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THE DREAM THAT BECAME A NIGHTMARE

By Scott O'Mara

As many readers are aware, the current Workers' Compensation system was amended to incorporate Utilization Review (UR) and Independent Medical Review (IMR). The dream for this change was that it would expedite injured workers' access to the medical care they need, so the system would be more efficient and workers could be treated with fewer delays and thereby recover more quickly. *Unfortunately, however, the truth is that the opposite of what was intended has occurred, and this dream has instead become a nightmare.*

As readers are further aware, as set forth in prior newsletters — particularly, Law1199.com Newsletter 2015 Issue #13 — the doctors involved in UR and IMR never see the injured workers whose entitlement to recommended medical care they are determining based solely on the medical records provided to them. When the requested treatment is denied — as is often the case — such denials are very difficult to overturn because of the limited review process in the present system.

The California Constitution sets forth in Article XIV, Section 4, that the Workers' Compensation system is to be a "**complete system**", with "***full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve [California injured workers] from the effects of such [work-related] injury***". The present Work Comp system fails miserably in fulfilling that requirement. The damage done by UR and IMR became quite apparent early on as the medical care recommended by so many treaters of injured workers' has been denied by UR and upheld by IMR.

Most recently, this damage was reflected in the case of *King v. CompPartners, Inc.* In this case, the injured worker, Mr. King, was on medication which had been authorized but then was stopped abruptly, causing him to suffer four seizures. Mr. King subsequently filed a lawsuit against the Utilization Review vendor and the doctor involved in terminating his medication abruptly, with documentation substantiating that such termination was negligent and had resulted in his four seizures, thus constituting medical malpractice. The employer and the UR vendor argued that they have a cloak of protection against such allegations, and that the UR doctors — despite the fact that they are making decisions to approve or deny medication — are not "practicing medicine".

The *King* case eventually worked its way to the California Supreme Court, which unfortunately embraced the idea that California workers do not have the right to hold UR vendors and doctors accountable for any harm they have caused, thereby upholding the concept that these vendors

and doctors *do* have a “cloak of protection”. The employer argued that the civil liability or the doctor’s responsibility for a medical malpractice suit was a removal of the exclusive remedy the California Workers’ Compensation system is based upon.

The finding in the *King* case does not conform to the requirements of the California Constitution, as noted above. Moreover, it encourages more wrongful actions by employers, Utilization Review and Independent Medical Review, and the doctors involved because they have no accountability. Therefore, legislative change is needed to give clarity to the Courts so the type of injustice and harm done to Mr. King does not continue. I discussed the actions needed to remedy the current Workers’ Compensation system in Law1199.com Newsletter 2015 Issues #12 and #13,

With a new governor soon to take office, it is now appropriate to meet again with the California Legislature and express to them the failure of the present Work Comp system and how this failure is resulting in higher levels of worker disability, longer periods of time for employees to be off work while recovering from their injuries, and an increased risk of serious harm, such as what occurred to Mr. King.

Labor Code §3600 is reflective of the bargain entered into by the parties more than 100 years ago. The concept was that California injured workers should be able to access medical care and other benefits when they sustain a job-related injury. In other types of litigation, an injured individual needs to demonstrate some type of negligent act on behalf of the wrongdoer. Labor Code §3600 specifically states that an employer’s liability for compensation to a worker who is injured on the job does not require the worker to establish negligence against the employer, even if the employee dies as a result of that injury.

If an injury is subject to the provisions of Labor Code §3600, the waiver of the establishment of negligence sets forth a cap as to the amount of damages the worker can receive. The damages are provided in the form of medical care, temporary disability benefits and permanent disability benefits.

Unlike other doctors, Utilization Review and Independent Medical Review doctors who fail to provide adequate medical care for injured individuals are *not* subject to medical malpractice allegations. Per the new ruling in the *King* case, they have a totally unreasonable cap of protection for the medical determinations they make regarding the care recommended by injured workers’ treating doctors.

In the *King* case, the employer successfully maintained that the UR doctor who made the error of abruptly terminating the applicant’s medication was merely stating an opinion, not providing medical care. Therefore, they argued that the cessation of medication which caused injury to Mr. King should not be subject to a medical malpractice lawsuit. Their argument to the Supreme

Court was that the UR vendor — an outside company — should be subject to protection from a medical malpractice lawsuit pursuant to Labor Code §3600. Unfortunately, the Court agreed and embraced this protection for UR doctors.

The Supreme Court acknowledged that independent claims adjusters and administrators hired by self-insured employers who handle Workers' Compensation are protected pursuant to Labor Code §3600, and the Court embraced the extension of this protection to the outside vendor — Utilization Review — and their doctor, indicating that recovery is limited because of the bargain entered into between employees and employers in Labor Code §3600.

The Court further indicated that they did not agree with the Appellate decision allowing a party to show additional factors which would remove the exclusive remedy of Labor Code §3600. *Of interest, two of the concurring opinions by the Supreme Court justices expressed concern that Utilization Review might not be working as the Legislature intended, and the legislative branch might therefore want to revisit that issue and whether the existing safeguards — essentially, Independent Medical Review and the audit process — provide a sufficient incentive for UR to be competent and careful in its medical determinations.* One of these justices pointed out that while common law remedies are in place to provide protection to the general public, these remedies do not apply within the provisions of Labor Code §3600. Again, this reiterates the need for the California Legislature to re-examine the effectiveness of the present Workers' Compensation system.

The Supreme Court's opinion in the *King* case again illustrates the need to initiate a revision of the California Workers' Compensation system, as previously occurred with the establishment of Utilization Review and Independent Medical Review. Not only are workers being wrongfully harmed by the present system, the Supreme Court also has recognized that the current approach needs correction. This again provides an important reason for meeting with California's legislators to get them to create a system of medical care which comports with the California Constitution.

The failure of the dream to provide prompt and adequate medical care to injured workers is a nightmare. The reality is that many injured workers are unable to access the care they need because of the structure of the present system — a system which has no proper checks and balances, as it does not allow any thorough evaluation of UR and IMR doctors and their decisions which so often deny injured workers the care they need.

Below are the Labor Code changes I am proposing to right the wrongs inherent in the present Workers' Compensation system:

(1) Labor Code §4616 would be amended to add:

4616. (a) (6) Injured workers have the right to predesignate a treating physician prior to sustaining a work injury. Upon sustaining an industrial injury, workers then have the right to treat either with their predesignated doctor or a doctor on the employer's Medical Provider Network list (if the employer has created an MPN). If the latter option

is selected, the worker is entitled to treat with the MPN doctor without having to go through either Utilization Review and/or Independent Medical Review.

(7) Injured workers also have the right subsequent to sustaining a work injury to select a treating physician who is on the health plan in which they are enrolled.

(2) Labor Code §4616.1(a) (which allows economic profiling of doctors) would be deleted.

(3) Labor Code §4610.5(a) would be amended to add:

4610.5. (a) (3) Any dispute subject to Utilization Review does not encompass doctors selected from the Medical Provider Network list. Any care recommended by a doctor participating in an MPN will be deemed approved.

(4) Labor Code §4610.6(a) would be amended to read as follows:

4610.6. (a) The parties have the right to use an Agreed Medical Evaluator or Panel Qualified Medical Evaluator to resolve issues regarding Labor Code §4610.5. If that right is not exercised, the parties then have the right to engage in the Independent Medical Review process. If the IMR process is chosen, the Independent Medical Review organization shall conduct the review in accordance with this article and any regulations or orders of the Administrative Director, and the organization's review shall be limited to an examination of the medical necessity of the disputed medical treatment, based upon need care to cure or relieve from the effects of the injury.

(5) Labor Code §4610.6(f) would be amended to read as follows:

4610.6. (f) The Independent Medical Review organization shall provide all interested parties with the analyses and determinations of the medical professionals reviewing the case, along with the names, academic credentials and professional achievements of those reviewers.

(6) Labor Code §4610.6(g) would be amended to read as follows:

4610.6. (g) Determinations of the Independent Medical Review organization shall be deemed to be determinations of the Administrative Director and shall be binding on all parties if the parties so stipulate. Without that stipulation, any and all determinations made by the IMR process are subject to judicial review to ensure the determinations are fair and meaningful relative to the parties of interest.

The concept of a 'complete system of Workers' Compensation' as set forth in the California Constitution, Article XIV, §4, must be reflected by Independent Medical Reviewers:

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 to the extent of relieving from the consequences of

any injury . . . [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 . . .

(7) Labor Code §4610.6(h) (which states that the determinations of IMR are binding, and workers have no right to appeal IMR determinations through the WCAB), would be deleted.

(8) Labor Code §4610.6(l) would be amended to read as follows:

4610.6. (l) If a determination of the Administrative Director is reversed, the disputed issues shall be resolved by the judicial process, and the parties will follow the determinations made by the judge regarding said issues.

(9) Labor Code §4610.6(m) would be deleted and replaced by the following:

4610.6. (m) All Independent Medical Review doctors shall have a current medical license for the State of California.

These changes will benefit both employers and employees, and will allow for the provision of reasonable and expeditious medical care to enable injured workers to return to their jobs sooner and with less impairment. On the other hand, failure to make these changes will constitute a continuing failure to honor the bargain entered into by California employers and employees a century ago, and will ultimately result in higher costs for employers because of workers' increased residual impairment, and because of employers' need to hire and train new employees to replace those no longer able to perform their substantial duties because of the failures of the present Workers' Compensation system.

In summation, these changes are simple and direct, and they would provide the checks and balances which are urgently needed to rectify the current Workers' Compensation system.



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**THE LAW OFFICES OF
SCOTT A. O'MARA**

2370 Fifth Ave.
San Diego, CA 92101

4200 Latham St. – Ste. B
Riverside, CA 92501-1766

1-800-LAW-1199

**BOBBITT, PINCKARD
& FIELDS, A.P.C.**

8388 Vickers St.
San Diego, CA 92111

4200 Latham St. – Ste. B
Riverside, CA 92501-1766

858-467-1199

(1-800-529-1199)

619-583-1199

951-276-1199

www.law1199.com

www.coplaw.org

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