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Exit Interview

Garamendi: Workers' Comp Reform Worked, Though Issues Remain

By Pat Maio

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Garamendi: "My recommendation for the past two years has been for the State Fund to more aggressively price—or reduce their prices—and thereby create more serious price competition"

John Garamendi's days as California's insurance commissioner are winding down.

In fact, depending on when you read this, Garamendi, a Democrat, could be lieutenant governor elect after Tuesday's election against Tom McClintock.

Either way, his last day on the job as insurance commissioner is Dec. 31. Democrat Cruz Bustamante and Republican Steve Poizner are vying to replace Garamendi as insurance commissioner.

Garamendi, insurance commissioner since 2003, has had a hand in workers' compensation, automotive, title and other insurance issues.

In an interview on the eve of the election, Garamendi addressed what he thinks still needs to be done, including:

Reducing the role of the State Compensation Insurance Fund, a quasi-government workers' compensation insurer that controls about half of the California market. Lessening the fund's role in premium pricing could allow rates to drop even further, Garamendi said.

Creating an ombudsman whose job would be to expedite cases and appeals through the system, though the job would do little good without regulatory changes to clean up the system further.

Enacting emergency regulations to boost compensation to severely injured workers.

Garamendi, 61, first was elected as California's insurance commissioner in 1991. Four years later, President Bill Clinton appointed him to the No. 2 position in the Interior Department where he worked on environmental and water issues.

In 1998, Garamendi left the federal post to become a partner in Yucaipa Cos., Ron Burkle's Los Angeles-based private investment firm.

He was elected insurance commissioner for a second time three years ago.

He recently talked with the Business Journal's Pat Maio about his tenure as insurance commissioner.

Have workers' compensation reforms worked?

The reforms are incredibly successful. They followed the roadmap that I helped lay out, and which (former Gov. Gray) Davis signed dealing with the medical side of the issues.

The second set of reforms dealt with the indemnity piece, which addressed lost wages and the way in which the system operates. And that too followed the basic roadmap for reform, which had been adopted during the (Gov. Arnold) Schwarzenegger period. The result of this has been a \$14 billion reduction in the cost of claims.

That's a 58% reduction in cost of claims from what they had been before we began to deal with this. This is an unheard of success story.

Are legitimately injured workers getting a fair shake?

There are problems. However, these problems are not large for the total system but are important for the operation of the system and for a small, select group of very seriously injured workers who have lost a significant ability to work. This is about a 50% reduction in their indemnity, or lost wage payments. Many of these people can never work again.

Some have lost arms or legs and wind up in wheel chairs. They can work but are not able to do their previous kind of work. The amount they are paid should be—or must be—addressed because it's just plain not fair.

So these people are not getting compensated correctly in some cases?

We recommended in the reforms that we have specific criteria to judge a disability. The American Medical Association description of disabilities was selected as the criteria. The criteria then were to be matched up with a payment schedule for each of those types of disabilities. When the division of workers' compensation (a unit of the Department of Industrial Relations) wrote the regulations, it mismatched the disability schedule with the payment schedule, so those with the highest disability received 50% of what they previously did.

How did that happen?

I don't know. It's Murphy's Law. It just happened. I don't know why it happened. But it did happen.

How can it be fixed?

A regulation, or emergency regulation could be used to immediately solve this problem.

Why isn't the governor doing this?

I think there is a fear of opening up this entire reform. Now the Legislature did try to pass a bill—which I opposed. It was a bill pushed by (State Sen. President Pro Tem Dan) Perata. It went far beyond what was necessary to solve this specific problem. My request to the governor for some time has been to straighten out this problem with a new regulation.

(Editor's note: Schwarzenegger vetoed the Perata bill on Sept. 19, a bill sponsored by Democrats in the Legislature that would have doubled the cost of permanent disability benefits temporarily until a permanent fix could be found. He promised to revisit some parts of the workers' comp overhaul if an administration analysis due at year-end should find that "seriously injured workers are falling through the cracks.")

The second area of concern is the utilization review. The utilization review is the program employers or insurance companies use to make sure treatment given to injured workers is consistent with medical treatment guidelines set by the state. This program is used to decide whether or not to approve medical treatment recommended by the injured person's doctor.

The regulations were so broad as to allow an insurance company, or third party administrator, to force an injured worker to go through many different steps before they could get medical care.

The result is that appropriate and proper medical care has been delayed. Again, a regulation tightening up the utilization review process could solve this problem very quickly. I've recommended that this be done.

Why is this being held up? What is the fear?

Election year. That's the only reason. The reason publicly stated by the administration is that they are awaiting a study.

The third area that the law required to be dealt with are guidelines on medical practice by the American College of Occupational and Environmental Medicine.

The guidelines, which were a description of the appropriate medical care to be given, were to be updated and expanded to those medical treatments not covered by the guidelines. That law passed three years ago and has yet to be implemented. Medical treatment guidelines now are dated and incomplete and that creates a problem with the utilization review, which in turn creates an opportunity for inappropriate treatment.

Now these are regulations that should be written.

Can't regulations be adopted rather than opening up Pandora's box and taking these matters to the legislature?

That is exactly what I am saying. And I've requested for many months that this be done. The longer it delays, the more concern is created and the more likelihood for legislative reform that may or not be beneficial.

Who is benefiting from these delays?

You are looking at a 58% decline in cost of claims and a 45% to 48% decline in cost of premiums. So there is a very fat profit margin that the insurance industry has carved out for several reasons. One reason for this being the case is that the State Fund has kept prices artificially high, allowing the private sector to pick and choose people they want to cover. This allows the private sector to cherry pick.

What can be done to make the system more competitive?

What is necessary here is more competition. The State Fund, even though it has dropped its

market share to below 50%, is nevertheless the price leader. And where they price, the other companies price a little bit below or above, depending on whether they want that particular customer. My recommendation for the past two years has been for the State Fund to more aggressively price—or reduce their prices—and thereby create more serious price competition.

But the State Fund won't reduce its prices? Why not?

They are the epitome of an ossified bureaucracy.

(Editor's note: The State Fund says it hasn't passed on all potential cost savings to businesses in a bid to rebuild the fund's reserves, which are used to pay workers' comp claims. The reserves were drawn on during the surge in workers' comp claims a few years ago.)

Why not urge the governor to rein in this program?

First of all, I'd recommend—and have recommended—that they do emergency regulations on the things that I discussed, and do it right away. These things need to get done and finally do away with these problems. My staff and I have been informally requesting this for about 18 months now. The formal letters have been much more recent. But we had previously decided to do it more informally than publicly. We did recommend certain changes to the law that would have eliminated these problems, and we did that three years ago. We've been at this for some while. It's time to solve this problem and get this thing out of the way, and move on.

There's some talk of having an ombudsman to expedite some of these cases and appeals where both injured workers and employers would have representation. Is this a good idea or not necessary?

An ombudsman is always useful but would have little value until the underlying cause of the problem is resolved. They'll find the same roadblocks and constantly be encountering the same problems.

It might be useful to highlight the problems more effectively with an ombudsman. But the underlying problems are what need to be solved here. We have an ombudsman in our department and it's a very useful tool.

It's a very simple process to set up an ombudsman office. It could be done. The division of workers' compensation is well funded now. One of the legislative reforms gave them a lot of money. They can set up an office without any legislation, or any regulations. They could simply

do it. Now my department doesn't handle workers' comp claims. We are not authorized to do that. Nonetheless we get a lot of complaints and deal with them as though we are an ombudsman. This ombudsman should reside in the division of workers' comp. The money is there and it could be done tomorrow.

What are you seeing in terms of workers' comp fraud in California. Is it down or up?

Fraud and abuse are significantly down. We are talking very far down because of the reforms that have made it much more difficult to abuse the system in terms of following the guidelines on physical disabilities and medical services.

Secondly, we are very aggressive about going after fraud. We've organized the district attorneys, city and county police departments and the insurance industry to aggressively go after fraud. We also work with other agencies, such as the Franchise Tax Board, the Board of Equalization and IRS. Our focus has been on the organized criminal gangs. Joe six-pack that decides to cheat, well that is a problem. We get Joe six-pack, too, but our real focus is where the big money is, which is in these organized criminal gangs.

How many pages are there in an encyclopedia? That's how many different ways there are to rip off the system. The rip-offs occur in numerous ways: staffing agencies, insurance companies, insurance agents and brokers, chiropractors, doctors and lawyers. It's all there.

Anywhere there's money, there is fraud. And somebody will figure out a way to cheat the system. There are still medical providers out there ripping off the system. But it's far, far less now.

Are the premiums still high enough to be an anti-business issue here in California?

No. If anybody is making that argument then it's a false argument. California has dropped into the average price range across the nation. We were at \$5 per \$100 in payroll just a few years ago. Now we are at \$2.50.

So it's not an issue as far as driving businesses out of state?

It was debatable whether it was an issue when it was \$5 because we were creating more business than what was leaving. I'm not saying it wasn't an issue. But it clearly is not an issue today. As to why companies leave, companies leave for many reasons. Workers' comp is not the final straw.

It was a factor three years ago. If you took a look at the overall economy, more businesses were created and entering the state than were leaving. But businesses did leave the state because of workers' comp. Today, businesses leave for any number of reasons. But workers' comp is not the last straw. It's one of the cost factors. You don't leave California to go to Texas or Alabama because of workers' comp. You leave for other reasons.

Are insurance companies being overzealous in denying claims and limiting payouts?

Yes, absolutely. Insurance companies, including the State Fund, use the utilization review process to deny proper treatment and indemnity (compensation). The system is benefiting insurance companies. There is no doubt about it.

Have the reforms caused short-term disability payments to go up and long-term disability payments to go down? Do you buy into that?

I'm not prepared to say that. That may be, in fact, inaccurate. I'm not going to attest to that being accurate. It strikes me as being incorrect. But I don't know. I can't say that right off the top of my head.

Long-term disability payments for seriously injured workers went down but for other types of injuries that's not the case. But for short-term vs. long-term payments, I've not seen that statistic. I'm not saying you are right or wrong. I'd be careful using that statement until you could verify it. I'm not here to tell you if that is true or not. It sounds incorrect.

Are complaints concerning delays and denial of medical care increasing?

First, the number of claims has dropped dramatically, which speaks to the success of the reforms to date. Whether there is a backlog being created, it is much less now than before. Clearly there are some cases where there are delays, and that's the utilization review process that I spoke to before. Overall the backlog is significantly down and delays are significantly less. I'm not saying there isn't a problem but it is much less today than two years ago.

A few years ago, an underground economy was flourishing among certain industry trades due to the workers' comp situation. Do you still think this is the case?

There still certainly is an underground economy. There is no doubt about it. And we continue to find companies—particularly in the construction industry—that are using inaccurate wages and

paying cash under the table. We are finding and prosecuting one or two of these companies each month. Yes, there is an underground economy. Is workers' comp the principal reason for it? I'd say it is a factor. Is it the principal factor? Probably not. The other social benefits, social security and health insurance are probably just as much a factor. Workers' comp is not forcing people into an underground economy. Greed and avarice are.