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NEW DECISION IN THE DUBON CASE A HUGE SETBACK FOR CALIFORNIA INJURED WORKERS

by Scott O'Mara

Since our first newsletter for October 2014, the Workers' Compensation Appeals Board issued an *en banc* decision in the *Dubon* case on October 6, 2014. This decision reviewed and reduced the positive value of the previous determination made in the February 2014 decision, which provided clarity and justice to workers seeking medical care under the Workers' Compensation system. It should be noted that the February 2014 ruling was made by different commissioners than the May 2014 ruling, as new commissioners appointed in May 2014 were instrumental in the revocation of the February 2014 decision.

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The February 2014 *Dubon* decision recognized that Utilization Review and Independent Medical Review, otherwise known as UR and IMR, respectively, have some substantial procedural defects which radically impact negatively California workers' ability to exercise their rights pursuant to the California Constitution. Article 14, Section 4, of the California Constitution grants the legislative body the power to create and enforce a complete system of Workers' Compensation, including adequate provisions to protect the comfort, health, safety and general welfare of any and all California workers and those dependent upon them for support. The 1976 case of *Bell v. Samaritan Medical Clinic, Inc.* stated in essence that injured workers are not liable for medical bills associated with their industrial injuries.

As readers are aware, the legislative enactments of Senate Bill 863 in 2012 and Senate Bill 899 in 2004 have changed accessibility to medical care, making it more difficult for workers to receive adequate medical care under the California Workers' Compensation system.

As previously discussed, the new legislation created the secretive IMR process, which does not allow workers to know the identity of the Independent Medical Review doctors and therefore eliminates the possibility for cross-examination of doctors as to their credentials and understanding (or lack thereof) of critical medical documents.

Medical documents became a very significant issue in the *Dubon* case. In the first decision of February 2014, the Court was aware that there can be — and in the *Dubon* case there actually were — material and procedural defects. In the February 2014 decision, the *Dubon* Court acknowledged that the adjusting agency did not provide all the medically necessary records for the Utilization Review doctor to consider. The attorney for the worker established this, and based upon this manipulation, the Workers' Compensation Appeals Board determined the artificial and secretive standards established by Senate Bill 863 should not have application.

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Another official standard, as many readers are aware, was that the worker would have to rely upon the determination of the Independent Medical Review doctor and not have the right to litigate or present evidence before a judge as to the inappropriateness of the IMR decision, thereby binding the worker to the decision for a period of 12 months. The February 2014 *Dubon* decision acknowledged that the carrier, by not sending all the proper documents to the IMR doctor, had gutted and eviscerated the ability of Utilization Review to give adequate consideration and make an appropriate decision as to the necessity of the recommended medical care.

In the new *Dubon* decision issued on October 6, 2014, the new Board stated that the ability to litigate access to medical care is not based on material procedural defects. The Board felt that the Independent Medical Review process is the sole way California injured workers can access medical care. The *en banc* decision held that the only litigation allowable would be based on the issue of

timeliness. Therefore, all California workers are encumbered with the Utilization Review process, regardless of the documents provided *or not provided* by the employer, and the UR determination is then forwarded to Independent Medical Review if it is challenged by the worker. Thus, injured workers have a very limited right to litigate cases before a judge.

It is interesting to note that in the February 2014 *Dubon* decision the judge used the phrase "wealth of medical records" when referring to the records not reviewed by the UR doctor. Based upon this failure to give adequate consideration to the medical treatment requested, the WCAB in February 2014 felt it was appropriate to intervene and take the issue outside the IMR process and allow judicial review.

Unfortunately, the new October 6, 2014 Dubon decision shifts the economic responsibility for medical care from the Workers' Compensation system to private healthcare programs (such as Blue Cross, et al.) utilized by workers — a shift which will have an immediate and long-term negative effect on California injured workers.

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The immediate effect is allowing employers to manipulate and provide selective documentation to the UR vendors contracted by them. This contracted vendor then reviews those documents and is aware that if they grant the medical care requested, the cost will be borne by the employer/carrier — the very provider of their UR contract. On the other hand, if they deny the requested care, the cost is shifted to the employee via his or her private insurance (*i.e.*, Blue Cross, etc.).

The structure of this protocol is ripe for conflicts of interest because of the contracts UR vendors have with employers. Only a very naive individual would expect a UR decision to be an impartial determination. It is not, and never can be.

The next step of review when a UR decision is challenged — Independent Medical Review (IMR) — involves a corporate entity contracted by the State. The IMR reviewing doctors receive the same pay whether they spend six days or five minutes reviewing a UR determination. Currently, 84 to 85% of IMR decisions uphold UR decisions, thereby denying injured workers the medical care they need as determined by the doctors who actually know them — their treating physicians.

Compounding the problem is the fact that the Court, based upon the recent *Dubon* decision, is limited in granting and protecting workers' rights as set forth in the California Constitution, Article 14, Section 4. The rationale provided in the current decision is very weak, based on the argument that the UR failures cited in the first *Dubon* decision are minor technical or immaterial defects which are insufficient to invalidate the UR process.

Workers who have cases ongoing for many years and are receiving medical care are also going to run into this barrier for accessing medical care. The parties need to recognize that as these barriers of artificial denial occur, workers will be more inclined to engage in Compromise and Release settlements. These settlements pay workers a lump-sum benefit and shift the liability from the employer to the worker's private health plan, thereby raising the cost of private health plans.

One option is to seek an appeal of the October 6, 2014 *Dubon* decision. The other is to seek legislation to correct the wrong it has created. Individual workers, associations and health providers need to be proactive to ensure the financial solvency of the medical care system and the solvency of workers and their families. This, in turn, will also benefit employers by allowing workers to receive adequate medical care and return to work more expeditiously.

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