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UTILIZATION REVIEW AND INDEPENDENT MEDICAL REVIEW NEED TO BE EVISCERATED

By SCOTT O'MARA

California Constitution, Article IV, Section 4 — which sets forth the concept that Workers' Compensation is to be a complete system providing medical care in the event of a job-related injury to cure and relieve the injured worker from the effects of his/her injuries — is now before two Appellate District Courts as to the constitutionality of newly implemented legislation which impacts injured workers' access to medical care. As many readers are aware, the legislative enactments created between 2004 and the present date have in many cases eliminated injured workers' access to timely and adequate medical care, or made such care impossible to obtain.

As most readers are aware, the first stage in obtaining medical care is for the treating doctor to make a recommendation for treatment. The adjuster then has the right to send this recommendation through a process called Utilization Review (UR), wherein a decision as to the appropriateness and necessity of the treatment recommended is made by an outside vendor employed by either the adjusting agency or the self-insured employer. This decision to adopt or take issue with the recommended care supposedly is made after the UR doctor has reviewed the relevant medical records.

In the past, injured workers had the constitutional right to present before a judge evidence which establishes that the UR doctor is a physician who has not seen the patient, does not know the patient and therefore has no history with the patient. As a result, this doctor's opinion is very narrow in comparison with that of the treating doctor, who typically has seen the patient many times. After being so informed, the judge would then weigh and measure the evidence and make a fair decision accordingly. In many situations, the recommended medical care would be granted because of the judge's understanding as to the role of the treater, who knows the patient, has seen the patient, and has the goal of helping the patient to recover from his/her injuries.

However, the legislation enacted in recent years has totally changed the protocol, removing the opportunity for an injured worker to take his/her case before a judge when the UR doctor has denied the treater's recommended care. Instead, the injured worker whose recommended treatment has been denied by UR now has only the option of appealing the denial through the Independent Medical Review (IMR) process. This process is very secretive, as the identity of the IMR doctor evaluating the UR opinion is not made known to the parties. Moreover, like the UR doctor, the IMR doctor does not know the patient and has never seen the patient. The end result of this process more than 80% of the time is that the IMR doctor simply "rubber-stamps" the UR denial.

A very significant case is *Stevens v. WCAB*. On 9/30/15, a panel of justices from the First District Court of Appeal heard oral argument.

The focus was the lack of due process available to injured workers because of the hidden identity of the IMR doctor, which in and of itself is violative of the California State Constitution, Article IV, Section 4, because the mechanisms to resolve the case allow for no checks and balances. The UR doctors, who never see the injured workers, are paid by the employers; and the IMR doctors are protected by a cloak of secrecy, which eliminates any opportunity to challenge their determinations.

The Administrative Director, who had counsel present at the First District Court of Appeal, is part of the State of California. In that capacity, the State took the position that keeping the review process away from so-called "interest groups" — who they allege are under the undue influence of the treating doctors — created a pool of independent physicians, and the guidelines of evidence-based medicine had produced a problem which has been resolved by the IMR process. Of interest, one of the justices drew an analogy to a traveling medicine man — such as in the *Wizard of Oz* — and such individual's inability to deal with real medical problems.

The Third District Court of Appeal is also going to review whether the vendor, Maximus Federal Services, which controls the IMR process, is meeting mandatory statutory deadlines set forth by Labor Code §4610.6(d), which states that a decision shall be rendered by IMR within 30 days of its receipt of a request for review and accompanying supporting documentation.

During the year 2014, the average waiting time for the vendor, Maximus Federal Services, which controls the IMR process in the state of California, to render its decision regarding treatment which has been denied by UR is well beyond 100 days. As of March 2015, their assertion is that their response time is now 24 days. Attorneys representing injured workers subject to UR and IMR maintain that decisions which do not meet a 30-day standard should allow for Court intervention to render an independent decision outside the IMR process.

Labor Code §4610.6(d) states:

> "The organization shall complete its review and make its determination in writing, and in layperson's terms to the maximum extent practicable, within 30 days of the receipt of the request for review and supporting documentation, or within less time as prescribed by the Administrative Director."

The language in the Labor Code — "to the maximum extent practicable" — is the verbiage the Defendants will seek to use to extend the 30-day limit.

In June 2015, the Workers' Compensation Appeals Board panel found that a untimely UR decision allows the injured worker to avoid the IMR process. It found that a Workers' Compensation judge then would make a determination as to the reasonableness and necessity of the recommended medical care. This standard was also applied to IMR decisions, indicating that an untimely IMR review is the same as an untimely UR review and allowed the judicial process to intervene.

It is reasonable to expect that the vested interest that Workers' Compensation carriers and self-insured employers have in shifting medical responsibility from their table to workers' private health coverage will cause them to appeal any further decisions which recognize the failure of UR and IMR.

Legislatively, this subject needs to be re-examined, and two prongs of correction should occur. One is through the Courts, and the second is through the Legislature, which has failed to keep the principles of the Workers' Compensation system consistent with the mandate of the California Constitution to provide medical care to cure and relieve injured workers from the effects of their job-related injuries. This failure effectively destroys a medical system which facilitates a quicker recovery for workers with less time off work and less disability, saving employers money in both areas — *i.e.*, by having fewer temporary disability payments and payments pursuant to Labor Code §§4850 and 4800.5, and through workers having reduced levels of permanent disability because of a more effective recovery.

As an ancillary regarding safety workers, the delay created by the current UR/IMR process places many workers and employers at risk that workers will not be able to improve because of the delay in receiving medical care, forcing workers to seek an industrial disability retirement. *The meaningless process of UR and IMR needs to be eviscerated.*

Attached is an article from the California Association of Highway Patrolmen by Scott O'Mara which provides a review of medical care and the current legislation and also an article about "Inside Corporate America's Campaign to Ditch Workers' Comp by Michael Grabell, ProPublica, and Howard Berkes, NPR. The article by Mr. Grabell and Mr. Berkes dated 10/14/15 addresses the devastation which will occur to injured workers and their families by "ditching" or limiting Workers' Compensation.

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NOTICE

Making a false or fraudulent Workers' Compensation claim is a felony subject to up to 5 years in prison or a fine of up to $50,000 or double the value of the fraud, whichever is greater, or by both imprisonment and fine.

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