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RECENT CASE SHOWS UR & IMR DECISIONS MAY BE SUBJECT TO MEDICAL MALPRACTICE LAWSUITS

By Scott O'Mara

More injured workers in California and their families are becoming aware of the failure of the current Workers' Compensation system with respect to the "bargain" entered into between employers and employees a century ago which established three substantial benefits for injured workers: (1) medical benefits to cure or relieve the effects of an industrial injury; (2) reimbursement for time lost from work because of the injury; and (3) compensation for any permanent impairment resulting from the injury.

A previous issue of this newsletter (Law1199.com Newsletter) — 2015 Issue #13 — featured an extensive discussion of California Constitution Article XIV, Section 4, which sets forth specific mandates as to the benefits an employer or Workers' Compensation carrier is to provide, including full provision of medical care to cure or relieve the effects of a work injury. Such medical care covers a wide umbrella of treatment options which can be accessed according to the nature and severity of the injury, such as medications, injections, surgery, hospitalization, nursing care, surgical supplies and even organ transplants and home reconfiguration in extreme cases.

Senate Bill 863 continues to be an encumbrance upon injured workers — and also places additional costs on employers — because of the failure of this legislation, which theoretically was intended to correct some of the wrongs of previous Workers' Compensation legislation, but in fact has produced further setbacks through the creation of the Utilization Review (UR) and Independent Medical Review (IMR) protocols which have blocked or severely impeded many workers' access to medical care.

A series of cases have been brought through the courts regarding the problems created by UR and IMR, and the plenary (*i.e.*, absolute and unrestricted) authority given to the current protocols, thereby placing limitations on injured workers' exercise of their given rights as established by the California Constitution.

One of the cases currently being reviewed again by the California Supreme Court is the *Frances Stevens* case, wherein the Applicant contends an injured worker must be given an opportunity to cross-examine the IMR doctor making an adverse decision with respect to the worker's access to medical care.

More recently, the case of *Kirk King v. CompPartners* involved a situation wherein the failure of the UTILIZATION REVIEW process resulted in a medical emergency which caused damage to the California injured worker through the cessation of his medicine without

warning, thereby providing Mr. King the basis for a MEDICAL MALPRACTICE allegation against the UR physician.

Medical malpractice is based upon a doctor-patient relationship and the failure of the doctor to fulfill his/her duty to the patient. In this situation, Mr. King had a serious medical problem for which he was prescribed Klonopin, a psychotropic medication (*i.e.*, a medication capable of affecting the mind, emotions and behavior). The employer then submitted this prescription through the Utilization Review process, wherein the decision to deny continuation of the medication was made by a doctor who never saw Mr. King and had no interpersonal relationship with him. No account was taken of the fact that patients who take Klonopin should be weaned off it gradually, as sudden cessation of this medication can result in medical problems.

In Mr. King's case, the Klonopin was stopped abruptly with no warning simply to save money for the employer or carrier, and the injured worker was never informed of the potentially serious consequences of the sudden cessation of his medication.

Mr. King asserted that this conduct by the UR doctor was cause for a medical malpractice action. The doctor's response was to argue that his action to deny the Klonopin was made within the Utilization Review system and was not a violation of his doctor-patient relationship within that context. He contended that his role was merely to review the medical recommendation and provide his comment on same, maintaining that he had no responsibility to provide care to the patient. He further asserted that no doctor-patient relationship existed, as he had never personally examined Mr. King.

The Court in *Kirk King v. CompPartners* has been made aware that but for the UR doctor's findings, Mr. King's medication would not have been terminated, and the harm to the injured worker would not have occurred. The UR review was conducted at the request of the Workers' Compensation carrier, who sought to minimize costs through discontinuation of the injured worker's medication, but without considering the potential impact of same.

The decision of the *King* case at the first level was that the doctor had limited obligation to the injured worker. The UR company argued that the doctor who discontinued Mr. King's medication was not at fault for not communicating a warning, as such action was not within the necessary responsebilities of his role within the UR protocol. The doctor also asserted that the injured worker's claims are limited because of the mandate for Utilization Review and Independent Medical Review.

There is case law which finds the essential elements of a lawsuit for medical malpractice are based upon the doctor's duty to provide care in a doctor-patient relationship. This duty can be either expressed or implied. A patient has a reasonable expectation that a doctor has proper professional skills and will provide treatment or a sound opinion on treatment based on the exercise of reasonable care and diligence towards the patient.

For employers to defend the UR/IMR system and maintain that doctors within this system do not have to apply their professional skills and review medical treatment recommendations based on reasonable care and diligence towards the patient — in other words, that

they do not have to meet the same standard of care as doctors outside this system — is absurd and, more significantly, contrary to the mandates of the California Constitution.

The *King* case has been remanded back for the Plaintiff to amend their complaint and go forward. This decision was rendered by the Fourth District Court of Appeal, Division 2.

Concurrent timewise is the fact that the California Supreme Court in another case is indicating it will issue a decision regarding granting a writ challenging the Utilization Review and Independent Medical Review protocols for their failure to meet the mandates of the California Constitution.

In addition, several other cases are working their way through the court system, taking substantial issue with the changes which have occurred because of the wrongful enactment of Senate Bill 863, signed by Gov. Brown on September 19, 2012.

Of interest is the fact that based on the *King* case, UR and IMR doctors potentially will be subject to accountability and medical malpractice actions — meaning they will no longer be able to engage in *laissez faire* catch-and-release programs where they simply review medical records, make critical decisions for patients without weighing their impact on the injured worker, and get paid. Moreover, their decisions typically have reflected primarily what employers and carriers have wanted — *i.e.*, denial of recommended medical care. This exposure of the UR and IMR protocols, their deficiencies, and their failure to satisfy standards established by the California Constitution, is needed, in addition to the legislative changes set forth in 2015 Issue #13 of the Law1199.com Newsletter.

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