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FAILURE OF WORKERS' COMP MEDICAL SYSTEM CAUSES HARM TO BOTH EMPLOYEES & EMPLOYERS

By SCOTT O'MARA

In the March newsletter *(see attached)*, there was discussion as to the Workers' Compensation system and the fact that it was created to provide medical care to injured workers to cure or relieve the effects of their industrial injuries. In summary, that newsletter reflected that the system ultimately was radically changed by Senate 863, which has impacted all injuries, regardless of the date of injury. This bill implemented the Independent Medical Review process — a process with major failings which have resulted in a denial of adequate medical care to California injured workers.

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The *en banc* decision by the California Workers' Compensation Appeals Board in *Jose Dubon v. World Restoration, Inc., and State Compensation Insurance Fund* on 2/27/14 directed a cure to one of the inadequacies of Senate Bill 863 which had allowed the carrier, self-insured employer or claims adjuster to select and limit the information provided through the IMR process, thereby benefitting the employer, carrier or third-party entity by reducing the likelihood of the requested medical care being approved.

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Recently, however, State Compensation Insurance Fund *(otherwise known as State Fund)* has filed a petition seeking reconsideration of the *Dubon* opinion. As you look at the previous newsletter, you will see that the *Dubon* case created an opportunity for justice and a fair and balanced weighing of the evidence which would allow an impartial judge to determine the medical necessity of the requested care. In essence, the *Dubon* case created *transparency* and *accountability*.

State Fund is arguing strongly against this transparency and accountability. They prefer — as do many other carriers, employers and defense people — that a blanket be placed on the facts, camouflaging and hiding the true reality of the need for medical care. This guise is done with the misperception that it will lower costs for the employer. However, the reality is that workers will be off work longer and have higher levels of disability, or be unable to return to work because they have not had the proper medical care to cure or relieve the effects of their work injuries.

The *Dubon* case allows a process which ensures that the carrier's handling of a Workers' Compensation case does not have procedural defects which would undermine or eviscerate the utilization review (UR) protocol. If in fact proper information is not provided to utilization review companies, the UR process can be found to be inadequate, giving the injured worker the right to remove himself or herself from this protocol which does not allow transparency and accountability.

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Again, the utilization review procedure begins with the worker's doctor seeking approval for medical care. The employer then may utilize the utilization review process as established on 1/1/04. This protocol involves a contract between the employer or its insurer with an outside entity to make determinations regarding the appropriateness and necessity of medical care. The UR process ordinarily must be completed within five days of the treating doctor's request for authorization, although additional time may be granted — possibly allowing the adjuster up to 14 days — if further information is needed. On the other hand, in certain medical situations requiring urgent

treatment, the deadline can be reduced to 72 hours or less after the request for care.

In the *Dubon* case, the adjuster failed to provide necessary information to the utilization review entity. Therefore, the Court stated:

"A UR decision is invalid if it is untimely or suffers from material procedural defects that undermine the integrity of the UR decision."

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Through this action, the Workers' Compensation Appeals Board is creating transparency and accountability. The Board further stated:

"If a defendant's UR is found invalid, the issue of medical necessity is not subject to IMR but is to be determined by the WCAB based upon substantial medical evidence, with the employee having the burden of proving the treatment is reasonably required."

This then would protect the worker from having to be subject to the Independent Medical Review (IMR) process, which simply upholds utilization review decisions 79% of the time, according to data released by the California Division of Workers' Compensation in January 2014. Of significance also is the fact that not having injured workers be subject to IMR provides a great opportunity for employers and third-party administrators to reduce their costs, especially when far more IMR requests are being filed than was anticipated, thereby undermining their potential savings from this so-called reform.

The accountability created by the *Dubon* case reflects back to the California Constitution, which states:

"A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support . . . [with] full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury . . .."

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State Compensation Insurance Fund's motivation is the argument that Senate Bill 863 removes workers' constitutional rights, judicial review and accountability from the medical process, with the UR and IMR protocol providing the one and only answer relative to treatment which is to be provided to injured workers. It is anticipated that State Fund will take this matter to the Appellate Court, arguing that SB 863 lowers the cost for the employer and expedites medical care for the injured worker. *Nothing could be further from the truth, based upon the history which has evolved following the passage of that legislation.* The selectivity of information being provided to utilization review, as in *Dubon*, and the 79% IMR denial rate offer clear evidence of the failure of this system to provide adequate, timely care to injured workers to cure or relieve the effects of their industrial injuries.

Labor Code §4610.5 must be reviewed and changed to comply with the California Constitution to create transparency and accountability. This approach, contrary to what is being stated by the defendants, will provide the real way to reduce Workers' Compensation costs by enabling more workers to return to their jobs, or return to work sooner, and with lower levels of disability.

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NOTICE

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