LAW1199.COM NEWSLETTER™
2019 ★ ISSUE #3
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# PROPOSED CHANGES TO THE LABOR CODE

## By Scott O'Mara

The Workers' Compensation system in California was specifically created to compensate employees for injuries sustained in the course of their employment. The primary goal of this compensation is for injured workers to be cured or relieved from the effects of their work-related injuries. Existing law establishes that the Workers' Compensation system is administered by the Administrative Director of the Division of Workers' Compensation.

The California Constitution specifically sets forth in Article XIV, Section 4, that the Workers' Compensation system is to be "a complete system of workers' compensation" . . . [which will] "create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained . . . in the course of their employment, irrespective of the fault of any party . . . [with] full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury".

Senate Bill 863, which was signed by Gov. Brown in September 2012 and went into effect in January 2013, changed the Workers' Compensation system by implementing Independent Medical Review (IMR). Prior to that time, the Utilization Review (UR) protocol existed. In both of these protocols (UR and IMR), the reviewing doctors never see the injured workers for whom they are making important decisions regarding their medical care needs.

Utilization Review doctors are a group of physicians who have a contract with, and are paid by, the employer or the employer's adjusting agency.

Independent Medical Review doctors are paid by the employer. Of significance, again, is the fact that none of these doctors ever see the injured

workers whose medical care they are determining. In addition, IMR doctors are protected by a cloak of secrecy, as their identities are never revealed.

The IMR process is the injured worker's only avenue of appeal for UR denials of medical care. Before IMR was instituted, injured workers had the right to present evidence to a judge as to their treating doctor's opinion, and the judge would weigh and measure that opinion — the opinion of a doctor who had seen the patient many times and therefore had a solid basis for the care which he/she had recommended — versus the opinion of a UR doctor who had never seen the patient.

The implementation of the Independent Medical Review process, in theory, was supposed to expedite the system. However, the history of IMR decisions reflects that an extremely high percentage of UR denials of treatment have simply been upheld. In fact, in 2017, only 8.3% of these denials were overturned. The truth is that both UR and IMR doctors have no accountability under the present system.

A troubling case occurred where injured worker King was on medication which had been authorized by his treating doctor, who knew the patient well and truly understood his needs. However, that medication was abruptly stopped by the UR/IMR process, causing Mr. King to suffer four seizures. This matter ultimately went to the California Supreme Court, which unfortunately determined that UR doctors have no accountability for the harm they cause.

The delay in receiving medical care — and the denial of medical care — are significant, and this significance overflows into the worker who is not able to receive the care needed. In many situations, the employees embrace the concept of a Compromise and Release, but in doing so they give up their lifetime medical care. Under the Workers' Compensation system, this shifts the economic consequences of a job-related injury away from what is mandated by the California Constitution, to the worker's own health plan.

The enclosed proposed amendments and deletions constitute a rightful move which will not increase the money workers will receive for their job-related injuries, but will increase their access to medical care to cure or relieve the

**effects of their work-related injuries and place the economic responsibility for such injuries where it rightfully belongs — on the Workers' Compensation system as opposed to individual health plans.**


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# WORKERS' COMPENSATION LAW . . . THE PROBLEMS AND THE SOLUTION

## CURRENT LAW

Senate Bill 863, signed in 2012 by Gov. Brown, has caused unforeseen harm to injured workers and their families by delaying and denying medical care. The delays and denials caused by the Utilization Review/Independent Medical Review (UR/IMR) process not only increase costs for injured workers, who at times are forced to use their private health insurance, but raise costs for employers as well in many situations.

## THE PROBLEMS AND THE SOLUTION

Currently, appeals of medical denials of treatment for work-related injuries are made through the IMR process, which protects its doctors from scrutiny by withholding their identities. Also, in many cases, the specialties of both UR and IMR doctors is in the wrong area of expertise for the medical care they are reviewing. Furthermore, *UR and IMR doctors never see the injured workers whose recommended medical care they are reviewing*, yet despite this lack of contact, they are fully empowered to delay or deny the treater's recommended care for one year. This violates the California Constitution, Article 14, Section 4, which states that the Workers' Compensation system is to be a "complete system of workers' compensation [which] includes ... full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve [injured workers] from the effects of [their] injury."

Prior to SB 863, workers had the absolute right to present a judge with the knowledgeable and expert reports of their treaters — doctors who had examined and treated the workers personally. The judge then was in a position to weigh and measure the substantial evidence of the treater. Again, *UR and IMR doctors never see their patients*, and the worker's ability to present the above-mentioned evidence to a judge has been removed.

The proposed legislation would allow injured workers to decide if they want the opportunity to present a full picture of the care and treatment they have received from their treater. This option is in stark contrast to the lack of information which current UR and IMR doctors have when they make critical medical decisions for California injured workers.

## WHAT THE PROPOSED BILL WILL DO

The proposed bill would create an opportunity for injured workers to receive the proper medical treatment they need to be cured or relieved from the effects of their injuries, thereby allowing them to return to work sooner and with less disability. The checks and balances created by workers having the right to present evidence to a judge ensures a means of properly reviewing the decisions of UR and IMR doctors, who never see the injured workers.

The bill also ensures that UR and IMR doctors have the appropriate medical expertise to make their critical and long-lasting decisions affecting the injured workers whose recommended medical care they are reviewing, as all treatment records and findings of tests will be subject to full review.

Finally, the proposed legislation also requires all UR and IMR doctors to be licensed in the state of California. Furthermore, it will allow injured workers to learn the identifies of these doctors, their specialties and expertise, and exactly what reports, testing and other records they have reviewed. These changes will force UR/IMR doctors to render more sound and proper medical decisions, subject to review.

CONDENSED VERSION

# PROPOSED LABOR CODE MODIFICATIONS

**Labor Code §4610.**

(a) For purposes of this section, "utilization review" means utilization review or utilization management functions that prospectively, retrospectively, or concurrently review and approve, modify, or deny, based in whole or in part on medical necessity to cure and relieve, treatment recommendations by physicians, as defined in Section 3209.3, prior to, retrospectively, or concurrent with the provision of medical treatment services pursuant to Section 4600.

(b) For all dates of injury occurring on or after January 1, 2018, emergency treatment services and medical treatment rendered for a body part or condition that is accepted as compensable by the employer and is addressed by the medical treatment utilization schedule adopted pursuant to Section 5307.7, by a member of the medical provider network or health care organization, or by a physician predesignated pursuant to subdivision (d) of Section 4600, within the 30 days following the initial date of injury, shall be authorized without prospective utilization review, except as provided in subdivision (c). The services rendered under this subdivision shall be consistent with the medical treatment utilization schedule. In the event that the employee is not subject to treatment with a medical provider network, health care organization, or predesignated physician pursuant to subdivision (d) of Section 4600, the employee shall be eligible for treatment under this section within 30 days following the initial date of injury if the treatment is rendered by a physician or facility selected by the employer. For treatment rendered by a medical provider network physician, health care organization physician, a physician predesignated pursuant to subdivision (d) of Section 4600, or an employer-selected physician, the report required under Section 6409 and a complete request for authorization shall be submitted by the physician within five days following the employee's initial visit and evaluation. Treatment recommendations by a doctor participating in an MPN are not subject to utilization review and will be deemed approved. (Addition)

(c) Unless authorized by the employer or rendered as emergency medical treatment, the following medical treatment services, as defined in rules adopted by the administrative director, that are rendered through ~~a member of the medical provider network or~~ (Deletion) health care organization, a predesignated physician, an employer-selected physician, or an employer-selected facility, within the 30 days following the initial date of injury, shall be subject to prospective utilization review under this section:

(4) (A) Final decisions to approve, modify, or deny requests by physicians for authorization prior to, or concurrent with, the provision of medical treatment services to employees shall be communicated to the requesting physician within 24 hours of the decision by telephone, facsimile, or, if agreed to by the parties, secure email.

(B) Decisions resulting in modification or denial of all or part of the requested health care service shall be communicated in writing to the employee, and to the physician if the initial communication under subparagraph (A) was by telephone, within 24 hours for concurrent review, or within two normal business days of the decision for prospective review, as prescribed by the administrative director. If the request is modified or denied, disputes shall be resolved in accordance with Section 4610.5, if applicable, or otherwise in accordance with Section 4062.

**Labor Code §4610(4)(c)**

(C) In the case of concurrent review, medical care shall not be discontinued until the employee's physician has been notified of the decision and a care plan has been agreed upon by the physician that is appropriate for the medical needs of the employee. Medical care provided during a concurrent review shall be care that is medically necessary to cure ~~and~~ (Deletion) or (Replacement) relieve, and an insurer or self-insured employer shall only be liable for those services determined medically necessary to cure and relieve. If the insurer or self-insured employer disputes whether or not one or more services offered concurrently with a utilization review were medically necessary to cure and relieve, the dispute shall be resolved pursuant to

Section 4610.5, if applicable, or otherwise pursuant to Section 4062. A compromise between the parties that an insurer or self-insured employer believes may result in payment for services that were not medically necessary to cure and relieve shall be reported by the insurer or the self-insured employer to the licensing board of the provider or providers who received the payments, in a manner set forth by the respective board and in a way that minimizes reporting costs both to the board and to the insurer or self-insured employer, for evaluation as to possible violations of the statutes governing appropriate professional practices. Fees shall not be levied upon insurers or self-insured employers making reports required by this section.

**Labor Code §4610(o)**

(o) The administrative director shall develop a system for the mandatory electronic reporting of documents related to every utilization review performed by each employer, which shall be administered by the Division of Workers' Compensation. The administrative director shall adopt regulations specifying the documents to be submitted by the employer and the authorized transmission format and timeframe for their submission. For purposes of this subdivision, "employer" means the employer, the insurer of an insured employer, a claims administrator. ~~or a utilization review organization, or other entity acting on behalf of any of them.~~ (Deletion)

(p) If the administrative director determines that the employer, insurer, or other entity subject to this section has failed to meet any of the timeframes in this section, or has failed to meet any other requirement of this section, the administrative director may assess, by order, administrative penalties for each failure. A proceeding for the issuance of an order assessing administrative penalties shall be subject to appropriate notice to, and an opportunity for a hearing with regard to, the person affected. The administrative penalties shall not be deemed to be an exclusive remedy for the administrative director. These penalties shall be deposited in the Workers' Compensation Administration Revolving Fund.

(q) The administrative director shall contract with an outside, independent research organization on or after March 1, 2019, to evaluate the impact of the provision of medical treatment within the first 30 days after a claim is filed, for a claim filed on or after January 1, 2017, and before January 1, 2019. The report shall be provided to the administrative director, the Senate Committee on Labor and Industrial Relations, and the Assembly Committee on Insurance before January 1, 2020.

*(Amended by Stats. 2019, Ch. 647, Sec. 6. (SB 537) Effective January 1, 2020.)*

(r) The determination of the independent medical review organization shall be deemed to be the determination of the administrative director and shall be binding on all parties if the parties so stipulate. Without such stipulation, any and all determinations made by the independent medical review organization shall be subject to judicial review. (Addition)

(s) All decisions issued by utilization review shall protect the employee and/or the employer from a utilization review decision that causes injury or harm to the employee. Failure to meet the medical standard of care by negligence and/or omission may constitute medical malpractice by the utilization reviewer. (Addition)

**4610.5.**

~~(a) This section applies to the following disputes:~~ (Deletion)

(a) This section shall not apply to treatment services rendered by a doctor selected from an employer's Medical Provider Network (MPN) list. Any care recommended by a participating doctor in an MPN shall be deemed approved and not subject to utilization review. Where treatment recommendations are subject to utilization review, this section applies to the following disputes: . . . (Addition)

**Labor Code §4610.5**

(4) Unless otherwise indicated by context, “employer” means the employer, the insurer of an insured employer, a claims administrator, ~~or a utilization review organization, or other entity acting on behalf of any of them.~~ (Deletion)

(d) If a utilization review decision denies or modifies a treatment recommendation based on medical necessity, the employee may request an independent medical review as provided by this section.

(e) A utilization review decision may be reviewed, unless a treating doctor is part of the employers MPN ~~or appealed only by independent medical review pursuant to this section.~~ (Deletion) Neither the employee nor the employer shall have any liability for medical treatment furnished without the authorization of the employer if the treatment is modified or denied by a utilization review decision, unless the utilization review decision is overturned by independent medical review in accordance with this section.

(f) As part of its notification to the employee regarding an initial utilization review decision based on medical necessity that denies or modifies a treatment recommendation, the employer shall provide the employee with a one-page form prescribed by the administrative director, and an addressed envelope, which the employee may return to the administrative director or the administrative director’s designee to initiate an independent medical review. The employee may also request independent medical review electronically under rules adopted by the administrative director. The employer shall include on the form any information required by the administrative director to facilitate the completion of the independent medical review. The form shall also include all of the following:

~~(1) Notice that the utilization review decision is final unless the employee requests independent medical review.~~ (Deletion)

**Labor Code §4610.5**

(p) The claims administrator who issued the utilization review decision in dispute shall notify the independent medical review organization if there is a change in the claims administrator responsible for the claim. Notice shall be given to the independent medical review organization within five working days of the change in administrator taking effect.

(q) The determination of the independent medical review organization shall be deemed to be the determination of the administrative director and shall be binding on all parties if the parties so stipulate. Without such stipulation, any and all determinations made by the independent medical review organization shall be subject to judicial review. (Addition)

*(Amended by Stats. 2016, Ch. 868, Sec. 5. (SB 1160) Effective January 1, 2017.)*

**4610.6.**

~~(a) Upon receipt of a case pursuant to Section 4610.5, an independent medical review organization shall conduct the review in accordance with this article and any regulations or orders of the administrative director. The organization’s review shall be limited to an examination of the medical necessity of the disputed medical treatment.~~ (Deletion)

(a) The parties have the right to use an agreed medical evaluator or their own selected qualified medical evaluator to resolve issues regarding Labor Code §4610.5. If that right is not exercised, the parties, at their discretion, may engage in the independent medical review process. All independent medical review doctors shall have a current medical license for the State of California. If the independent medical review process is chosen by both parties, the independent medical review organization shall conduct the review in accordance with this article and any regulations or orders of the administrative director, and the organization’s review shall be limited to an examination of the medical necessity of the disputed medical treatment, based upon the care needed to cure or relieve the injured worker from the effects of his/her injury. The

independent medical review is subject to judicial review unless both parties waive this right. (Addition)

(b) Upon receipt of information and documents related to a case, the medical reviewer or reviewers selected to conduct the review by the independent medical review organization shall promptly review all pertinent medical records of the employee, provider reports, and any other information submitted to the organization or requested from any of the parties to the dispute by the reviewers. If the reviewers request information from any of the parties, a copy of the request and the response shall be provided to all of the parties. The reviewer or reviewers shall also review relevant information related to the criteria set forth in subdivision (c).

(c) Following its review, the reviewer or reviewers shall determine whether the disputed health care service was medically necessary based on the specific medical needs of the employee and the standards of medical necessity as defined in subdivision (c) of Section 4610.5.

(d) (1) The organization shall complete its review and make its determination in writing, and in layperson's terms to the maximum extent practicable, and the determination shall be issued, as follows:

(A) For a dispute over medication prescribed pursuant to the drug formulary submitted under subdivision (h) of Section 4610.5, within five working days from the date of receipt of the request for review and supporting documentation, or within less time as prescribed by the administrative director.

(B) For all other medical treatment disputes submitted for review under subdivision (h) of Section 4610.5, within 30 days of receipt of the request for review and supporting documentation, or within less time as prescribed by the administrative director.

(C) If the disputed medical treatment has not been provided and the employee's provider or the administrative director certifies in writing that an imminent and serious threat to the health of the employee may exist, including, but not limited to, serious pain, the potential loss of life, limb, or major bodily function, or the immediate and serious deterioration of the health of the employee, the analyses and determinations of the reviewers shall be expedited and rendered within three days of the receipt of the information.

(2) Subject to the approval of the administrative director, the deadlines for analyses and determinations involving both regular and expedited reviews may be extended for up to three days in extraordinary circumstances or for good cause.

(e) The medical professionals' analyses and determinations shall state whether the disputed health care service is medically necessary. Each analysis shall cite the employee's medical condition, the relevant documents in the record, and the relevant findings associated with the provisions of subdivision (c) to support the determination. If more than one medical professional reviews the case, the recommendation of the majority shall prevail. If the medical professionals reviewing the case are evenly split as to whether the disputed health care service should be provided, the decision shall be in favor of providing the service.

(f) The independent medical review organization shall provide the administrative director, the employer, the employee, and the employee's provider with the analyses and determinations of the medical professionals reviewing the case, and a description of the qualifications of the medical professionals. ~~The independent medical review organization shall keep the names of the reviewers confidential in all communications with entities or individuals outside the independent medical review organization.~~ (Deletion) If more than one medical professional reviewed the case and the result was differing determinations, the independent medical review organization shall provide each of the separate reviewer's analyses and determinations.

(f) The independent medical review organization shall provide all interested parties with the analyses and determinations of the medical professionals reviewing the case, along with the

names, academic credentials, professional achievements of those reviewers and proof of licensing within the State of California. (Addition)

~~(g) The determination of the independent medical review organization shall be deemed to be the determination of the administrative director and shall be binding on all parties.~~ (Deletion)

(g) The determination of the independent medical review organization shall be deemed to be the determination of the administrative director and shall be binding on all parties if the parties so stipulate. Without such stipulation, any and all determinations made by the independent medical review organizations shall be subject to judicial review. (Replacement)

~~(h) A determination of the administrative director pursuant to this section may be reviewed only by a verified appeal from the medical review determination of the administrative director, filed with the appeals board for hearing pursuant to Chapter 3 (commencing with Section 5500) of Part 4 and served on all interested parties within 30 days of the date of mailing of the determination to the aggrieved employee or the aggrieved employer. The determination of the administrative director shall be presumed to be correct and shall be set aside only upon proof by clear and convincing evidence of one or more of the following grounds for appeal:~~ (Deletion)

~~(1) The administrative director acted without or in excess of the administrative director's powers.~~ (Deletion)

~~(2) The determination of the administrative director was procured by fraud.~~ (Deletion)

~~(3) The independent medical reviewer was subject to a material conflict of interest that is in violation of Section 139.5.~~ (Deletion)

~~(4) The determination was the result of bias on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability.~~ (Deletion)

~~(5) The determination was the result of a plainly erroneous express or implied finding of fact, provided that the mistake of fact is a matter of ordinary knowledge based on the information submitted for review pursuant to Section 4610.5 and not a matter that is subject to expert opinion.~~ (Deletion)

~~(i) If the determination of the administrative director is reversed, the dispute shall be remanded to the administrative director to submit the dispute to independent medical review by a different independent review organization. In the event that a different independent medical review organization is not available after remand, the administrative director shall submit the dispute to the original medical review organization for review by a different reviewer in the organization. In no event shall a workers' compensation administrative law judge, the appeals board, or any higher court make a determination of medical necessity contrary to the determination of the independent medical review organization.~~ (Deletion)

(h) If the determination of the administrative director is reversed, the disputed issues shall be subject to judicial process, and the determination of the workers' compensation judge shall be binding on the parties unless there is an appeal to the WCAB. (i) All independent medical review doctors shall be licensed by the State of California to practice medicine. (Addition)

(j) Upon receiving the determination of the administrative director that a disputed health care service is medically necessary, the employer shall promptly implement the decision as provided by this section unless the employer has also disputed liability for any reason besides medical necessity. In the case of reimbursement for services already rendered, the employer shall reimburse the provider or employee, whichever applies, within 20 days, subject to resolution of any remaining issue of the amount of payment pursuant to Sections 4603.2 to 4603.6, inclusive. In the case of services not yet rendered, the employer shall authorize the services within five working days of receipt of the written determination from the independent medical review organization, or sooner if appropriate for the nature of the employee's medical condition, and shall inform the employee and provider of the authorization.

(k) Failure to pay for services already provided or to authorize services not yet rendered within the time prescribed by subdivision (l) is a violation of this section and, in addition to any other fines, penalties, and other remedies available to the administrative director, the employer shall be subject to an administrative penalty in an amount determined pursuant to regulations to be adopted by the administrative director, not to exceed five thousand dollars ($5,000) for each day the decision is not implemented. The administrative penalties shall be paid to the Workers' Compensation Administration Revolving Fund.

(l) The costs of independent medical review and the administration of the independent medical review system shall be borne by employers through a fee system established by the administrative director. After considering any relevant information on program costs, the administrative director shall establish a reasonable, per-case reimbursement schedule to pay the costs of independent medical review organization reviews and the cost of administering the independent medical review system, which may vary depending on the type of medical condition under review and on other relevant factors.

~~(m) The administrative director may publish the results of independent medical review determinations after removing individually identifiable information.~~ (Deletion)

(m) The administrative director shall publish the results of independent medical review determinations, with identification of the IMR doctors names and working locations. All IMR doctors shall have a current medical license from the State of California. (Addition)

(n) If any provision of this section, or the application thereof to any person or circumstances, is held invalid, the remainder of the section, and the application of its provisions to other persons or circumstances, shall not be affected thereby.

*(Amended by Stats. 2016, Ch. 868, Sec. 6. (SB 1160) Effective January 1, 2017.)*

**Labor Code §4616.**

(a) (1) An insurer, employer, or entity that provides physician network services may establish or modify a medical provider network for the provision of medical treatment to injured employees. The network shall include physicians primarily engaged in the treatment of occupational injuries. The administrative director shall encourage the integration of occupational and non occupational providers. The number of physicians in the medical provider network shall be sufficient to enable treatment for injuries or conditions to be provided in a timely manner. The provider network shall include an adequate number and type of physicians, as described in Section 3209.3, or other providers, as described in Section 3209.5, to treat common injuries experienced by injured employees based on the type of occupation or industry in which the employee is engaged, and the geographic area where the employees are employed.

(2) Medical treatment for injuries shall be readily available at reasonable times to all employees. To the extent feasible, all medical treatment for injuries shall be readily accessible to all employees. With respect to availability and accessibility of treatment, the administrative director shall consider the needs of rural areas, specifically those in which health facilities are located at least 30 miles apart and areas in which there is a health care shortage.

(3) A treating physician shall be included in the network only if, at the time of entering into or renewing an agreement by which the physician would be in the network, the physician, or an authorized employee of the physician or the physician's office, provides a separate written acknowledgment in which the physician affirmatively elects to be a member of the network. Copies of the written acknowledgment shall be provided to the administrative director upon the administrative director's request. This paragraph shall not apply to a physician who is a shareholder, partner, or employee of a medical group that elects to be part of the network.

(4) (A) (i) Commencing July 1, 2021, every medical provider network shall post on its internet website a roster of all participating providers, which includes all physicians and ancillary service providers in the medical provider network, and shall update the roster at least quarterly. Every

network shall provide to the administrative director the internet website address of the network and of its roster of participating providers. The roster of participating providers shall include, at a minimum, the name of each individual provider and their office address and office telephone number. If the ancillary service is provided by an entity rather than an individual, then that entity's name, address, and telephone number shall be listed.

(ii) The administrative director shall post, on the division's internet website, the internet website address of every approved medical provider network.

(B) Every medical provider network shall post on its internet website information about how to contact the medical provider network contact and medical access assistants, and information about how to obtain a copy of any notification regarding the medical provider network that is required to be given to an employee by regulations adopted by the administrative director.

(5) Every medical provider network shall provide one or more persons within the United States to serve as medical access assistants to help an injured employee find an available physician of the employee's choice, and subsequent physicians if necessary, under Section 4616.3. Medical access assistants shall have a toll-free telephone number that injured employees may use and shall be available at least from 7 a.m. to 8 p.m. Pacific standard time, Monday through Saturday, to respond to injured employees, contact physicians' offices during regular business hours, and schedule appointments. The administrative director shall promulgate regulations governing the provision of medical access assistants.

**Labor Code §4616**

(6) Injured workers have the right to predesignate a treating physician prior to sustaining a work-related injury. Upon sustaining an industrial injury, these workers then have the right to treat with their predesignated doctor or a physician on the health plan in which they are enrolled, or a doctor on their employer's medical provider network (MPN) list. If the worker selects a doctor from his/her employer's MPN, any treatment recommended by that doctor shall not be subject to utilization review (UR) or independent medical review (IMR). (Addition)