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I. 2019 & 2020 - LEGISLATIVE UPDATE

WCEA vs. PINNACOL ASSURANCE

2019 – Democratic House & Senate – Thus the claimant's attorneys bar (WCEA) has all of the power to propose and pass legislation favorable to the injured worker. Lots of talk, almost no legislation. Too much other important legislation and couldn't get bills to the Committee.

A) The Creation of the Colorado Uninsured Employer Fund. The Fund opened in January 2020.

B) HB19-1105 – Nurse Practitioners can join P.A.'s in achieving Level I Accreditation.

NOTE: Neither N.P.'s nor P.A.'s have the authority to independently place injured worker at full duty or MMI for purposes of terminating TTD. M.D. must co-sign the report.

- **WCRP 11 (DIME Procedures) –** Rule Changes effective January 1, 2019 & again in July 2019.

II. 2020 –All Bills proposed in 2019, were keyed up to be passed this year. However, due to COVID, very little substantive procedural legislation even addressed.

BILL PASSED:

1) HB 20-026 – Compensability of psychologically traumatic event- either visual or audio. (Effective September 13, 2020)

LEGISLATION PASSED OVER OR REJECTED

1) SB 20-216 - "COVID PRESUMPTION BILL" - (ATTACHED)
Presented but due to estimated cost to the State. (*Did not pass*.)

- ***DISCUSSION RE: SERIOUS ISSUES POSED BY COVID AND CONCERNS*** –

COLORADO STATISTIC:

- **2,525 CoVid-19-related claims as of 10/10/20, of which there are:**
- **22 fatal First Reports**
- **3 fatal Admissions**
- **18 fatal denials**
- **1 fatal case pending positions**
- **512 non-fatal final admissions**
- **235 non-fatal general admissions**
- **1,695 non-fatal denials**
- **61 pending non-fatal position statements**

"**First reports**" means initial claim report to DWC. "**Admission**" means the insurer has agreed that they are liable for benefits. "**Final Admission**" means that the insurer believes no further benefits are needed/owed. "**General Admission**" means the insurer is in the midst of paying benefits. "**Denial**" means the insurer is denying that they are liable for benefits. The 61 are cases where the insurer still has time to admit or deny.

- **<u>TO DATE NO COVID CLAIMS HAVE PROCEEDED TO HEARING.</u>**

However, the theory for recovery, at least under the current law is that the contraction of the disease is an "Occupational disease", which is defined by §8-40-201(14), as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, **and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.**

(Emphasis added).

The Admission filed likely involve situations like the meat packing plants where an outbreak occurred and the worker could easily prove transmission at work.

As you can see, the majority of non-fatal claims have been denied. Under current law, it is claimant's burden to prove that his/her contraction of the disease can be fairly traced to his employment…..

This could be a tough burden to meet, especially in light of all the various fact scenarios involved with living arrangements, and the opportunity to contract the disease at other non-work place environments.

Many unanswered questions will have to be addressed by the Courts and/or the legislature when they reconvene to re-review the "presumption bill" and/or vote for an overhaul or modification to its proposed terms.

NATIONAL STATISTICS
(Compiled by R.L. Trailor as of August 21, 2020)

* More than 1/3rd of States have accepted Covid-19 as an 'occupational illness' for certain workers
* 19 States have made changes to work comp compensability amid Covid-19
* 11 States have issued executive orders/directives/emergency rules on Covid-19 "presumptions" of compensability for workers who can claim they contracted Covid-19 on the job
* 8 States have passed legislation establishing "presumptions" of compensability for workers

Typically, the worker has the burden of proof of establishing that their injury or illness was work-related. However, these "presumption" changes can/will mean that workers who contract Covid-19, can just alleged that it happened at work, an "automatic presumption", then **shifts the burden of proof onto the employer, to rebut this presumption and basically, prove the employee contracted the disease elsewhere!**

2) AGREED UPON LEGISLATION -Discussed submitted, but never addressed due to COVID.

A) Lowering the Statutorily Capped Benefits. - Currently per C.R.S., §8-42-107(5), two Caps on Indemnity Benefits exist. (TTD + PPD). The Capped amount of recovery changes every year.

- **Example = For injuries post 7-1-19, Cap for TTD & PPD with rating under <u>25%</u> = $91,126.84. If <u>over 25%</u> then Cap increases to $182,251.37**
- **AGREED LEGISLATION IS TO REDUCE THE LOWER CAP TO <u>19% or less</u>. HENCE, A RATING ►20% = Entitles injured worker to the Higher Cap.**

B) 24 MONTH DIME- HB 1154- (Stalled in committee as of 10/12/20)

Presently, there are 4 elements that must be met before Respondents can apply for a 24-month Division IME.
This new legislation will require yet another element be met before Respondents can apply for a 24-month DIME.

- **Mandates that the IME used to establish MMI after 24 months of treatment, be close in proximity if not after 24-month period.**

Previously, per C.R.S., §8-42-107(8)(b)(II)(A)-(D),

- **Respondents were able to use any MMI report from any IME to meet the element that they secure an IME finding MMI, when the ATP refuses to place the clamant at MMI.**
- **NEW REQUIREMENT - IME stating MMI must be at least 20 Months after the DOI.**

C) APPORTIONMENT

1) TTD AND MEDICAL BENEFITS - Proposal specifically overrules two Court of Appeals decisions allowing apportionment of TTD & Medical Benefits. Proposal makes it clear that apportionment is NEVER allowed in these situations.

2) PPD – No apportionment for a prior impairment rating unless the injured worker received an impairment rating, and compensation for that rating was received in a prior W.C. Claim.

D) STATUTE OF LIMITATIONS ON RESPONDENT'S ABILITY TO MOVE TO WITHDRAW ADMISSIONS

Under Current Law, there is no SOL on Respondents ability to attempt to withdraw an Admission based on it being "improvidently filed." Presently, if an IME opines, say two years after the injury, that he believes the injury was not caused by the incident, Respondents can then move to Withdraw their Admission. If an ALJ permits this, then Respondents become eligible to attempt to recoup the overpayment of previously paid benefits.

LEGISLATION: Puts a two-year S.O.L. on this ability from the date the Admission is filed.

Note: ***This statute does not affect attempts to withdraw Admission based on Fraud.***

E) ELIMINATE RESPONDENTS ABILITY TO RECOVER OVERPAYMENTS

WCEA Proposing: No recovery if benefits were due when paid.

F) ELIMINATION OF SSD OFFSET WHEN CLAIMANT IS OLDER THAN 45 ON DATE OF INJURY, WHEN THE INJURY CAUSES PERMANENT AND TOTAL DISABILITY

- **Presently, Respondents receive a 50% offset for all SSD received if injured worker is over 45 years of age on the date of injury that causes permanent and total disability. Under this new legislation, if Claimant is already receiving SSD on the date of injury, no offset permitted.**

G) RE-OPENING OF PTD (PERMANENT AND TOTAL DISABILITY) CLAIMS: - Change to amount injured worker can earn after being declared PTD, without risking a Petition to Re-open by Respondents.

* **Amount of permissible earnings will change from $4,000.00 to $7,500.00 in a full year.**
* **Respondents have the burden to establish that claimant has earned more than $7,500.00, or participated in activities that indicate that such earnings are possible.**

H) MILEAGE REIMBURSEMENT PAYMENTS WILL BE REQUIRED TO BE PAID WITHIN 30 DAYS OF RECEIPT.

- **Presently, there is not time a frame for timely payments.**
- **Also, initiates 120-day time limit on claimants to request this mileage reimbursement.**
- **Also requires insurer to notify the injured worker of the 120-day deadline as well as provide a form for use when requesting mileage reimbursements.**

III. WHAT'S OLD, NEW AND IMPORTANT FOR EMPLOYERS TO KNOW UNDER COLORADO LAW.

A) RIGHT TO CONTROL MEDICAL CARE IN THE FIRST INSTANCE

- **WCRP 8 letter, (List of four (4) providers)**
- **Must be given to claimant within seven (7) business days of notice of injury. NOTE: PROOF OF PROVISION IMPORTANT!**
- ***(Can e-mail list to injured worker, and request they choose the doctor and send choice back via e-mail.)***
- **Do not recommend listing individual doctors only, clinic + doctor, as many doctors move from clinic to clinic and list would be invalid if any**

of the 4 has moved when list given out.

- **Recommend have clamant circle/underline provider chosen & date and sign!**
- **If claimant indicates no medical care is needed. Have him sign a form to this effect. "Refusal of Medical Care".**

Ramifications if fail to provide WCRP 8 list of four providers:

- **Claimant is free to chose any doctor and/or any doctor recommended by his attorney.**
- **If claimant chooses one of the many infamous claimant-oriented doctors, per C.R.S., §8-42-107(8), that doctor controls MMI and RTW issues and can continue to treat for more than 24 months (2 YEARS!), and there is nothing the employer can do about it.**
- **Once two (2) years passes, per C.R.S., §8-42-107(8)(b)(II)(A)-(D), Respondents can then file for a 24-month DIME, if all four preconditions have been met.**
- **Per WCRP 11-4 (9), once DIME physician is selected, per the procedures set forth in C.R.S., §8-42-107.2, the appointment can be scheduled out to up to 75 days for the DIME to occur.**
- **It can take a month to receive the DIME report.**
- **So all in all, by the time a report is received, with the hope that the DIME will opine MMI, (this many times does not occur), failing to provide the list of 4 providers can cause a claimant to be off work and/or receive medical care for well over 28 months!!! Costly error!!!**

B) HOW TO HANDLE FULLY CONTESTED CLAIMS – CLAIMS INVOVING SUSPICION OF FRAUD

- **UNLESS ABSOLUTELY CERTAIN YOUR ATTORNEY CAN WIN THE CLAIM IN COURT, DO NOT DENY MEDICAL CARE!!**

- **Give injured worker the Rule 8, List of 4 providers and follow steps above.**

- **SECURE STATEMENTS FROM ALL WITNESSES AND GET INJURED WORKER TO FILL OUT A STATEMENT. (Have all witnesses date and sign Statements.)**

- **Notify the health care clinic of the suspicion of fraud and provide details as to why you question the claim. (*Your medical provider can prove to be very useful in the defense of the claim. – i.e. mechanism of injury, lack of objective findings, inconsistent history of injury…)***
- **Report Injury to Workers' Compensation Carrier and advise that you**

"contest" the claim.

- **When filling out Employer First Report of Injury use words such as, "employee alleges……"**

C) WHAT IS THE EFFECT OF A PRE-EXISTING CONDITION ON NEW INJURY.

- **Colorado law follows the "you take them as you hire them", theory of liability. Also known as the "Egg shell theory".**

- **Generally speaking, unless you can prove that claimant did not recover from prior injury, any new injury will constitute an aggravation of a pre-existing condition.**

- **Recommendation to try to avoid this scenario: PRE-EMPLOYMENT FUNCTIONAL CAPACITY EVALUATIONS, which measure employee's baseline of function prior to hiring.**

- **Theory to win, medical provider opines that employee has returned to his "baseline of function", on a certain date and all future treatment related to pre-existing condition.**

D) DEFENSE OF "INCIDENT" vs. "INJURY"

- **Even if incident occurs at work, and is undisputable, if have correct facts, can try to prove that although an incident occurred at work, no injuries resulted. (Need medical opinion to assist with this defense)**