LAW1199.COM NEWSLETTER™

2014 ★ ISSUE #1

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SECRETIVE IMR PROCESS AND ITS CONSTITUTIONALITY FACING LEGAL CHALLENGES

By Scott O'Mara

In the March and April 2014 PORAC SafetyOfficerAttorneys.com newsletters, the *Dubon* case was discussed, specifically with reference to its significant impact on the California Workers' Compensation system. A review of this case suggests it has the potential to cure the inadequacies of Senate Bill 863, which allows insurance carriers, self-insured employers and claims adjusters to limit and select the medical information to be provided to the Independent Medical Review doctor through the IMR process. This case also raises the possibility that the IMR process does not meet the State of California's constitutional standards.

Recently, the California First District Court of Appeal agreed to hear a case (the *Frances Stevens* case) setting forth the issue of whether an employer can be compelled to authorize treatment from a doctor outside its own Medical Provider Network. The Court of Appeal will be reviewing a petition filed by Stevens' counsel on April 3, 2014, which correctly asserts that Labor Code §4610.6 — which prohibits a judge or appellate court from reviewing any findings or determinations made by an IMR doctor — violates Article XIV, §4, of the State Constitution, which vests with the California Legislature the authority to enact Workers' Compensation laws "that provide substantial justice without encumbrance"; and those laws, of course, are subject to review by the State Appellate Court system.

The Independent Medical Review protocol has gutted the fundamental rights of due process because it does not allow for cross-examination of the IMR doctor (whose identity remains unknown) making a determination as to the reasonableness and necessity of medical treatment recommended for an injured worker. This secretive protocol is clearly a denial of due process and is being challenged in the case under appellate review.

The attorney representing the worker in this case correctly states:

"The issue is that since the process is a secretive one, the injured worker has no basis upon which to ever mount an appeal on the grounds cited above."

The "grounds cited above" include allegations of fraud, conflict of interest, or bias. The cloak of secrecy inherent in the IMR process eliminates the opportunity to make such allegations.

Stevens' counsel goes on to state that another concern is that the language used in Senate Bill 863 does not allow for an appeal based upon a mistake of fact.

There has been recent discussion of the Workers' Compensation Appeals Board internal memo which also acknowledged the potential constitutional challenge to the IMR process. This memo reviews the *Costa* case, in which the Fourth District Court of Appeal upheld the mandatory dispute resolution process for industrial accidents in a collective bargaining agreement because the decisions were subject to review by the Appeals Board and the Appellate Courts. The *Costa* decision found that the mandatory arbitration relative to this process was lawful because it was subject to judicial review. *Again, the new IMR process is <u>not</u> subject to judicial review.*

Numerous other articles have been written raising the issue as to the constitutionality of Independent Medical Review.

OTHER RECENT NEWS

ASSEMBLY BILL 1035

In other news, Assembly Bill 1035, sponsored by Assembly Speaker John Perez, was passed by the California Senate on April 28, 2014. This bill nearly doubles the time to file death benefit claims from 240 weeks to 420 weeks — a significant increase of 180 weeks. This bill will be subject to additional review by the Assembly for changes made to it by the Senate before it proceeds to Gov. Jerry Brown.

Of note is the fact that similar bills introduced by Speaker Perez in 2012 (AB 2451) and 2013 (AB 1373) — both of which would have extended the time to file death benefits to 480 weeks — were vetoed by the Governor. However, based upon comments made by supporters of the present bill (AB 1035), there is anticipation that the reduction from 480 to 420 weeks will encourage Gov. Brown to sign the bill.

ASSEMBLY BILL 2378

The Senate Committee which reviews legislation regarding Workers' Compensation modifications recently unanimously supported Assembly Bill 2378, introduced by

Assemblyman Henry Perea. This bill provides clarification as to a recent decision issued in January 2013 which limited access to benefits for many safety officers. This legislation — Senate Bill 899 — placed a limit of 104 weeks on the payment of temporary disability benefits.

The Court in other cases had recognized that benefits pursuant to Labor Code §4850 are separate and distinct from other benefits and not on a par with temporary disability. Therefore, the 104-week limitation placed on temporary disability benefits initially did not have application to benefits pursuant to Labor Code §4850. In January 2013, however, the First District Court of Appeal indicated that benefits pursuant to Labor Code §4850 would be subject to the 104-week limitation. Therefore, safety workers cannot receive more than one year of temporary disability and one year of §4850 benefits — contrary to other case law involving Labor Code §4850.

However, new proposed legislation — Assembly Bill 2378 — would correct the two-year cap created by the First District Court of Appeal's January 2013 decision and allow for the payment of §4850 benefits plus two years of temporary disability. Christy Bourna, lobbyist for the bill's sponsor, noted that at least five previous WCAB decisions have held that salary continuation benefits (such as §4850 benefits) do not count against the two-year cap because they are not considered to be a Workers' Compensation benefit.

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