



### **IMPACTS ON MEDICAL CARE, EMPLOYMENT AND DISABILITY BY: SCOTT A. O'MARA**

The workers' compensation case can influence several major factors of employment:

1. Medical care; and
2. Compensation while off-work (Labor Code §4850, TTD); and
3. Ability to return back to full duty; and
4. Ability to retire if necessary.

The California Constitution sets forth the employee's right for medical care to cure or relieve the effects of the job injury. Article 14, Section 4.

The most significant foundational element is the treating doctor or examining doctor and then staff reports and notes of the injury and input of same.

The injured worker's attorney is an instrumental element in helping the worker garner and provide correct and accurate information to the treaters, and their staff. If the counsel is brought in at a stage that is late in the development of the case there becomes a substantial question as to the complete factors of information provided.

Many workers who sustain job injuries have a narrow view and are not educated or knowledgeable of the necessity of providing a broader scale of information. The well trained and experienced attorney that is involved in the case can make proper inquiries of their client and have the client reflect correctly and properly as to what elements they were exposed to, and what changes occurred post these work related elements.

The concept of the Alternate Dispute Resolution Program (ADR) can have value in the relationship to the ongoing failures that have occurred with the implementation of Utilization Review (UR) and Independent Medical Review (IMR). A challenge that exists are the participants in the joint committees who administer the ADR Programs and their role in reviewing and ensuring that there is a functional aspect.

The major challenge becomes the ombudsmen, the mediators and arbitrators. These individuals do not have a full connections with the worker at the onset. Their full connections with the workers are towards the final manifestation and development of the case. These individuals could be impartial, but their involvement at the later stages of the case do not provide an understanding or foundation of information of what the injured worker must share with the treater. For example, the exposures that have occurred, the subjective complaints that have occurred, and the limitations that have occurred throughout the development of the medical condition or disease.

In addition, there are other substantial factors such as if the medical care and treatment is causing other ancillary problems. Under workers compensation these ancillary problems become the responsibility of the workers compensation system. For example, if the worker takes injections, medication or has surgery for the work injury and that causes other problems, that will become the responsibility of the employer.

This connection is not always given full value by the treaters or the ombudsmen, the mediators and arbitrators. If the worker has a pre-existing condition such as diabetes, and it affects the work related condition, the treatments for the diabetes falls within the workers compensation system.

These elements must be identified and shared with the treater. These additional elements can allow for a faster recovery for the worker, and lower the level of impairment. But, if they are not identified or dealt with they can increase the time off of work and potentially compound and force the worker to retire who does not want to retire.

It is imperative that the worker's counsel be brought in at the very early stages of the case. The full concept of workers compensation is to assist and protect the worker and their family.

The growth and development of the case is important. The substantial evidence is the doctor's notes, nurse's notes, medical reports, doctor reports that reflect the foundation of the job related injury. This is something that counsel will engage in.

The medical notes are reviewed by the employer, employer's attorney, employer's adjuster and continuously examined by medical professionals. If the medical notes are correct this affords and protects the worker for access to medical care to cure and relieve. If the medical notes do not provide a full specter of the levels of pain, this raises a situation where there will be delay for the recovery for the worker. A major concern is where the notes have a non balanced communication with the medical group. There is an emphasis on the bad days and the worker did not reflect there are good days. What happens is that the worker feels the pain and discomfort and that is the discussion with the doctor, but yet even with pain and restrictions there are days that they are better and can do more activities. With the worker having an attorney involved at the onset of the case he or she can remind the injured worker to provide a full picture of the pain given there are good days and bad days. By educating the treater of the good days and bad days this balanced information may lower the value of the case, but that is not the issue. The issue is correct information of good days and bad days and removing some of the concerns the employer has to engage in unmerited fraud investigations that occur.

The medical opinions of the treating doctors are based upon the objective findings of tests and the subjective complaints of their patient. The balanced communication affords a stronger basis for a correct medical opinion.

In the area of residual impairment there are different levels of disability. One is an actual disability where the worker cannot engage in that activity. The second type is a prophylactic disability, one where the worker may have pain but can engage in the activities. The level of discomfort and pain and objective findings are the elements that are used to determine if the worker can return back to their substantial duties in law enforcement. If the doctor opines that the restrictions are prophylactic this means there is disability but the worker can continue with their substantial duties in law enforcement. If the doctor feels they have actual restrictions then they cannot engage in that activity. This may cause a forced retirement.

Besides the level of disability, another concern happens when some employers put in the settlement agreement a waiver of reinstatement. With the waiver of reinstatement if the worker's condition gets better and the retirement system mandates a re-evaluation and determines that the worker can return back to work this waiver is a tool that the employer utilizes (and by court cases have established) that the worker does not have a right to come back and return to their previous position. This holds true also if the worker feels they have improved and wants to return to their previous employment.

The workers' compensation system also has a window to change and re-evaluate the level of impairment. If the case is resolved by either a trial or a stipulated award the worker has five years from the date of injury to re-open the case for new and further disability if the condition becomes more disabling. This is another factor that the ombudsmen, mediator or arbitrators are not educated on or will advise the worker regarding the same.

The impairment in certain medical situations may be of such magnitude that the worker needs 24-hour care. In that situation I have litigated and established that there is that need and yet the employer wants the injured worker to go to a facility and be there the rest of their life and not have any other source of care. The medical opinions and the labor code allows the spouse, friend or some other elements selected by the worker to provide

the care at the worker's home with that individual being paid for by the employer. One of the more disturbing cases was the worker that had been shot several times and could not return back to work nor was he able to engage in other employment. The worker had contact with many confidential informants and had made many arrests. The grave concern was being placed in a care facility where he could be exposed to friends and families of gangs and be at risk. The County sought to deny reimbursement by his spouse, we litigated and prevailed. We also were able to establish reconstruction of the house.

The development of the substantial evidence that supports these medical and social needs is one that requires counsel being involved at the onset of the case. Counsel will go into detail with the worker and their family of options that are available and provide information to the treating doctor to have the treating doctor understand the magnitude and the risk factors of being in certain areas of treatment other than their domestic situation with their spouse.

Finally, there are areas where the employer has sought to reduce the level of compensation to the worker because they had retired. In this scenario the worker retired and took eighteen months to provide care to his mother who was seriously ill. The employer tried to utilize this as a way to deny the worker full compensation for the residual impairment that he had. The argument was that he removed himself from the open labor market. That was incorrect and we were able to provide testimony as to the care he provided to his mother prior to her death and the fact that he was seeking to work as a consultant prior to his stroke that was found to be job related. The employer aggressively fought this and I prevailed and he was able to receive the full compensation. Unfortunately for the worker he was another one that had a condition that developed and manifested to the point that he was 100% disabled and another renovation of the house and payment to the spouse to provide care which the employer vigorously fought and lost. I was able to show the need for home health care and payments to his wife for their domestic care.



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### THE LAW OFFICES OF SCOTT A. O'MARA

2370 Fifth Ave.  
San Diego, CA 92101  
  
4344 Latham St. – Ste. 250  
Riverside, CA 92501-1766  
  
1-800-LAW-1199  
(1-800-529-1199)  
619-583-1199  
951-276-1199  
[www.law1199.com](http://www.law1199.com)

### BOBBITT, PINCKARD & FIELDS, A.P.C.

8388 Vickers St.  
San Diego, CA 92111  
  
4344 Latham St. – Ste. 250  
Riverside, CA 92501-1766  
  
858-467-1199  
[www.coplav.org](http://www.coplav.org)

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