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PROPOSED CHANGES TO THE LABOR CODE

By Scott O'Mara

The Workers' Compensation system in California was specifically created to compensate employees for injuries sustained in the course of their employment. The primary goal of this compensation is for injured workers to be cured or relieved from the effects of their work-related injuries. Existing law establishes that the Workers' Compensation system is administered by the Administrative Director of the Division of Workers' Compensation.

The California Constitution specifically sets forth in Article XIV, Section 4, that the Workers' Compensation system is to be "a complete system of workers' compensation" . . . [which will] "create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained . . . in the course of their employment, irrespective of the fault of any party . . . [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".

Senate Bill 863, which was signed by Gov. Brown in September 2012 and went into effect in January 2013, changed the Workers' Compensation system by implementing Independent Medical Review (IMR). Prior to that time, the Utilization Review (UR) protocol existed. In both of these protocols (UR and IMR), the reviewing doctors never see the injured workers for whom they are making important decisions regarding their medical care needs.

Utilization Review doctors are a group of physicians who have a contract with, and are paid by, the employer or the employer's adjusting agency.

Independent Medical Review doctors are paid by the State. Of significance, again, is the fact that none of these doctors ever see the injured workers

whose medical care they are determining. In addition, IMR doctors are protected by a cloak of secrecy, as their identities are never revealed.

The IMR process is the injured worker's only avenue of appeal for UR denials of medical care. Before IMR was instituted, injured workers had the right to present evidence to a judge as to their treating doctor's opinion, and the judge would weigh and measure that opinion — the opinion of a doctor who had seen the patient many times and therefore had a solid basis for the care which he/she had recommended --- versus the opinion of a UR doctor who had never seen the patient.

The implementation of the Independent Medical Review process, in theory, was supposed to expedite the system. However, the history of IMR decisions reflects that an extremely high percentage of UR denials of treatment have simply been upheld. In fact, in 2017, only 8.3% of these denials were over-turned. The truth is that both UR and IMR doctors have no accountability under the present system.

A troubling case occurred where injured worker King was on medication which had been authorized by his treating doctor, who knew the patient well and truly understood his needs. However, that medication was abruptly stopped by the UR/IMR process, causing Mr. King to suffer four seizures. This matter ultimately went to the California Supreme Court, which unfortunately determined that UR doctors have no accountability for the harm they cause.

The delay in receiving medical care --- and the denial of medical care --- are significant, and this significance overflows into the worker who is not able to receive the care needed. In many situations, the employees embrace the concept of a Compromise and Release, but in doing so they give up their lifetime medical care. Under the Workers' Compensation system, this shifts the economic consequences of a job-related injury away from what is mandated by the California Constitution, to the worker's own health plan.

The enclosed proposed amendments and deletions constitute a rightful move which will not increase the money workers will receive for their job-related injuries, but will increase their access to medical care to cure or relieve the

effects of their work-related injuries and place the economic responsibility for such injuries where it rightfully belongs — on the Workers' Compensation system as opposed to individual health plans.

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PROPOSED LABOR CODE CHANGES

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The Workers' Compensation system in California was specifically created to compensate employees for injuries sustained in the course of their employment. The primary goal of this compensation is for the injured worker to be cured or relieved from the effects of the work-related injury. The California Constitution specifically sets forth these principles in Article XIV, Section 4, which states that the California Workers' Compensation system is to be:

> A complete system of workers' compensation . . . [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 . . ..

Senate Bill 863, which was signed by Gov. Brown in September 2012 and became effective in January 2013, changed the Workers' Compensation system by implementing Independent Medical Review (IMR). However, none of the IMR doctors ever see the injured workers for whom they are determining whether the treatment recommended for them is reasonable and necessary. In addition, these doctors are protected by a cloak of secrecy, as their identities and qualifications are never revealed to the parties.

Moreover, the delay in injured workers receiving the medical care they need — and, in many cases, the denial of that care — are a significant factor in inhibiting the ability of many workers to return to their jobs quickly and with less disability. Thus, such delays and denials are causing harm to many injured workers, and, in many situations, actually increasing costs for employers.

Four Labor Code revisions are required for the California Workers' Compensation system to comport with the California Constitution and allow injured workers to receive the care requisite to cure or relieve the effects of their injuries. The proposed Labor Code revisions would remove the barriers created for injured workers by the current unreasonable delays and denials involved in receiving their needed treatment.

The four Labor Codes in need of revision are Labor Code §§4610, 4610.5, 4610.6 and 4616.

<u>Amendment to Labor Code §4610(c)</u> *(Changes indicated in bold italics; lined-through words deleted)*

Treatment recommendations by a doctor participating in an MPN are not subject to utilization review and will be deemed approved. Unless authorized by the employer or rendered as emergency medical treatment, the following medical treatment services, as defined in rules adopted by the administrative director, that are rendered through a ~~*member of the medical provider network or*~~ health care organization, a predesignated physician, an employer-selected physician, or an employer-selected facility, within the 30 days following the initial date of injury, shall be subject to prospective utilization review under this section: . . .

Addition to Labor Code §4610(s) *(Changes indicated in bold italics)*

The determination of the independent medical review organization shall be deemed to be the determination of the administrative director and shall be binding on all parties if the parties so stipulate. Without such stipulation, any and all determinations made by the independent medical review organization shall be subject to judicial review.

Addition to Labor Code §4610(t) *(Changes indicated in bold italics)*

All decisions issued by utilization review shall protect the employee and/or the employer from a utilization review decision that causes injury or harm to the employee. Failure to meet the medical standard of care by negligence and/or omission may constitute medical malpractice by the utilization reviewer.

Replacement for Labor Code §4610.5(a) *(Changes indicated in bold italics)*

This section shall not apply to treatment services rendered by a doctor selected from an employer's Medical Provider Network (MPN) list. Any care recommended by a participating doctor in an MPN shall be deemed approved and not subject to utilization review. Where treatment recommendations are subject to utilization review, this section applies to the following disputes: . . .

Addition to Labor Code §4610.5(q) *(Changes indicated in bold italics)*

The determination of the independent medical review organization shall be deemed to be the determination of the administrative director and shall be binding on all parties if the parties so stipulate. Without such stipulation, any and all determinations made by the independent medical review organization shall be subject to judicial review.

Replacement for Labor Code §4610.6(a) *(Changes indicated in bold italics)*

The parties have the right to use an agreed medical evaluator or their own selected qualified medical evaluator to resolve issues regarding Labor Code §4610.5. If that right is not exercised, the parties, at their discretion, may engage in the independent medical review process. All independent medical review doctors shall have a current medical license for the State of California. If the independent medical review process is chosen by both parties, 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 the care needed to cure or relieve the injured worker from the effects of his/her injury. The independent medical review is subject to judicial review unless both parties waive this right.

Replacement for Labor Code §4610.6(f) *(Changes indicated in bold italics)*

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, professional achievements of those reviewers and proof of licensing within the State of California.

Replacement for Labor Code §4610.6(g) *(Changes indicated in bold italics)*

The determination of the independent medical review organization shall be deemed to be the determination of the administrative director and shall be binding on all parties if the parties so stipulate. Without such stipulation, any and all determinations made by the independent medical review organizations shall be subject to judicial review.

DELETE Labor Code §4610.6(h)

Replacement for Labor Code §4610.6(I) *(Changes indicated in bold italics)*

If the determination of the administrative director is reversed, the disputed issues shall be subject to judicial process, and the determination of the workers' compensation judge shall be binding on the parties unless there is an appeal to the WCAB. All independent medical review doctors shall be licensed by the State of California to practice medicine.

Addition to Labor Code §4616(a)(6) *(Changes indicated in bold italics)*

Injured workers have the right to predesignate a treating physician prior to sustaining a work-related injury. Upon sustaining an industrial injury, these workers then have the right to treat with their predesignated doctor or a physician on the health plan in which they are enrolled, or a doctor on their employer's medical provider network (MPN) list. If the worker selects a doctor from his/her employer's MPN, any treatment recommended by that doctor shall not be subject to utilization review (UR) or independent medical review (IMR).