

## Post-Reform Outcomes:

# Permanent Disability Claims with Attorney Involvement Preliminary Analysis & Findings

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### EXECUTIVE SUMMARY

CWCI analyzed 201,081 permanent disability (PD) claims to assess statewide and regional changes in attorney involvement, initial PD benefit payment, claim closure rates and average claim payments following the implementation of SB 899 in April 2004. Compared to the pre-reform claim experience, the latest post-reform data show:

- A reduction of 6.4 percent in the attorney involvement rate for PD claims.
- Increases in the percentage of PD claims that received at least one PD payment at 12, 24 and 36 months post injury.
- A relative increase of 33 percent in the claim closure rate for attorney involvement claims at 36 months of injury.
- A 6.5 percent reduction in the average amount paid on all PD claims at 36 months post injury, and a 5.0 percent reduction in the average amount paid on attorney involvement claims. These reductions, however, may be largely due to the post-reform sample's limited exposure to recent adverse medical and indemnity development.
- Significant regional variation in attorney involvement rates, claim closure rates, and average claim payments.

### BACKGROUND

Prior to 2004, disputes in permanent disability claims focusing on the nature and extent of injury were exacerbated by the subjectivity of California's permanent disability rating schedule. SB899, the workers' compensation reform bill enacted in April 2004, implemented a new permanent disability rating schedule (PDRS) based on guidelines adopted by the American Medical Association and intended to introduce greater objectivity, uniformity and consistency into the rating system, and to relieve some of the administrative tension surrounding the settlement of disputed permanent disability claims.

SB899 also addressed issues of apportionment -- the process of determining what

portion of an employee's current work injury is legally attributable to the worker's industrial injury. Prior to SB899, the Workers' Compensation Appeals Board did not apportion permanent disability awards based on the pathology, or causation of the injury. Instead, the workers' compensation statutes focused on the disability itself, and an employer could be held liable for the full extent of a disability, even where an employee's preexisting but non-disabling condition or disease may have contributed to the injury. Senate Bill 899 modified statutory law to align occupational injury and causation, with the employer's liability limited to that "percentage of permanent disability directly caused" by the industrial injury regardless of the date of injury.

The common goal of these and the other reforms enacted between 2003 and 2004 was to reduce the subjectivity of various decisions, awards, and medical treatment. In theory, by reducing subjective results, the California workers' compensation system would have greater predictability of key system dynamics, lower costs and a reduced need for litigation and attorney representation.

Recently, the Workers' Compensation Appeals Board (WCAB), in its en banc decisions in *Almaraz/Guzman* and *Ogilvie*, determined that the separate elements of the permanent disability rating formula are rebuttable. This has given rise to concerns that the objectivity and consistency of the permanent disability rating system introduced by SB 899 will be eroded.

- In *Almaraz/Guzman*, the WCAB ruled that the AMA Guides portion of the 2005 PD Rating Schedule may be overridden by showing that the rating fails to “accurately reflect” the injured worker’s disability. The decision allows the evaluating physician to consider how the impairment affects work activity. The physician can then use other charts, tables, and chapters of the AMA Guides to rate the disability.
- In *Ogilvie*, the Board held that the diminished future earning capacity (DFEC) modifier of the PD Rating Schedule may be refuted by comparing the injured worker’s wage loss to the relevant wage data for similarly situated employees. This data is then used to devise a new modifier for the claimant’s diminished future earning capacity. The Board’s step-by-step procedure opens new avenues for circumventing the PD Rating Schedule. While the Board refers to the statutory mandate requiring that the PD rating system “promote consistency, uniformity, and objectivity,” its opinion provides a blueprint for subjective awards based on a unique, individual calculation of the employee’s wage loss.

As a result of these en banc decisions, all elements of the PD Rating Schedule appear vulnerable to rebuttal. This could, in turn, fuel additional litigation, particularly at the lower end of the PD scale, and increase efforts to raise higher PD ratings to reach life pensions and permanent total disability levels.

## STUDY GOAL

The goal of this study is to measure and compare key aspects of pre- and post-reform claims experience for permanent disability claims with attorney involvement. Specifically, the study measures changes in the overall attorney involvement rate for PD claims; the percentage of claims receiving an initial PD payment within 12, 24, and 36 months of injury; the claim closure rate at 36 months post injury; average benefit payments at 36 months post injury for all PD claims and for PD claims with attorney involvement; and regional breakdowns for attorney involvement, claim closure rates, and average amounts paid per PD claim.

## DATA

For this study, the authors compiled a special data set from CWCI’s Industry Claims Information System (ICIS V10B). The data included policy, claim and benefit detail for California injured workers with permanent disability payments within three years of injury. Two subsets of claims with permanent disability were created: those with 2001 and 2002 dates of injury to represent the pre-reform period, and those with 2004 and 2005 injury dates to represent the post-reform period. All permanent disability claims used in the study were valued at three years post injury. The final data sample included 122,828 claims from the pre-reform period and 78,253 claims from the post-reform period. Any claim with a payment transaction to an applicant attorney and/or a defense attorney was deemed an attorney involvement claim.

## Limitations of the Data

The available data used in the study had specific limitations. First, indemnity claims -- particularly PD claims -- typically take many years to resolve. The California Workers’ Compensation Insurance Rating Bureau (WCIRB) estimates that at one year post injury, less than 14 percent of the ultimate medical and indemnity benefits on an indemnity claim are paid.<sup>1</sup> At three years post injury, approximately 61 percent of indemnity benefits and 41 percent of medical benefits have been paid. The data for this study was limited to a three-year valuation point for the post-reform claim sample. In addition, the 2007–2008 adverse medical and indemnity development trends documented in a series of studies conducted by CWCI, WCIRB and other research organizations will have limited influence on the post-reform pool of claims used in this analysis. Finally,

1 Workers’ Compensation Insurance Rating Bureau January 2009 Rate Filing, A:B-17, Part A, Section B, Appendix A, Exhibit 3.

while the data and results reflect an accurate picture of the system characteristics of PD claims and its “checkbook” of payments, the results are not adjusted for pre- and post-reform differences in claim severity or ratings distribution.

## RESULTS

### Attorney Involvement Rates

Has the attorney involvement rate declined under SB899? Exhibit 1 shows the pre- and post-reform attorney involvement rates for PD claims in the California workers’ compensation system.

<b>Exhibit 1. California WC Attorney Involvement Rates -- Pre- vs. Post-Reform PD Claims</b>				
Claims w/ Attorney	# of PD Claims		% of PD Claims	
	Pre-Reform	Post-Reform	Pre-Reform	Post-Reform
No	13,756	13,253	11.2%	16.9%
Yes	109,072	65,000	88.8%	83.1%
Total	122,828	78,253	100.00%	100.00%

Exhibit 1 shows that the attorney involvement rate for California workers’ compensation PD claims dropped from 88.8 percent in the pre-reform period (accident years 2001 and 2002) to 83.1 percent in the post-reform period (accident years 2004 and 2005); a relative decline of 6.4 percent.

### Percent of Claims with Initial PD Paid at 12, 24, and 36 Months Post Injury

One of the implicit goals of the 2003-2004 California workers’ compensation reforms was to increase the efficiency of claim adjudication -- and the speed of the initial PD payment is regarded as a key measure of system efficiency. Therefore, the authors calculated the percentage of permanent disability claims with at least one PD payment at 12, 24 and 36 months post injury and compared the results for pre- and post-reform PD claims (Exhibit 2).

<b>Exhibit 2. % of PD Claims with PD Paid at 12, 24 and 36 Months All Claims and Attorney Involvement Claims, Pre- vs. Post-Reform</b>						
	All PD Claims			Attorney Involvement Claims		
	PD Paid @ 12M	PD Paid @ 24M	PD Paid @ 36M	PD Paid @ 12M	PD Paid @ 24M	PD Paid @ 36M
Pre-Reform	29.6%	64.2%	81.0%	27.8%	63.7%	81.6%
Post-Reform	32.4%	68.4%	88.1%	30.2%	68.3%	89.6%
% Change	9.5%	6.5%	8.8%	8.6%	7.2%	9.8%

For all PD claims and for those involving an attorney, the percentage of claims in which the initial PD benefit was paid within 12, 24, and 36 months of injury increased following the reforms. At 12 months post injury, the percent of all PD claims with at least one PD payment increased from 29.6 percent in the pre-reform period to 32.4 percent in the post-reform period, a relative change of 9.5 percent, while among the attorney involvement claims, the PD payment rate increased from 27.8 percent on pre-reform claims to 30.2 percent on post-reform claims; a relative change of 8.6 percent. This shows that while the proportion of permanent disability claims with attorney involvement declined in the post-reform era, the initial delivery of PD benefit payments accelerated.

### Claim Closure Rates

Another proxy for efficiency is the rate and speed of permanent disability claim resolution and claim closure. Permanent disability claims, by virtue of their complex medical treatment and disability evaluation, as well as protracted scheduling issues for final resolution, can take years to reach administrative closure. One of the legislative intentions of the reforms was to expedite claim closures for all claims. Exhibit 3 shows the percent of claims with permanent disability that were administratively closed at 12, 24 and 36 months post injury.

<b>Exhibit 3. PD Claim Closure Rate at 12, 24 and 36 Months All Claims and Attorney Involvement Claims, Pre- vs. Post-Reform</b>						
	All PD Claims			Attorney Involvement Claims		
	Closed @ 12M	Closed @ 24M	Closed @ 36M	Closed @ 12M	Closed @ 24M	Closed @ 36M
Pre-Reform	4.4%	16.9%	36.3%	2.6%	14.0%	33.6%
Post-Reform	6.5%	23.2%	46.9%	4.1%	19.8%	44.7%
Pct Change	47.7%	37.3%	29.2%	57.7%	41.4%	33.0%

For all PD claims and PD claims with attorney involvement, the claim closure rates at 12, 24 and 36 months post injury increased after the reforms. For example, at 36 months post injury, the percent of all PD claims that were closed went from 36.3 percent in the pre-reform period to 46.9 percent in the post-reform period; a relative increase of 29.2 percent. Among the attorney involvement claims the closure rate at 36 months increased from 33.6 percent on pre-reform claims to 44.7 percent on post-reform claims; a relative change of 33 percent.

## Average Payments

Exhibit 4 compares pre- and post-reform average payments for all claims and attorney involvement claims at 12, 24 and 36 months post injury.

Exhibit 4. Avg. Amounts Paid on PD Claims at 12, 24 and 36 Months All Claims and Attorney Involvement Claims, Pre- vs. Post-Reform						
Total Paid Per Claim*	All PD Claims			Attorney Involvement Claims		
	Pre-Reform	Post-Reform	% Change	Pre-Reform	Post-Reform	% Change
@ 12M	\$17,268	\$17,496	1.3%	\$17,923	\$18,163	1.3%
@ 24M	\$34,636	\$32,844	-5.2%	\$36,760	\$35,144	-4.4%
@ 36M	\$48,283	\$45,155	-6.5%	\$51,697	\$49,123	-5.0%
<b>Avg. Medical</b>						
@ 12M	\$9,392	\$8,672	-7.7%	\$9,731	\$8,982	-7.7%
@ 24M	\$16,428	\$14,833	-9.7%	\$17,359	\$15,782	-9.1%
@ 36M	\$21,440	\$20,221	-5.7%	\$22,849	\$21,881	-4.2%
<b>Avg. TD</b>						
@ 12M	\$5,877	\$6,602	12.3%	\$6,116	\$6,832	11.7%
@ 24M	\$8,894	\$10,127	13.9%	\$9,396	\$10,637	13.2%
@ 36M	\$10,567	\$11,297	6.9%	\$11,221	\$11,923	6.3%
<b>Avg. PD</b>						
@ 12M	\$938	\$1,210	29.0%	\$928	\$1,201	29.4%
@ 24M	\$4,955	\$5,016	1.2%	\$5,208	\$5,388	3.5%
@ 36M	\$9,069	\$8,891	-2.0%	\$9,662	\$9,756	1.0%

\* Includes all benefits and all claims and litigation-related expense payments.

For all permanent disability claims and for PD claims with attorney involvement, average first-year benefit payments<sup>1</sup> increased 1.3 percent between the pre- to the post-reform periods. However, at 24 months post injury, average payments per claim decreased by 5.2 percent on all claims and by 4.4 percent on claims with attorney involvement. At the 36 month valuation, average claim payments in the post-reform period were 6.5 percent lower among all claims and 5.0 percent lower among claims with attorney involvement.

Prior CWCI research documented a decline in average medical payments per claim immediately following the implementation of SB899. A similar reduction is noted in this study, which found that average medical benefit payments on all PD claims and on attorney involvement claims decreased between 4.2 and 9.7 percent from the pre- to the post-reform period at all valuation points.

Temporary disability (TD) benefits increased significantly following SB 899, due in large part to the increases in minimum and maximum TD rates, which have been indexed to the annual increases in the State Average Weekly Wage – a change mandated by earlier legislation. At 12 months post injury, the average TD payment increased 12.3 percent on all claims and 11.7 percent on claims with attorney involvement. At 24 months post injury, the average TD payment increased 13.9 percent for all claims and 13.2 percent for attorney involvement claims; and at 36 months post injury, average TD payments rose 6.9 for all claims and 6.3 percent for the attorney involvement claims. Permanent disability (PD) benefit payments were 29 percent higher for all PD claims and 29.4 percent higher for PD claims with attorney involvement at 12 months post injury; at 36 months post injury however, average PD benefit payments fell back close to pre-reform levels.

The authors recognize that these trends appear to differ from trends found in recently published studies that showed adverse medical and indemnity development beginning in 2007. It should be noted, however, that the post-reform pool for this study reflects the experience of accident year 2004 and 2005 claims, valued up to 36 months, and would not have had adequate exposure to the recent adverse trend to be significantly influenced. Therefore, follow-up studies on this post-reform sample, as well as more current PD claims, will be essential.

2 Average Total Claim Paid includes medical, temporary and permanent disability, death benefits and related claim expenses.

**Exhibit 5. Regional Variations: Attorney Involvement Rates & Claim Closure Rates at Three Years Post Injury, Pre- vs. Post-Reform**

	Attorney Involvement Rate			Claim Closure Rate at 36 Months		
	Pre-Reform	Post-Reform	% Change	Pre-Reform	Post-Reform	% Change
Los Angeles	91.8%	87.6%	-4.6%	28.1%	38.0%	35.3%
San Diego	86.5%	79.0%	-8.7%	37.8%	52.6%	39.1%
Palm Springs	91.5%	87.8%	-4.1%	38.0%	40.8%	7.3%
Riverside, San Bernardino, Imperial	90.3%	84.2%	-6.7%	30.9%	43.4%	40.5%
Orange	90.8%	85.0%	-6.4%	32.2%	43.1%	33.7%
Kern, Tulare, Inyo, Mono, Salinas	91.1%	86.1%	-5.5%	35.4%	46.2%	30.5%
San Jose	85.6%	83.3%	-2.6%	32.0%	45.4%	41.8%
San Joaquin, Stanislaus, Mariposa, Fresno	88.3%	83.1%	-6.0%	36.9%	48.8%	32.1%
Sacramento To Lake Tahoe	86.1%	78.1%	-9.3%	36.0%	53.7%	49.3%
San Francisco, Marin, Peninsula, North Bay	84.1%	79.0%	-6.1%	36.9%	47.2%	28.0%
East Bay	83.1%	75.4%	-9.3%	33.0%	44.4%	34.8%
Ventura, Santa Barbara, San Luis Obispo	90.8%	82.0%	-9.7%	42.8%	51.6%	20.5%
Northern Cos And Ca Offices In Reno, Nv	89.7%	80.4%	-10.3%	38.4%	48.3%	26.0%
San Francisco, Marin, Peninsula, North Bay	91.7%	84.8%	-7.5%	36.2%	46.6%	28.7%
Other	85.7%	75.2%	-12.3%	36.7%	48.9%	33.5%
<b>Total</b>	<b>88.8%</b>	<b>83.1%</b>	<b>-6.5%</b>	<b>33.6%</b>	<b>44.7%</b>	<b>33.1%</b>

## Regional Differences

Prior California workers' compensation research has consistently showed significant regional differences in claim outcomes in the California workers' compensation system. Exhibit 5 shows the percent of claims with attorney involvement by California region, as well as the percentage of claims closed at 36 months post injury.

The overall statewide decrease in the attorney involvement rate (Exhibit 1) was also observed in all regions of California, ranging from a 2.6 percent decrease in the San Jose region to a 10.3 percent decrease in rural Northern California counties. Likewise, the statewide increase in the claim closure rate at 36 months post injury was also evident in the regional analysis, which noted increases ranging from 7.3 percent in the Palm Springs area to 49.3 percent in the Sacramento to Lake Tahoe region.

Exhibit 6 shows that post-reform changes in the average amounts paid on PD claims with attorney involvement varied significantly by region.

Statewide, total benefit payments per PD claim at 36 months post injury decreased 5.0 percent from \$51,697 in the pre-reform period to \$49,123 in the post-reform period. Average indemnity payments on these claims, which include tem-

porary disability, permanent disability, and death benefits, decreased 10.5 percent from a pre-reform average of \$26,582 to a post-reform average of \$23,801. All California regions showed decreases in average total indemnity benefit payments, ranging from a 3.2 percent decrease for San Francisco, Marin, Peninsula, and North Bay to a 14.1 percent decrease in Orange.

Statewide average total medical payments per claim at 36 months post injury decreased 4.2 percent from \$22,849 in pre-reform years to \$21,881 in the post-reform years, but the decrease was not universal across all regions. The San Joaquin, Stanislaus, Mariposa, Fresno area showed an increase of 12.0 percent from a pre-reform average of \$18,427 to a post-reform average of \$20,645, and the Butte, Sutter, Yuba, Chico Area showed a 14.1 percent increase from \$20,073 to \$22,897. Several other regions of the state, including Ventura, Santa Barbara, San Luis Obispo, rural Northern California, and Kern, Tulare, Inyo, Mono, and Salinas also showed post-reform increases in average medical benefit payments at the 36 month benchmark.



**Exhibit 6. Regional Variations: Average Amounts Paid--PD Claims with Attorney Involvement at 36 Months, Pre- vs. Post- Reform**

	Avg. Paid per Claim @ 36M			Avg. Medical Paid @ 36M			Avg. Indemnity Paid @ 36M*		
	Pre-Reform	Post-Reform	% Change	Pre-Reform	Post-Reform	% Change	Pre-Reform	Post-Reform	% Change
Los Angeles	\$53,436	\$48,980	-8.3%	\$24,441	\$22,425	-8.2%	\$26,095	\$22,518	-13.7%
San Diego	\$53,254	\$48,714	-8.5%	\$24,819	\$22,295	-10.2%	\$26,622	\$23,324	-12.4%
Palm Springs	\$55,220	\$50,352	-8.8%	\$26,315	\$22,669	-13.9%	\$26,973	\$24,353	-9.7%
Riverside, San Bernardino, Imperial	\$54,766	\$49,358	-9.9%	\$25,011	\$21,545	-13.9%	\$27,399	\$23,950	-12.6%
Orange	\$56,267	\$50,586	-10.1%	\$26,409	\$23,293	-11.8%	\$27,231	\$23,397	-14.1%
Kern, Tulare, Inyo, Mono, Salinas	\$51,370	\$49,597	-3.5%	\$23,551	\$23,725	0.7%	\$25,824	\$22,846	-11.5%
San Jose	\$52,465	\$48,995	-6.6%	\$22,233	\$20,937	-5.8%	\$28,251	\$25,076	-11.2%
San Joaquin, Stanislaus, Mariposa, Fresno	\$44,077	\$46,085	4.6%	\$18,427	\$20,645	12.0%	\$24,078	\$22,905	-4.9%
Sacramento To Lake Tahoe	\$52,612	\$52,119	-0.9%	\$22,458	\$22,310	-0.7%	\$28,146	\$27,016	-4.0%
San Francisco, Marin, Peninsula, North Bay	\$47,746	\$47,484	-0.5%	\$19,642	\$18,996	-3.3%	\$26,204	\$25,367	-3.2%
East Bay	\$51,099	\$50,975	-0.2%	\$20,667	\$21,122	2.2%	\$28,395	\$26,632	-6.2%
Ventura, Santa Barbara, San Luis Obispo	\$52,701	\$51,081	-3.1%	\$21,734	\$22,764	4.7%	\$28,655	\$25,305	-11.7%
Northern Cos And Ca Offices In Reno, Nv	\$47,387	\$47,588	0.4%	\$20,415	\$21,381	4.7%	\$25,594	\$24,455	-4.4%
Butte, Sutter, Yuba, Chico Area	\$46,930	\$49,282	5.0%	\$20,073	\$22,897	14.1%	\$25,270	\$24,257	-4.0%
Other	\$46,788	\$46,796	0.0%	\$18,981	\$18,996	0.1%	\$24,931	\$22,374	-10.3%
<b>Total</b>	<b>\$51,697</b>	<b>\$49,123</b>	<b>-5.0%</b>	<b>\$22,849</b>	<b>\$21,881</b>	<b>-4.2%</b>	<b>\$26,582</b>	<b>\$23,801</b>	<b>-10.5%</b>

\* Includes TD, PD, death and vocational rehabilitation/SJDB payments.

## CONCLUSION

SB899 was, in part, intended to introduce greater objectivity, uniformity and consistency into the rating system and to relieve some of the administrative tension surrounding the settlement of disputed permanent disability claims. In theory, by reducing subjective results, the California workers' compensation system would have greater predictability of key system dynamics, lower costs, and a reduced need for litigation and attorney involvement.

Key findings of this analysis show that the post-reform experience of AY 2004 and 2005 claims is marked by a reduction in the proportion of permanent disability claims with attorney involvement. In addition, initial PD benefit payments increased, the initial PD payment occurred sooner, claim closure rates increased and average claim payments at three years post injury decreased. Thus the legislative intent of the 2004 reform bill seem to have been at least partially accomplished.

There are other cautions however. Recent en banc decisions in Almaraz/Guzman and Ogilvie have given rise to concerns that the objectivity and consistency of the permanent disability rating system introduced by SB 899 will be eroded. As a result, these en banc decisions could fuel litigation, particu-

larly at the lower end of the PD scale, and increase efforts to inflate high PD ratings in order to achieve life pension and permanent total disability levels.

The authors also note that the medical and indemnity reductions in this PD analysis, which contrast with other recently published CWCI studies showing adverse medical and indemnity development in late 2006 through 2008, are likely due to the fact that the post-reform sample of 2004 and 2005 claims valued at 36 months has yet to reflect the full rising trend of medical and indemnity expenses. Follow-up studies on post-reform PD claims and attorney involvement are therefore essential.

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### ABOUT CWCI

The California Workers' Compensation Institute, incorporated in 1964, is a private, non-profit organization of insurers and self-insured employers conducting and communicating research and analyses to improve the California workers' compensation system. Institute members include insurers that collectively write more than 87 percent of California workers' compensation direct written premium, as well as many of the largest public and private self-insured employers in the state.



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