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

UR & IMR PROBLEMS CONTINUE; SAFETY WORKERS UNFAIRLY CRITICIZED; WORKERS' COMP REFORM NEEDED TO RESTORE CHECKS AND BALANCES

By Scott O'Mara

Labor Code §139.5 addresses the Independent Medical Review (IMR) process, which commenced for injuries occurring on or after January 1, 2013, setting forth a cloak of protection and secrecy for the doctors who participate in the IMR protocol. This protocol is the appeal vehicle for injured workers whose recommended medical care has been denied by the Utilization Review (UR) process. In both cases — UR and IMR — the reviewing doctors making determinations as to the appropriateness and necessity of recommended medical care do not actually see the injured workers for whom they make these decisions.

An additional problem with the IMR process is the secrecy factor — *i.e.*, the withholding of the names of its reviewing doctors. This effectively eliminates challenges to the determinations made by IMR doctors, because their determinations can only be overturned if the injured worker can demonstrate that a decision involved an act of malice; that the doctor did not make a reasonable effort to determine the facts; that the IMR company did not select its medical professional from a fair and impartial panel of doctors with the qualifications to render an appropriate medical decision; that the doctor was not licensed and in good standing, or did not have clinical knowledge of the specialty involved in his/her decision; that the doctor has been subject to disciplinary actions or sanctions; or that the doctor has an economic connection to the employer, Workers' Compensation insurer or claims administrator. ***However, because the IMR process is cloaked in secrecy, it is virtually impossible for injured workers to delve into any of these areas to establish the basis for challenging an IMR decision.***

On January 25, 2018, the First Appellate Court, Division Two, supported the Workers' Compensation Appeals Board's decision that the identity of reviewers in the IMR process — as set forth in Labor Code §§4610.5 and 4610.6(f) — shall be kept confidential in all communications with entities or individuals outside the IMR organization. This legislative enactment effectively removes the WCAB's power to allow the parties to examine IMR evaluators.

The system of checks and balances available in the judicial, executive and legislative branches of our government has been completely eviscerated in the Workers' Compensation arena. This evisceration delays, removes and/or complicates injured workers' ability to access appropriate medical care. The 2013 changes in California law go hand-in-hand with the changes made in 2004 which empowered employers to force injured workers in certain employment situations to select from a Medical Provider Network list of doctors established by the employer.

These concepts — and the problems associated with same — are contrary to the mission of the California Workers' Compensation system, and they provide employers an opportunity and incentive to manipulate the system at the expense of California injured workers and their families, not to mention society as a whole. The argument made for the IMR process is that it was initiated to expedite the Workers' Compensation system and provide injured workers with access which previously did not exist. However, while the current legislation may have been created with good intention, it unfortunately has produced just the opposite result.

Unfortunately, also, the press is now attempting to take issue with safety people facing the final years of their career while acknowledging their job-related injuries. Had they acknowledged these injuries earlier in their career, their employer may have intimidated them by asserting that they cannot perform their substantial duties. This attitude discourages some workers from acknowledging their injuries and seeking remedies at the time the injury occurred so they can continue with their employment.

The Deferred Retirement Option Plan (DROP) was created for the mutual benefit of the employer and the worker. Now, as safety officers — whether they be police, deputy sheriffs or firefighters — reach the point of retirement and cessation of their employment by the DROP program or regular retirement, and they acknowledge their job-related injuries, the response of the news media is to question their veracity. Had these workers been able to access medical care expeditiously at the onset of their symptomatology, that could have cured or relieved the effects of their injuries and diminished their level of disability later in their career. However, this course of action frequently has not been allowed because of Utilization Review, Independent Medical Review, and/or threats of injured workers losing their employment for filing a claim. If safety officers do not seek medical care for their job-related inju-

ries, a shift of economic responsibility occurs away from the employer — who has been a factor in the manifestation of the injuries — to the injured safety officers and their families.

In 1906, President Theodore Roosevelt stated: "Industrial accidents are a risk of the trade which the law must place on the employer who alone is able to pass it on to consumers, upon whom in justice all costs incident to the manufacture of a commodity should fall." In the situation of California workers — including safety officers — job-related injuries occur, and there are people who are motivated to continue with their employment; people who delay obtaining care for fear of losing their jobs; and people who cannot access medical care in a reasonable and appropriate manner because of the UR and IMR processes currently in existence.

California Workers' Compensation legislation has attempted to shift the blame and costs for work injuries to the workers themselves by taking certain cases out of context and trying to use those as a standard for all workers, This is clearly a violation of the California Constitution, Article XIV, Section 4, which specifically states that the Workers' Compensation system "includes adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workers in the course of their employment", 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".

The mischaracterization of the Los Angeles Fire and Police as to the level of cases they have filed fails to acknowledge the age of the workers, the length of time worked, the tremendous physical and emotional stress associated with their work, and the workers' fear of losing their job if they file a Workers' Compensation claim. The UR & IMR system — which continues to be a complete and disgraceful failure — needs to be remedied. The writers of the articles which appear to take great delight in attacking California workers would see everything in a different light if they were the recipient of a job-related injury and a victim of this failed system which frequently does not provide adequate medical care to cure or relieve their injuries, or if they were in a position where they might lose their job because of the employer or adjuster taking unfair action which is out of context with a job-related injury.

At one time, legislation was proposed to deal with some of the problems created by the present system. ***These proposals clearly need to be reconsidered.*** The basic principle and purpose of Workers' Compensation to cure or relieve the effects of work injuries, as set forth in the California Constitution, needs to be implemented. The "splash news" issued regarding the DROP participants (without acknowledging the significant factors noted above) needs to be rejected for its misguided perspective and countered with truthful arguments, and the limitations placed upon the Courts by the legislative enactment of Utilization Review and Independent Medical Review need to be reconsidered and changed to allow checks and balances which will lead to more fair and just results. By doing so, we will have less turnover and less time off from work, and people will be able to retire with less disability.

Please go to www.LAW1199.com and *review Law1199.com Newsletter 2015 Issue #5 regarding the direct and simple changes needed to eliminate the errors of the present system and comply with the California Constitution, Article XIV, Section 4.*

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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, which-

ever is greater, or by both imprisonment and fine.

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