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Word On The Industry

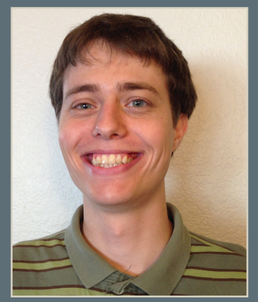
WorkCompCentral's examination of the state of the California workers' comp industry

About this Project

Three WorkCompCentral reporters devoted at least one week each to tell the story behind the story about the dysfunction of California's workers' compensation system. Greg Jones, Sherri Okamoto, and Ben Miller interviewed dozens of highly placed sources, studied voluminous documents and researched two decades of legislative actions and judicial decisions to bring readers this report about the state of the system.
Their stories follow below:

Greg Jones is a native of Green Bay, Wisc. He graduated from the University of Wisconsin with a bachelor's of arts degree in political science in 2002. Jones worked for the Roswell (N.M.) Daily Record as a general assignment reporter from 2002 to 2003 and as a reporter for the Eastern Arizona Courier from 2003 to 2005. He was managing editor of Casino Connection and associate editor of Global Gaming Business in Las Vegas, Nevada, from 2005 to 2009. He joined the WorkCompCentral staff as a reporter in 2010 and was promoted to Western Bureau Chief in 2011. Jones resides in Sacramento.

Sherri Okamoto graduated from Occidental College in Los Angeles with departmental honors for English and comparative literature. She went on to Loyola Law School in Los Angeles, obtaining her juris doctorate in 2006. Okamoto worked for the Daily Journal and Metropolitan News-Enterprise before joining the WorkCompCentral staff as legal reporter in January 2012. She is a resident of Ventura, Calif.



Ben Miller, a native of Reno, Nevada, graduated from the University of Reno's Reynolds School of Journalism in 2013 after working for four years on the student newspaper, including one year as editor-in-chief. He covered City Hall in Santa Maria, California for the Santa Maria Times after college and joined the WorkCompCentral staff in June 2014 as a reporter focusing on medicine and business. Miller is a resident of Sacramento.

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Lawyers, Doctors and Long Recoveries Drive Calif. Costs to No. 1 in Nation

By Greg Jones
Western Bureau Chief

Workers' compensation coverage is expensive in California. Everybody knows that. But dig a little deeper and you might wonder why. The Golden State, after all, doesn't offer the nation's most generous disability benefits and the industrial mix is not more hazardous than other states.

Yet policies in California rank as the priciest in the nation, according to the Oregon Department of Consumer and Business Services latest premium ranking comparison, released in October. The state's written premium grew from $8.8 billion in 2009 to $14.8 billion in 2013. The averaged charged rate increased from $2.10 per $100 of payroll in 2009 to $2.97 for the first three months of 2014.

Something, in other words, is making carriers charge more. So what is it?

To find out, we delved into a series of analyst's reports, analyzed scores of numbers and spoke with experts from across the country. What we found is that no single factor fully explains California's high costs. But, in combination, they illustrate why employers bemoan the system in California.

Lawyers, Lawyers Everywhere

A 2012 Workers' Compensation Research institute study found that nearly 30% of injured workers in California hired an attorney. Only two states, Tennessee and Maryland, had a higher rate of employees retaining counsel.

Alex Swedlow, president of the California Workers' Compensation Institute, said litigation in indemnity claims is the most significant factor in explaining the state's relatively high average claim cost.

"California, compared to other states, has high rates, severity and frequency," he said. "It is driven in large part because of the relatively high level of litigation and attorney involvement."

CWCI reported in February that permanent disability claims filed between 2005 and 2010 were more than twice as expensive when lawyers were involved. Average cash and medical payments for permanent disability claims increased to $61,092 with an attorney involved, compared to $24,874 without a lawyer.

Meanwhile, a greater percentage of injured California workers are hiring attorneys.

A 2003 report by CWCI covering claims filed between 1993 and 2000 found attorneys were involved in 76.2% of all permanent disability and 29.9% of all indemnity cases. The 2014 report found attorneys were involved in 80.4% of PD cases and 38.3% of indemnity claims.

But that doesn't explain why California workers turn to lawyers. Is it simply that Californians are more litigious? That's certainly a common argument. Americans for Tax Reform called California the worst "judicial hellhole" in the country. However, the claim that California is drowning in a sea of lawsuits doesn't seem to withstand scrutiny.

Take, for example, tort claims. It's true that a lot are filed in California. Only New York and New Jersey produce more tort claims per year according to data from the Court Statistics project. But, account for population and California on a per capita basis drops to the middle of the pack for the 38 states included in the Court Statistics Project data.

California, compared to other states, has high rates, severity and frequency," he said. "It is driven in large part because of the relatively high level of litigation and attorney involvement."

In fact, if one accepts tort claims per capita as a proxy for measuring overall litigiousness of a state, then the Court Statistics Project figures would indicate that New Jersey, Delaware, Connecticut, New York, Missouri, Nevada, Rhode Island, Florida, New Mexico, Ohio, Michigan, Alabama, Maryland, Indiana, Tennessee, Arkansas and Arizona are all more litigious than California.

Swedlow said the most likely reason there's so much litigation in California is because there are so many attorneys. California has more attorneys than any other state except New York, according to the American Bar Association. The number of attorneys in a given area is strongly correlated with higher claim costs, as well as higher severity, Swedlow said.

There are, of course, other factors that can drive an injured worker to hire an attorney. WCRI in 2012 found workers are more likely to hire an attorney when they fear they may be fired for filing a claim or when they think a supervisor does not believe their injuries are legitimate. Other factors include worker perception that the claim has been denied, either as a result of receiving a formal denial or delays in receiving benefit payments, according to WCRI.

In other words, workers hire attorneys when confronted with uncertainty. And there's a lot of uncertainty in California's workers' comp system.

Different Laws for Different States

John F. Burton, professor emeritus in both the School of Management and Labor Relations at Rutgers University and the School of Industrial and Labor Relations at Cornell University, said he thinks that the workers' compensation laws in California leave more room for discretion than the laws of other states.

"There is more room for disagreement and more room for a good lawyer to make a difference in the outcome of a case," he said.

Burton also said that states such as Florida and Texas have caps on attorney fees that make it difficult for workers to find attorneys willing to take their case.

Claimants' attorneys in Florida are limited by statute to 20% of the first $5,000 in benefits secured for the client, 15% of the next $5,000 and 10% of any amount in excess of $10,000. In Texas, attorney fees are capped at 25% of the injured workers' recovery, and attorneys can't bill more than $150 an hour under a cap that was instituted in 1991.

In California, a workers' compensation judge must consider the responsibility assumed by an attorney, care exercised in representing a claim, time involved and results obtained when awarding fees. Attorneys are typically awarded 12% to 15% of the benefits awarded to an injured worker, although this can increase to as much as 30% in complicated cases that also involve additional fees for improper delays in paying benefits.

"I think in certain states, Florida and Texas as the primary examples, the law is written in such a way that it's very difficult to get attorneys to represent (injured workers)," Burton said. "Fee schedules are cut back and it's not as lucrative to represent workers in Florida or Texas, whereas in California, my sense is that hasn't happened."

Medical Costs and Disability

Robert Hartwig, president of the Insurance information Institute, said any effort to explain why California is an expensive state can't overlook the state's higher average medical costs.

There is more room for disagreement and more room for a good lawyer to make a difference in the outcome of a case...

Average medical costs account for nearly two-thirds of benefit payments – and average costs per indemnity claim rose in California an estimated 68% from 2009 to 2013. In California, the average medical cost per indemnity claim is $46,054 – 70% higher than the national median of $26,372. Only Alabama and Delaware having higher medical costs.

At the same time, injured workers are more likely to receive permanent disability benefits in California than in all but six National Council on Compensation Insurance states. Almost half of indemnity claims in California result in the payment of permanent disability benefits, compared to a median of 34% among NCCI states. Only South Carolina, Montana, Illinois, New York, Oklahoma and Kansas have a higher percentage of indemnity claims with permanent disability benefits.

Combined, the higher average medical costs and the higher frequency of permanent disability claims, has a substantial impact, Hartwig said.

"If we step back a minute, controlling health care costs, no matter how they're administered, be it workers' compensation or general health, is a challenge that vexes just about every insurer," he said. "It's a problem for the economy as a whole."

Also, it's not unusual for health care to be more expensive in a large state with large metropolitan areas, he said. Auto insurance carriers face similar problems with higher medical costs in densely populated states.

"We could easily be having the same conversation about New York or Florida or Texas or Illinois," he said.

CWCI's Swedlow, on the other hand, expressed concern about the struggle to contain medical inflation in California, which he said he sees as a problem of over-utilization. Provider reimbursement under the Official Medical Fee Schedule is about 120% of Medicare, and it's lower than many other states, yet California is among the top states in terms of severity, he said.

"What our research has consistently shown is litigation is a prime driver of our costs, it is not necessarily a fee schedule problem that drives medical and with extended medical care, you have delayed return to work," he said.

Swedlow also lamented a 28% increase in spending on prescription drugs from 2012 to 2013. Spending on pharmaceuticals is the fastest growing component of medical costs in the state's comp system, he said.

Burton, the professor in New Jersey, said the fact that costs and benefit payments in California are higher than in other states is not necessarily indicative of trouble in the Golden State. Rather, he said, a number of states are slashing benefits in something of a "race to the bottom."

NCCI reported a 24% decrease in indemnity benefits in Oklahoma effective Feb. 1, and a 16.6% reduction in benefits took effect in Tennessee July 1.

In Florida, the entire system is in jeopardy with Miami-Dade Circuit Judge Jorge Cueto ruling in August that the Legislature has "decimated" benefits over the past 20 years to the point that the Workers' Compensation Act is "no longer an adequate exclusive replacement remedy in place of common-law tort." The case is currently before the state's 3rd District Court of Appeal.

With states cutting benefits in a "runaway fashion," California might not want to compare itself to what's happening elsewhere, Burton said.

"I think right now we're in a free fall in a lot of states," he said. "Therefore, I think California needs to be put into that perspective. Here's a state where costs relative to other states are becoming higher. Part of that is a problem on the medical side. But part of it is the target keeps moving because so many starts are seriously reducing the level of protection they're providing."

California has consistently ranked near the top among the 50 states in workers' compensation premium costs, rising to the No. 1 position again in the latest biennial study by the Oregon Department of Consumer and Business Services, released in October.

Judges have their own Take on Lawmakers' Reforms

By Sherri Okamoto

WorkCompCentral Legal Reporter

The cycle of reform has become a tired refrain in the California workers' compensation system. The Legislature passes a bill to reduce costs. The courts make rulings that reduce the anticipated savings. The process repeats, again and again and again.

California has been through this dance at least five times over the course of the last 25 years, most recently in 2012. In each instance, lawmakers promised that the reforms would reduce frictional costs and improve the overall functioning of the work comp system. But in all of the previous cases, court rulings have unraveled much the cost savings – and they could be threatening to do so again.

How did reform become such a broken record? Our story begins in the early 1990s, when the number of stress claims exploded.

The Claims Mill Era

Back then, the workers' comp system was far different than it is today. "A new client would came in and you'd send him to a doctor, and that was all there was to be done," recalls Alan Gurvey, an applicants' attorney with Rowen, Gurvey & Win. He said it was so easy to represent workers that many lawyers with general practices would "dabble" in workers' compensation – something that rarely happens anymore.

Our story begins in the early 1990's, when the number of stress claims exploded.

But, Gurvey concedes, it also was an environment in which fraud flourished.

So-called "claims mills" were prevalent in Southern California – these were businesses that solicited disgruntled workers to file stress claims and amassed large profits by providing treatment and medical-legal evaluations to these workers, at the expense of their employers.

At the time, claimants needed to prove only that 10% of the cause of the psychiatric injury was related to employment, and this low threshold of proof made it easy for the mills to churn out claims.

In 1981, 1,844 stress claims were filed in California, according to the Department of Industrial Relations' Division of Labor Statistics and Research. By 1990, that number had increased ten-fold, to 10,444. The following year, 15,688 stress claims were filed.

Meanwhile, the cost of the comp system was ballooning, from $4 billion in 1981 to over $10 billion in 1991. But little was being done about the obvious problems in the system. Workers' compensation fraud was hardly recognized, much less prosecuted, by law enforcement, before 1991.

Then Gov. Pete Wilson signed into law Senate Bill 1218, establishing a specific felony for workers' compensation fraud, and providing a dedicated source of funding for fraud investigation and prosecution. That same year, he also signed Assembly Bill 971, which barred workers from bringing work-related stress injury claims if they had been on the job for less than six months.

Costs Drop...Temporarily

With those bills, the governor had addressed two of the biggest issues driving workers' comp costs. But yet, insurance premiums continued to rise. Ironically, California employers were paying some of the highest rates among the states for coverage, while the indemnity payments paid by the carriers to their employees were among the lowest in the nation.

California Lawmakers responded with a slew of legislation in 1993, and AB 110 was the flagship measure. AB 110 established the Employer Bill of Rights, increased temporary and permanent disability benefits, and extended injury-prevention efforts. The bill also provided the opinion of a worker's primary treating physician with a presumption of correctness in legal proceedings regarding permanent disability.

According to the Department of Industrial Relations, the combined effect of the 1993 legislative reforms would reduce workers' compensation expenditures by about $1.5 billion annually.

And at first, the number and cost of workers' compensation claims dropped significantly. Preliminary data released by the department indicated the number of indemnity claims per $1 million of payroll declined by more than 31% between 1991 and 1994. The average cost of indemnity claim also dropped from a high of $13,285 in 1991 to $12,261 in 1994 – a reduction of nearly 8%.

But the savings didn't last long. In 1996, the en banc Workers' Compensation Appeals Board took on the task of interpreting the 1993 reforms, and the treating doctor presumption, in Minniear v. Mt. San Antonio Community College District. In Minnear, the appeals board decided that the presumption of correctness applied to a worker's primary treating physician against all other opinions when the issue was medical treatment.

Applicants' attorney Julius Young of Boxer Gerson says he remembers the Minnear decision as being "a big deal." Since the primary treating doctor's opinion was presumably right on everything, Young said, that made "controlling medical care a very appealing strategy," as whoever had control over the selection of the PTP would have a "big advantage."

...the combined effect of the 1993 legislative reforms would reduce expenditures by about $1.5 billion annually

One Step Forward, Two Steps Back

After the Minniear decision came out, the average cost of medical treatment on workers' compensation claims began to increase at rates exceeding 15% annually. The average estimated medical cost per indemnity claim soared from $12,292 in 1996 to $42,320 in 2003, according to the Commission on Health and Safety and Workers' Compensation.

This increase in costs spurred the Legislature to take action again, and, by a stroke of Gov. Gray Davis' pen, AB 749 passed into law in 2002.

The commission predicted that AB 749's repeal of the treating doctor presumption would provide "a quick reduction in expected medical costs for a substantial savings of $370-$820 million." However, this was offset by significant increases in the benefits payable for temporary total and permanent disabilities that were scheduled to take effect over the next four years. The Workers' Compensation Insurance Rating Bureau estimated that the increased benefits provided by AB 749 would increase total annual benefit costs by 17.8%, or $3.2 billion, by 2006.

Arnold's Law

Gov. Gray Davis signed two workers' comp reform bills (AB 227 and SB 228) just before he was ousted by voters in a recall election and replaced by Gov. Arnold Schwarzenegger. Schwarzenegger had made reform of the state's workers' comp system a top priority during his campaign, and under his watch SB 899 also became law.

The Workers' Compensation Insurance Rating Bureau predicted that AB 227 and 228 would yield savings of $3.5 to $4.2 billion through its revisions to the medical fee schedule and utilization-review process, as well as the elimination of vocational rehabilitation. The measures also capped a worker's ability to receive chiropractic care and physical therapy at 24 visits per industrial injury.

Later, SB 899 ushered in more drastic changes to the comp system, placing restrictions on a worker's ability to select a treating doctor and/or medical expert, and on the doctor's ability to determine the level of a worker's disability. The reform also limited temporary disability benefits to 104 weeks and changed the way permanent disability could be apportioned between industrial and non-industrial causes.

The bureau estimated that these changes would cut costs by $3.3 billion by limiting the things that the parties could fight over, but SB 899 wound up spawning even more litigation.

Much of the initial fighting centered on SB 899's attempt to promote consistent permanent disability ratings by having doctors evaluate an injured worker using the American Medical Association Guides to the Evaluation of Permanent Impairment. Under the system created by SB 899, the impairment rating assigned by the Guides would then be modified in accordance with a permanent disability rating schedule developed by the Department of Industrial Relations, which accounted for the worker's diminished future earning capacity, occupation and age.

Ironically, California employers were paying some of the highest rates among the states for coverage, while the indemnity payments paid by the carriers to their employees were among the lowest in the nation.

Defense attorney Gerald Lenahan of Lenahan Lee Slater & Pearse says he thought the motivation for this procedure was to generate ratings that were "consistent, uniform and objective. This was a welcome idea for members of the defense bar, since ratings tended to be very inconsistent depending on the doctor.

According to a Division of Workers' Compensation report on SB 899, the problem had been that two workers with the same type of injury could receive entirely different permanent disability ratings because there was so much subjectivity in the way impairment was evaluated, and in the way it was converted into a disability award.

But applicant attorneys chafed at such restrictions, arguing that a narrow focus on objective medical conditions and empirical wage loss data didn't always result in a disability rating that accurately reflected the limitations their clients actually had.

The en banc WCAB then ruled in the consolidated cases of Almaraz v. SCIF and Guzman v. Milpitas Unified School District that a rating under the AMA Guides could be rebutted by a showing that it would produce an "inequitable" or "disproportionate" impairment determination. If the application of the Guides didn't produce an accurate rating, the board said a doctor could use any chapter, table or method in the AMA Guides to reach a rating that "most accurately reflects the injured employee's impairment."

While the appeals board was dealing with Almaraz-Guzman, it also was wrestling with whether Permanent Disability Rating Schedule should be rebuttable as well. The en banc board decided in Ogilvie v. City and County of San Francisco that the schedule was also rebuttable if its modifiers wouldn't fully account for a worker's future lost wages from an injury.

Reforming Arnold's Reforms

...SB 863 changed enough of the system that the Workers' Compensation Insurance Rating Bureau predicted that it would produce an overall cost savings of $1.1 billion.

Gov. Jerry Brown in 2012 signed SB 863, which tinkered with the medical provider networks established under Schwarzenegger's legislation. Arnold's bill allowed employers and carriers to set up networks of care providers that workers would be required to use. But it also put in place a multi-level process for an injured worker to change physicians within an employer's network and obtain an independent medical review to dispute a treatment of diagnosis.

Workers almost immediately began looking for ways to stay out of an employer's medical provider network. The WCAB in 2006 published an en banc decision in Knight v. United Parcel Service telling employers they're on the hook for medical treatment obtained by workers who are not properly notified about the employer's medical provider network.

The board then followed that decision up with two en banc decisions in Valdez v. Warehouse Demo Services, saying that reports obtained from a doctor outside of the employer's MPN could not be used as evidence to support her claim for benefits.

However, the 2nd District Court of Appeal annulled the board's decisions in 2012. While the case was up on review to the California Supreme Court, Brown signed SB 863 into law.

The latest reform amended the Labor Code to state that any report prepared by an out-of-network doctor whom a worker has elected to see cannot be used as the sole basis of an award for compensation. The Supreme Court acknowledged that the law had changed while the case was pending, but it said neither the amended version of the Labor Code post-SB 863 nor the prior version of it completely barred the admissibility of out-of-network reports.

Latest Reform Attempt

That said, SB 863 changed enough of the system that the Workers' Compensation Insurance Rating Bureau predicted that it would produce an overall cost savings of $1.1 billion.

The bureau anticipated that the addition of a lien filing fee for new claims, and an activation fee for existing claims, would save $480 million by cutting down on the number of claims being pursued. Meanwhile the elimination of the Oglvie litigation and challenges to the ratings schedule was expected to save $210 million, and $390 million was supposed to come from the reduction disputes over medical treatment due to independent medical review.

In the first two years since SB 863 took effect, it seems to have had the desired result of reducing the number of lien filings. Last October, the bureau reported that the number of lien filings was down 60%.

Based on this dramatic fall, the bureau's chief actuary and chief operating officer, Dave Bellusci, testified at a Department of Insurance hearing in October on the 2015 advisory pure premium rate that the savings from the lien provisions in SB 863 could be as much as $680 million.

But there is still an open question as to whether the lien fees will remain a part of the comp system.

A group of service providers in July 2013 filed a complaint in federal trial court asserting that the $100 activation fee for liens that pre-date SB 863 is unconstitutional.

U.S. District Court Judge George H. Wu tentatively agreed, and he issued a preliminary injunction last November prohibiting the Division of Workers' Compensation from enforcing the activation fee provisions from SB 863.

The administration is contesting Wu's order, and the dispute in Angelotti Chiropractic v. Baker is pending before the U.S. 9th Circuit Court of Appeals.

While employers may not have gotten everything that they wanted through the various legislative reforms, applicants' attorney Bernardo de la Torre in Whittier said that is not the judicial branch's role.

"It is not the courts' job to save money for employers and insurers. It is their job to examine the legislation against the voter-passed constitutional mandate to provide medical care and disability compensation," he said.

"If legislation helps insurers avoid the reasonable costs of the results of work injuries, that cost doesn't magically disappear, but is simply shifted to employees, their families, group health plans and the taxpayers through other programs to address medical care and disability support."

SB 899

Before passage of SB 899 in 2004, workers with the same type of injury could receive entirely different permanent disability ratings because there was so much subjectivity in the way impairment was evaluated, and in the way it was converted into a disability award.

Legislative Reforms and Judicial Reactions

1991
Gov. Pete Wilson signs AB 971 and SB 1218 into law. The Assembly bill limits stress claims and the Senate measure makes filing fraudulent claims a felony.

1993
Wilson signs into law a package of bills that abolish the minimum rate law for insurance premiums, increase temporary and permanent disability benefits, institute medical cost containment, cap vocational rehabilitation benefits at $16,000 and creates the Commission on Health and Safety and Workers' Compensation.

1996
The Workers' Compensation Appeals Board rules in Minnear v. San Antonio that a presumption of correctness applies to a primary treating physician against all other opinions on treatment issues. The Court of Appeals declines to review the decision.

2002
Gov. Gray Davis signs into law AB 749, which restores a minimum temporary total disability benefit and increases awards for permanent disability. The bill also eliminates the treating physician presumption of correctness, except for injuries that pre-date the bill and for applicants who have pre-designated physicians. The bill also mandates adoption of a pharmaceutical fee schedule.

2003
Davis signs into law AB 227 and SB 228, which make numerous revisions to the Workers' Compensation Act, including an across-the-board 5% reduction in the medical fee schedule, mandatory utilization review process, elimination of vocational rehabilitation and capping chiropractic and physical therapy treatments to 24 visits.

2004
Gov. Arnold Schwarzenegger signs into law SB 899. The sweeping reform measure mandates evidence-based treatment guidelines, allows employers to direct care to medical provider networks, limits TD benefits to 104 weeks, allows apportionment of awards based on causation of the injury and makes numerous other changes. The bill also requires disabilities to be rated according to American Medical Association guidelines and mandates adoption of a new Permanent Disability Rating Schedule to translate the AMA guides ratings into PD awards. The DWC responded by adopting a PDRS that had the effect of reducing average awards by more than 50%.

2009
The WCAB rules in a pair of decisions known as Almaraz and Guzman that ratings determined using the AMA Guides can be rebutted by a showing that the result is an "inequitable" or "disproportionate" impairment determination. Another WCAB decision in Ogilvie holds that the rating schedule is rebuttable if its modifiers do not fully account for an applicant's future lost wages.

2012
Gov. Jerry Brown signs into law SB 863, which increases permanent disability benefits, mandates a lien filing fee for new liens and an activation fee to pursue pre-existing liens, establishes independent medical review and bill review and allows employers to direct care through contracts with health care networks, among other changes.

2013
A federal judge enjoins the state from collecting activation fees for liens that were filed before passage of SB 863 as medical providers pursue a lawsuit alleging that the retroactive fees are unconstitutional.

Angela Wei / Labor's Comp Expert Stepped on Toes to Make Reform Deal

Senate Bill 863 was the product of years of work by Angie Wei.

The legislative director of the California Labor Federation, the fiery Wei had an eye towards reform since the 2004 passage of Senate Bill 899, which decreased permanent disability benefits by about 60%, according to the Workers' Compensation Insurance Rating Bureau.

"There was a shared analysis between employers and workers that injured workers were pretty screwed under the permanent disability schedule," she said.

In 2005, Wei was appointed to serve on the Commission on Health and Safety and Workers' Compensation. With Wei on board and growing discontent from various stakeholders, the commission became the launching pad for SB 863.

Wei, along with the other members of the commission, heard reports year after year about the state of workers' compensation — workers struggling to get medical care amid multi-year delays, costs increasing for employers and unpredictable court decisions making the system volatile. Wei traded off chairing the commission with Sean McNally, then a representative of the self-insured Grimmway Farms, and formed a working relationship with him.

Labor representatives and employers were both eager to tackle the issues coming before the commission, she said, and the opportunity to address them all at once in the form of a reform bill allowed the sides to leverage an increase in permanent disability benefits with cost decreases in other areas.

"The only way to achieve a significant benefit increase was to tackle a number of significant issues and not do all the one-offs," she said.

In 2009, they decided it was time to pursue reform. One of labor's major interests was restoring permanent disability benefits, while employers were interested in gaining more control over medical care and driving down costs. But the initial efforts got leaked, to WorkCompCentral and after legislators and other critics got a hold of the plans, they fell apart.

In 2011, Wei and McNally tried again. They agreed that the two original stakeholders in workers' compensation — the employers and the employees — should be the only two voices at the table before the bill went public. Representatives of the attorneys, medical professionals, copy services, managed care organizations and other groups were not invited.

"Angie and Sean were the two quarterbacks for both sides and I think they really were the leaders for both parties in terms of focusing our attention and bringing us together," said Martin Brady, executive director of the Schools Insurance Authority and one of the employer representatives in the negotiations.

The negotiations took about a year, with the various representatives meeting in Sacramento to weigh their options. According to Baker, the negotiations fell apart and came back together several times.

"(Wei and McNally) were sitting at opposite sides of the table but they were able to come back, even if they disagreed. They were able to come back and work things out," Baker said. "It takes strength to do that."

When the bill finally hit the legislature in August, it was a surprise.

"I don't think that anybody thought we would get to a deal and that the deal would be adopted by the legislature," Wei said.

The employer-employee approach to the negotiations proved to be controversial. Dan Mora, president of the applicant copy shop Gemini Duplication, has been a vocal critic of the copy service fee schedule mandated under the bill. The fee schedule calls for a flat fee paid to non-contracted copy shops instead of letting them bill for the procurement and preparation of documents used as evidence in workers' compensation hearings.

He said he didn't respect the approach Wei, McNally and the others involved in the negotiations took in crafting such a large reform bill and called Wei a "bully" for her part in leading the efforts.

"That's how I would characterize her, as a bully. She's profane, she's unprofessional. In meetings, she would drop f-bombs," Mora said.

Baker said Wei's approach to the process was driven by her desire to help workers.

"(She is) caring for her constituency and her workers," Baker said. "(She is) analytical, strong, with a strong conviction to protect workers."

Though the state is still moving through the process of implementing SB 863 in its entirety, Wei said she sees several victories.

"Putting schedules on (medical fees), giving some more predictability on things is an upside. I think the permanent disability ratings are going up, putting more money in the workers' pockets is an upside," she said.

However, Wei still sees work to be done.

"I think that utilization review still needs a big look," she said. "Somethings not working; injured workers aren't getting the treatment they deserve."

Sean McNally / Employer Wish List Led to Grand Bargain with Labor

When Sean McNally was managing the workers' compensation program for the self-insured Grimmway Farms in the early 2000s, the owner of the company approaching him with frustrations about the state's workers' compensation system.

"He said, 'We have fewer injuries than we've ever had and we're paying more than we ever have,'" McNally recalled.

The boss asked McNally to come up with a "Christmas list" of things he would change if he were the king of California workers' compensation for a day. That list would spark a chain of events that led to Senate Bill 863 — the largest-ever reform measure in California workers' compensation.

McNally and Grimmway Farms took the list to other growers all across the state and raised about $6.5 million to lower workers' compensation costs. They filed a ballot initiative with the state's attorney general, and that caught the attention of the governor.

"We filed with the attorney general and like the next day (Arnold) Schwarzenegger called and said, 'Who are you guys, and we need to meet because I ran on work comp reform and you guys are ... hijacking it,'" McNally said.

The group met with the former governor and got him on board with the effort. Together, they leveraged the pressure from the ballot measure to get the state legislature to pass Senate Bill 899, a 2004 law that reduced permanent disability benefits for injured workers amid other changes. The governor appointed McNally to leadership roles with the State Compensation Insurance Fund and the Commission on Health and Safety and Workers' Compensation.

Both the bill and McNally's place on CHSWC would prove instrumental to aligning the components that would lead to SB 863. CHSWC is where McNally formed a relationship with California Labor Federation Legislative Director Angie Wei, also a commissioner on the board, as well as CHSWC's former director Christine Baker. McNally and Wei got to know each other, and Baker helped them see eye to eye, McNally said.

Meanwhile, discontentment about the cuts to benefits grew among those representing injured workers and the costs of workers' compensation began to rise for employers despite SB 899.

McNally and other employers wanted to take the power to rule on medical decisions away from judges because it led to unpredictability, causing insurers to need to reserve more money and thus raise insurance rates for businesses. Wei and other labor groups wanted to gain back the permanent disability benefits they'd lost. Baker became director of the Department of Industrial Relations, and Jerry Brown was elected to the governorship.

All the pieces for reform were in place.

"We've got a sympathetic governor, we've got a sympathetic labor secretary, we've got Christine in a better place now," McNally recounted.

In the second half of 2011, McNally and Wei decided to pull together a group of negotiators representing labor and employment to start meeting in Sacramento to achieve the aims of both sides.

Joel Sherman, the director of safety, workers' compensation and regulatory compliance for Grimmway Farms, said that drawing the right people together for such a project is a particular talent of McNally's.

"(During negotiations for SB 899 and SB 863), some issue would come up and he would put his mind to it and he would come up with the name of an individual who understood that aspect well enough to come up with language that would survive, in some cases, supreme court scrutiny," Sherman said.

McNally picked William Zachry with Safeway, Tim East with Disney, Martin Brady with the Schools Insurance Authority, Dan Bagan from the United Parcel Service and Theresa Muir with Southern California Edison.

McNally said that only labor and management were invited to the negotiating table because those are the two original stakeholders in workers' compensation.

As such, those involved in the negotiations were sworn to secrecy. While myriad other groups — doctors, lawyers, copy shops and more — were aware that reform efforts were underway, details didn't become public until a draft version of the bill was released in August 2012, about a month before the governor would sign it into law.

Alan Gurvey, a member of the California Applicants' Attorneys Association, said he believes that those involved with the negotiations approached the reform efforts with only cost reduction in mind and that the permanent disability increases didn't justify the other changes the bill included — things like eliminating the compensability of sexual dysfunction and adding the independent medical review process.

"(IMR) had nothing to do with getting the injured worker medical treatment," Gurvey said. "It had everything to do with cost containment for our clients."

McNally said that applicants' attorneys didn't want the IMR process to bypass the AME/QME process because it gives them less control over medical decisions.

"They hate that jurisdiction was taken away from the judges because they can't manipulate the outcome," he said.

McNally said the creation of IMR for workers' compensation and the elimination of sexual dysfunction and other "abused" injuries from compensability both reflect victories he was hoping to achieve coming into the reform negotiations.

But as the workers' compensation system moves through the process of implementation and learning to work with the climate SB 863 created, he said he is unsure whether the bill has achieved the results he and others wanted.

"We probably won't know for another six months or a year how much the perm disability increased, if at all, and how much in savings we're getting out of IMR," he said.

William Zachry / Jobsite Knife Injury Foreshadows a Career in Comp

One day in 1976, a playground director for Daly City named William Zachry spotted a fight breaking out between two high school-aged girls as a crowd looked on. Zachry, who was working the job to put himself through college, rushed to the scene to break it up. One woman was on top of the other, hitting and hitting, and as the city employee tried to pull them apart, he felt a knife enter his back several times at the direction of some unknown person.

"The knife went through my lung, through my (diaphragm), through my spleen," Zachry recalled. "I ended up in the hospital and ... they took out my spleen."

Zachry had officially become an injured worker in the state of California. And although he would become acquainted with the state's workers' compensation system, he had no intention of becoming further involved in it.

Almost 40 years later, Zachry directs the workers' compensation plans of one of the largest private self-insured companies in California. He also has mementos of three major legislative efforts he helped push through in an attempt to fix myriad problems with the state system that constitutes the nation's largest workers' compensation market — a photograph of himself standing with former Gov. Gray Davis after the signing of Assembly Bill 227 and Senate Bill 228, a copy of Senate Bill 899 signed by former Gov. Arnold Schwarzenegger and a copy of Senate Bill 863 signed by Gov. Jerry Brown.

In 2011 and 2012, Zachry participated in the negotiation of SB 863, the largest and most recent of those reform bills, representing the self-insured grocery store chain Safeway. Sean McNally, the leader of the employer representatives who negotiated the bill, hand-picked him and four others to meet with a group representing labor.

The meetings began "quietly" in the latter half of 2011 to discuss which problems the negotiators wanted to tackle, and dragged on through almost the end of the legislative session in 2012.

"I probably spent two days a week for a year up in the capitol working on that," Zachry said.

Zachry brought several things to the table — he represented self-insured employers, which became a major aspect of the final bill, he had first-hand experience as an injured worker and he had prior experience working on workers' compensation legislation.

"Bill just has a very unique skill set," said Martin Brady, executive director of the Schools Insurance Authority and one of the employer-side negotiators for SB 863. "He's got a lot of experience and I think he's very pragmatic in terms of how he approached the negotiations."

Brady said Zachry brought a certain amount of authority into the negotiations as a person the stakeholders could listen to about how the system works for applicants.

"It's one thing to talk about theory but it's another to work with somebody like Bill who have actually had the experience," he said.

Another perspective Zachry brought with him to the negotiations was that of "saying yes" to injured workers. After working as a claims adjuster for various insurance companies in California, including Zenith Insurance Co. and then taking on leadership of Safeway's workers' compensation plan in 2001, he's encountered many adjusters who believe their job is to tell injured workers "no."

He tells them that their job is to say "yes," to get the worker what they need as quickly as possible. After all, delayed care means delayed recovery, worse outcomes and more money paid out.

That's why one of Zachry's major goals going into the negotiations was to stop judges from ruling on medical decisions. He was one of the people pushing for the creation of independent medical review in the system.

"The thought was if you can do IMR it will be a lot faster than doing two (qualified medical evaluations) on every case and taking six months to a year," he said.

Zachry said the intent of the system — to have medically-educated people making decisions about medical care — has been achieved.

"What you need is a medical dispute process that will say, 'OK, here's a medical professional making this decision, not a non-medical professional, which is usually the judge,'" Zachry said.

He said another major victory of SB 863 was that it made it much easier for companies and other entities to become self-insured. The bill strengthened annual reporting requirements for public self-insured entities, gave the Office of Self-Insurance Plans more oversight of employers and changed the method used to calculate how much an employer must set aside to cover their workers' compensation liabilities. According to a July report from the Division of Workers' Compensation, no self-insured entity has defaulted since the changes went into effect, which reduces the costs others must pay to cover losses.

However, he said the main benefit of the bill to employers — to reduce the costs of workers' compensation — has yet to be fully measured.

"(SB) 863 will take another three, four or five years to really figure out what's working, what's not working and what needs to be fixed," he said.

David Lanier / Brown's Point Man Brought Skeptics on Board for Reform

When an agreement was finally reached on workers compensation reform in 2012, it came towards the end of the legislative session. That gave David Lanier – then the chief deputy of legislative affairs for Gov. Jerry Brown's office – roughly a month to push Senate Bill 863 through the legislature before the end of session.

"The reason for the short timeline was really just a reflection of the complexity and the length of the negotiations," said Lanier, now the secretary of the Labor and Workforce Development Agency. "It was unclear for most of the spring and into the summer whether the parties could reach a compromise. The governor's interests were certainly in a bill that reflected support from both employers and from workers, from labor."

Lanier, whose professional background includes almost 20 years of managing political staffs and advising politicians, was up against stakeholders such as medical professionals, copy services and attorneys who had been left out of the negotiation process and opposed the bill. Upon reviewing the bill draft, the California Applicants' Attorneys Association called it "more damaging than SB 899."

"Toward the end there were questions by different stakeholders — the California Medical Association, the (ambulatory surgery centers)," said Christine Baker, director of the Department of Industrial Relations. "He helped facilitate dialogue and clarification in many areas."

From the point the bill hit the legislature to the time it met the governor's pen, a period that encompassed most of August and the beginning of September 2012, Lanier met with various legislators to cheer on the reforms and convince the lawmakers that the measures were needed.

Sean McNally, who managed the workers' compensation program for the self-insured Grimmway Farms and was the chief negotiator for employers' interests in SB 863, said some of the key legislators Lanier, Brown and the other lobbyists were able to bring on board with the effort were Assemblywoman Shannon Grove, R-Bakersfield, Sen. Juan Vargas, D-San Diego, Sen. Michael Rubio, D-Shafter, Sen. Kevin de León, D-Los Angeles, and Sen. Jean Fuller, R-Bakersfield.

The bill passed with five no votes in the Assembly and four in the Senate on Aug. 31 and was signed by Gov. Brown on Sept. 18.

Two years after the bill passed, Lanier and Baker said they have reasons to be optimistic that the bill achieved at least some of the things the negotiators and governor were hoping for — a long list including increased permanent disability benefits, more efficient medical utilization decisions through the independent medical review process and reduced liens clogging up the courts.

Baker said the number of liens being filed is coming down, treating physicians are being paid more under new medical fee schedules and medical costs shrinking as well.

"They had increased 50% from 2005 to 2012, and now ... the rating bureau is reporting that the medical costs are coming down, they're beginning to decline," she said.

However, he and Baker agreed, the California workers' compensation system will have to wait to see whether SB 863 produces the sustained benefits in cost decreases and benefit raises the negotiators were hoping for.

"I don't think we know yet," Lanier said. "I think we have some initial positive results, but we don't have anything final."

15%

After the Minnear decision came out, the average cost of medical treatment on workers' compensation claims began to increase at rates exceeding 15% annually.

Word On The Industry

Although California's workers' compensation system is one of the most costly in the nation, several other states have set maximum benefits at much higher levels.

TTD, WEEKLY MAXIMUM

STATE RANK					
1	Iowa	$1,543.00	48	Kansas	$587.00
2	District of Columbia	$1,441.80	49	Georgia	$525.00
3	New Hampshire	$1,383.00	50	Mississippi	$449.12
12	**California**	$1,074.64			

Data for one state was not available
Source: Workers Compensation Research Institute

PTD, WEEKLY MAXIMUM

STATE RANK					
1	Iowa	$1,543.00	46	Wyoming	$543.33
2	District of Columbia	$1,441.80	47	Utah	$521.00
3	New Hampshire	$1,383.00	48	Mississippi	$449.12
11	**California**	$1,074.64			

Not applicable for two states, Data for one state was not available
Source: Workers Compensation Research Institute

PPD, WEEKLY MAXIMUM

STATE RANK					
1	District of Columbia	$1,441.80	38	Ohio	$283.00
2	Iowa	$1,419.00	39	Alabama	$220.00
3	New Hampshire	$1,383.00	40	Rhode Island	$180.00
37	**California**	$290.00			

Not applicable for five states, Data for six states was not available
Source: Workers Compensation Research Institute

MAX BENEFIT, AMPUTATION OF DOMINANT ARM AT SHOULDER

STATE RANK					
1	Illinois	$429,977.60	36	Massachusetts	$50,795.04
2	Pennsylvania	$382,120.00	37	Alabama	$48,840.00
3	Nevada	$375,717.60	38	Rhode Island	$28,080.00
12	**California**	$168,817.50			

Not applicable for seven states, Data for five states was not available, Not scheduled in one state. Source: Workers Compensation Research Institute

MAXIMUM BENEFIT, LOSS OF ONE EYE

STATE RANK					
1	Pennsylvania	$256,300.00	35	Alabama	$27,280.00
2	Maryland	$249,417.00	36	Minnesota	$22,800.00
3	Alaska	$177,000.00	37	Rhode Island	$14,400.00
27	**California**	$57,500.00			

Not applicable for five states, Data for six states was not available
Source: Workers Compensation Research Institute

California Premium Cost Ranking

California has consistently ranked near the top among the 50 states in workers' compensation premium costs, rising to the No. 1 position again in the latest biennial study by the Oregon Department of Consumer and Business Services, released in October.

Rates	2000	2002	2004	2006	2008	2010	2012	2014
Calif.	$3.34	$5.23	$6.08	$4.13	$2.72	$2.68	$2.87	$3.48
Ranking	3	1	1	2	13	5	3	1
National Median	$2.26	$2.42	$2.58	$2.48	$2.26	$2.04	$1.88	$1.85
Calif. v. Median	147.79%	216.12%	235.66%	166.53%	120.35%	131.37%	152.66%	188.11%

Pct. Changes	2000	2002	2004	2006	2008	2010	2012	2014
Calif.	-	56.59%	16.25%	-32.07%	-34.14%	-1.47%	7.09%	21.25%
National Median	-	7.08%	6.61%	-3.88%	-8.87%	-9.73%	-7.84%	-1.60%

Cumulative Change	2004	2014	Total
Calif.	$6.08	$3.48	-42.76%
National Median	$2.58	$1.85	-28.29%

Source: Oregon DCBS rate ranking comparisons reproduced in WCIRB "State of the System" report, 2014

In the early 1990s, claimants needed to prove only that 10% of the cause of the psychiatric injury was related to employment. The low threshold of proof made it easy for mills to churn out claims.

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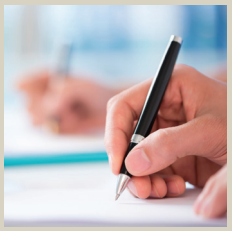

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