

WORKCOMP KEYNOTES

ESM SOLUTIONS, INC.

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A KeyNote from ESM Solutions, Inc.

Greetings and Spring Salutations! Welcome back to our WorkComp KeyNotes newsletter! Can you believe we're already into the second quarter of 2010?! In his book, A Moveable Feast, Ernest Hemingway writes, "When spring came, even the false spring, there were no problems except where to be happiest." And now, out with the black, cold winter days of 2009 and into the spring gateway of 2010; our sails are filled with an optimistic warm breeze.

I believe that 2010 is going to define our country as the year of change. In order to bring positive change to the safety of our work environments, it is our company's mission to work tirelessly with our clients and industry champions in assisting them to make the best legal, financial and ethical decisions in managing their Workers' Compensation program.

Safety is a noble effort and is achieved with the culmination of strategic resources organized into a succinct plan of action with key individuals who champion and own their specific duties and responsibilities.

A corporation can manage risk in one of two fundamentally different ways: (1) Reactive: one risk at a time on a largely compartmentalized and decentralized basis; or (2) Proactive: all risks viewed globally within a coordinated and strategic framework.

What are the goals of your risk management framework?

Here are 5 tips to assist you in enhancing your Workers' Comp risk management program:

1. Hire the best fit for the job. What are your hiring procedures?
2. Prevent injuries with an active IIPP.
3. Designate and cultivate your medical provider relationship.
4. Implement a Stay-At-Work, Return-To-Work program.
5. Develop procedures for continual communication and follow up with injured workers and claim handlers for effective claim closures.

ESM believes that creating an effective risk management plan creates a long-term advantage over competitors that manage and monitor risks individually. By measuring and managing risks consistently and systematically, and by giving your managers the information and incentives needed to optimize the understanding between risk and return, your company strengthens its ability to carry out its strategic plan.

We hope that you enjoy this issue's articles and please drop us a line and share one of your success stories.

Spring forward!

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The Good, The Bad and The Ugly!

In 2004, SB899, a.k.a. the Reform, was passed because the Workers' Compensation costs in California were out of control. The reform was "Good" as it was effective in lowering Permanent Disability (PD) ratings by using a more objective and uniform approach. PD ratings were expected to be consistent from doctor to doctor under the AMA Guides, because everyone was subject to the same Rating Schedule.

In 2009, two cases began to erode some of the savings the Reform had achieved with PD ratings. These "Bad" cases are called Almaraz / Guzman. Applicant Attorneys convinced Judges that the AMA Guides could be rebuttable, and physicians should be able to help injured workers obtain higher PD Ratings. These cases allowed doctors to go completely outside "the Guides" and the results were reminiscent of higher pre-Reform ratings. Upon Appeal, physicians are now limited to the "four corners of the Guides", but still have ample opportunity to increase ratings. It is important to note that physicians must rationalize why an alternate rating is more accurate than the strict application of the AMA Guides. If they do not, the Trier of Fact may decide not to award the higher rating under Almaraz / Guzman.

And now we have the "Ugly" Ogilvie case. Once again, Applicant Attorneys found a way to increase PD ratings by arguing that diminished earning capacity should result in higher PD by altering the Future Earning Capacity (FEC) adjustment factor to a Diminished Future Earning Capacity (DFEC). In some cases, this could dramatically increase the PD Rating. We have not seen this case tested as frequently at the Workers' Compensation Appeals Board (WCAB). However, since we are starting to see it alleged more often, we recommend employers be prepared to defend the exposure. This case is another way to rebut the AMA Guides and increase PD ratings and settlements.

But there are defenses! Depositions and labor market surveys may be necessary to defend this allegation. Lack of motivation, poor economic conditions or unrelated health conditions are employer arguments for unemployment. However, the best defense against Ogilvie is to keep your injured employee at work. If there is no loss of earnings, Ogilvie does not apply.

Almaraz, Guzman and Ogilvie are "En Banc" decisions. En Banc means that all seven Judges at the WCAB voted on the cases. Because the decisions were En Banc, these cases are now the law. All three cases are currently on Appeal.

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THIS ISSUE'S INDUSTRY QUESTION

2010 X-Mod Calculation Change

Q How will the newly revised method of calculating the X-mod impact employers?

A The experience rating system is a merit rating system that compares employers of similar jobs and gives employers a credit for having an X-mod less than 100% or a debit if the X-mod is greater than 100%.

The changes are mandatory and will be applied to all experience rated California employers to policies incepting after 1/1/10.

This revision in the calculation reflects the biggest changes to the Experience Rating System in over 20 years. The stated intent of the Workers' Compensation Insurance Rating Bureau (WCIRB):

- **To simplify the X-mod rating system**
- **To improve its predictive accuracy**
- **To enhance its ability to provide a financial incentive for employers to manage safety in the work place**

Whether or not a claim occurs is more indicative of future claims than the total cost of a claim that may be influenced by many factors. The X-mod formula has been changed to a "single split" method and the first \$7,000 of each claim is considered the PRIMARY component.

The EXCESS (over \$7,000 but less than \$175,000) is calculated based on the size of the employer. Starting in 2011, the X-mod Worksheet will also show a "loss free" X-mod. That is, what an employer's X-mod would be with no losses.

The new system encourages financial savings to employers to prevent injuries by assessing their company's hazards and creating a global safety plan to minimize these risks.

Post injury, an employer can reduce loss work days by accommodating work restrictions and can control medical costs with a designated medical provider within the carrier's Medical Provider Network.

For more information: www.wcirbonline.org

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Working the Claims Management Details Best Practices to cut claim costs and ensure legal compliance.

Keep your employees working after a work related injury or illness! Sounds simple, right? But coordinating job accommodation takes skills of negotiating, coaching, disciplining, and follow up attention to the details. Someone must accept the responsibility of championing and orchestrating the events. **Who in your organization is assigned this responsibility?**

In addition to reducing claims costs, considering job accommodation for each and every injured employee keeps you compliant with labor laws, Fair Employment and Housing Act (FEHA), and the Americans with Disabilities Act (ADA). ADA is a federal statute governed by the EEOC, Equal Employment Opportunity Commission (www.eeoc.gov). FEHA is a California provision under the Department of Fair Employment and Housing (www.dfeh.ca.gov).

The goal of the state and the federal statutes are the same. *Every person, regardless of real or perceived disability, should be afforded the opportunity of employment.* "Employment is nature's physician, and is essential to human happiness", said Galena, Greek physician in AD 172.

With the new 2010 X-mod calculations, even 3 weeks off work can cost employers dearly. In a recent example, a small employer (total payroll less than \$205,000) had **one claim for \$7,360 that cost them 42 points on their X-mod (No kidding!) driving the X-mod to 129%**. This also put them into the Cal/OSHA Target Inspection Program with a fine and potential site visit.

Here was a missed opportunity for this small employer to reduce the cost and the risk. If this small employer had provided modified work duties for the injured worker for just 3 weeks during the recovery period, it would have **reduced the X-mod by 8 points**. Additionally, if the employer had set up a designated medical clinic within the carrier's Medical Provider Network rather than using a hospital's emergency room (for this non emergency back strain), **another 12 points would have been shaved off the X-mod. The resulting X-mod would have been 109% with these two changes in their Workers' Comp claims management procedures.**

And, the employer would no longer be subject to Cal/OSHA's TIP program or fine.

To assist employers in managing their dual obligations under Workers' Comp and disability law, the California Commission on Health and Safety and Workers' Compensation published in February 2010, a handbook entitled, "Practical Guidance Under Workers' Compensation and Disability Rights Laws in California" (http://www.dir.ca.gov/chswc/Reports/2010/HandbookRTW_2010.pdf http://www.dir.ca.gov/chswc/CHSWC_FactsheetRTW_2010.pdf). Take advantage of these free resources to begin or improve your own Return-To-Work policies and procedures. Assign this responsibility to a compassionate, detail-oriented person within your organization and empower them to coordinate the job accommodation efforts. The savings will be dramatic and will keep you compliant with the laws of FEHA.

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Did You Know?

- ESM has been working with California School Districts helping them to manage their property, liability and Workers' Compensation hazards. The objective is to assist them with compliance and cost savings by mitigating the health and safety exposures to teachers, students and visitors.
- If your mod jumps over 125%, this can trigger a letter from Cal/OSHA and possibly a site visit. Cal/OSHA's Targeted Inspection Program (TIP) fines range from \$100 - \$10,000 and are based on the employer's payroll. Here is the link to Labor Code 62.7 and 62.9, which further define the exact amount of the Cal/OSHA fine. www.leginfo.ca.gov/cgi-bin/displaycode?section=lab&group=00001-01000&file=50-64.5. If you do receive a letter from Cal/OSHA, be sure to have your IIPP in order. Employers without an active IIPP are subject to additional citations. Inadequate IIPPs are the number one Cal/OSHA citation year after year.

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