

Administrative Law Judge Mulls Class Status

By **Draeger Martinez**

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A plaintiffs' lawyer on Thursday pressed an administrative law judge to take the unusual step of declaring class status for potentially thousands of Californians who, the lawyer says, were shortchanged by insurers.

Nick Kazandjiff and co-counsel Patrick DeBlase also said they want to sift through the Division of Workers' Compensation computers to find other prospective class members.

"The defendants want to compare this [complaint] to cases dealing with future obligations to workers, but this case is about workers who already got screwed in the past," DeBlase told Workers' Compensation Appeals Board Judge Roger Tolman Jr.

But lawyers for dozens of insurance companies that are being sued said Tolman does not have the authority to certify a class.

"Right now, the board doesn't have any procedures allowing it to hear class actions," said Lary A. Rappaport, who represents Zenith Insurance Co.

The defense lawyers accused the plaintiffs of trying to stitch together an overly broad collection of complaints to create more leverage for their case.

They said a certified class would open the complaint to any Californian who was supposed to receive workers' compensation and believes they were underpaid, paid late or did not receive statutory penalties.

"Class actions are typically brought by people who have no other remedy available. The applicants do have administrative remedies available, and, in fact, they're already pursuing those remedies," Rappaport said.

Tolman said he would issue a ruling within 30 days on a request by the defendants, dozens of workers' compensation insurers, to dismiss the case. The judge did not say when he would rule on the plaintiffs' class request.

DeBlase of Kiesel Boucher & Larson in Beverly Hills and Kazandjiff represent 27 named plaintiffs in separate actions against the insurers.

The plaintiffs claim they were underpaid, were paid late or did not receive penalties to which they were entitled.

Each worker's file stems from an admitted claim, where he or she suffered an on-the-job injury, then filed a claim that the employer's insurer agreed to pay, he said.

"The insurance company is supposed to pay 'temporary disability,' a working replacement at two-thirds the worker's average weekly wage," said Kazandjiff, of Kazandjiff Traney in Sherman Oaks. "The company is supposed to send a stream of uninterrupted benefit payments, every 14 days like clockwork."

Kazandjiff said he was buoyed by state Insurance Commissioner John Garamendi's recent decision to fine long-term disability insurer UnumProvident \$8 million for wrongfully denying and underpaying claims.

"I'm glad to see that state agencies aren't afraid to reopen tens of thousands of disability cases," Kazandjiff said.

UnumProvident is not a defendant in Kazandjiff's cases.

Mark Kahn, associate chief judge with the Division of Workers Compensation, disputed the defense claim that his board could not certify classes.

But he acknowledged that such cases are rare.

"We have two other proposed class actions currently under consideration, and they both face motions to dismiss because they don't properly name a class that can be certified," said Kahn, who oversees all workers' compensation appeals boards from Fresno to San Diego.

He did not preside over Thursday's hearing.

Kahn said he could recall five proposed class actions since 2002 filed with the workers' compensation appeals board.

None of them was certified, he said. Kahn said the appeals board more likely

would consider cases for complex consolidation, which is an acknowledgement of their common issues of law and fact.

The plaintiffs in the current action claim insurance companies commonly overlooked sending out the first benefit check, sent them late or miscalculated the amount owed. They said their complaint was supported by audits conducted by the Division of Workers' Compensation over the past decade.

The 2004 Department of Industrial Relations audit found 17.1 percent of claims the agency checked were underpaid, with injured workers owed an average of \$1,136.10.

Although the underpayments varied from year to year, from a low of \$756.03 per audited claim in 2003 to a high of \$1,468.71 in 2003, Kazandjiff said they're indicative of problems plaguing the entire industry.

"It doesn't sound like much, a few hundred dollars here for one guy or a couple thousand for one woman, but it adds up," Kazandjiff said. "And that doesn't even count the penalties."

A section of the state Labor Code enacted in 1990 requires insurers to pay a 10 percent penalty on late payments in workers' compensation cases. Kazandjiff estimates 90 percent of workers do not receive penalties to which they are entitled.

"The Industrial Relations director in 1998 testified at a state Senate subcommittee hearing that insurers are underpaying by \$84 million per year," Kazandjiff said. "The Workers' Compensation Insurance Rating Bureau made a statement that it's really only \$40 million per year. Either way, we're talking about real money, especially since it's going back 15 years."

But Frank Falsetto, who represents co-defendant State Compensation Insurance Fund, doubts that figure.

"There's nothing like that; these are results on a very few claims that are audited," said Falsetto of Sheppard, Mullin, Hampton & Richter in Los Angeles. "It's not meant as a statistically valid sample, and Nick [Kazandjiff] has extrapolated from the per-case amount out to all injured workers."