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WORKERS' COMPENSATION MEDICAL CARE: AT LAST THE DOOR IS OPENING

By Scott O'Mara

The California Workers' Compensation system has benefits available to injured workers with the goal of curing or relieving the effects of their inju-ries so they can return to their employment. On 5/19/17, on remand from the Court of Appeal, a unanimous WCAB panel in the *Stevens* case *(discussed below)* returned this matter to the trial level for further proceedings, opening the door to challenging the UR/IMR processes.

Senate Bill 863, signed by the Governor on 9/19/12, allowed employers and carriers to use an artificial standard to measure what is reasonable "to cure or relieve injured workers from the effects of their injuries". This legislation defined the necessity of medical treatment based upon guidelines allegedly using empirical data to set forth parameters of care. The challenge created was the fact that the standards utilized pursuant to the Medical Treatment Utilization Schedule (known as MTUS) fail to appreciate the uniqueness of an injured worker's treating doctor's ability to determine most appropriately what care is reasonable and necessary for the worker because of the personal history of the doctor with the patient, and the fact that this doctor is in the best position to interpret the results of testing in context with the best approach for each individual patient.

On the other hand, the MTUS takes a blanket approach in dealing with all workers without any consideration for unique individual factors, all for the alleged purpose of cost containment — and without taking into account the huge personal cost of denying or limiting needed care to a large number of California's injured workers. In many situations, the implementation of the MTUS has removed the treating doctor's ability to make unique determinations for individual patients based specifically on their personal needs.

The protocols set forth by the 2012 legislation also placed great restrictions on the Workers' Compensation Appeals Board, limiting the Board's ability to weigh the factors in individual cases — as they had done previously — and make decisions regarding the necessity and appropriateness of recommended care based on the uniqueness of each particular situation. According to the new protocol, after a treating doctor makes a Request for Authorization (RFA) of recommended treatment, the carrier then refers the request to an outside vendor — as part of a standard procedure called Utilization Review (UR) — for the vendor to make a decision as to the necessity and appropriateness of the care which has been recommended. An important fact, however, is that the UR vendor is not an objective entity, but rather a business with economic ties to the employer and/or carrier. Not only are UR doctors not in a position to make objective decisions; they also never see their patients — making their decisions based solely on the information provided to them by the employer/carrier. Thus, these vendors never have any personal involvement with the

injured workers for whom they make important medical decisions, thereby denying them any opportunity to consider the uniqueness of each individual worker and his or her situation.

Then, once the UR doctor (who does not see the injured worker) makes his/her decision on recommended care — which many times is a denial or limitation of care — the injured worker has very limited opportunity to overturn this decision. The established protocol is for the worker to appeal the UR decision by taking his/her case to Independent Medical Review (IMR). However, while the names of doctors involved in the UR process are disclosed, the identities of IMR doctors are never revealed, as discussed in previous newsletters. This cloak of secrecy prevents any real opportunity for further appeal if the IMR doctor upholds the UR denial, which is the case more than 80% of the time. As a result, many injured workers do not receive the care they need because of the UR/IMR protocol.

Several constitutional challenges have been made regarding the adequacy (or the lack thereof) of the new system, particularly in the recent *Stevens* case, in which the Court of Appeal upheld a unanimous WCAB decision which overturned a Findings and Order in which a Workers' Compensation Judge determined that the Appeals Board lacked the power to review and respond to the IMR doctor's determinations regarding the necessity and appropriateness of recommended medical care.

At one time, the Medical Treatment Utilization Schedule did not recognize certain types of medical care — even though these types of care had long been accepted in the Workers' Compensation arena as appropriate to cure or relieve the effects of injuries. The determination by the WCAB in the *Stevens* case, and the upholding of that determination by the Court of Appeal, has now expanded a much-needed view as to the validity of Independent Medical Review decisions based solely upon artificial standards created by the MTUS. Prior to this decision, when a UR denial was upheld by IMR, that decision was in effect "written in concrete", virtually ending any chances for the injured worker to seek further review in the hopes of finally obtaining the care recommended by his/her treating doctor. However, the recent WCAB decision in *Stevens* at last creates the opportunity for California injured workers to challenge IMR decisions denying access to the medical care they need — which, after all, is a basic right written into the California Constitution. In addition, the *Stevens* determination calls attention to the questionable standards established by the MTUS, in which the value of the treating doctor's unique understanding of each individual patient is clearly overlooked and undervalued. Simply put, the standards set forth by the MTUS are not consistent with California law.

The recent holding by a *unanimous* WCAB panel in the *Stevens* case, rescinding the denial of applicant's IMR appeal and returning this matter to the trial level for further proceedings, may represent only a small opening of a large door, but hopefully it will shed significant light on the continued failure of the UR/IMR protocol and the misguided MTUS, and the great degree of harm the system in place has done to so many California injured workers. The Courts need to be empowered with the ability to weigh and measure the uniqueness of each individual case in the context of what methodology of care is most appropriate for the

injured worker in question. The existing blanket approach applying the artificial standards set by the MTUS within the UR/IMR protocol fails miserably in this regard, as this approach lacks substance and denies the individuality of each worker. The doctor-patient interaction of California injured workers and their treating doctors *must* be considered a substantial guiding factor in determining the appropriate treatment for each patient.

In the *Stevens* matter, the defendant argued that the applicant's medical treatment did not require a health aide to assist with bathing, dressing, using the bathroom, etc., as a result of her condition which imposed great limitations. Again, the key factor is the individual involved, and the specific, unique needs of that individual. Determinations regarding an injured worker's need for home health care — or other medical treatment — must be made by the treating doctor, whose decisions are based on objecttive findings and subjective complaints of the actual patient as presented in person to the doctor --- not by an unidentified doctor using generic impersonal standards of a universal template to make medical decisions without seeing or examining the injured worker.

Therefore, the decision that the WCAB can overturn IMR determinations based on incorrect usage or interpretation of the MTUS guidelines is significant and a hopeful sign for the future of medical care in the California Workers' Compensation system.

For further information, please go to the website www.law1199.com and review 2015 issues number 1 and 5, which set forth some proposed legislative changes which should be made to enable California injured workers to access the medical care they need to cure or relieve the effects of their injuries.

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