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An Agricultural Law Research Article

**Workers' Compensation Reform  
and the Future of the Disabled  
Farm Worker in California**

by

Connie M. Valention-Parker

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# WORKERS' COMPENSATION REFORM AND THE FUTURE OF THE DISABLED FARM WORKER IN CALIFORNIA

## I. INTRODUCTION

Concerns over escalating workers' compensation costs in California prompted adoption of Senate Bill 899 ("SB 899"),<sup>1</sup> which was passed on April 16, 2004, and signed into law by Governor Arnold Schwarzenegger on April 19, 2004. The bill modifies and transforms all aspects of workers' compensation benefits, and ultimately reduces the scope and quantity of benefits.<sup>2</sup> Injured agricultural workers are adversely affected because their disability benefits are reduced, medical benefits are restricted, and vocational rehabilitation benefits are eliminated. These consequences leave injured agricultural workers with the limited options of surviving on less disability income, continuing to work at levels exceeding their physical limitations, and seeking public assistance. This comment will discuss changes to the workers' compensation system wrought by SB 899 and their effect on agricultural workers in particular.

### *A. Pressure to Change Workers' Compensation Laws in California*

Resolving the "workers' compensation crisis" was a top goal of newly elected Governor Schwarzenegger following his October 2003 election. In the Governor's January 6, 2004 State of the State message, he explained, "Our workers' comp costs are the highest in the nation-nearly twice the national average. California employers are bleeding red ink from the workers' comp system. Our high costs are driving away jobs and businesses."<sup>3</sup>

Governor Schwarzenegger called on the legislature to provide reform by March 1, 2004, or else he would put reform measures on the ballot for

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<sup>1</sup> SB 899, 2004 Leg. (Ca. 2004), 2004 Stats. ch. 34 (codified as amended in scattered sections of Cal. Labor Code).

<sup>2</sup> *Id.*

<sup>3</sup> Workers' Compensation in California, Reform 2004, <http://www.igs.berkeley.edu/library/htWorkersCompensation.htm> (last visited July 15, 2005).

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public decision.<sup>4</sup> California Chamber of Commerce President Allan Zaremberg suggested,

Without meaningful workers' compensation reform, California employers will continue to look to neighboring states to locate or expand their business. Further, as the national economy begins to rebound, our skyrocketing workers' compensation costs will continue to provide a severe disincentive for business to locate new jobs or ventures in our state.<sup>5</sup>

These concerns drove the force in creation and adoption of SB 899.

### *B. SB 899: Short Term Results*

The reform legislation has met its objective in providing financial relief for some California businesses. The Workers' Compensation Insurance Rating Bureau of California ("WCIRB") published in its 2004 report, "[t]he workers' compensation insurance financial crisis that California insurers and employers have encountered over the last several years began to abate in 2004."<sup>6</sup> The WCIRB further reported, "[f]or employers, the multi-year trend of double-digit workers' compensation insurance premium rate increases was halted as average rates decreased for the first time in five years."<sup>7</sup> By the third quarter of 2004, just a few months following the enactment of SB 899, the statewide average insurer premium rate was sixteen percent lower than the average rate charged in the second half of 2003.<sup>8</sup> Unfortunately, these savings come at a price, and are not possible absent a drastic reduction of workers' compensation benefits, which would adversely affect those in need of these benefits, especially agricultural workers.

### *C. Issues to be Addressed*

First, this Comment will address characteristics of occupational injuries that occur in California's agricultural industry, and how they compare to work-related injuries in other industries. Second, this paper will briefly narrate the history of workers' compensation law in California, and its relationship to farm workers. Third, this Comment will address the changes invoked by SB 899, which includes modifications of legal construction, workers' compensation procedures, and benefits, and how

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<sup>4</sup> *Id.*

<sup>5</sup> Allen Zaremberg, *Employers Must Act Now to Help Lower Workers' Comp Costs*, CAL-TAX DIGEST (2004), <http://www.caltax.org/member/digest/Winter2004> (last visited Nov. 13, 2005).

<sup>6</sup> Robert A. Milke, *WCIRB California 2004 Annual Report 2* (2005).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 4-5.

these modifications will impact agricultural workers. Next, this Comment will analyze anticipated cost shifting as a result of SB 899; this involves the financial transition from private industry to the public sector, as publicly funded benefits fill the vacuum left by SB 899. Finally, this Comment will address solutions and alternatives that should be explored in order to protect the well-being of injured farm workers, while maintaining some of the cost saving attributes of SB 899.

## II. AGRICULTURAL-RELATED INJURIES IN CALIFORNIA

Workers' compensation laws significantly affect California's agricultural industry. Four percent of all work-related injuries in the State of California fall within the agricultural sector.<sup>9</sup> Over forty percent of agricultural injuries result in lost time, compared to thirty-three percent of all other industrial claims.<sup>10</sup> The agriculture sector has a higher proportion of temporary disability, permanent disability, and death claims compared to all other industries.<sup>11</sup> Common agricultural injuries include sprains and strains, punctures, fractures, and dermatitis.<sup>12</sup> This is consistent with the repetitive nature of agricultural occupations, considering such tasks as picking, pruning, sorting, the use of sharp tools, climbing ladders to reach trees, and exposure to pesticides.

The average age of an injured agricultural worker is younger than those injured in other occupations: 35.5 years compared to the age of 36.4 years for all other industries. Ninety percent of injured workers in the agricultural sector are male, reflecting that the California agriculture industry is male-dominated.<sup>13</sup> In comparison, seventy percent of workers' compensation claimants are male in all other industries.<sup>14</sup> The California Workers' Compensation Institute provides the following information about employers in the agricultural sector:

Smaller employers are prevalent in agricultural industries, with nearly two-thirds of the claims made against employers who pay less than \$50,000 in annual premium versus 43 percent of claims from all industries. On the other hand, employers with policies of \$500,000 or more account for only one out

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<sup>9</sup> California Workers' Compensation Institute, Score Card: Agriculture, (2002), available at [http://www.cwci.org/MemSub/bulletin/Bulletins\\_/Detail.cfm?BulletinId=236](http://www.cwci.org/MemSub/bulletin/Bulletins_/Detail.cfm?BulletinId=236); then follow "Click here for California Workers' Compensation Score Card" (last visited Jul. 15, 2005) (This is as of 1999 based on a seven-year study by the California Workers Compensation Institute).

<sup>10</sup> *Id.*

<sup>11</sup> California Workers' Compensation Institute, *supra* note 9.

<sup>12</sup> California Workers' Compensation Institute, *supra* note 10.

<sup>13</sup> California Workers' Compensation Institute, *supra* note 9.

<sup>14</sup> *Id.*

of 20 agricultural claims, less than half the proportion noted for claims overall.<sup>15</sup>

The Disability Evaluation Unit, the state agency responsible for rating permanent disabilities for the purpose of calculating the amount of financial compensation due, recognizes the farm laborer as one of the most arduous of all occupations.<sup>16</sup> Farm workers, in comparison with “lighter” occupations, were usually awarded higher compensation for most physical injuries under the Permanent Rating Schedule preceding SB 899. This is because the Schedule took into account the effect of the physical disability on the injured agricultural worker’s ability to compete in the open labor market. The theory is that a farm laborer who, for example, injured his knees from bending all day has a stronger handicap in the open labor market than, for example, a secretary with a similar knee injury.

Most agricultural positions encompass a relatively lesser degree of skill, education, and lower pay than other careers. For instance, a grader or sorter of agricultural products may expect entry-level wages of \$7.43 per hour.<sup>17</sup> Entry level for agricultural equipment operators is \$7.76; and for farm workers and laborers, \$7.55 per hour.<sup>18</sup>

The State of California Employment Development Department provides the following job description of these occupations. Graders and sorters of agricultural products “grade, sort, or classify unprocessed food and other agricultural products by size, weight, color, or condition.”<sup>19</sup> Agricultural equipment operators “drive and control farm equipment to till soil and to plant, cultivate, and harvest crops. [The worker] [m]ay perform tasks of hay bucking. [The worker also] [m]ay operate stationary equipment to perform post-harvest tasks, such as husking, shelling, ginning.”<sup>20</sup>

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<sup>15</sup> California Workers’ Compensation Institute, *supra* note 10.

<sup>16</sup> STATE OF CALIFORNIA, SCHEDULE FOR RATING PERMANENT DISABILITIES UNDER THE PROVISIONS OF THE LABOR CODE OF THE STATE OF CALIFORNIA 1-5, 3-13 (1997) (The DEU rates permanent disabilities according to the California Rating Schedule which recognizes farm laborers as a “4” on a scale of one to five, five being the most arduous of all occupations in all industries).

<sup>17</sup> Employment Development Department, State of California, California Labor Market Info (2005), <http://www.labormarketinfo.edd.ca.gov> (follow “Find an Occupation Profile” hyperlink, then enter “Graders and Sorters, Agricultural Products” and then “Explore Occupation.” Do the same for “Farm Workers and Laborers” and “Agricultural Equipment Operators”) (last visited Jul. 18, 2005).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

Finally, the duties for farm worker and laborer occupations are described as:

Manually plant, cultivate, and harvest vegetables, fruits, nuts, horticultural specialties, and field crops. Use shovels, trowels, hoes, tampers, pruning hooks, shears, and knives. Duties may include tilling soil and transplanting, weeding, thinning, or pruning crops; applying pesticides; cleaning, grading, sorting, packing harvested products. May construct trellises, repair fences and farm buildings, or participate in irrigation.<sup>21</sup>

The above duties and skills are not readily transferable into other professions. This presents a serious problem if an agricultural worker becomes so injured that he or she cannot return to his or her usual and customary employment position. Thus, the option of vocational re-training is essential for such injured workers in order to keep them in the work force and in jobs that are physically compatible with their disabilities.

### III. BACKGROUND OF WORKERS' COMPENSATION LAW IN CALIFORNIA

Article XIV, section 4 of California's constitution provides the legislature with the authority to create and enforce a complete system of workers' compensation:

A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party.<sup>22</sup>

Workers' compensation coverage first became compulsory in 1913, with the passage of the *Workmen's Compensation Insurance and Safety Act*.<sup>23</sup> The Act provided compensation to employees for their work-related injuries "irrespective of the fault of either party."<sup>24</sup> The policy behind this no-fault system was that costs associated with workers' compensation injuries should pass onto the employer.

The risk of injury to workmen in the industries governed by the law should be borne by the industries, rather than by the individual workman alone. As the ultimate result, the burden imposed in the first instance upon the em-

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<sup>21</sup> *Id.*

<sup>22</sup> CAL. CONST. art. XIV, § 4.

<sup>23</sup> Workmen's Compensation Insurance and Safety Act, 1913 Stats. Ch. 176 (codified as amended in scattered sections of CAL. LAB. CODE).

<sup>24</sup> *Id.*

ployer, will, it is said, be distributed, as part of the cost of production, among the consuming public.<sup>25</sup>

The inception of this no-fault, compulsory system had its share of critics. Two years following passage of the Act, California Supreme Court Justice Shaw described the concept of liability imposed on an "innocent" employer as "revolutionary" and "destructive."<sup>26</sup> He believed that the misfortune of an injured employee whose negligently self-inflicted injury was at no fault of the employer should be compensated by the state through a lawful method of taxation rather than "the state compelling the innocent employer to bear the whole of the state's burden and to perform the state's duty by paying the entire compensation himself."<sup>27</sup>

The legislature in 1913 did not consider the "comfort, health, safety, and general welfare" of agricultural workers in passing the Workmen's Compensation, Insurance, and Safety Act.<sup>28</sup> Indeed, the original definition of "employee" for the purpose of coverage under the Act excluded "any employee engaged in farm, dairy, agricultural, viticultural, or horticultural labor, in stock or poultry raising ...."<sup>29</sup> This exclusion of agricultural workers from coverage was no longer recognized by 1959.<sup>30</sup>

The Workmen's Compensation and Safety Act is codified in several provisions of the California Labor Code. Many of these provisions have been repealed, amended, and supplemented by SB 899. Some of the provisions that most dramatically affect agricultural workers will be addressed in this Comment.

#### IV. ADOPTION OF SB 899: CHANGES IN THE LAW AND THE IMPACT

SB 899 was emergency legislation; it was declared to take effect immediately "in order to provide relief to the state from the effects of the current workers' compensation crisis."<sup>31</sup> Section 47 of the bill provides:

The amendment, addition, or repeal of, any provision of law made by this act shall apply prospectively from the date of enactment of this act, regardless of the date of injury, unless otherwise specified, but shall not constitute good

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<sup>25</sup> *Pacific Employers Ins. Co. v. Indus. Accident Comm'n*, 219 Cal. App.2d 634, 639-640 (1963).

<sup>26</sup> *Indemn. Co. v. A.J. Pillsbury*, 170 Cal. 686, 731, 735 (1915).

<sup>27</sup> *Id.* at 735.

<sup>28</sup> Workmen's Compensation Insurance and Safety Act, *supra* note 23, CAL. CONST., *supra* note 22.

<sup>29</sup> Workers' Compensation Insurance and Safety Act, *supra* note 23 at § 14.

<sup>30</sup> 1959 Stats. ch. 505, § 1.

<sup>31</sup> SB 899, *supra*, note 1 at ch. 34, § 49.

cause to reopen or rescind, alter, or amend any existing order, decision, or award of the Workers' Compensation Appeals Board.<sup>32</sup>

The Fifth and Second Appellate Districts interpreted section 47 to require application of the new law instantly, even on cases where there was completion of discovery and submission for decision to the Workers' Compensation Judge shortly before the new laws came into effect.<sup>33</sup> Thus, the suggestion that vested benefits should be protected, or that the parties are prejudiced by the change in laws on an injury claim well-developed before reform, does not compromise immediate applicability of the new law.

#### A. Liberal Construction of Workers' Compensation Law

Labor Code section 3202 provides that the provisions of the Labor Code "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the scope of their employment."<sup>34</sup> Interpretation of the California Constitution and judicial decisions enjoin a liberal construction of workmen's compensation statutes in favor of the workman.<sup>35</sup> "[Liberal construction] governs all aspects of workers' compensation; it applies to factual as well as statutory construction. Thus, if a provision of the Act may be reasonably construed to provide coverage or payments, that construction should usually be adopted, even if another reasonable construction is possible."<sup>36</sup>

Labor Code section 3202 was kept intact following SB 899, but section 3202.5 of the Code was added to read: "All parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence in order that all parties are considered equal before the law."<sup>37</sup> Preponderance of the evidence is defined as "evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth."<sup>38</sup> One court's explanation was, "[a]lthough the WCAB and Appellate Courts must construe workers' compensation laws liberally in favor of extending disability benefits, the employee nevertheless carries the burden of proof by a preponderance of the evidence that an injury or disease arose out of and in the course of

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<sup>32</sup> *Id.* at § 47.

<sup>33</sup> See *Kleeman v. Workers' Comp. Appeals Bd.*, 127 Cal.App.4th 274, 278 (2005); *Marsh v. Workers' Comp. Appeals Bd.*, 130 Cal.App.4th 906, 909 (2005) (These cases questioned applicability of the old versus new law on apportionment issues).

<sup>34</sup> CAL. LAB. CODE § 3202 (Deering 2003).

<sup>35</sup> *Pruitt v. Workers' Comp. Appeals Bd.*, 261 Cal 2d 546, 553 (1968).

<sup>36</sup> *Arriaga v. County of Alameda*, 9 Cal.4th 1055, 1065 (1995).

<sup>37</sup> CAL. LAB. CODE § 3202.5 (Deering 2005).

<sup>38</sup> SB 899, *supra* note 1, at § 9.

employment.”<sup>39</sup> Thus, the mandate of liberal construction would not apply to the parties’ burden of proof.<sup>40</sup>

## *B. Treatment and Medical-Legal Examinations for Injured Workers*

### 1. Medical Treatment

Labor Code section 4600 was the governing provision on medical treatment for injured workers. It imposed liability on the employer for all medical treatment that is “reasonably required to cure or relieve from the effects of the injury.”<sup>41</sup> This language provided the courts much latitude in awarding medical or related care including housekeeping services,<sup>42</sup> a live-in weight loss program at Duke University Medical Center,<sup>43</sup> and unlimited changes of treating physicians in some circumstances.<sup>44</sup> The statute also permitted the injured employee to select his own treating physician, as opposed to being limited to treatment by an “employer-controlled” physician, thirty days after reporting the injury.<sup>45</sup>

SB 899 significantly changed Labor Code section 4600. No longer is “medical treatment that is reasonably required to cure or relieve the injured worker from the effects of his or her injury”<sup>46</sup> subject to judicial interpretation or the opinion of the treating physician. Rather, “medical treatment that is reasonably required to cure or relieve the injured worker from the effects of his or her injury means treatment that is based upon the guidelines adopted by the Administrative Director pursuant to Section 5307.27, or, prior to the adoption of those guidelines, the updated American College of Occupational and Environmental Medicine’s Occupational Medicine Practice Guidelines.”<sup>47</sup> These guidelines take away the treating physician’s full discretion to treat according to the needs of the individual patient, which should be tailored to both the patient’s pathology, and his or her physical job demands that are dictated by the agricultural industry, with the ultimate goal of returning the worker to gain-

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<sup>39</sup> Riehl v. Workers’ Comp. Appeals Bd., 2005 Cal.App.Unpub. LEXIS 2384, 5 (2005) (not certified for publication).

<sup>40</sup> CAL. LAB. CODE § 3202 (Deering 2003); CAL LAB. CODE § 3202.5 (Deering 2005).

<sup>41</sup> CAL. LAB. CODE § 4600 (Deering 2003).

<sup>42</sup> See Smyers v. Workers’ Comp. Appeals Bd., 157 Cal.App.3d 36, 42 (1984).

<sup>43</sup> See Braewood Convalescent Hospital v. Workers’ Comp. Appeals Bd., 34 Cal.3d 159, 168 (1983).

<sup>44</sup> See Ralph’s Grocery Co. v. Workers’ Comp. Appeals Bd., 38 Cal.App.4th 820, 831-832 (1995).

<sup>45</sup> CAL. LAB. CODE § 4600 (Deering 2003), Ralph’s, *supra* note 44.

<sup>46</sup> CAL. LAB. CODE § 4600 (Deering 2003).

<sup>47</sup> SB 899, *supra* note 1, at § 23. (Currently the Administrative Director has not developed guidelines other than the ACOEM.)

ful employment. Thus, it is less likely that injured agricultural workers will be satisfied with their treatment, and their long-term health outcomes will be compromised. In addition, the injured worker does not have the same freedom to exercise a change of treating physicians after thirty days. This right is preserved only in situations where the employer or insurer did not establish a medical provider network.<sup>48</sup>

Section 4600 previously allowed the injured worker to be treated by a physician of his or her choice at the outset of the case if the physician was pre-designated by the employee in advance of suffering the on-the-job injury.<sup>49</sup> Section 4600, as amended, requires the injured worker to jump through more hoops in order to effectively pre-designate a treating physician.<sup>50</sup> One of the new prerequisites calls for the employer to have non-occupational health coverage in place when the employee pre-designates a treating-physician.<sup>51</sup> Generally, farm labor and packing positions are not notorious for competitive health benefits. In fact, the majority of agricultural workers lack employer-paid health insurance.<sup>52</sup> Therefore, section 4600 has essentially terminated the option for agricultural workers to pre-designate treating physicians.<sup>53</sup> Overall section 4600 as amended essentially takes away most, if not all, farm industry-employee choices over medical treatment.

The California Constitution described "a complete system of workers' compensation" as including "full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve

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<sup>48</sup> *Id.*

<sup>49</sup> CAL. LAB. CODE § 4600 (Deering 2003).

<sup>50</sup> CAL. LAB. CODE § 4600 (Deering 2005). Labor Code section 4600(d)(1) provides: If an employee has notified his or her employer in writing prior to the date of injury that he or she has a personal physician, the employee shall have the right to be treated by that physician from the date of injury if either of the following conditions exist:

(A) The employer provides nonoccupational group health coverage in a health service plan ....

(B) The employer provides nonoccupational health coverage in a group health plan or a group health insurance policy ....

Section 4600(d)(2) adds:

... a personal physician shall meet all of the following conditions:

(A) The physician is the employee's regular physician and surgeon ....

(B) The physician is the employee's primary care physician and has previously directed the medical treatment of the employee, and who retains the employee's medical records, including his or her medical history.

(C) The physician agrees to be pre-designated.

<sup>51</sup> *Id.*

<sup>52</sup> Rural Migration News, Workers Compensation, Pesticides, available at: [http://migration.ucdavis.edu/rmn/more.php?id=254\\_0\\_3\\_0](http://migration.ucdavis.edu/rmn/more.php?id=254_0_3_0) (last visited Oct. 15, 2005).

<sup>53</sup> CAL. LAB. CODE § 4600 (Deering 2005).

from the effects of such injury.”<sup>54</sup> It is more challenging for an agricultural worker to receive these benefits when the legislature confined what treatment an injured worker can receive and with whom. The legislature has drastically narrowed the right to treatment to no more than what is currently accepted by the American College of Occupational and Environmental Medicine. Even with implementation of these guidelines, agricultural workers will not benefit as much from treatment regimens that have less emphasis on their individual medical needs.

## 2. Medical-Legal Examinations

Several provisions governed disputes regarding industrial causation, the nature and extent of disability, and medical treatment issues by providing discovery procedures for obtaining medical opinions.<sup>55</sup> Section 4060(c) provided that each party may select a qualified medical evaluator if a medical evaluation is required to determine industrial liability for an injury of an employee represented by an attorney.<sup>56</sup>

The other statutes provided procedures in which the parties would have been able to select an agreed-upon physician to examine and comment on disability and treatment issues, if the employee is represented by an attorney, and the procedures to seek an independent “panel” examination if the injured worker was *pro se*.<sup>57</sup> If negotiations on an agreed medical examiner are unsuccessful, Labor Code section 4062 essentially provided each party the opportunity to select their own “qualified medical examination.”<sup>58</sup>

Irrespective of the panel medical examination procedure for non-represented injured workers, the parties had a fair amount of freedom in selecting the medical experts whose opinions would ultimately control the nature and amount of workers’ compensation benefits. This selection was strategically and intelligently based on the parties’ knowledge of the physician’s expertise with the particular illness involved, the physician’s history in commenting on workers’ compensation issues, and the physicians’ philosophy on certain medical or disability matters.

Statutory changes imposed by SB 899 put agricultural workers in a precarious position because in most situations they no longer have control over selection of their medical expert opinions, even with the retention of experienced counsel. The medical discovery statutes, Labor Code

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<sup>54</sup> CAL. CONST. art. XIV, § 4.

<sup>55</sup> CAL. LAB. CODE §§ 4060 – 4062 (Deering 2003).

<sup>56</sup> CAL. LAB. CODE § 4060(c) (Deering 2003).

<sup>57</sup> CAL. LAB. CODE §§ 4061 – 4062 (Deering 2003).

<sup>58</sup> CAL. LAB. CODE § 4062 (Deering 2003).

sections 4060 through 4062, were changed so that it is no longer an option for each party to seek an independent medical examination.<sup>59</sup> Adverse parties can still seek an agreed medical examination with one agreed upon "neutral" physician when the injured worker is represented.<sup>60</sup> Otherwise, the parties are limited to panel-qualified medical examination procedures as amended in Labor Code section 4062.1 and added by section 4062.2.<sup>61</sup> A panel-qualified medical examination entails that the Administrative Director, as opposed to the parties, assigns a panel of three qualified medical evaluators.<sup>62</sup> From there, the parties ultimately submit to the lesser of three evils as the evaluating physician.<sup>63</sup> The Code provides that each party may strike one doctor from the assigned panel of three; the last doctor standing will be the influential medical expert in the case, whether the parties like it or not.<sup>64</sup>

### C. Disabilities and Rehabilitation

#### 1. Temporary Disability

Labor Code section 4656 is the provision for temporary disability benefits.<sup>65</sup> Temporary disability "refers to the healing period directly following an industrial injury during which the employee is off work temporarily and is unable to perform the job while recovering from and being treated for the immediate effects of an industrial injury."<sup>66</sup> Total temporary disability benefits under the old law could not exceed two hundred forty compensable weeks within a period of five years from the date of injury.<sup>67</sup>

Labor Code section 4656 was amended so that the maximum period for temporary disability benefits is now one hundred four compensable weeks, as opposed to the maximum of two hundred forty weeks provided before reform.<sup>68</sup> Furthermore, the one hundred four week requirement shall not extend beyond a period of two years from the date of commencement of the first temporary disability payment.<sup>69</sup>

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<sup>59</sup> CAL. LAB. CODE §§ 4062.1, 4062.2 (Deering 2005).

<sup>60</sup> CAL. LAB. CODE § 4062.2 (Deering 2005).

<sup>61</sup> CAL. LAB. CODE §§ 4062.1, 4062.2 (Deering 2005).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> CAL. LAB. CODE § 4062.2 (Deering 2005).

<sup>65</sup> CAL. LAB. CODE § 4656 (Deering 2005).

<sup>66</sup> 1 SHELDON C. ST. CLAIR, CALIFORNIA WORKERS' COMPENSATION LAW AND PRACTICE 381 (5th ed. James Publishing 2001).

<sup>67</sup> CAL. LAB. CODE § 4656 (Deering 2003).

<sup>68</sup> CAL. LAB. CODE § 4656 (Deering 2005).

<sup>69</sup> *Id.*

This is a concern for agricultural workers because more than forty percent of workers' compensation claims involving agricultural workers result in lost time.<sup>70</sup> For those farm workers with more serious injuries, temporary disability beyond one hundred four weeks may be necessary. For example, prolonged time off work can occur when an injured farm worker requires multiple surgeries for a spinal injury. A significant absence from work can also be necessary when a farm worker suffers multiple traumatic injuries from a motor vehicle accident that occurred traveling between rural work sites, or from a tractor overturn.

## 2. Permanent Disability

Permanent disability is the fixed disability an injured worker has after being treated for his or her injury and reaching maximum medical improvement.<sup>71</sup> Before the reform legislation, Labor Code section 4660(a) provided that permanent disability shall be determined as follows:

In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his age at the time of such injury, consideration being given to the diminished ability of such injured employee to compete in an open labor market.<sup>72</sup>

By considering the employee's diminished ability to compete in an open labor market, injured workers who continued in their present employment or who otherwise suffered no wage loss could still be entitled to a permanent disability award. Judge Sheldon St. Clair explained the significance of the open labor market concept:

[T]oday, the employee, because of a magnanimous employer, may be earning fine wages despite his physical handicap, but tomorrow he may be fired by the employer for whatever reason – economic downturn, or a lack of full ability to do the job - at which point the employee would be forced to seek employment in an open labor market competing against healthier, more physically or mentally fit job candidates.<sup>73</sup>

Permanent disability was, and continues to be, expressed in terms of a rating that is a percentage of total disability.<sup>74</sup> These percentages are determined in accordance with the California Rating Schedule adopted by the Administrative Director.<sup>75</sup> The permanent disability rating is con-

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<sup>70</sup> California Workers' Compensation Institute, *supra* note 10.

<sup>71</sup> CAL. CODE REGS. tit. 8, § 10152 (Barclays 2005).

<sup>72</sup> CAL. LAB. CODE § 4660(a) (Deering 2003) (emphasis added).

<sup>73</sup> ST. CLAIR, *supra* note 66, at 445.

<sup>74</sup> STATE OF CALIFORNIA, SCHEDULE FOR RATING PERMANENT DISABILITIES 1-2 (2005).

<sup>75</sup> *Id.*

verted into a number of weeks that the injured worker will receive permanent disability indemnity at a weekly rate determined by statute.<sup>76</sup> For example, a farm worker that is twenty percent permanently disabled and has a permanent disability rate of \$100.00 per week, would be entitled to seventy and a half weeks of compensation at \$100.00 per week totaling \$7,500.00.<sup>77</sup>

SB 899 called for replacement of the Rating Schedule in existence since April 1, 1997.<sup>78</sup> The old schedule measured the employee's diminished ability to compete in the open labor market consistent with Labor Code section 4660(a).<sup>79</sup> Standard disability ratings in the Schedule pre-reform included percentages for objective factors of disability, such as motion loss, muscle atrophy; subjective factors of disability, such as physical pain, tingling or numbness; and diminished capacity to perform specified work functions, known as "work function impairments" or "work capacity guidelines," such as the loss of ability to climb, squat, perform heavy work, and so on.<sup>80</sup> The standard ratings for work function impairments usually were based, at least partially, on subjective factors of disability. Other times the work function impairments were utilized when the physician evaluating the injured worker reported that the worker should not do certain types of activities for prophylactic reasons.<sup>81</sup>

Labor Code section 4660 was amended so that permanent disability is no longer measured by consideration being given to the employee's diminished ability to compete in the open labor market. Rather, Labor Code section 4660(a) now reads:

In determining the percentage of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to an employee's diminished *future earning capacity*.<sup>82</sup>

Well before any anticipation of this amendment, Professor Larson explained the illogic of focusing on wage loss as a measure of permanent disability. He wrote that an insistence on loss of earnings as the test would deprive an undeniably injured worker an award and foster "the

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<sup>76</sup> STANFORD D. HERLICK, CALIFORNIA WORKERS' COMPENSATION HANDBOOK 6-4 (18th ed. Lexis Law Publishing 1998).

<sup>77</sup> SCHEDULE FOR RATING PERMANENT DISABILITIES, *supra* note 16, at A-14; CAL. LAB. CODE § 4453(b)(3) (Deering 2005).

<sup>78</sup> SB 899, *supra* note 1, at § 32.

<sup>79</sup> CAL. LAB. CODE § 4660(a) (Deering 2003).

<sup>80</sup> SCHEDULE FOR RATING PERMANENT DISABILITIES, *supra* note 16, at 2-14.

<sup>81</sup> *Id.*

<sup>82</sup> CAL. LAB. CODE § 4660(a) (Deering 2005) (emphasis added).

absurdity of pronouncing a man non-disabled in spite of the unanimous contrary evidence of medical experts and of common observation."<sup>83</sup>

Labor Code section 4660(b)(2) provides that an employee's future earning capacity shall be a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees.<sup>84</sup> This pigeon-holes an employee into a selective criteria and is not as equitable as the "open labor market" concept wherein injured workers are compensated based on their inability to compete in all professions as opposed to predetermined fields.

The amended statute also called for the composition of a new permanent disability rating manual which generally applies to all injuries occurring on or after January 1, 2005.<sup>85</sup> The new schedule omits the subjective "work capacity guidelines" and replaces this with objective earning capacity ratings. Impairment descriptions now come from the American Medical Association ("AMA") Guidelines.<sup>86</sup>

To illustrate what effect this has on workers, including unskilled laborers who are prevalent in the agricultural profession, the Department of Public Health Sciences of University of California, Davis conducted a working study comparing two hundred eighteen agreed medical reports of workers injured before the reform legislation and rated them according to the old and new Rating Schedules.<sup>87</sup> The results were that average percentage point ratings for impairment under the 2005 law were approximately one-third the size of ratings for disability under the old law.<sup>88</sup> The authors anticipated that benefits for permanently disabled workers could decrease over sixty percent under the new law.<sup>89</sup> Those with back injuries were found to have a twenty-seven percent lower rating under the new Schedule; there was a fourteen percent lower rating for

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<sup>83</sup> St. Clair, *supra* at pp. 443 – 444 (citing from Larson's *Workmen's Compensation* (Desk Edition), at 10-2-10-3).

<sup>84</sup> CAL. LAB. CODE § 4660(b)(2) (Deering 2005).

<sup>85</sup> CAL. LAB. CODE § 4660(d) (Deering 2005) (The new permanent disability schedule also applies to some injuries occurring before January 1, 2005, depending on the permanent and stationary date, or whether the employer is required to provide a Labor Code section 4061 Notice to the injured worker).

<sup>86</sup> CAL. LAB. CODE § 4660(b)(1) (Deering 2005).

<sup>87</sup> J. Paul Leigh, Ph.D., Stephen A McCurdy, M.D., M.P.H., Differences in Workers' Compensation Disability and Impairment Ratings Under Old and New California Law 2 (March 10, 2005) available at [http://phs.ucdavis.edu/Publications/refsearch\\_detail.php?ref?id=2328](http://phs.ucdavis.edu/Publications/refsearch_detail.php?ref?id=2328) (this is a working paper).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

a single shoulder injury, twenty-four percent lower for a single wrist, and twenty-nine percent less for a single knee injury.<sup>90</sup>

A more specific example to illustrate the new Schedule's effect involves a thirty-four year old tractor driver with a single knee injury. Under the old Permanent Disability Schedule, which contained the Work Capacity Guidelines, he may have received a permanent work restriction from his physician precluding him from heavy lifting, climbing, walking over uneven ground, squatting, kneeling, crouching, crawling, pivoting, or other activities involving comparable physical effort.<sup>91</sup> Accordingly, his disability would rate at thirty-two percent, worth up to \$23,800.00 under the old Schedule.<sup>92</sup> The new law forbids any rating of work restrictions in favor of standard ratings dictated by the American Medical Association Guidelines. The same injured tractor driver with a thirty percent loss of knee extension per the AMA Guidelines would be considered fifteen percent disabled.<sup>93</sup> The maximum dollar value for this level of disability is \$8,040.00.<sup>94</sup>

There are legitimate opposing interests concerning permanent disability reform: installing a rating system that cannot be abused by workers who lack objectively verifiable medical symptoms versus making sure that the general welfare of the injured employee is adequately provided for. One alternative to achieve this balance would be to maintain the current rating schedule, but increase permanent disability weekly compensation rates, or the number of weeks of entitlement, for people like injured farm workers who have less chances of returning to their physically demanding careers.

### 3. Vocational Rehabilitation

In addition to medical and disability benefits, employees injured in the course and scope of employment were entitled to vocational rehabilitation training, if medically qualified and if their employers could not accommodate their industrial disabilities with modified or alternate job positions.<sup>95</sup> Vocational rehabilitation became a mandatory benefit on the employer for all injuries on or after January 1, 1975.<sup>96</sup> Reform in 1993 provided an expenditure cap of \$16,000.00, among other limitations on

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<sup>90</sup> *Id.* at 33.

<sup>91</sup> SCHEDULE FOR RATING PERMANENT DISABILITIES, *supra* note 16, at 2-19.

<sup>92</sup> *Id.* at 6-3, A-16.

<sup>93</sup> STATE OF CALIFORNIA, SCHEDULE FOR RATING PERMANENT DISABILITIES 6-2 (2005).

<sup>94</sup> CAL. LAB. CODE §§ 4453(b)(3)(C), 4658(a)(1) (Deering 2005) (This is based on 50.25 weeks of compensation with a permanent disability rate of \$160.00 per week).

<sup>95</sup> CAL. LAB. CODE § 139.5 (Deering 2003).

<sup>96</sup> ST. CLAIR, *supra* note 66, at 636.

the mandatory vocational rehabilitation plan.<sup>97</sup> The idea behind vocational rehabilitation was to “get a disabled worker from ‘the bed to the job.’”<sup>98</sup> The basic policy advanced in Labor Code section 139.5 is:

[T]o encourage participation in vocational rehabilitation by industrially injured employees to the fullest extent possible, thereby affording them the means for returning to the productive work force and minimizing society’s burden of caring for them and their families. In the workers’ compensation system, vocational rehabilitation is a preferred benefit.<sup>99</sup>

It could be argued that rescinding the statutory right of vocational retraining does not take away any vested benefit of non-United States citizens who are prevalent in the agricultural industry.<sup>100</sup> The right to vocational rehabilitation was not recognized for “illegal workers” in situations where the employee was not able to return to work, in an alternate or modified position compatible with the employee’s work related disability, solely because of his or her immigration status.<sup>101</sup> In 2000, the Second District Court of Appeals decided that allowing otherwise would afford “illegal workers” greater benefits than “legal workers,” in violation of the Equal Protection Clause of the United States Constitution.<sup>102</sup> However, this situation was narrowly limited to situations where the employer actually could accommodate the injured worker and followed all legal procedures in offering the accommodation.<sup>103</sup>

SB 899 did not immediately repeal vocational rehabilitation, although the lifespan of this benefit is in jeopardy. The Labor Code provides that section 139.5, the provision that mandates vocational rehabilitation benefits, shall only apply to injuries occurring before January 1, 2004.<sup>104</sup> Those injured post January 1, 2004 are no longer entitled to vocational rehabilitation training under the guidance of a counselor, or other assis-

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<sup>97</sup> *Id.* at 637.

<sup>98</sup> *Moyer v. Workers’ Comp. Appeals Bd.*, 10 Cal.3d 222, 232 (1973).

<sup>99</sup> *Sanchez v. Workers’ Comp. Appeals Bd.*, 217 Cal. App. 3d 346, 357 (Cal. Ct. App. 1990).

<sup>100</sup> Rural Migration News, Workers’ Compensation, Pesticides, available at: [http://migration.ucdavis.edu/rmn/more.php?id=254\\_0\\_3\\_0](http://migration.ucdavis.edu/rmn/more.php?id=254_0_3_0) (last visited Oct. 15, 2005).

<sup>101</sup> *Del Taco v. Workers’ Comp. Appeals Bd.*, 79 Cal.App.4th 1437, 1439 (2000).

<sup>102</sup> *Id.* at 1437, 1439.

<sup>103</sup> *Id.*

<sup>104</sup> CAL. LAB. CODE § 139.5(k) (Deering 2005) (For those injured after January 1, 2004, injured workers who medically could not return to their regular occupations received nontransferable vouchers for education related training or skill enhancement, limited to \$4,000 to \$10,000, depending on the level of permanent disability, as opposed to a comprehensive plan monitored by a vocational counselor that was subject to \$16,000 cap regardless of the permanent disability level. This was an earlier attempt by the legislature to curb the cost of vocational rehabilitation for California employers and insurers. See CAL. LAB. CODE § 139.5 (Deering 2004)).

tance, such as placement in medically feasible job positions. Furthermore, section 139.5(l) provides that the statute remains in effect only until January 1, 2009.<sup>105</sup> So what was once considered the "preferred benefit"<sup>106</sup> for getting the injured worker from the "bed to the job,"<sup>107</sup> and relieving society's burden of caring for the disabled, has essentially been destroyed in favor of financial savings for California employers or insurers.

This is especially troublesome for agricultural workers because they are less likely to have career options if they lack education and transferable skills. This means that disabled farm workers may continue working in arduous positions that could be adverse to their health. If there is no possibility of continuing in their usual occupations because of permanent disability, these farm workers may seek welfare or retraining from the State Department of Rehabilitation. Thus, the financial burden of vocational rehabilitation on private industry will vanish under SB 899; however, the burden will be shifted to California taxpayers.

Vocational rehabilitation is far too important to agricultural and similarly situated workers to be terminated altogether. Private industry concerns about the cost of vocational programs pre-reform could be alleviated through less drastic measures. One alternative would be if workers' compensation insurance premiums included a one-percent increase that could be assessed to a rehabilitation fund. Another alternative would be if the legislature or administrative director reinstates vocational rehabilitation, with more developed and objective standards that incorporates labor market information, so vocational rehabilitation benefits are only paid towards re-training plans that offer feasible objectives towards a return to work.

#### 4. Apportionment

The reform legislation transformed existing laws on apportionment of permanent disability by amending Labor Code section 4663 and repealing section 4750.<sup>108</sup> "Apportionment is the process employed by the [WCAB] to segregate the residuals of an industrial injury from those attributable to other industrial injuries, or to non-industrial factors, in

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<sup>105</sup> CAL. LAB. CODE § 139.5(l) (Deering 2005).

<sup>106</sup> Sanchez, *supra* note 101, at 357.

<sup>107</sup> Moyer, *supra* note 99, at 232.

<sup>108</sup> CAL. LAB. CODE § 4663 (Deering 2005), SB 899, *supra* note 1, at § 37.

order to fairly allocate the legal responsibility.”<sup>109</sup> Labor Code section 4663 previously provided, “[i]n case of aggravation of any disease existing prior to a compensable injury, compensation shall be allowed only for the proportion of the disability due to the aggravation of such prior disease which is reasonably attributed to the injury.”<sup>110</sup>

The statute provided that the employer is not liable for any preexisting disease or condition, but is responsible for the aggravation of the preexisting condition or disease caused by the industrial injury.<sup>111</sup> The overall rule was: the employer takes the employee as he finds him, and if the work-related accident caused a worsening of a preexisting non-disabling disease, then the employer should bear the burden of paying for it.<sup>112</sup> The employer could only escape liability if the preexisting disease would have within all reasonable medical probability become symptomatic and disabling regardless of the subsequent industrial injury. This usually was a near to impossible standard for an employer to prove.

The other apportionment statute, Labor Code section 4750, applied when there was evidence of a previous permanent disability or impairment as opposed to a preexisting disease or condition.<sup>113</sup> The statute provided:

An employee who is suffering from a previous permanent disability or physical impairment and sustains permanent injury thereafter shall not receive from the employer compensation for the later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment.<sup>114</sup>

For instance, a farm laborer with a previously deformed right hip and a measurable shortening of the right leg, but who could perform “medium” or “average” agricultural labor by thinning thirty to thirty-five trees a day, picking seven bins of peaches a day, climbing ladders with both legs, and so on, would have a prior disability, falling under Labor Code section 4750 because the prior hip condition was a “handicap in the open labor market.”<sup>115</sup> To calculate apportionment under this situation, the preexisting percentage of disability should be calculated without reference to the later industrial accident and then subtracted from the com-

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<sup>109</sup> *Fresno Unified School Dist. v. Workers’ Comp. Appeals Bd.*, 84 Cal.App.4th 1295, 1304 (2000) (quoting *Ashley v. Workers’ Comp. Appeals Bd.*, 37 Cal.App.4th 320, 326 (1995)).

<sup>110</sup> CAL. LAB. CODE § 4663 (Deering 2003).

<sup>111</sup> *Id.*

<sup>112</sup> ST. CLAIR, *supra* note 66, at 512-513.

<sup>113</sup> CAL. LAB. CODE § 4750 (2003).

<sup>114</sup> *Id.*

<sup>115</sup> *Avila v. Workers’ Comp. Appeals Bd.*, 14 Cal. App. 3d 33, 37 (1970).

bined disability. The difference represents the compensable disability allocated to the subsequent injury.<sup>116</sup>

Labor Code section 4750 more often applied when there was evidence of a prior permanent disability award with the same or different employer, which illustrated a defined level of prior disability. Despite such evidence, achieving apportionment under the statute was not foolproof. Mere testimony that the injured worker "rehabilitated" from the prior industrial injury could sometimes be sufficient to overcome apportionment.

The law on apportionment was changed, rendering it easier for employers and insurers to discount permanent disability benefits. Labor Code section 4663 was repealed and a new section 4663 was added to the Code.<sup>117</sup> Section 4663(a) provides that apportionment of permanent disability shall be based on causation as opposed to disability.<sup>118</sup> The statute puts requirements on reporting physicians to address the issue of causation of permanent disability.<sup>119</sup>

Labor Code section 4664 was added to the Code and provides that the employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.<sup>120</sup> Section 4664(b) differs from Labor Code section 4750, which was repealed by the bill.<sup>121</sup> It provides: "If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury."<sup>122</sup> No longer is the word of an injured worker sufficient to prove that he or she has been rehabilitated from a prior permanent disability. It appears that the employee will need to provide tangible evidence to prove rehabilitation such as medical reports, and witness testimony.

Section 4664(b) should not hurt the injured farm worker as it really just lowers the evidentiary weight of what could sometimes be biased puffery by some injured workers who desire, but do not deserve, the full value of a second permanent disability award. However, the other apportionment statute, Labor Code section 4663, as amended, affects workers more adversely. Most people, including farm workers, live normal pro-

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<sup>116</sup> *Id.* at 39.

<sup>117</sup> SB 899, *supra* note 1, at §§ 33, 34.

<sup>118</sup> CAL. LAB. CODE § 4663(a) (Deering 2005).

<sup>119</sup> CAL. LAB. CODE § 4663(b) (Deering 2005).

<sup>120</sup> CAL. LAB. CODE § 4664 (Deering 2005).

<sup>121</sup> CAL. LAB. CODE § 4664(b) (Deering 2005); CAL. LAB. CODE § 4750 (Deering 2004); SB 899, *supra* note 1, at § 37.

<sup>122</sup> CAL. LAB. CODE § 4664(b) (Deering 2005).

ductive lives earning wages despite the existence of chronic medical conditions like arthritis, diabetes, herniated spines, or prior surgeries. If one was performing his or her job duties fully and this ability terminated because of an on-the-job injury, rather than independent progression of the pre-existing disease or condition, it punishes the injured worker for having the prior non-disabling medical condition. Such a rule is in direct contradiction to the constitutional mandate of relieving employees from injuries arising out of and during the course of employment.

## 5. Penalties

Labor Code section 5814 imposed a penalty of ten percent on the employer or insurance carrier each time a workers' compensation benefit was "unreasonably delayed or refused."<sup>123</sup> This penalty was assessed not only on the amount that was paid late, but the entire class of benefit, such as, temporary disability, permanent disability, and medical treatment, throughout the life of the claim.<sup>124</sup> There were no statutory limits on this penalty preceding SB 899.<sup>125</sup> The policy behind the statute was both remedial and penal. "The remedial aspect is to encourage return of the injured workers to their employment as quickly as possible. The penal aspect is to compel the employer to comply with the law fully and promptly."<sup>126</sup> Timely payment of benefits to injured workers serves an important purpose "to ameliorate economic hardship because of the interruption of their employment and concomitant loss of income."<sup>127</sup> The employer or insurer was not arbitrarily assessed these penalties; liability depended on an evidentiary hearing that proved that the delay or refusal to pay compensation was unreasonable.<sup>128</sup> Regardless, the penalty was felt by some to be overly harsh and sought too often by overzealous employee-attorneys.

Labor Code section 5814 was repealed and then a new version was added to the Labor Code.<sup>129</sup> This section no longer provides for an unlimited ten percent penalty on the class of benefit each time that benefit was unreasonably delayed or denied.<sup>130</sup> Rather, the penalty is now capped at twenty-five percent of the payment unreasonably delayed or

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<sup>123</sup> CAL. LAB. CODE § 5814 (Deering 2003).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Davison v. Indus. Accident Comm'n*, 241 Cal. App. 2d 15, 18 (1966).

<sup>127</sup> *Consani v. Workers' Comp. Appeals Bd.*, 227 Cal. App. 3d 12, 23 (1991).

<sup>128</sup> *Id.*

<sup>129</sup> SB 899, *supra* note 1, at §§ 42, 43.

<sup>130</sup> CAL. LAB. CODE § 5814 (Deering 2005).

refused, or up to \$10,000, whichever is less.<sup>131</sup> The statute also provides a discretionary option by the appeals board: "the appeals board shall use its discretion to accomplish a fair balance and substantial justice among the parties."<sup>132</sup>

Section 5814(b) provides a conditional grace period for the employer or insurer.<sup>133</sup> If the employer or insurer discovers that a benefit was unreasonably delayed or refused, and no penalty was claimed by the employee, the employer or insurer, within ninety days from the date of the discovery, may pay a ten percent self-imposed penalty of the amount of the payment unreasonably delayed or refused, along with the principal amount due.<sup>134</sup> This replaces the twenty-five percent or \$10,000 penalty mandated by section 5814(a).<sup>135</sup>

The new Labor Code section 5814 was designed to relieve the onerous financial burden on employers and insurers imposed by penalty awards. However, penalties were not awarded to injured workers without due process. Through proper interpretation of the former section 5814, the workers' compensation judge would not award penalties if the employer or insurer raised a genuine dispute affecting the integrity of the employee's claim for that particular benefit. Mere compliance with workers' compensation benefit statutes before reform effectively relieved the employer or insurer from large penalties while assuring that injured workers received benefits they were entitled to on a timely basis.

An example of an injured worker affected by the revised statute is an agricultural worker permanently totally disabled due to a heat stroke induced brain injury. Medical care for this individual costs in the hundreds of thousands of dollars, consisting of treatment such as hospitalization, outpatient care, in home nursing, and speech therapy. Such care is anticipated for the remainder of the worker's life, who was not more than middle-aged at the time of injury. If any of his treatment was found to be unreasonably delayed or refused, the injured worker could expect penalties of ten percent for previously paid and all ongoing medical care, which well exceeds the statutory maximum of \$10,000.00. However, after the new Section 5814, this is all the injured worker can receive, despite being previously vested in the right of unlimited ten percent penalties.<sup>136</sup>

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> CAL. LAB. CODE § 5814(b) (Deering 2005).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> This scenario is based on an actual case pending, but the names and other information are omitted to protect the parties' privacy.

Another concern about the new Section 5814(a) in particular is that assuming the insurer or employer already paid the mandated \$10,000.00 or twenty-five percent, there is less motivation for the company to timely pay the applicable benefit on the next occasion it is due. There is no longer the threat of infinite ten percent penalties on the entire classification of benefit throughout the life of the claim. Labor Code section 5814.6 was added to the Code to alleviate this concern.<sup>137</sup> It provides that any employer or insurer that knowingly violates Section 5814 with “a frequency that indicates a general business practice is liable for administrative penalties of not to exceed \$400,000.00.”<sup>138</sup> The Administrative Director imposes these penalty payments and deposits them into the State’s Return to Work Fund.<sup>139</sup>

It is unsettled whether this is an effective deterrent on benefit violations. Under the old Section 5814, the agricultural employee’s attorney had plenty of motivation to seek and pursue penalties for delayed or denied benefits because that compensation went directly to his or her client, with usually twelve percent of the amount rendered to the attorney for legal services. The attorney only had to prove an unreasonable delay or refusal as it pertained to the particular benefit or payment at issue. Proving such conduct is far simpler than proving violation of Section 5814 “with a frequency that indicates a general business practice.”<sup>140</sup>

#### *D. SB 899 and Public Benefit System-Wide Effects*

Injured workers are experiencing the effects of the reduction in benefits created by SB 899. Insurance Commissioner, John Garamendi, stated, according to the Los Angeles Daily News: “Certainly, the reforms have reduced costs, but they’ve created serious problems for legitimately injured workers in terms of immediate access to medical care and disability payments to maintain their standard of living.”<sup>141</sup>

Those who relied on the workers’ compensation system to provide for their health and general welfare as guaranteed by the Constitution, were immediately deprived of medical treatment choices, vocational rehabilitation training, and the quantity of temporary disability and permanent disability benefits as of April 19, 2004. Some have lost their homes and

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<sup>137</sup> CAL. LAB. CODE § 5814.6 (Deering 2005).

<sup>138</sup> CAL. LAB. CODE § 5814.6(a) (Deering 2005).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Work Comp Central, Impoverished Claimants Talk to L.A. Paper: 7/19/05, 1, ¶ 6, available at <http://www.workcompcentral.com>. (On file with the *San Joaquin Agricultural Law Review*.)

careers.<sup>142</sup> As noted earlier, in 1915 Justice Shaw suggested that workers' compensation benefits in certain situations should be the state's burden as opposed to the employer's.<sup>143</sup> Perhaps California is closer to Justice Shaw's preference, albeit in a manner he did not anticipate.

Injured workers in the agricultural industry who are destitute and whose constitutional rights are no longer protected by the workers' compensation system must eventually look towards public resource alternatives to cure or relieve them from the effects of an industrial injury. Taxpayer sponsored state and federal benefits are now an injured worker's only remedies for assistance to bridge the gaps in coverage effectuated by SB 899.

The state of California provides short-term disability insurance benefits for a period up to fifty-two weeks; the Employment Development Department ("EDD") administers these benefits.<sup>144</sup> Although these state benefits are geared towards those disabled from non-work related injuries or medical conditions, EDD may pay benefits when an employer or insurer refuses or delays workers' compensation benefits.<sup>145</sup> Requirements for collecting state disability insurance are attainable for many injured workers.<sup>146</sup> Farm workers whose temporary disability benefits are cut short by SB 899 may be applying for this state-sponsored benefit.

California's Department of Rehabilitation may be an alternative source for those needing vocational rehabilitation benefits that employers were previously mandated to provide. The Department of Rehabilitation is available for qualifying disabled applicants and provides assistance with

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<sup>142</sup> *Id.* at ¶ 3 and 8.

<sup>143</sup> *Western Indemnity Company v. A.J. Pillsbury*, 170 Cal. 686, 734 - 735 (1915).

<sup>144</sup> Employment Development Department, Claim Filing and Processing, *available at*: <http://www.edd.ca.gov/direp/dicfp.htm>. (last visited Nov. 13, 2005).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* The EDD provides these requirements:

- cannot do regular or customary work for at least eight consecutive days;
- must be employed or actively looking for work at the time the applicant becomes disabled;
- must have lost wages because of the disability;
- must have earned at least \$300.00 from which state disability insurance deductions were withheld during a previous period;
- must be under the care and treatment of a licensed doctor or accredited religious practitioner during the first eight days of disability;
- must complete and mail a claim form within forty-nine days of the date applicant became disabled; and
- the applicant's doctor must complete the medical certification of applicant's disability.

vocational training, education, and career opportunities.<sup>147</sup> Application for such assistance may be increasing if farm workers can no longer receive employer-sponsored retraining due to SB 899.

Longer term needs for disability benefits can be satisfied through social security disability insurance.<sup>148</sup> This public benefit will be especially important to permanently disabled farm workers whose benefits were reduced by SB 899. Qualifying individuals may receive Social Security if they are certified for disability, and as may be the case with most farm workers, their education and training is insufficient to meet requirements of alternate professions.<sup>149</sup> Finally, Medi-Cal may be an alternative to low-income disabled applicants, who need medical services that were previously compulsory for the employer to provide.<sup>150</sup>

## V. CONCLUSION

First, this Comment addressed the political pressure to implement workers' compensation reform in California. Next, this comment addressed the role of agricultural workers in the state, including a description of their job skills and representation among all injured workers who receive workers' compensation benefits. A brief history of workers' compensation, and a description of important workers' compensation benefits were described in order to appreciate SB 899's impact on agricultural workers. This Comment also described the changes in legal construction, compensation benefits, medical-legal discovery, and penalty awards wrought by SB 899. Finally, a prediction was made that injured agricultural workers will turn toward public benefits like state disability or Social Security to fill the voids in the current workers' compensation system.

The objective behind SB 899 was to relieve financial burdens on California employers, but such a goal cannot have a meaningful effect without decreasing benefits. The reform legislation reduced medical, disability, and rehabilitation benefits, and restricted choices over treating physicians as well as selection of medical-legal examiners.

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<sup>147</sup> *Id.* See also California Department of Rehabilitation website, <http://www.rehab.cahwnet.gov/eps/vocrehab.htm>. (last visited Aug. 16, 2005).

<sup>148</sup> Social Security Online: Disability Programs, *available at*: <http://www.ssa.gov/disability> (last visited Aug. 16, 2005).

<sup>149</sup> See Social Security Online, <http://www.ssa.gov/disability/step4and5.htm> (last visited Aug. 16, 2005).

<sup>150</sup> J. Carlos Fox, Point-Counterpoint: Aren't the WC Reforms Simply a Way of Cost Shifting? <http://workinjury.com/p-c/pc-2.htm> (last visited Oct. 14, 2005).

Farm workers are often dependent on workers' compensation as the physical demands of their professions correspond with on-the-job injuries. Combined with the unlikelihood of other employment opportunities, the reform invoked by SB 899 will especially impact this class of workers. This is not to say that there was not waste or abuse of the State's compensation system that was worthy of attention and change. Unfortunately, the reform invoked by SB 899 went beyond this problem. If injured workers are not adequately provided for, as appears to be the case with the wholesale changes effectuated by SB 899, the legislation will create more problems for the agricultural industry and California taxpayers than was ever anticipated. Furthermore, the costs of injured workers in the agricultural industry will not be eliminated, but simply shifted from private employers to the public in the form of increased demand for public services.

SB 899 should be revisited, perhaps allowing more flexibility for agricultural workers to obtain retraining, specialized treatment, and increased indemnity benefits to offset the disparate impact injuries have on workers in this heavily laborious industry. Vocational rehabilitation should be preserved, but perhaps with stricter monitoring requirements to ensure that these benefits are in fact being provided to those who require retraining and that the retraining has a practical application towards achieving new employment. Employees should have the opportunity to treat with their selections of physicians so long as the selections are made in good faith and not abused. Financial compensation needs to consider the agricultural worker's limited ability to compete in the open labor market to have any meaningful effect.

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