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Race, age, gender bias hits workers across state

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In an age when an African-American, a woman and a senior citizen each has a pretty good shot of becoming president, you'd think that this country is finally evolving beyond discrimination based on race, gender and age.

But there's one area where such discrimination appears to be perfectly allowable: workers' compensation insurance.

Since Gov. Arnold Schwarzenegger successfully pushed his workers' comp reform package in 2004, some medical examiners have decided that they not only have the right but the state-mandated duty to pare down claims based on the race, gender or age of the worker.

The problem stems from the portion of the law dealing with "apportionment," which requires employer-approved medical examiners to review injuries and determine to what extent they are related to unspecified "other factors" beyond the employee's working conditions.

The vagueness of the "other factors" phrase has allowed the medical examiners to use race, age and sex when determining how much the company is liable for the injury.

For instance, if a man has a heart attack on a job, the medical examiner might decide that he should get less money than a woman would because men are typically more prone to heart attacks than women.

Take the case of Milton Jones, a former relief cook in the deli department of Costco Wholesale in San Diego. From May 2000 to September 2001, Jones' duties included cleaning the chicken-roasting ovens with an industrial grease remover.

At the end of each day, Jones would cool the ovens to about 300 degrees and spray the interior with grease remover. After waiting for the ovens to cool, Jones would poke his

head in - the ovens stand about 5 feet tall - and wipe off the burned-on grease, sometimes reapplying the grease remover.

The grease remover came with a warning that it could cause irritation to the point of bronchitis and pneumonia. And it was particularly noxious when heated. It vaporized in the hot ovens, irritating Jones' nose, eyes, face and lungs. He began suffering from asthma, nasal congestion, sleep apnea and hypertension - afflictions that he had not suffered before. He was prescribed steroids and inhalers that helped him breathe easier but also pushed his blood pressure higher.

When Jones sought workers' comp assistance for his pains, a company-approved medical examiner found that repeated exposure to the vaporized oven cleaner was likely to result in chronic bronchial infection.

But the medical examiner cut Jones' workers' comp payments in half because, as an African-American, he had a "genetic" predisposition to high blood pressure or hypertension.

"I felt robbed," Jones said. "They went all the way back to my military records and found that I had no problems with blood pressure. But he said he believed that African-Americans are more prone to having high blood pressure because of our physical makeup and lifestyle and what we typically eat. And I thought, 'Oh, really?' I don't know where he got that from. I'm not eating fried gizzards or stuff like that. I eat salads and fruits and vegetables."

Jones' case isn't unique. Here's a question-and-answer session between an attorney and a medical examiner in a similar workers' comp case:

"A man with an industrial myocardial infarction (work-related heart problem), everything else being equal, would get a lower percent (of a workers' comp payment) than a female?"

"Yes," the examiner said.

"And an African-American . . . would get a lower percent than a white under the same circumstances? Is that correct?"

"Yes."

Here are a few other examples:

Last month, medical examiners at Kaiser Permanente in San Diego cut down a food service worker's claims for carpal tunnel syndrome because she had several pre-existing conditions, including "being female." In the past several years, medical examiners in other locales have cited "female gender" as a reason for cutting carpal tunnel claims, since women statistically report more problems than men.

Last September, a medical examiner in Los Angeles disallowed a third of a 52-year-old clerk's claims of work-related stress on the grounds that her advanced age made her susceptible to hypertension. (As a 52-year-old myself, I'm getting hypertense just thinking that some young whippersnapper of a medical examiner thinks my age makes me hypertense.)

Last March, a medical examiner in Torrance disallowed a portion of a cleaning woman's claims that her work-related back injury had resulted in depression. The examiner's reasons for slimming down the claim included that she was a woman from Central America.

"She's from El Salvador and she is, as the pronoun indicates, a woman," the examiner said in a deposition. "She has a personality disorder . . . which sadly might apply to all too many women. And I must say, when it comes to Central America, it might apply to more men than I would care to mention."

A middle-aged Hispanic man who spent decades working for a utility company injured his left shoulder and left leg on the job. By the medical examiner's account, the worker was involved in intense physical activity: "putting up (power) lines, working underground, climbing up poles, construction, maintenance of lines, kneeling, squatting." But the examiner trimmed his claim, saying that his injuries were also caused by his race, age and gender.

"Age plays a big role in what you determine the nonwork-related factors are, even though he did work half of his life there," the examiner said. "Some of these (factors) are racially connected and some are gender connected."

"Is part of his disability due to the fact that he's a man versus a woman?" the worker's attorney asked.

"Very likely, yes."

Linda Atcherley, a workers' compensation attorney in San Diego, said she was appalled when the discriminatory apportionment decisions started coming through.

"People assume that all the workers who are involved in workers' comp cases are represented by attorneys, but that's not always true," she said. "A lot of workers don't even see the doctors' reports. They don't know why the doctors made their decisions."

The spate of apportionment decisions might not be accidental. Some corporate lawyers are telling clients how apportionment can be used to their advantage. Next month, for instance, the National Business Institute - a nationwide group that sponsors continuing-education seminars for lawyers and other professionals - will host a talk in Sacramento on "How to 'Discriminate'

(Apportion) on the Basis of Age, Sex, etc."

State Sen. Carole Migden, D-San Francisco, last week introduced a bill to end workers' comp decisions based on race, sex and age. But her bill will likely face stiff opposition from the insurance industry, which has opposed any substantial changes to Schwarzenegger's reform package.

The San Francisco Examiner opined last week that the best way of dealing with the flaws in workers' comp is to assemble a blue-ribbon panel of business executives, labor leaders and health care practitioners to "impartially rework the regulations until everyone agrees on their fairness."

"Yeah. That'll happen," you might say. I mean, when was the last time that labor, business and the medical community agreed on anything related to workers' comp?

As the *Examiner* notes, however, the business community might have no alternative. Otherwise, it says, "the day will come when there is no longer a Republican governor in the state Capitol to veto unwarranted weakening of workers' compensation reform."