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CDI Finds they Overcharged Employer...

Applied Underwriters Ignored X-Mod Change

Insurance Commissioner Ricardo Lara finds more controversy about Applied Underwriters. Commissioner Lara determined California Insurance Company (CIC), an Applied Underwriters unit, violated Insurance Code sections 11734 and 11735 by using an unfiled and unapproved loss rating factor to nullify the positive impact of an amended X-Mod that dropped nearly 60 points and should have lowered the employer's premiums.

The Department also found that Applied used an illegal experience modification formula that resulted in this employer being charged $180,000 more than they should have. These is reason to suspect this is not a one-time offense.

As an Applied Underwriters carrier, CIC is part of the larger Berkshire Hathaway (NYSE: BRK.A) group of companies. Berkshire is in negotiations to sell Applied Underwriters' and its related companies.

The case stems from 5 Diamond Protection's time as a CIC insured from June 2016 until the policy was canceled on Jan. 9, 2018 for non-payment. 5 Diamond provided security services to bars, nightclubs, and hotels, but it ceased active operations in late 2017 or early 2018 due to financial troubles.

Here, 5 Diamond had an X-Mod of 163 when the policy renewed on June 8, 2017, but the X-Mod was corrected to a 106 X-Mod after previously excluded payroll was added to the calculation. The payroll from 2015 had not been audited in time for the original X-Mod calculation. The change in the X-Mod was applied retroactively back to the policy inception date. The revision reduced 5 Diamond's estimated experience-modified premium by more than $103,000.

CDI says Applied used an unfiled Loss Rating Factor to nullify the change.

Unique Formula

"[CIC] uses the Loss Rating Factor to eliminate any difference between an insured's experience-modified premium and its premium under the Loss Rating Plan model," according to the decision. "The result is that the Loss Rating Plan

"Applied" continued on page 8

Baker Reforms Continue Working...

California Workers' Comp Costs Continue To Drop

The Workers' Compensation Insurance Rating Bureau governing board has a tough decision to make early next month when it meets to discuss a potential mid-year workers' comp rate filing.

A first look at the year-end 2018 industry data shows a five-point decrease in the projected loss ratio from the one used for its Jan. 1, 2019, rate filing, but the 2019 approved rates already contemplate much of those savings.

The Bureau is a private organization with quasi-governmental responsibility. It is financially supported exclusively by insurance carriers in whose interests it operates.

The general rule of thumb has been that the Bureau would make a mid-year or amended filing if the indicated

"Reforms" continued on page 7

It is 6,569 days since our last lost-time accident.

INSIDE

Industry Fretting Future of Workers' Comp

The major data analytics in California's workers' comp system continue to show improvement thanks to the resilience of the Baker Reforms, but industry insiders are anything but complacent. A new administration, a new Insurance Commissioner and a labor-backed Democratic supermajority in the Legislature are all contributing to an underlying sense of unease.

"There's a restlessness in the air," said California Workers' Compensation Institute president Alex Swedlow in his opening address at the Institute's annual meeting (for event photos see page 6). "There's a feeling it's all about to change again."

Swedlow points out that SB 899 and the Baker reforms in the form of SB 863, SB 1160 and AB 1244 have already defied past patterns that tended to produce significant reforms every five to 10 years.

The current period of stability is unprecedented in recent history, and no one can say for sure how much longer it will run. But speakers conceded that there was a similar feeling of unease at the start of the last administration and things didn't turn out too bad for the industry.

"We felt the same restlessness when Gov. Jerry Brown rolled into office eight

"Future" continued on page 9

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Uber Settles Driver Dispute But Doesn't Reclassify

A pending class action filed by Uber drivers in California and Massachusetts over alleged misclassification as independent contractors is heading to settlement. The parties agreed to a $20 million payout for the nearly 14,000 drivers, but none will be reclassified as employees under the deal.

The settlement may come against a backdrop where Uber drivers around the Unites States and in California are preparing to strike over an alleged 25% cut in "wages." Drivers will demand they be paid at least $28 per hour. Some drivers insist that after they pay expenses they earn as little as $3.75 per hour. Drivers pay all of their own automobile expenses including wear and tear.

The settlement in *O'Connor v. Uber Technologies* is still pending final approval by a federal judge for the Northern District of California, but it was granted preliminary approval at a hearing last week. The case was first filed in 2013.

"Although a number of drivers are particularly concerned with the ongoing employment status issue, this settlement (once again) does not resolve that question," the proposed settlement notes. "But it would provide an immediate benefit for many settlement class members who are anxious to receive some payment from this long-running litigation. It also allows them to avoid further delay, as well as uncertainty from continued litigation. The question of the proper classification of Uber drivers will undoubtedly continue to be litigated in other cases and other fora."

The $20 million settlement would be shared by approximately 11,000 drivers in California and another 2,600 in Massachusetts. Attorneys could claim up to 25% of the total settlement amount in fees plus recover their costs for the litigation and administration of the case. The drivers were part of a larger class action, but the case was pared down by the Ninth Circuit Court of Appeal that held most of the drivers had to submit their claims to arbitration (for past coverage see Uber Gets...).

The settlement acknowledges the ongoing litigation and discussions about the California Supreme Court's decision last year in the Dynamex case, but says litigating those issues in this case "would be a time-consuming and uncertain endeavor." Key among these issues is whether Dynamex's "ABC" test can be applied retroactively. Legislation is also being debated that could affect the application of the Dynamex test to these drivers. ▲

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CALENDAR OF EVENTS

April 1-4
IAIABC Forum. Paradise Point, San Diego. For more information go to www.iaiabc.org

April 8-9
California Self-Insurers Association Seminar and Educational Conference. The Disneyland Hotel, Anaheim. For more information go to www.ca-self-insurers.com

April 11
Council of Self-Insured Public Agencies North Meeting. The Hilton Hotel, Concord. For more information go to cosipa.org

April 11-12
American Society of Workers' Comp Professionals Annual Meeting. The Four Seasons Hotel, Las Vegas, Nev. For more information go to www.amcomp.org

April 23
The Executives in Workers' Compensation Conference. The Waterfront Resort, Huntington Beach. For more information go to www.ewcconference.com

May 2
California Alliance of Self-Insured Groups (CA-SIG) 2019 Spring Forum. Kimpton Shorebreak Hotel, Huntington Beach. For more information go to ca-sig.org

May 7
California Workers' Compensation Institute 2019 California Workers' Comp Case Law Seminar. The Grand Event Center, Long Beach. For more information call 510-251-9470.

July 17-19
California Coalition on Workers' Compensation Annual Conference. Disney's Grand Californian Hotel & Spa, Anaheim. For more information go to ccwcworkcomp.org

August 27-29
Claims Conference of Northern California. The Villages at Squaw Valley, Lake Tahoe. For more information go to claimsconference.org

September 3-6
CWC & Risk Conference. Monarch Beach Resort, Dana Point. For more information go to www.cwcriskconference.org

PAGA, Comp, Classification Issues Dominate Labor Secretary's Confirmation Hearing

Gov. Gavin Newsom's appointment of Julie Su to be California's next Secretary of Labor and Workforce Development received wide-ranging support from labor and business interests at her confirmation hearing before the Senate Rules Committee. The Labor Commissioner faced questioning from committee members about the state's Private Attorneys General Act (PAGA), employee classifications in a post-Dynamex environment, and the state of the workers' comp system, but the outcome of the hearing was never in doubt.

Julie Su

In testimony to the Committee, Su says the state is tracking who is filing PAGA lawsuits and reviewing the cases to ensure that they are furthering the state's goals and are not just shakedowns for settlements. The law allows private individuals to file lawsuits to collect penalties for violations of state labor laws. Successful lawsuits enable the plaintiff to keep 25% of the recoveries with the rest going to the state.

"We're tracking the outcomes of those cases," says Su. "We now get settlements before they are finalized, so we have a chance to look and see: Are all the issues that were alleged, in fact, being resolved? Is the state getting the penalties that we should be getting? Are these cases furthering the purposes of the PAGA statute which is to make sure that labor laws are being enforced when the government is unable to step in?"

Su says they are also using the information to track trends and to look for abusive practices. "We're looking to see if there are certain parties, certain attorneys, who are constantly filing these suits...we're taking a close look at that and will continue to do that," she says. "We're very hopeful that through the information gathering and accountability and working with parties in the state to give us information that we will both promote the right purposes of PAGA and curb the over litigiousness that is a problem especially for small businesses."

Employee or Contractor

Su maintained the administration's line first espoused in Gov. Newsom's state-of-the-state address that the issue of properly classifying workers as either independent contractors or employees is an issue that goes far beyond the California Supreme Court's decision in Dynamex.

"What is the promise that we want to make to employees in the state of California, to people who work in California. What are the standards that we want to exist regardless of status and how do we preserve the ability for businesses to be innovative and flexible and to adapt to the changes in the economy," Su noted in her comments to the committee.

> *"We're looking to see if there are certain parties, certain attorneys, who are constantly filing these suits..."*
> *– Julie Su, Labor Commissioner*

Multiple bills are currently pending in the Legislature to address the Dynamex case. Assemblyman Lorena Gonzalez (D-San Diego) is carrying AB 5 to "codify" and "clarify" the decision's application to state law. Applicant's attorneys and labor reps have already made it clear that the clarification they seek is to have Dynamex apply to all employment situations, including workers' comp. Currently, it is limited to disputes in wage and hour cases. Assemblyman Melissa Melendez (R-Lake Elsinore) is carrying AB 71 to require use of the Borello factors to determine employment status in all disputes, not just for workers' comp issues, and Assemblymen Ken Cooley (D-Rancho Cordova) and Tom Daly (D-Anaheim) are carrying AB 233 to carve out a statutory exemption to allow licensed insurance agents and brokers to elect to considered independent contractors.

Baker Workers' Comp Reforms

Su also pledged to continue working to further the workers' comp reforms passed by her predecessors that have proved so successful in bringing down California's workers' comp costs while increasing benefits for injured workers (see related story on page 1). The Baker workers' comp reforms have produced eight straight workers' comp rate cuts with rates now down over 40% since the reforms took hold.

While noting these successes, Su maintains that the industry is still learning about what's working with the reforms, such as the independent medical review process, and what is still a work in progress. To this end, she is backing an upgrade of the Division of Workers' Compensation's case management system to better identify where to focus future efforts.

"I am very data driven about how we should do our work," says Su. "I will be looking closely with my departments and my divisions at what the data tells us about any on-going abuses, problems, friction in the system, things we need to improve and certainly trying to address those to the best of my ability."

Su was confirmed with the unanimous support of the Committee. ▲

Department Faces Pushback Over Draft SIU Regulations

The California Department of Insurance asked for feedback on draft regulations for carriers' special investigative units (SIU) and its staff got an earful at a packed house meeting in Sacramento. Carrier representatives from across the country raised numerous objections to the draft updates. They would be the first changes to the regulations in roughly 15 years.

CDI officials maintain that they are looking to update the regulations to address changes in the way carriers are complying with their SIU obligations to investigate and refer suspected fraud. In some cases, carriers are outsourcing these investigative responsibilities to independent third parties or leaving it to their contracted third-party administrators (TPAs), and this is creating oversight problems for the department.

"Some have an in-house SIU, some don't and contract out, and in a lot of cases the insurer has no idea what's going on."
— Steve Smith,CDI's support and compliance enforcement branch chief

Steve Smith, chief of CDI's support and compliance enforcement branch, says his staff is seeing more and more cases of what he refers to as "spiderweb" SIU structures. In these cases, he notes the carrier will have contracts with multiple TPAs. "Some have an in-house SIU, some don't and contract out, and in a lot of cases the insurer has no idea what's going on," says Smith. "Or they think they know what's going on, but it's not happening. That's what we're trying to tighten up here."

CDI Deputy Director Jeff Margolis reminded attendees at the pre-notice meeting that the statutory requirements for SIU operations are the carrier's to bear and cannot be offloaded via contract. The updates to the regulations are intended to make clear where that responsibility rests.

Industry Concerns

But industry reps pushed back on what they see as imprecise language in the draft regulations that could pull in all sorts of vendor contracts unrelated to SIU or anti-fraud activities. A key concern is the training requirements in the draft regulations that carriers would be obligated to provide if a contract is later deemed covered.

Reps maintain that the current draft language could be read to apply to contracts for perfunctory services such as background checks or credit reports and that would then trigger the training requirements. Noting the length of time since the last revisions to the regulations, one attendee urged the Department to be precise in its wording as the language adopted will have to be interpreted by auditors years, even decades, in the future.

CDI officials said they would attempt to rework the wording to remove any ambiguity before a formal proposal is released. The department will also be working on language covering encrypted information that is submitted in response to Department data requests.

CDI officials noted that they have been receiving information in encrypted formats and often lack the key to unlock the data. "If we're getting stuff we can't open, then you're not compliant," says CDI's Smith.

Attendees pointed out that the department already has a secure portal for submitting information in response to consumer complaints and questioned why it couldn't be used for SIU related data. Such a move would eliminate the need for encryption, they say. CDI staff indicated that they would investigate whether this would work with its systems.

Carriers also pushed back on draft language calling for them to address a laundry list of items in their fraud referrals. They note that it appears the Department is trying to create a "how to" manual for investigations, but say this would create numerous legal problems for carriers. Attendees pointed out that any failure to address an item in the Department's proposed checklist list would become an exhibit in the inevitable civil lawsuit by the target of the investigation claiming the carrier failed to investigate the case properly. Carriers note that not every item in the list applies to every investigation.

The Department says the language was an attempt to address the wide variation in the quality of the referrals it receives. "There's a wide variation of opinion on what is a thorough investigation," says Margolis noting that the language was an attempt to have carriers "show their work." Margolis says without clear standards it's difficult to pursue enforcement actions against carriers that are essentially mailing it in and not thoroughly investigating suspected fraud cases.

"There's a wide variation of opinion on what is a thorough investigation,"
— CDI Deputy Director Jeff Margolis

CDI agreed to work on the language before coming back with a formal proposal; however, no formal timeline was announced. Copies of the existing draft regulations are available in our Resources section or by clicking here. ▲

Presumptions, Privacy and Firefighter Bills Up For Hearings

The legislative machine is coming to life, and several workers' comp bills are up for early hearings. Most important for the workers' comp community is the hearing about the bill to create an exemption from the California Consumer Privacy Act of 2018 (CCPA) for the insurance industry. A fix is still in the works for self-insured employers and other ancillary workers' comp providers.

First up is the Senate Labor, Public Employment and Retirement Committee, which will hear SB 416 by Sen. Ben Hueso (D-San Diego) later today. The Assembly Insurance Committee will begin action next week with AB 981 by Assemblyman Tom Daly (D-Anaheim) to address the privacy issue and two workers' comp bills.

As drafted, SB 416 is designed to expand existing workplace presumptions for California Highway Patrol officers, firefighters and other public safety officers "to all persons defined as peace officers" with some limited exceptions.

Privacy, Firefighters

The Assembly Insurance Committee is meeting next week, and the big item on the agenda is Daly's attempt to carve out an exception to the CCPA for the insurance industry. The bill as drafted creates that exception for entities already covered by the Insurance Information and Privacy Protection Act, but that act does not apply to self-insured employers.

The committee is also slated to hear AB 932 by Assemblyman Evan Low (D-Silicon Valley) and AB 1400 by Assemblyman Sydney Kamlager-Dove (D-Los Angeles). AB 932 would extend workers' comp benefits to off-duty firefighters injured in the 2017 mass shooting in Las Vegas. The bill goes further than earlier legislation for peace officers injured in the same shooting. The earlier bill gave counties and public agencies the discretion to provide benefits in such situations, but AB 932 would require benefits in this case.

AB 1400 is also a presumption bill. It would extend the presumptions that already apply to firefighters actively engaged in fighting fires to all fire service personnel with exposure to active fires or the health hazards associated with firefighting operations. The Assembly bills will be heard April 3.▲

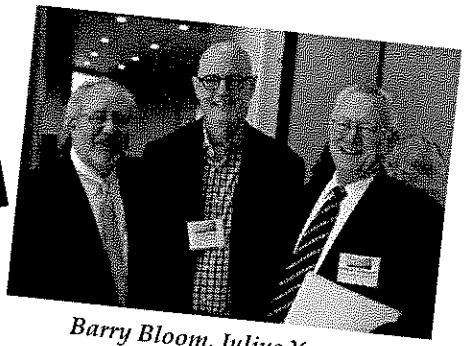
Calls For Strong Leadership at Cal/OSHA

Leadership at the Department of Industrial Relations is changing with the new administration of Gov. Gavin Newsom and calls are coming in for those changes to include a strong, new leader at Cal/OSHA. *Workers' Comp Executive's* sister publication, *Cal-OSHA Reporter,* documented a handful of scandals over just the past year, including the arrest of a district manager for bribery, that it says are indicative of the abject lack of leadership and control at the agency.

In an open commentary to the safety and health community, Cal-OSHA Reporter notes that at least five candidates have applied for the Division of Occupational Safety and Health chief's post – three internal candidates and two from outside the agency. The publication is calling on the Governor to put politics aside and select a strong, experienced leader that will be able to control and provide direction to the Division and the broader safety and health community. The full text of the commentary by Publisher J Dale Debber is available by clicking here. ▲

Community Page - CWCI 55th Annual Meeting March 21, 2019

Vern Steiner, Bill Zachry, Alex Swedlow

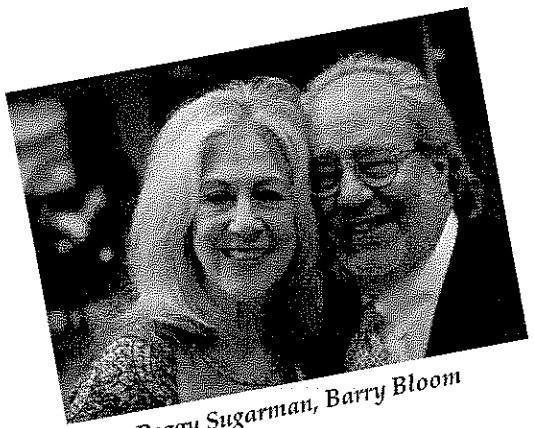


Barry Bloom, Julius Young, Richard Jacobsmeyer

Alex Swedlow, Suzanne Guyan

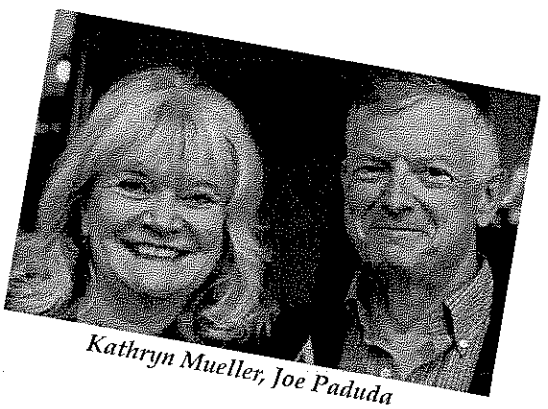
Len Welsh, Christine Baker, Bob Young, Jacki Graf, Cyndy Larsen

Richard Jacobsmeyer, Saul Allweiss, Ellen Langille



Peggy Sugarman, Barry Bloom

Lori Kammerer Donahue, Mark Pew



Kathryn Mueller, Joe Paduda

Mark Priven, Frank Neuhauser

To view the more photos from the event click here.

We welcome pictures from your event or convention providng it is has over 100 attendeees, Non profit organizations are given preference. For more information on how to submit your event, click here.

change is for five-points or more.

Complicating the discussion for a potential 2019 mid-year filing though is the fact that the Bureau's last filing was based on the March 31, 2018, data. And former Insurance Commissioner Dave Jones based his decision on the industry's June data as well as some different assumptions for trending.

The result is the projected loss ratio for July 1 policies at this point is only two points lower than the currently adopted rates. The Bureau's Actuarial Committee will take another look at the data as well as alternate projections at a meeting in early April. The Governing Committee will review the results at a meeting the following day and decide on the potential mid-year filing at that time.

Savings Components

A number of factors are in play to bring down the projected loss ratio with declining medical costs being the primary driver – particularly pharmacy costs. Claims data indicates that pharmacy costs are about a quarter of what they were three years ago thanks in large part to changes in the state's fee schedule, the impact of independent medical review decisions and the advent of a workers' comp prescription drug formulary.

The industry's improvement on medical costs is directly linked to the Baker workers' comp reforms which introduced independent medical review (IMR) to settle medical treatment disputes in 30-45 days rather than waiting roughly 18 months for a QME report and a decision by a Workers' Compensation Appeals Board judge. Under IMR the decisions are made by medical providers.

Speedier Settlements

The quicker resolution of these disputes is helping bring down temporary disability duration and is speeding up settlement rates for claims – both old and new claims. When the reforms were passed, only 15% of permanent disability claims were settled by the first report, but that total is now over 23% and continues to climb. At second report the total is up eight percentage points, and the third report level is up four points to over 60%. Older claims are also showing marked improvement in settlement rates.

Notable on the settlement front is the fact that settlement rates are up sharply in the Los Angeles and San Diego regions, and the settling cases include cumulative trauma claims. Settlement rates are up 17% and 16% respectively in the two markets.

Speculation is that the Division of Workers' Compensation's elimination of nearly 300,000 liens cleared the way for many of these cases to finally settle. DWC dismissed the liens when the lienholders failed to file a declaration under penalty of perjury that the lien is valid, the services were performed and that the underlying claim for payment is not subject to independent bill review.

On the TD front, the average number of weeks of paid temporary disability at the first survey level is down nearly 28% since it peaked at 67.4 weeks in 2008. The improving economy, faster resolution of medical disputes and the lien reforms are being credited with bringing down TD duration rates. The average for 2016 claims is down to 48.6 weeks, according to Bureau data.

Diminishing Liens

One change that will work its way into whatever projection the Bureau makes will be greater recognition of the savings from the SB 1160 and AB 1244 workers' comp reforms that targeted workers' comp liens. The Bureau's Jan. 1, 2019, filing used an assumption that lien filings were down 40%, but by the time of the rate hearing the indication was that filings were down 50%. Former Commissioner Jones based his decision on the 50% reduction in lien filings.

The latest data through the end of 2018 show that lien filing rates continue to drop. The current estimate is that lien filings are down over 60% since these two bills were enacted. Over the second half of 2018, lien counts averaged around 9,600 a month compared to 25,500 per month in 2016.

The number of providers filing liens is also down since the state required them to sign the declarations. Whereas there were nearly 5,100 providers filing liens before the SB 863 and subsequent reforms, the total is down to 1,236. In addition to the declaration requirement, the reforms also cracked down on the assignment of liens to others which put the clamps on the lien factoring industry.

"It seems like a new plateau," says WCIRB chief actuary Dave Bellusci. He says that before the April meeting staff will consult with claims professionals to ensure the trend of fewer lien filings is continuing in 2019, but the actuarial committee approved the use of the 60% reduction figure in staff's calculations for a potential mid-year filing. ▲

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rates and the Loss Rating Plan premium remain constant during the policy year, irrespective of whether the insured's experience modification changes. [CIC] simply adjusts the Loss Rating Factor to counteract the changed experience modification, so that the product of the filed rate, the experience modification, and the Loss Rating Factor always equals the Loss Rating Plan rate."

The Department says CIC has not filed any description of the Loss Rating Factor or its effects with the Commissioner. "In addition, none of Respondent's Loss Rating Plan filings indicate that an insured's premiums will be unaffected by a mid-policy period change to the experience modification," according to CDI administrative law judge Clarke de Maigret who wrote the decision.

Applied argued that it was not required to file the Loss Rating Factor – a position it also took in prior disputes with the Department over its reinsurance participation agreement (RPA) used in its EquityComp and SolutionOne programs. It lost the argument in all.

Contravenes Public Policy

In addition to not filing the Loss Rating Factor, CDI says the insurer also failed to file other "supplementary rate information" with its Loss Rating Plan. Without this supplemental rate information, it is not possible to calculate rates or premiums for an insured.

The unfiled information includes a "Medical Only Claim Development Factor," an "Indemnity Claim Development Factor," and a "Medical Only Loss Development Factor." The factors are determined by an actuarial calculation on aggregate historical data that is not publicly available, according to CDI.

Maigret says the use of this unfiled supplemental rate information and the unfiled Loss Rating Factor is not only unlawful but contravenes public policy and misapplies CIC's filed rates.

"Section 11735's policy aims include ensuring that the Commissioner has information necessary to determine that insurers charge amounts that are not discriminatory, cover their losses and expenses, and do not threaten their solvency," Maigret wrote. "By withholding supplementary rate information from its filings, Respondent prevented the Commissioner from exercising those oversight duties."

Failing to file the information also obfuscates the rates that are actually being charged and limits employers ability to obtain coverage at the best rates. "Rate disclosure confers little value if the public does not have access to the formulas and information carriers use to modify their rates," Maigret adds. "Meaningful price comparison is simply impossible without such formulas and information."

Experience Rating Violation

The decision also finds that CIC violated section 11734's Uniform Experience Rating Plan requirements by using a different experience rating period and essentially ignoring the significant change in 5 Diamond's X-Mod.

The decision notes that CIC's loss rating plan uses a five-year experience rating period that ends no more than 90 days before the policy's effective date. The state's Experience Rating Plan uses three years of experience that typically ends 21 months before the policy date.

"In addition, the Loss Rating Plan model adjusts premiums using three different methods to assess risks specific to the insured and a further method to assess risks more generally within the insured's industry," Maigret notes. "Those methods differ markedly from the ERP's single experience modification formula, which is the only experience rating formula permitted by the Insurance Code."

Additionally, Maigret rejected CIC's argument that the Commissioner had actually approved the Loss Rating Plan. "[T]he Commissioner's failure to reject a rate filing does not indicate he approved its contents," he wrote. "In any event, the Commissioner has no authority to approve a plan that violates the Insurance Code."

Finding that CIC misapplied its filed rates by using the Loss Rating Factor and the Loss Rating Plan, the department ordered the carrier to recalculate 5 Diamond's premium using CIC's filed rates for the covered classes and applying the 106 X-Mod to the base premium.

"We are of course, very pleased with the outcome, which illustrates the important function the Insurance Commissioner serves in protecting California businesses such as 5 Diamond from arbitrary and unfair premium adjustments which are incapable of rational prediction and interfere with legitimate business planning," says attorney Nicholas Andrea. "As for the recalculation of premium remedy ordered, we are not at liberty to disclose given ongoing discussions between 5 Diamond and CIC."

Copies of the decision in *5 Diamond Protection v. California Insurance Company* are available in our Resources section or by clicking here. ▲

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years ago," says California Coalition on Workers' Compensation lobbyist Jason Schmelzer. In addition to authoring and defending the latest reforms, he notes that Brown ended his two terms with a better sign/veto record on workers' comp issues than his predecessor.

Schmelzer says Gov. Gavin Newsom has assembled a "strong team" that includes one of the key negotiators of SB 863 – Angie Wei of the California Labor Federation – who is serving as chief deputy cabinet secretary for policy development. "They are people with great experience, and they're thinking really hard about what they're doing," he says of Newsom's team.

Workers' comp could also benefit from all the legislative attention that's focused on two issues: Dynamex and fixing the privacy implications from last year's passage of the California Consumer Privacy Act. Jeremy Merz, western region vice president for the American Property Casualty Insurance Association, predicts that workers' comp is unlikely to be a big issue this year as it is not seen as a problem. California is no longer the most expensive system in the nation, and the system's costs continue to improve.

One source says that Dynamex is currently consuming even more bandwidth in the Capital than SB 863 did at the same point of its evolution. The word of warning though was to watch out once this is off the Legislature's plate. The conversation then will focus on changes to the utilization review, independent medical review and medical provider network systems.

Commissioner's Views

Insurance Commissioner Ricardo Lara also noted the success of the reforms which he supported as a Senator but says there are still trouble spots. One of these is the persistently high cost for delivering workers' comp benefits in California – a point that CCWC's Schmelzer also told attendees to remain vigilant about.

"While the SB 863 reforms have proven effective, we do still have issues to resolve," says Lara. "For example, allocated loss adjustment expenses – the costs associated with defending claims, including legal fees and investigation costs – continue to be very high."

Lara also says the high rate of cumulative trauma claims in California and the persistent fraud in the system will also be targets for his department.

"There's a lot of work that we still have to do," says Lara, noting that a priority for his administration will be to double down on going after fraud. Pointing to his role in making the final allocation of anti-fraud funds to District Attorneys, Lara says he will be looking closely at caseloads and how many fraud cases are actually prosecuted when making these funding decisions. Lara says his control over these purse strings has made him very popular with the DAs.

Trouble Spots

Attendees also heard updates on the Institute's latest research projects, including new insight into who is driving the high rate of IMRs and how the industry responded to California's new workers' comp prescription drug formulary. The trends are telling.

CWCI researcher Stacy Jones reviewed IMRs to determine why a requested treatment was denied or modified by UR and says there are several common themes. Often the requests lack the clinical documentation or rationale for the requested treatment. Another common issue is the lack of diagnostic findings to support the request.

California saw a 7% increase in IMR determination letters last year as the total number of cases climbed past 185,000. Driving these numbers are a relatively small group of physicians and law firms.

CWCI's preliminary analysis indicates that just ten physicians are linked to 9% of all the IMR decisions – 16,297 overall. The concentration is down roughly 6% from the prior year, but the physicians are still evenly split between Northern and Southern California.

The concentrations are even higher though when looking at the law firms that are sending the UR denials and modifications on to IMR. The overwhelming majority of IMRs stem from litigated cases.

Here over one-third of the IMR letters are linked to 50 firms, and just ten firms are responsible for over 15% of the IMR cases – 27,547 in all. Overall, 942 different firms submitted at least five UR decisions to IMR.

Researchers note that for many of the firms at the top of the list it is nearly automatic that a UR denial or modification of a treatment request – even a modification that merely brings the request in line with the MTUS guidelines – is challenged. IMRs are performed at the employer's expense.

Formulary Results

CWCI researchers also presented new finding on the rollout last year of a new workers' comp prescription drug formulary. The formulary includes drugs that are exempt from prior review if prescribed in accordance with the MTUS and non-exempt drugs that are subject to prior review. Not every drug is listed in the formulary and drugs that do not appear on either list are also subject to prior authorization. Additionally, there are special fill and perioperative drugs that are normally non-exempt, but in the first few days of treatment or in conjunction with a surgery can be prescribed without prior authorization. These drugs are limited to a 4-day supply.

Important findings are that there was a shift in prescribing behavior with a measurable uptick in the use of exempt drugs – up 9% after the formulary – which do not generate the expense of utilization review. Use of non-exempt drugs which do go through UR process also dropped significantly – down 15 % in 2018. Both developments should have a positive impact on frictional costs in the system.

One troubling finding though was the increase in use on "non-listed drugs," which increased 38% to 16.4% of the overall prescriptions. Payments tied to these drugs increased even more up 42% and accounted for 38.9% of the overall pharmacy spend. The Institute is continuing to track the trends, and additional reports will be forthcoming. ▲

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