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UR DOCTORS MUST BE HELD ACCOUNTABLE; MEDICAL CARE MUST COMPORT WITH THE CALIFORNIA CONSTITUTION

By Scott O'Mara

Utilization Review is a process by which employers review and approve, modify, delay or deny employees' medical treatment requests within the Workers' Compensation system. The establishment of this process has raised some very significant questions: *What is the extent of responsibility that UR doctors have towards the injured workers' whose treatment requests they are reviewing? Can these doctors be charged with malpractice or negligence based on their decisions?*

The UR doctors contracted by employers to review treatment recommended by injured workers' treating physicians (based solely on a review of the pertinent medical records) argue that they — the UR doctors — are liable for being charged with malpractice or negligence only if a physician-patient relationship has been established based on an express or implied contract requiring the doctor to treat the patient. They maintain that Labor Code §4610(b) does not mandate that UR doctors have the duty to provide care for the injured workers for whom they make treatment decisions, and that the exclusive remedies under Workers' Compensation protect them from the consequences of their egregious acts — malpractice or negligence.

In a case which is currently before the California Supreme Court, *King v. CompPartners, Inc.*, a Utilization Review doctor who is being sued for malpractice and his employer argue that different rules and duties apply to UR physicians. They maintain that while treating physicians obviously have the responsibility for the day-to-day care of the injured workers they treat, UR doctors do not have a duty to thoroughly vet each case brought to their attention, and are therefore immune from the responsibility for any negligent or harmful decisions they make regarding the denial of recommended care.

This idea that UR physicians and their damaging actions are free from scrutiny — removing any duty for them to make sound decisions regarding medical care for injured workers — violates the basic concept of a doctor's role. *This perspective is both repulsive and frightening* — particularly for California injured workers in their 60s, 70s and 80s who are forced to rely upon a flawed system to provide the care and treatment they need to be cured or relieved from the effects of their work-related injuries.

The UR protocol is contrary to the very concept of the Workers' Compensation system, which was entered into as a bargain between employers and employees. The California Constitution states that this system is to provide medical care to cure or relieve injured workers from the effects of their injuries. In the *King* case, the injured worker sustained a work injury in 2008. In 2011, his treating doctor prescribed the medication Klonopin, which King began taking on a regular basis.

Then, on July 1, 2013, Labor Code §4610 was enacted, creating the Utilization Review protocol applicable to all work injuries, regardless of the date of injury. This new process allowed employers to contract doctors to review treatment recommendations made by injured workers' treating physicians. Despite the fact that UR

doctors — unlike treating doctors — never actually see or establish a relationship with the injured workers whose treatment recommendations they are reviewing, the new legislation gave them the authority to approve or, more importantly, deny recommendations made by the treating physicians, thereby enabling employers and insurance carriers to reduce their costs.

In Mr. King's case, the UR doctor determined that the Klonopin he had been taking was not medically necessary, so the treating doctor's recommendation for continued care was denied. Of extreme significance is the fact that once this denial occurred, Mr. King should have been weaned off his regular medication gradually — not have it discontinued abruptly. In this case, however, weaning did not occur. As a result of this most unfortunate and fateful UR decision, Mr. King suffered four seizures after his medication was discontinued. This occurrence makes it easy to see the devastating and explosive impact such UR decisions can have upon California injured workers.

Clearly, the California Workers' Compensation system, as it currently exists, invites and creates abuse. The doctor who cut off Mr. King's regular medication was working for the Utilization Review company and had an ethical responsIbility to advise the injured worker of the potential impact of abrupt cessation of his medication. Mr. King was never so advised.

The Workers' Compensation system, like any other system, requires checks and balances. Those involved in the Utilization Review process argue that such safeguards are already in place because in certain specific circumstances a $10,000 penalty can be imposed against the UR provider. However, this penalty is *de minimis* and non-functional — in reality, a farce. Moreover, the whole UR system ignores any responsibility its doctors should have towards the injured workers whose health status and family life they are impacting — especially when the workers are never educated as to the potential effect(s) of discontinuation of the medical care or treatment they have been receiving.

In an attempt to protect themselves, employers and UR doctors cite Labor Code §4610.1, which restricts them to approving and prescribing very specific medications for particular conditions. They argue that Labor Code §5814 penalties up to $10,000 are the only possible solution workers have, and that no civil action should be allowed for Utilization Review doctors' misconduct, egregious acts or malpractice.

Looking beyond the *King* case, Labor Code §4610(c) has very broad implications for all current workers, including those who believe their cases have been resolved. The UR process allows and encourages employers especially to take advantage of injured workers who do not have attorneys. Also, as injured workers get older, their vulnerability increases. Labor Code §4610 allows employers/ insurers to manipulate and cut off needed treatment, causing great harm to many injured workers.

The idea that a doctor who obviously has physician credentials and an understanding as to injuries and the need for medical care can make a blanket denial of needed treatment *without any consequences* is fraught with abuse and harm to injured workers, not to mention society as a whole.

The parties defending CompPartners, the employer in the *King* case, argue that the injured worker's avenue for appeal is to seek Labor Code §5814 penalties up to a maximum of $10,000. *This is no solution whatsoever.* The UR process places an undue burden on injured workers and creates no accountability.

If a doctor renders an opinion which changes medical care by delaying, modifying or denying it, the doctor *must* share with the worker and/or his treating physician the potential impact such change could have. This will allow workers to protect themselves and enable doctors to be certain all components of their decisions have been taken into consideration.

If the Workers' Compensation system continues in its present form, we unquestionably will not only see more harmful consequences to California injured workers, like Mr. King's seizures; there also will be even more serious consequences, such as strokes and deaths. Recognition must be given to the fact that the goal of this system obviously was not simply to reduce costs to satisfy employers and insurance carriers.

Workers' Compensation doctors require special knowledge and information to fill out Request for Authorization forms. They also need time to communicate to Utilization Review doctors, and must be compensated for doing so. Without this compensation, it is medically non-feasible for them to engage in Workers' Compensation practice.

Doctors on employers' Medical Provider Network lists are physicians who have been individually selected by employers, and they are eligible for bonuses and subject to removal — two factors which could influence their determinations regarding injured workers' need for care. If these doctors issue an opinion that there *is* need for medical care, their opinion should not be subject to Utilization Review because they are, in actuality, the employer's doctors — which is the very reason they were selected for the MPN lists.

Legislative changes are much-needed to ensure the medical care under Workers' Compensation comports with the California Constitution to cure or relieve the effects of work-related injuries.

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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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