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THE CALIFORNIA WORK COMP SYSTEM CAN BE CORRECTED . . . BUT URGENT CHANGE IS NEEDED

By SCOTT O'MARA

California employers and employees entered into a "bargain" which placed limits on the damages workers could receive from a job-related injury, and also, pursuant to the California Constitution, allowed access to medical care to cure and relieve the effects of those injuries. This bargain is set forth in the California Constitution, Article XIV, Section 4, which states that the Workers' Compensation system is a complete system with full provisions for such medical, surgical, hospital and other remedies as are requisite to cure and relieve the effects of job-related injuries.

Under the assumption that the Workers' Compensation system could be expedited, Senate Bill 863 was provided for the Governor's review. This bill ultimately was signed into law by the Governor on 9/19/12.

The unfortunate consequence of SB 863 is that it did *not* expedite injured workers' access to medical care to cure and relieve the effects of their job-related injuries. It did not comport, and does not comport, with the California Constitution, Article XIV, Section 4. The California Workers' Compensation system mandate to provide medical care to injured workers has been damaged to a significant degree such that many workers are not able to access the medical care they need on a timely basis for fear of being embedded in the delays and denials which are now inherent in the system's protocols because of Senate Bill 863. This fatal flaw costs employers because it delays injured workers' recovery and also results in employees needing more extensive medical care as their conditions worsen and become more significant because of the delays in receiving timely care. In addition, employers have additional costs because of the increased level of impairment sustained by many injured workers. *This is a reality that will become more apparent as time goes on.*

The other reality is the changes which SB 863 has imposed on injured workers. Eventually, the part of extra costs being imposed on employers will also become the burden of the injured workers because of the shift of financial responsibility from the failed Workers' Compensation system to employees' private health plans, impacting workers and their families because of the denials and delays in receiving the proper medical care to which they should rightfully be entitled through the Workers' Compensation system pursuant to the California Constitution — an unjust penalty imposed by the enactment of Senate Bill 863.

This matter has been brought before the Appellate Courts, but they unfortunately have taken a narrow perspective on the legality of Senate Bill 863 rather than addressed the reality of its consequences.

As many readers are aware, the implementation of Utilization Review (UR) and Independent Medical Review (IMR) has removed injured workers' ability to present evidence to a judge for a determination as to the appropriateness and necessity of recommended treatment which has been denied, and the adequacy of determinations made using the Medical Treatment Utilization Schedule (MTUS). Furthermore, because of the secrecy involved in the IMR process, the identity of reviewing doctors is not revealed and their opinions cannot be challenged.

It should be noted that the IMR process does not allow a worker to present to a judge evidence as to the appropriateness and necessity of treatment recommended by doctors who have seen and treated the worker. This determination is made, not by a judge, but by a doctor who is never identified and is paid monies by the employer's agent, and who can never be held accountable for his/her determinations unless they reflect bias based on race, national origin, ethnic background, color, religion, age, sex, sexual orientation or disability, or if the IMR reviewer was subject to a material conflict of interest or guilty of a fraudulent act, or if the determination is plainly erroneous in expressed or implied finding of fact, and the mistake is a matter of ordinary knowledge based on information submitted to the IMR reviewer. However, these bases for disputing an IMR determination have no substance because of the names of reviewing doctors are kept secret. Again, IMR doctors do not see the injured workers.

It is interesting that in the current case of *Stevens v. WCAB*, which went before the First District Court of Appeal and in October 2015 this Court found the IMR process was not determined to be in violation of the California Constitution, one of the justices stated: "It is not our place under the state Constitution to second-guess the wisdom of the legislators in making these determinations." On 11/6/15, the California First District Court of Appeal was asked to reconsider its determination that the state's Independent Medical Review process passes constitutional muster

It is readily apparent that there was no "wisdom" in the legislative enactment of Senate Bill 863. The participants — labor, management, employers and employees — did not have a full grasp as to the changes which would result from the enactment of SB 863, and its failure to fulfill the bargain entered into by employers and employees in the early 1900s. However, this error in judgment and results, and its failure to allow the requisite treatment to cure and relieve the effects of employees' work injuries, can be corrected by making the following changes:

- 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.

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

■ 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.

■ 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.

■ 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.

■ 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 . . ..

■ 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.

■ Labor Code §4610.6(I) would be amended to read as follows:

4610.6. (I) 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.

■ 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.

Simply put, *correction of the current system is urgently needed to protect both employers and injured workers.*

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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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