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safetyofficerattorneys.com ★ www.law1199.com ★ **SCOTT O'MARA, MICHAEL PADILLA, RICK PINCKARD & BRAD FIELDS**

TIME LIMITS FOR WHOM & BUYING OF DOCTORS

By Scott O'Mara

The California Workers' Compensation system has five benefits to protect and assist workers who suffer job-related injuries: (1) medical care to cure or relieve the effects of the industrial injury; (2) temporary disability payments or benefits pursuant to Labor Code §4800.5 or §4850; (3) permanent disability payments for disability or impairment; (4) limited supplemental job displacement vouchers for injuries occurring on or after 1/1/04; and (5) death benefits for surviving dependents in certain limited situations. Unfortunately, however, employers and Workers' Compensation carriers continue to strive to limit the protection for injured workers which had been agreed to a century ago.

Throughout the United States and in California, the Workers' Compensation system, for the most part, resulted from the acceptance of a "bargain" between workers and employers in which both sides agreed to a compromise which appeared to provide a fair resolution between the differing perspectives of each side. To reach this agreement, workers relinquished the right to sue employers for unlimited liability, while employers accepted that no fault needed to be demonstrated for job-related injuries, for which workers would be entitled to receive compensation subject to certain caps or limitations.

However, despite this long-accepted "bargain" between workers and their employers, several states — including California — have sought to create further limits on injured workers' access to medical care. By reducing this access, these states have, in effect, shifted the responsibility for job-related injuries from employers — who rightfully should bear this burden — to injured workers and their personal health plans.

California has instituted the Utilization Review (UR) process, which allows non-examining doctors to make determinations regarding the necessity and appropriateness of medical care recommended by treating doctors. Prior to the passage of Senate Bill 863, workers who disputed Utilization Review decisions were allowed the opportunity to present evidence before a judge who would weigh and measure the facts and make an unbiased determination as to the injured worker's medical need and whether or not the recommended care should be approved.

I – TIME LIMITS FOR WORKERS: *YES*; TIME LIMITS FOR EMPLOYERS: *NO*

The enactment of SB 863 eliminated the opportunity for a judge to review the evidence, creating instead the Independent Medical Review (IMR) process as the only avenue of appeal for disputed UR decisions. The unfairness of this process became clear very quickly with the realization that IMR doctors — whose identity is withheld from the parties — were giving the "final word" on treating doctors' recommended care and treatment based solely on the medical records they have been provided, as their decisions — which about 88% of the time have merely rubber-stamped UR denials — are virtually immune from any further appeal because of the secrecy of the IMR process.

It is significant also that *injured workers have specific time limits* within which to appeal disputed Utilization Review determinations, and must submit their requests for Independent Medical Review to the Division of Workers' Compensation no later than 30 days after service of the UR decision denying the recommended care to the worker. If this 30-day limit is not met, the worker is denied the recommended care for a period of 12 months. *Yet employers argue that the employer's part of the appeal, IMR should not be subject to this same 30-day time limits when reviewing UR denials.*

Several situations have evolved where an employer has delayed the IMR process in violation of the Labor Code by not providing all the essential documentation to the IMR doctor within a *time limit* of 30 days). Specific legislation has been passed which subjects these employers or agents to small fines for such misconduct, providing a direct acknowledgement that the present system is subject to either intentional or negligent manipulation by employers which effectively delays or denies injured workers their needed care.

With respect to IMR's mandated responsibilities, 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 cases in which IMR has failed to meet its 30-day *time limit* reflect a risk for injured workers, not a risk for employers. When a determination is untimely, an employer will simply argue that they can proceed through the IMR process again, as opposed to allowing a judge to make an independent determination regarding the necessity and appropriateness of recommended treatment. In actuality, IMR is neither "independent" nor objective, as evidenced by their 88% denial rate of UR appeals.

Currently, there are two significant cases before the Appellate Courts regarding the legislated IMR *time limit* — one in the 2nd D.C.A., and the other in the 1st D.C.A. State Compensation Insurance Fund, which is involved in both cases, is arguing that violation of the 30-day rule should not result in a penalty, and that when that *time limit* is not met, the IMR process should simply be repeated, and the worker should not be allowed to take the matter before a judge for a truly independent determination regarding his/her need for medical care.

On the other hand, if an injured worker does not exercise his/her right to appeal a UR denial within the 30-day *time limit*, he/she has no further right to file an appeal.

Clearly, both sides should be subject to the same *time limits*. The idea that IMR can violate their 30-day deadline with the only consequence being a small penalty, while injured workers are not allowed any exceptions to their 30-day deadline, illustrates how the system is designed to protect employers at the expense of workers.

II – ECONOMIC PROFILING & BONUSES ALLOWS BUYING OF DOCTORS

Labor Code §4616.1 is further reflective as to the stacking of the Workers' Compensation system against the worker and the failure of the "bargain". This section states that economic profiling is the "evaluation of a particular physician, provider, medical group, or individual practice association based in whole or in part on the economic costs or utilization of services associated with medical care provided or authorized by the physician, provider, medical group, or individual practice association".

The use of economic profiling by employers has caused a breakdown in the traditional physician-patient relationship in the Workers' Compensation system, because Work Comp doctors are aware that, based on profiling, they potentially can be removed from the employer's medical provider network (MPN) list if they fail to keep costs down. This pattern is further reinforced by the fact that in some cases MPN doctors are even provided an economic incentive, such as bonuses, if they are successful in keeping costs down. In other words, *these doctors may be financially rewarded for minimizing injured workers' access to the care they really need*.

Recently, a spokesperson for the Department of Industrial Relations stated that 1,241 medical provider networks are currently using economic profiling. It is important for injured workers to be aware of this fact, *and the fact that their doctors may actually benefit financially from denying them proper medical care*.

Employers and carriers look at the cost of a claim and the medical care associated with it, as well as the level of impairment found by the treating doctor. It must be recognized that the financial incentives (such as bonuses) provided to these doctors for keeping costs down — along with the potential risk of their removal from the MPNs providing these lucrative opportunities if they fail to do so — clearly tend to skew the perspective of these doctors far from the realm of being "patient advocates" by influencing (in a negative way) their determinations as to their patients' need for medical care.

Regarding the Buying of Doctors (the incentives or bonuses which economic profiling enables doctor to receive), this issue is being addressed by Senator Pan's legislative proposal — Senate Bill 563. This bill would correct the wrongdoings imposed by such profiling, and seek to eliminate the Buying of Doctors, which unfortunately does occur.

The prior legislation — SB 863 — was thought to have some value in expediting medical care, but unfortunately the players who entered into this agreement did not foresee and understand the negative impact which the new law would have upon California injured workers and their families. Therefore, the law which instituted Utilization Review and Independent Medical Review needs to be modified to honor and respect the "bargain" entered into between employers and injured workers in the last century, so doctors can once again provide proper medical care and practice medicine in an unbiased environment instead of being trapped in a system which can either reward or penalize them *not for the quality of care they are providing, but for the extent of costs they create for employers and insurers*.

It takes little sophistication to recognize how the existing legislation has harmed injured workers while creating tremendous opportunities for employers to manipulate the system with the Buying of Doctors.

Clearly, also, injured workers need to have the right to take disputed UR and IMR determinations before a judge so a fair and impartial decision can be made as to the appropriateness and necessity of medical care which has been recommended by their treating physician.

If the reader goes to www.LAW1199.com, more information can be found regarding the subjects discussed herein. In particular, 2015 Issue #5 addresses the legislative changes which would correct the egregious wrongs imposed by the current law. Also, as set forth in 2016 Issues #2 and #3, all parties involved in providing Workers' Compensation medical care — i.e., treating doctors, examining doctors, UR doctors and IMR doctors — need to be aware that their conduct is being reviewed and may be subject to medical malpractice lawsuits in the event of their failure to provide timely and proper care.

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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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