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NEW DWC PROCEDURES — NOT ESTABLISHED BY STATUTE — THREATEN THE CALIFORNIA WORKERS' COMPENSATION SYSTEM

By Scott A. O'Mara

Law1199.com Newsletter 2015 Issue #1, entitled "The Current Workers' Compensation System Violates the Bargain Between Employers and Workers and Creates a Burden on Society", reflected the development of Workers' Compensation throughout Europe and the United States and encompassed the encumbrance placed upon California workers by the passage of Senate Bill 899 in 2004 which created the Medical Provider Network. The California Work Comp system subsequently was further burdened when Gov. Brown signed Senate Bill 863 on September 18, 2012.

Since the issuance of Law1199.com Newsletter 2015 Issue #1, additional enlightenment has occurred regarding the burden placed upon California Workers as a result of the 2004 and 2012 legislation, and the failure of the amendments which have legislatively been put in place, causing great harm to the state's workers. Law1199.com Newsletter 2019 Issue #3 contained a discussion of the corrective actions which are needed and can be implemented to allow California workers to independently make their own decisions as to the avenues they choose to access the medical care they need.

On February 13, 2020, a lawsuit was filed seeking a Writ of Mandate *(legally defined as "a court order to a government agency . . . to follow the law by correcting its prior actions or ceasing illegal acts")* to correct the existing Workers' Compensation system. This lawsuit in the Superior Court is an extraordinary move to force the California Department of Industrial Relations and the Division of Workers' Compensation to comply with their legal obligation to provide California workers with access to medical care to cure or relieve the effects of their work-related injuries as set forth in the California Constitution.

The only avenue to challenge treatment denials made by doctors relative to the care prescribed by a worker's treating doctor is through the Independent Medical Review (IMR) process, which requires workers to file an application for such review with the Department of Industrial Relations, Division of Workers' Compensation. Unfortunately, more than 80-to-90% of the appeals made to IMR are denied, and because of the cloak of secrecy protecting IMR doctors (80-to-90% denial) (as their identities are never made known), their determinations cannot be questioned. Moreover, IMR doctors (80-to-90% denial) never see their patients, and

they are not even required to be licensed in the state of California. The IMR protocol is clearly set up to support the decisions of Utilization Review (UR).

The IMR protocol also has a *second review process* to review and evaluate the medical care which has been provided by Employer Medical Provider Network physicians, who are selected by employers. If a worker disagrees with the opinion of a treater who is part of the Employer MPN, he/she can request a second and third opinion *(from other doctors who are also part of the Employer MPN)* as to the medical care in question. If these second and third doctor opinions are still not satisfactory to the needs of the injured worker, the worker's only remaining option is to file an appeal through Independent Medical Review, where the appeal will be subject to the determinations of an unknown doctor who never sees the worker and may not even be licensed in the state of California.

It has come to light that *the Division of Workers' Compensation (DWC) has unilaterally set forth its own additional steps which are not mandated by the Labor Code but must be met by injured workers*. If these steps are not met, workers have no way to move forward to challenge medical care denials. The steps mentioned consist of interrogatories created by the DWC — something which, again, is *not* required by the legislative enactments in the Labor Code.

Two cases have arisen — Scott *Pace* and *Scott Hines* — in which the interrogatories were provided to the workers. *These interrogatories, created unilaterally by the DWC, go beyond the scope of the legislative mandate and have created an additional threshold for injured workers to meet.* Workers who dispute the denial, delay or restriction of medical care made by Employer MPN doctors have only the one option of using the IMR protocol. Again, however, this protocol is set up to support the denial of medical care. As mentioned above, the names of IMR (80-to-90% denial) doctors are withheld from the public, they never see their patients, and they don't even have to be licensed in the state of California.

The Department of Workers' Compensation's creation of interrogatory templates has created another template which again is not set forth in any California statute, as correctly described by Juan M. Armenta, Esq., the attorney for Mr. Pace and Mr. Hines, as "underground rule-making activities".

The current system involving Employer MPN doctors, Utilization Review and Independent Medical Review is used by employers to deny or delay medical care. If an injured worker does not accept the Employer MPN doctor's recommendations, his/her opportunity for a second or third doctor's opinion simply involves further use of other Employer MPN doctors, with the final step being an appeal of their denials through Independent Medical Review..

What the DIR/DWC has done is to add an additional threshold of inquiry as to specifically why an applicant disagrees with the Employer MPN doctor's determinations, and to ask the worker as to what form of treatment he or she would like to have as opposed to what has been recommended by the Employer MPN doctors. This practice is operating in a manner which is contrary to what is established and goes outside the parameters of current policies and procedures. The counsel for the workers has correctly identified these DWC regulations and interrogatories which are not set forth by any statute as "underground rule-making activities". This practice further delays treatment for injured workers and places many workers who do not have the advantage of having counsel in a position where they are more vulnerable to a denial of care for not answering the inquiries.

On 11/19/19, the California State Auditor, Elaine M. Howle, C.P.A., issued a report to the Governor of California, the President Pro Tem of the Senate, and the Speaker of the Assembly. In this report, Ms. Howle found that the DWC was not adequately overseeing the system to ensure that California workers have access to the benefits to which they are entitled.

One of the failures existing at that time — and which continues to date — is the Division of Workers' Compensation's failure to ensure that the system has a sufficient number of Qualified Medical Evaluators to meet demands. The additional finding as to the "underground rule-making activities" employed by the DWC as set forth in the writ by the attorney (Mr. Armenta) representing Mr. Pace and Mr. Hines reflects an ongoing lack of acknowledgment of the necessity of having a system which works and provides care so injured workers can be cured or relieved of the effects of their injuries and then return to work, minimizing the disability benefits which employers have to pay.

The use of interrogatories upon injured workers is a means of seeking to have workers share their medical opinions as to the type and extent of treatment needed. This is not within the scope of the worker's knowledge or expertise, and only serves to delay or deny a worker's ability to receive the care which is actually necessary.

The current usage of interrogatories by the Department of Workers' Compensation needs to cease. It is essential for the legislative body to be aware of the failure and inadequacies of the present system, and the resulting need to rectify same.

The current wave of interrogatories which is eviscerating the California Workers' Compensation system should strongly propel the legislative changes which have been previously recommended.

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NOTICE: *Making a false or fraudulent Workers' Compensation claim is a felony subject to up to 5 years in prison or a fine of up to $50,000 or double the value of the fraud, whichever is greater, or by both imprisonment and fine.*

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