



OVERVIEW AND PREPARATION

By Scott A. O'Mara

The California Workers' Compensation laws were enacted by the legislative body to ensure fair and just treatment of California workers who incur injuries in the course of their employment, and provide them with the medical care they need to cure and relieve the effects of their work injuries through their entire lifespan. The specific language guaranteeing workers of this right is set forth in the California Constitution, Article XIV, Section 4, which specifically states:

A complete system of workers' compensation includes . . . full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury . . .

Many legislative changes have occurred since Article XIV, Section 4, was added to the California Constitution. One of the more challenging of these changes was the enactment of Senate Bill 899 in 2004, which created the concept of medical provider lists and established Utilization Review (UR) to determine the reasonableness and necessity of treating doctors' recommended medical care.

The next challenge was the enactment of Senate Bill 863, signed by Gov. Jerry Brown on 9/18/12, and effective as of 1/1/13. This bill created Independent Medical Review (IMR), which in theory was to be an avenue to appeal UR decisions. The combination of these two systems – Utilization Review and Independent Medical Review – was marketed by employers as a way to expedite injured workers' access to medical care.

All the above-mentioned changes have created opportunities for employers to remove or limit their responsibility to cure or relieve injured workers from the effects of their injuries as set forth in the California Constitution.

Utilization Review doctors are a group of physicians who have a contract with, and are paid by, employers or their adjusting agencies. Independent Medical Review doctors are paid by the State. Of significance, none of these UR and IMR doctors have ever seen the patients – the injured workers for whom they are determining the reasonableness and necessity of

recommended medical care. In addition, IMR doctors are protected by a cloak of secrecy, as their identities are never revealed, nor are their credentials.

The limits imposed relative to the review of medical care also have restricted injured workers' ability to present evidence to a judge regarding their treating doctor's opinion versus the opinions of UR and IMR doctors who don't personally know their patients because they never have had the opportunity to see them. In the past, injured workers whose medical care had been denied would appeal that decision by presenting evidence to support their treating doctor's opinions, and their appeals would be upheld because these doctors had actually seen their patients and had a better understanding as to their needs.

Of significance, also, is the loyalty which Utilization Review doctors have to the employers and third-party administrators who hire and pay them. Independent Medical Review doctors have no loyalty, but they engage in what I call a "catch-and-release" program — simply rubber-stamping UR denials — because such a low percentage are ever overturned (just 8.3% in 2017), making IMR appeals of UR decisions of little value.

The advent of Labor Code §3201.5 and the creation of the collective bargaining agreement provisions establishing alternative dispute resolution (ADR) initially was designed for construction-type industries and heavy-duty mechanics, allowing them to enter into a bargaining agreement which set forth the terms of the ADR system. Since its initiation, this system has expanded to include many bargaining units. ADR was designed to either supplement or replace the methodologies involved in the Workers' Compensation system. The marketing of this system by employers and outside vendors promotes the idea that this process will expedite an injured worker's access to medical care because it removes judicial involvement as to workers' access to medical care and their level of disability.

The factor which substantially harms the injured worker and benefits the employer is the limited Overview and Preparation the worker will not receive because the ADR is specifically crafted and designed to limit a worker's ability to involve an attorney at the onset of his/her case. This crafting minimizes injured workers' ability to present the proper information to their treaters and evaluators to achieve a fair and just resolution of their Workers' Compensation case.

The ADR procedure sets forth a protocol which requires an ombudsman to resolve issues at the first level. If that fails to resolve the issues, either from the worker's or employer's perspective, then mediation commences as the second step. If the mediation process is not favorable to the worker or the employer, the worker may retain an attorney at the arbitration trial level.

Of significance is that the Workers' Compensation adjusters who are handling these cases are sophisticated. They have training and experience which they are able to utilize to maximize the employer's ability to control and limit the medical care to cure or relieve, and/or the level of disability to which the worker may be entitled because of the work-related injury. This limitation to the development of an injured worker's case is a favorable mechanism for employers. The favorability lies in the fact that if the arbitration (ombudsman, mediator and arbitrator) is not favorable, then the appropriate route for the worker is to take the matter before the Workers' Compensation Appeals Board (WCAB). The WCAB focuses on the existence or lack of existence of *substantial evidence*, which is the determining factor as to the sustainability of the Workers' Compensation decision.

The substantial evidence is developed not at the trial level, but throughout the manifestation and development of the case — *and this is where it is a necessity for the worker to have an attorney*. The worker's attorney will provide the worker with an understanding of the Workers' Compensation process, so that when the worker is evaluated and treated by his/her treater or a medical evaluator pursuant to a Qualified Medical Examination, the worker will be prepared to provide a full and complete picture as to his/her work-related injuries and the work exposures related thereto, as well as the residual impairments which have resulted therefrom. This information is directive as to a worker's access to medical care on a lifetime basis, and the level of the worker's residual impairment, if any.

As stated previously, Utilization Review doctors and doctor groups are paid for by employers. Likewise, in the ADR mediation process, the ombudsmen, mediators and arbitrators making the determinations are paid for by employers. Workers' attorneys are excluded from involvement in the ADR process at many levels, and are thus unable to provide a full understanding to injured workers as to what substantial evidence is needed to justify a worker's need for medical care and his/her level of impairment. At the ombudsman or mediation stage of the ADR process pursuant to a WCAB decision, an applicant may seek legal advice from an attorney, but the attorney may not appear on behalf of the employee. While the worker's attorney may appear at the arbitration trial level, such appearance is too late, as the record has already been developed by the adjuster with emphasis to protect the employer, not the worker.

It is important to recognize that injured workers do *not* have a sophisticated understanding as to the significance of their subjective complaints, and how such complaints are a key factor in determining their level of impairment. Yet, if workers overstate these complaints, it may subject them to additional review and scrutiny, and raise a question as to their veracity. In this area, a worker's attorney can educate his/her clients and help them understand such topics as the mechanism of injury, what a specific injury is, what a cumulative trauma injury is, etc.; and also help them recognize the necessity of providing their treating doctor and any forensic doctors with a full and complete disclosure of all the information

essential to creating the best outcome for their Workers' Compensation case in terms of their need for medical care and an accurate assessment of their level of disability.

The arbitration carve-out has created the situation where people recognize the limitations of the arbitration process and have therefore found a way to remove themselves from the ADR process. This occurred through a death case where it was determined that the carve-out did not extend the claims of the dependents of the deceased employee. In another case, the worker was able to remove himself from the bargaining agreement – called the carve-out – because he ceased to be a member of the union at the time of his industrial injury.

Regarding the Workers' Compensation system – and Utilization Review and Independent Medical Review – changes are needed, and proposed Labor Code changes have been set forth on our website (www.LAW1199.com) and can be reviewed there. Issue 2019, Article #3 sets forth the proposed legislative changes which currently are being backed by several associations that recognize the need to have a Workers' Compensation system which is full and complete, and not one which is created to allow employers to buy their position through their selection of UR doctors, and also, in some cases, through their medical provider networks (MPNs) which limit employees' selection of doctors to ones which, again, are paid by the employers.

The alternative dispute resolution (ADR) system also creates an economic power point for employers. While the participants in this process are determined by agreement of the employer and the worker's union – whether it be the medical evaluator and/or the decision maker at the ombudsman, mediation and/or arbitration level – these participants, once again, are all paid for by the employer. Therefore, whether consciously or subconsciously, these ADR participants have a strong economic tie to the employer.

The impact of Utilization Review and Independent Medical Review currently can be mitigated by an injured worker's attorney's involvement in the case through educating the worker as to the nature of the UR and IMR processes and how best to proceed. However, the carve-out system is specific in its attempt to minimize a worker's attorney's involvement, and this allows employers and their highly-trained and sophisticated adjusters to take a narrow view as to injured workers' needs for treatment and/or their level of impairment.

The Workers' Compensation system acknowledges that certain conditions may emanate as the compensatory consequence of a worker's injury, such as a right knee injury which ultimately results in a left knee injury because of the worker putting extra stress on the left knee to compensate for the limitations caused by the injured right knee. This makes the left knee injury a compensable consequence of the right knee injury, and therefore makes the left knee injury job-related as well.

Another common scenario involves workers who take medication for a job-related condition and then develop additional problems, such as gastroesophageal reflux disease (GERD), kidney problems and/or numerous other medical concerns. If a worker understands this type of situation, and his/her treater reflects it, this justifiably expands the worker's medical care.

Finally, if a case does go before a judge at the Workers' Compensation Appeals Board, the judge will be someone who is paid by the State of California, *not the employer*. This creates a fair and impartial setting for the injured worker, *not one which is financially structured to benefit the employer who is providing payments to Utilization Review doctors and/or the ombudsman, mediator or arbitrator*. The judge will look for *substantial evidence* to support a decision favorable to the injured worker; if such evidence is lacking because it has not been developed, or because the worker's attorney's involvement in the case occurred too late, the worker will not receive a fair and just resolution to his/her Workers' Compensation claim.

Overview and Preparation are key elements to facilitate injured workers' access to medical care and treatment and enable continuation of their employment, or if needed medical retirement. The Overview constitutes knowledge that there are potentially several systems which are connected but yet distinct and separate from each other. The first is the Workers' Compensation system, and the second is the retirement system, whether it involves CalPERS or the County Retirement Act of 1937, or other retirement systems. These retirement systems will review an injured worker's medical records in the Workers' Compensation matter and then use those as a directive in determining the worker's retirement eligibility.

The Overview also includes information which the injured worker's attorney has provided to the worker regarding the Workers' Compensation and retirement systems, and how the worker can continue with his/her employment and not be forced into retirement; or, if the worker's condition is of such magnitude that continued employment is no longer a possibility, how the worker can access retirement under the existing protocols.

The critical elements in the Overview also encapsulate the injured worker's access to medical care, and how the need for such care must be properly documented in the medical reports of the treating physician and/or the evaluating physician(s). The entitlement to compensation for impairment is also reflective of the opinions expressed in those medical reports.

The Preparation for creating the ability to either obtain benefits or continue with employment without being forced into retirement requires an understanding as to the necessity of having treaters and evaluators provide supportive documentation — documentation which supports either an injured worker's continued employment and/or continued need for medical care; or, in the event the worker cannot continue with his/her

employment, documentation which opens the door for a possible disability retirement. The worker's attorney is a key element in this timely Preparation, without which the worker may not be protected.

The advent of Labor Code §3201.5 and the creation of the collective bargaining agreement provisions established alternative dispute resolution (ADR). The factor which substantially harms the injured worker and benefits the employer is the limited Overview and Preparation the worker will receive because the ADR is specifically crafted and designed to limit a worker's ability to involve an attorney at the onset of his/her case. This crafting minimizes the injured worker's ability to present the proper information (substantial evidence) to his/her treater and evaluators to achieve a fair and just resolution of his/her Workers' Compensation case.



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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.*

