the section with a 10% self-imposed penalty within 90 days of discovering the violation.

Labor Code 5414.3 does not allow for any reduction of the potential penalty by the issuance of a self-imposed penalty, which will likely encourage litigation given the possible amount of the penalties involved.

Labor Code 5814 states “the appeals board shall use its discretion to accomplish a fair balance and substantial justice between the parties.”

Labor Code 5414.3 states “the amount of the penalty shall be five times the amount of the benefits [up to $50,000].” There is no discretion after a WCJ has determined liability was unreasonably rejected.

Differences between Labor Code 5814 and 5414.3

Labor Code 5814 penalties are conclusively presumed resolved by approval of a standard C&R or issuance of an Award unless the claim is expressly preserved.

Labor Code 5414.3 penalties are not conclusively presumed resolved by standard settlement documents.

Labor Code 5814 contains a statute of limitations of two years from the date the payment of the compensation was due.

Labor Code 5414.3 contains no specific statute of limitations on seeking penalty payments.

Labor Code 5814 and 5414.3 both apply to all dates of injury prospectively and retroactively.

COVID Presumption

The addition of LC 5414.3 is the only change in SB 1127 relevant to the COVID-19 presumptions. The COVID presumptions were extended through 1/1/2024 by AB 1751.

If a claim by a protected employee under 3212.87 is later deemed to have been rejected unreasonably, the penalty will be applicable.

If a claim under the 3212.88 outbreak statute is later deemed to have been rejected unreasonably, the penalty will be applicable. An employer only has 45 days to investigate under LC 3212.88.

Possible Ambiguities

The statute refers to penalty as singular and benefits as a plural, but enterprising applicant attorneys have long tried to seek penalties for distinct and separate unreasonable delays and distinct and separate species of benefits (as discussed in cases such as Christian v. WCAB and Gallamore v. WCAB). In a denied claim later found to have been unreasonably denied, might an attorney attempt to seek a penalty for indemnity benefits as well as a penalty for medical benefits to try to avoid the $50,000 cap?

The section applies to all injuries regardless of whether they occur before, on, or after 1/1/2023, which would clearly mean penalties would be owing if a 2020 claim remained unreasonably denied after the operative date of 1/1/2023 but does that mean it applies to all rejections of liability, later found unreasonable, if the claim was accepted prior to the operative date of 1/1/2023? We may see litigation similar to Green v. WCAB and Abney v. Aera Energy.

There are more questions than these, but the clear conclusion is increased penalty litigation.

QUESTIONS?

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