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DUBON CASE FAVORABLE DECISION TO BE REVIEWED, PLACING WORKERS AT RISK

By Scott O'Mara

At the Federal level, we have seen through Obamacare and Veterans Administration care systemwide failures which delay and/or fail to provide adequate treatment, causing increases in residual disability and, in some cases, death. This same problem is occurring at an equally dramatic rate within the California Workers' Compensation system.

On 9/18/12, the Workers' Compensation system was amended pursuant to Senate Bill 863, the intent of which was to reduce costs. However, this cost reduction has occurred at the direct expense of California workers.

Prior to the passage of SB 863, a protocol was in place — utilization review (UR) — through which employers hire outside vendors to make determinations regarding the necessity of care recommended by treating doctors. A worker who disputed a UR finding had the right to present evidence to a judge so he/she could then offer an opinion as to the adequacy (or lack thereof) of the recommended medical care and the appropriateness of the UR decision.

However, Senate Bill 863 eliminated that checks-and-balances system by removing the right of injured workers to challenge UR denials by way of judicial review. In its place, SB 863 implemented the Independent Medical Review (IMR) process, through which workers can request reconsideration of UR denials. However, the IMR process has failed to handle in a timely manner the unexpectedly large volume of requests they have received for review of UR determinations, and the new protocol also has come under widespread attack for its secretive nature and questionable constitutionality.

A company called Maximus Federal Services obtained the initial contract as the medical reviewer of UR decisions, and this company now is in a position to renew its contract for an additional three to five years. However, as of mid-May 2014, Maximus had received 146,022 applications for review of UR denials of medical care, yet rendered only 33,322 decisions. Very clearly, the IMR process — which eliminated the option of judicial review — is a colossal failure. This failure severely impacts California injured workers, particularly by delaying their return to work and increasing their levels of residual disability.

Significantly, Maximus receives $560 for each case it reviews. Therefore, its contract with IMR involves millions of dollars. In fact, at a minimum, the contract appears to be worth at least $50 million.

Also of note is the fact that in more than 79% of the cases reviewed thus far, the Independent Medical Review process (*i.e.*, Maximus Federal Services) has merely rubber-stamped the UR denials. In other words, a huge expense is being paid for a process which, to a large extent, is not benefitting injured workers.

As stated previously, a very significant and important case — called *Dubon* — was issued recently. In this case, the Court became aware that the Workers' Compensation adjuster had not provided all the injured worker's relevant medical records to the insurance carrier's contracted utilization review firm. As a result, the *Dubon* Court determined that since there had been a material failure in the UR process, the Court was empowered to take jurisdiction and render a decision on the medical adequacy of care recommended for the worker.

Subsequently, State Compensation Insurance Fund (SCIF) and a number of other insurers joined in attacking the *Dubon* decision. *Why?* Because the IMR process supports their contracted utilization review doctors' denial of medical care, thereby keeping costs down for the insurance carriers — and shifting the burden of medical costs from the employers responsible for creating workers' injuries to the workers themselves, their families, and their personal health insurance policies.

For the Workers' Compensation system, the *Dubon* case is *the* most significant case of 2014. It represents an attempt to restore transparency and accountability to the Work Comp system by denying adjusters the opportunity to manipulate the outcome of utilization reviews by providing their contracted doctors with limited, selective medical information to their benefit.

The *Dubon* case allows the Court to step in and make an impartial decision for an injured worker, instead of having the worker's medical care recommendations be subject to the determination of another review process (IMR) and their contracted reviewer (Maximus), who is being paid $50 million or more by the State of California. Again, as stated, the *Dubon* case creates transparency and accountability in the Workers' Compensation system, replacing subjective decisions by contracted parties with objective decisions rendered by an independent reviewer (a judge).

Very recently, the *Dubon* case was at issue again when the Workers' Compensation Appeals Board (WCAB) granted reconsideration of that decision. The reconsideration opportunity was announced by the Court on 5/15/14. This development is very troubling, as it places all California workers and their families at risk once again, and potentially could increase the cost of private health insurance.

SCIF, in their appeal of the *Dubon* case, acknowledged that the doctor contracted by them had not received all of the injured worker's relevant medical records, but they felt it was not their obligation to provide *all* the documents. They took the position that the treating doctor was required to provide all the documentation in support of the treatment request, while they (SCIF) provided only those documents favorable to their position.

However, treating doctors do just that — they treat; their responsibility is to their patients. They are not attorneys or adjusters, and they cannot be expected to function in a role which is outside their expertise and realm of responsibility. SCIF, in its attempt to make treating doctors responsible for providing UR reviewers with medical documentation supporting the doctors' treatment recommendations, is placing a new "hat" on the treaters — a hat which they were never intended to wear, and which does not fit their intended role as medical providers.

The WCAB, in allowing the *Dubon* decision to be reviewed, stated: "We believe that this action is necessary to give us a complete understanding of the record and enable us to issue a just and reasoned decision." It should be noted that the previous Commission which issued the first decision on *Dubon* has changed and now has a new member.

Workers' Compensation is a system designed to protect California workers and provide them with benefits in the event of a job-related injury. *Dubon* partially corrected the wrongs imposed on these workers. Now, the new review which is being sought has the potential of creating great economic opportunities for Workers' Compensation carriers and their contracted medical reviewers, as well as the IMR system and its contracted reviewer, Maximus.

The utilization review process lacks integrity and transparency, as does the Independent Medical Process to an even greater degree, since its medical determinations are made by unidentified doctors and are not subject to judicial review.

Therefore, as stated above, the fact that the WCAB as of mid-May 2014 is going to review the *Dubon* case — a very significant decision issued on 2/27/14 — places California workers and their families at great risk.

CITY OF SAN JOSE DISABILITY POLICY HARMFUL TO INJURED SAFETY WORKERS

As a whole, the vast majority of California safety workers do not want to retire after sustaining a work injury. In fact, they are generally highly motivated to continue with their career.

The state of California, its counties, and its cities have all acknowledged the uniqueness of the work performed by safety workers, recognizing that they are always "on the front line" in defense of the public interest. Therefore, they and their families

need to be protected, and, to a certain extent, such protection has been provided to them.

One of the protections is to ensure that if and when safety workers sustain job-related injuries which preclude them from being able to perform their substantial duties, they will be in a position to maintain economic security for their family through the vehicle of an industrial disability retirement. However, the City of San Jose seeks to dramatically change this protocol.

Under the San Jose Disability Policy, peace officers qualify for a disability pension if the City's Independent Medical Board determines that they cannot work in any other city job. This policy presently applies specifically to new hires, but there is discussion regarding expanding it in the future to include current workers as well.

The concept of a disability retirement allows workers to engage in arduous, rigorous, dangerous employment with the understanding that if they sustain a career-ending work injury, they will still be able to provide a certain degree of economic security for their families. However, the new protocol being implemented in San Jose essentially undermines this concept, creating harm and havoc for injured safety workers. As a result of its implementation, several safety officers have left their employment with the City of San Jose, and others are contemplating doing so as well.

We will be following this matter to see what further developments occur. Clearly, the present situation in San Jose sets a dangerous precedent for injured safety workers and their families.

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