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THE CURRENT WORKERS' COMPENSATION SYSTEM IS IN VIOLATION OF THE CALIFORNIA CONSTITUTION

By Scott O'Mara

The California Constitution, Article 14, §4, states that the Workers' Compensation system is to be a "complete system" with "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 or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party". This article further states that the Work Comp system should make "full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve [the injured worker] from the effects of such injury".

For many years following the creation of this legislation, the Workers' Compensation system adhered to these constitutional provisions. That is, up until the enactment of Senate Bill 899 in 2004 and, subsequently, Senate Bill 863 in 2012.

SB 899 created the concept of Medical Provider Networks, creating the opportunity for employers to force injured workers to use doctors selected by the employers. This new system was ripe for abuse in that employers could reward MPN doctors with financial incentives for keeping costs down — a practice which is being allowed to continue until January 1, 2018, as of which date such financial incentives will no longer be allowed.

Then, in 2012, SB 863, under the guise of expediting medical care, removed the ability of injured workers to present evidence as to the inadequacy of the care being offered by employers. The Utilization Review (UR) process involves the use of a doctor hired by the employer to evaluate treatment recommendations for an injured worker and make a determination as to their reasonableness and necessity based solely upon a review of the medical records provided to the doctor, as UR doctors never see the injured workers for whom they make these decisions.

Prior to the passage of SB 863 in 2012, an injured worker had the right and the opportunity to provide evidence to a judge to justify the recommendations of his or her treating physician — a doctor who has personally seen the patient over a period of time and has the best understanding of the worker's situation, with substantial medical evidence to support his/her opinions. As a result, the judges involved in reviewing treating doctor opinions would place great value on those opinions. Therefore, the opportunity for

an injured worker to present his/her case to a judge for review provided a means of achieving a just resolution as to an injured worker's need for treatment — consistent with the requirements of the California Constitution relative to the provision of medical care.

In stark contrast, Utilization Review doctors, as stated above, never see the injured workers for whom they make important medical decisions based solely upon a one-time review of the medical records provided to them. In addition, the objectivity of UR doctors can easily be blurred by the contractual relationship they have with the employers who hire them. Moreover, until 1/1/18, UR doctors may even receive bonuses for making medical determinations favorable to the employers for whom they perform Utilization Reviews.

In theory, allegedly, the enactment of SB 863 in 2012 was going to expedite the provision of medical care. However, that turned out to be a ruse because of the introduction of the second phase of the employer-favored review process — Independent Medical Review (IMR). This second level of review purportedly was to provide a means for injured workers to appeal UR denials. However, this means of "appeal" has proved to be a sham, as *more than 80% of UR denials are simply rubber-stamped by IMR reviewers, and the fact that their identities are never revealed virtually eliminates any effective way to challenge their opinions*.

Furthermore, when an IMR doctor concurs with a UR denial of treatment, the injured worker involved is potentially precluded from receiving the care recommended for a period of up to one year. Injured workers who fail to proceed to Independent Medical Review after receiving a UR denial of care have no other means of challenging that denial.

Currently, litigation is in progress to allow injured workers whose treatment has been denied by an MPN doctor to obtain the opinions of up to two other physicians in the Medical Provider Network instead of having to proceed to review by UR and IMR doctors. The current case argues that if a worker is subject to a Medical Provider Network set forth by his/her employer pursuant to SB 899, the opinion of the MPN doctor who is selected by the injured worker and who actually sees the worker should be directive as to the worker's access to medical care, and the worker should not need to proceed to a medical determination made by a UR/IMR doctor.

When an employer has already selected its own Medical Provider Network doctors, the more expeditious and fairer route for an injured worker to access his/her treating physician's recommended medical care when an initial MPN doctor has not approved that care would be to allow the worker up to two more reviews by other MPN doctors as to the need for the care which has been denied.

The concept of allowing employers to select the doctors for their Medical Provider Network lists — and the further concept of allowing employers to pay bonuses to these

doctors (until 1/1/18) for employer-favorable decisions — should be enough acknowledgement of the great control employers already have over workers' access to medical care.

To force injured workers to use the Utilization Review and Independent Medical Review processes is in direct conflict with the California Constitution. These processes serve only to limit and restrict injured workers' access to medical care, if not remove that access altogether.

Law1199.com Newsletter 2015 Issue #5 reviews this same issue of concern to California injured workers and proposed that Labor Code §4610.5(a) 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.

This change would create a fair and equitable system which would comport with the California Constitution and allow injured workers to return to their jobs sooner, as well as lessen their levels of disability. This change also would lessen costs for employers because of injured workers' reduced time off work and lower levels of disability.

In any event, we will continue the fight on behalf of California's injured workers to restore the Workers' Compensation system so it will once again fulfill its intended purpose.

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