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POSTING OF WORKERS' RIGHTS FOR REPRESENTATION AB1870

BY: SCOTT A. O'MARA

The Governor signed AB1870 on 07/15/2024 which mandates employers post worker rights of legal representation for the work injury. AB1870 establishes a clear mandate that the employer post additional information regarding the employee's right for legal representation. If the employer does not follow the proper procedures to educate the employee by posting the rights for treatment, other benefits, and the added rights for legal representation, it will result in a **misdemeanor**.

Currently L.C. §3550 states:

1) How to obtain emergency medical treatment, if needed.
2) The kinds of events, injuries and illnesses covered by workers' compensation.
3) The injured employee's right to receive medical care.

AB1870 adds to L.C. §3550 as follows:

4) The injured employee may consult with a licensed attorney to advise them of their rights under workers' compensation laws. In some instances attorney fees may be paid from an injured employee's recovery.

Continuing with L.C. §3550:

5) The rights of the employee to select and change the treating physician pursuant to provisions of L.C. §4600.
6) The rights of the employee to receive temporary disability indemnity, permanent disability indemnity, supplemental job displacement and death benefits as appropriate.
7) To whom injuries should be reported.
8) The existence of time limits for the employer to be notified of an occupational injury.
9) The protections against discrimination provided pursuant to L.C. section 132a.
10) The internet website address and contact information that employees may use to obtain further information about the workers' compensation claims process and an injured employees' rights and obligations, including the location and telephone number of the nearest Information and Assistance Officer (through the WCAB).

A significant element of the current L.C. §3550 is section (e) which states if the employer fails to provide proper notices the employee is permitted to be treated by their personal physician during the failure of not providing notice. This could be a short window but it does allow for treatment.

Labor Code §3550 and the update by AB1870 provide a more complete opportunity for the injured worker to be cured or relieved from the job related injury. Labor Code §3550 states that the information in L.C. §3550 must be "posted and keep in a conspicuous location frequented by employees, and where the notice may (be) easily read by employees during the hours of the work day". "Failure to keep any notice required by the State shall constitute a misdemeanor."

The mandate by the current L.C. §3550 and the update made by AB1870 removes some of the restraint and guilt some employers place on the injured worker's opportunity to receive medical care to cure or relieve the effects of the job related injury.

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SPECIFIC INJURY, CUMULATIVE TRAUMA INJURY AND ANCILLARY INJURY

BY: SCOTT O'MARA

Workers' Compensation provides benefits to the worker that sustains a job related injury. The benefits can be medical care to cure or relieve the effects of the injury, compensation for time off of work, compensation for residual impairment that exists post maximum recovery period.

The common awareness is the two types of injuries that have to be proven as job related; a Specific and Cumulative Trauma injury. The more complex injury requiring additional development is the Ancillary Injuries.

The injuries that are occurring in the work situation require substantial documentation and the support of the treating doctor and/or the forensic doctor that is doing the evaluation.

This platform requires an expansion of understanding by the worker as to the various elements of the above-mentioned three types of injuries. This understanding must be factually correct and provided to the treating doctors and their staff so the substantial evidence platform is there that supports the injuries.

One of the major injuries that are not embraced by the employer is the Ancillary Injury. This injury expands the employer's liability to provide medical care to cure or relieve the effects of the injury. In addition it expands their liability for levels of permanent impairment they may emanate. For the worker, this understanding of all three types of injury and preparation provides a broader platform of protection for the worker and their family.

The physicians that are providing the medical care may be in an area of specialty and view the Ancillary body systems or Ancillary conditions subordinate to the medical care they are authorized to treat. Employers may not want to have to authorize other body systems and limit the treating doctor's medical care to ancillary problems. Examples of Ancillary Injury are where the medication, surgery or other forms of treatment of the job related condition causes harm and/or injury. Documentation of same is necessary**.** The worker must review all of his/her medications from https://www.webmd.com/ and look at side effects of medications they are taking. If these side effects are there, this must be identified to their treater. This is another important area that the worker's attorney needs to help develop (Medical Care Can Expand https://law1199.com/wp-content/uploads/2019/03/2019-issue-2.pdf.)

The preparation of the worker, by his/her attorney, prior to the treatment and forensic evaluation are paramount factors that can create this platform of protection.

The Ancillary Injury is reviewed as to whether the original injury is a contributory factor to the Ancillary Injury, and if so this provides an additional platform of medical care to cure or relieve the effects of the injury.

A common example is where the worker sustains a unilateral problem either in the leg or arm, and over use of the other extremity that was not injured occurs. If compensating increases problems to other body parts that were not originally injured this then becomes a compensable consequence of the first injury, an Ancillary Injury.

We see this common in leg injuries, such as an injury to the right leg and the worker relies more upon the left leg, back and upper extremities to move and get around. As a result of such, these additional body parts become symptomatic and develop the need for medical care or residual impairment, or both. In this situation there is a compensable consequence, Ancillary Injury and the employer under the workers' compensation system becomes responsible.

The Ancillary Injury is one where the employer wants to limit themselves from. The physicians that are providing the care many times are there for the role to provide care, but not looking to the legal consequences of the Ancillary Injury.

SPECIFIC INJURY, CUMULATIVE TRAUMA INJURY AND ANCILLARY INJURY

Another area besides the payment for disability to the injured worker that occurs can be the medical care. Medical care is to cure or relieve the effects of the injury and if the medical care causes further medical issues again, this is an Ancillary Injury.

This is an area where the employer and some medical providers are not going to jump forward to provide that coverage. The medical provider should acknowledge that there is a problem, but not necessarily come back and state it as a compensable consequence. The employer is not going to vet this out because it again creates a larger field of liability.

Unfortunately in many situations with industrial injury, particularly orthopedic injuries, there can be a significant weight gain. With the occurrence of weight gain, this can impact the heart system, pulmonary system and other body parts. The job injury can also make preexisting non work related medical conditions more problematic, such as diabetes. Even if there is a preexisting condition that existed prior to the job related injury if the condition becomes more problematic or more symptomatic because of the current job related injury, this becomes another factor in the compensable consequences of the injury. This is also an Ancillary Injury.

The workers awareness and discussion with the doctor is the foundation of evidence. The attorney that is representing the injured worker will be able to determine the potential for the Ancillary Injury and can help the worker focus on the proper communication with the medical providers to document same.

The workers' compensation system is one for protection of the worker. The workers' compensation system can raise the cost and liability to the employer. There can be employer views in conflict with the worker wanting to protect and secure medical care to cure and relieve the effects of the injury with the employer wanting to limit or eliminate costs. Knowledge is the key factor for the worker, and by the information garnered from the counsel, (the attorney for the worker), the worker is in a better position to protect themselves and their family for costs of medical care.

The employer is liable for any resulting disability or need for medical treatment arising from the job related injury or compensable consequence of same. One of the more telling cases that speaks to this is one litigated by this office, the *South Coast Framing, Inc. v Workers' Compensation Appeals Bd (Clark) (2015) 61 Cal.4th 291 [188 Cal. Rptr. 3d 46, 349 P.3d 141, 80 Cal.Comp.Cases 489*]. This was litigated by Daniel J. Palasciano of O'Mara & Hampton; a very significant case in workers' compensation that helps set forth the definition of a job related injury.

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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 §4800, §4850, §4800.5, 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 inquires 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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MEDICAL CARE FOR PREEXISTING CONDITIONS
BY: SCOTT O'MARA

If the worker has a job related injury there is entitlement to several benefits; one of the most important benefits is medical care. The California Constitution states that medical care for job injuries is to CURE or RELIEVE the effects of the job related injury.

The employer wants to contain and control as many costs as they can in the work related injury. In doing so, they then attempt to remove any medical condition that has become more disabling or problematic because of the job related injury.

The labor code speaks very generally that an injury is the result of a specific or cumulative trauma of work events or disease arising out of the employment. However, there are many situations where there is an aggravation of preexisting medical conditions that were non-industrial and this preexisting medical condition, whether that be a disease or condition, has connectivity because the work related injury, or the treatment for the work related injury, aggravates or accelerates those preexisting conditions. This then makes those conditional changes in the body or the system compensable, particularly when it comes to the medical care.

The employer does not want to see this expansion of medical care because the medical care can be a lifelong obligation for the employer that was not initially impacted by the specific or cumulative trauma, but the condition became more problematic or more symptomatic as time passed because of the aggravation of this preexisting condition(s).

One of the thoughts is that a compensable consequence would be that the worker sustained an injury to his left knee and then becomes more reliant on the right knee to move around. Due to this, the right knee becomes more symptomatic and needs medical care; this would expand the coverage under the workers' compensation system. Another example would be a worker that has a non-industrial heart condition existing prior to his employment of the job related injury. With the job related injury, if it has caused an elevation in the blood pressure, and this elevation of the blood pressure has caused an enlargement of the heart, this then would place the responsibility for the medical care for the heart to the employer.

The case law is rather direct that if the industrial injury or treatment for the industrial injury aggravates or accelerates the previous existing disease or condition resulting in disability, the injury is compensable for a level of disability and becomes the responsibility for the employer to provide the medical care for this new element.

Of interest is the elements of change, most workers do not have knowledge of, nor do the physicians that are treating, understand or embrace the concept of the aggravation of the preexisting non-industrial condition. The job related injury is the responsibility of the employer. The doctors that treat under the employer's medical provider network list are doctors that are limited in their full medical view and as are the doctors in the Carve-Out. If these doctors expand medical care under the workers' compensation system, the doctor will be under

review by the employer or adjuster for additional costs. This awareness the doctors have can remove the unrepresented worker from the full medical protection for them and their family because of the aggravation of preexisting non-industrial disease or conditions by the job related injury or treatment.

There can be changes in medical conditions that are non work related. These changes are initially considered to be non work related by either the work related injury or the medical care received for the work related injury. These changes must be reviewed and embraced as a responsibility of the employer. The treating doctors are a very important element to articulate how the above mentioned injury or medical care for said job related injury are a factor in the aggravation or worsening of the preexisting non industrial disease. The medical care is articulated by the California Constitution is the Cure or Relieve the effects of the injury and the broad perspective is necessary for full protection of a California injured worker.

Therefore, it is paramount that there is a continuous review as to any worsening of preexisting or new medical conditions that developed in part or in total because of the job related injury, or for care for the job related injury causing same.

The role of the treating doctor is a significant factor for access to medical care. In addition, there must be awareness that the employer's doctors that are on their medical provider network list or doctors on the Carve Out list may view the cases very narrowly to continue to have their standing as treaters for the employer.

The injured worker through their attorney must expand the knowledge and the responsibility of the treaters so the medical care is available to Cure or Relieve all medical conditions, either current, preexisting or in the future, that are related to the job related injury and that the job related injury or treatment for same has impacted either preexisting need for medical care prior to the injury, or additional medical care that develops after the job related injury.

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NURSE CASE MANAGERS HAVE THE POWER OF DOCTORS
BY: SCOTT A. O'MARA

The California Constitution specifically mandates in Article 14 Section 4 that the Constitution creates and enforces a complete system of workers' compensation. The legislative enactment states all provisions of securing safety in the place of employment full provisions of such medical, surgical, hospital or other remedial treatment is required to cure or relieve the effects of the injuries. A work-related injury may have a range of impact on the worker and their needs for care. Some of the medical care can be in the form of medication, surgery, physical therapy, wheelchairs, renovation of the house, transportation, 24-hour care, and other assistance to maintain a quality of life. After the enactment of Article 4 Section for the Constitution there were other legislative changes that placed restrictions on access to medical care. The first being the Medical Provider Network (MPN) where the employer can force the worker to treat within a group of doctors the employer selects and controls, unless the worker has predesignated a treater. The next change was Utilization Review (UR) that allows the adjuster to put the treating doctor's request under review and must have approval by the UR doctor who never sees the patient. If the UR doctor does not agree with the treaters recommendations which are set forth in the Request for Authorization (RFA) the treatment can be denied up to one year unless the worker applies for review by Independent Medical Review (IMR) ghosts' doctors.

Ghost doctor in their review (IMR) are supportive of denial or limit of medical care as set forth by the UR doctor approximately ninety percent of the time.

The IMR doctors/ghost doctors are a major problem for accessing medical care. The worker, their attorney or other parties of interest are not allowed to know who the IMR doctors are, that is the reason for the characterization of naming them ghost doctors. There is unique medical care that can be obtained by the usage of a Nurse Case Manger.

The Nurse Case Manger's academic background is that they are nurses with additional education. They manage and develop particular health plans for the injured worker who is seeking either recovery or improvement from a serious injury or chronic condition. The Nurse Case Manger, pursuant to the *Jennifer Patterson v. The Oaks Farm* ADJ3905924, which is a significant panel decision, provides medical treatment that falls within the parameter of Labor Code Section 4600.

The Nurse Case Managers often collaborate with doctors and other medical professionals to obtain the injured worker's comprehensive care that are needed to cure or relieve the effects of the injuries. The Nurse Case Manager in many situations is an advocate for the patient's coordination of care and providing of ancillary health services if needed. The *Patterson v. The Oaks Farm* ADJ3905924 is an opinion and decision after reconsideration considered to be a significant panel decision. These findings are that:

1. The provisions of a Nurse Case Manager is a form of medical treatment under Labor Code §4600; and
2. Employer may not unilaterally cease to provide approved Nurse Case Manager services when there is no evidence of a change in the employee's circumstances or conditions showing the services are no longer reasonably required to cure or relieve the injured worker from the effects of the industrial injury.

These findings directly impact the employer's usage of the mandate of UR and the forced appeal to IMR by the worker to the ghost doctors. The employer will attempt to establish that the employee's medical condition or circumstances are such that the use of the Nurse Case Manager is no longer required or necessary to cure or

relieve the effects of the injury. By unilaterally going forward in trying to change the treatment and the usage of the Nurse Case Manager will not succeed without the above-mentioned substantial evidence.

The injured worker in many situations is in a difficult quandary because of the employers continued attempt to maintain control or eliminate the cost of medical care.

The treating doctors can be strong patient advocates, but they may not have full comprehension of the magnitude of the case and the medical necessity for accommodations in the home such as remodeling, putting ramps in, changing the bathroom, or providing a vehicle that allows the transportation of the injured worker. The treating doctors do not necessarily have the in depth knowledge as to what other medical services as mentioned above will cure or relieve the effects of the injury.

For the injured worker it is paramount that they have a strong relationship with the Nurse Case Manager so that the Nurse Case Manager can comprehend the overall picture. As stated before, the Nurse Case Manager has the power of doctors therefore this power can be of great magnitude in helping to cure or relive the effects of the injury.

If the employer unilaterally moves to curtail or cut off medical care and does not go through the steps necessary or does not recognize the Nurse Case Manager as medical care, this subjects the employer to a penalty sanction pursuant to Labor Code §5814 for failure by the employer, insurance carrier or third-party carrier to provide medical care to cure or relieve the effects of the injury. Again, there are additional perspectives as to medical care to cure or relieve, those can be set forth by the treating doctor and the Nurse Case Manager.

Nurse Case Managers have the power of the doctors and the injured worker must respect and interact appropriately with the Nurse Case Manager to reinforce this relationship. Finally, when the worker characterizes the subjective complaints to the Nurse Case Manager and/or the doctors and subjective complaints of the worker's perceptions of pain, discomfort or limitations, it is very important that if the worker has good days and bad days this is expressed. Without this expression this also will empower challenges as to the worker's needs. Therefore, in the discussion with the worker, the Nurse Case Manager and the treater have a broadened sense as to pain and discomfort and the impact of same.

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KEEP YOUR ARMORED VEST, KEEP YOUR BACK-UP WEAPON

BY: SCOTT O'MARA

The Workers' Compensation and Retirement systems overlap in many areas, and with this overlap there can be a direct impact on the workers' compensation case and resolution of the workers' compensation case and/or retirement case.

The concept of a back-up weapon and the armored vest is one of protection. The back-up weapon or armored vest is not one that the safety member will waive.

In the development of the workers compensation system, the primary goal has been a system that allows the injured worker, with a job-related injury, to receive medical care to cure or relieve the effects of the industrial injury. This is constitutionally mandated. There have been several changes in the legislation that has occurred; such as Utilization Review (UR) which allows the employer to second guess the treatment recommended by the treating doctor, and thus delay/deny the recommended treatment. This severely impacts the worker.

There is a back-up system called Labor Code §4605 which expands the medical opinion beyond the parameters of UR or Independent Medical Review (IMR) or Qualified Medical Evaluators (QME). This legislation, Labor Code §4605, states that the employee at his/her expense may obtain a consulting physician, or attending physician's opinion as to medical issues. The Labor Code states that any report prepared by the consulting or attending physician pursuant to Labor Code §4605, shall not be the sole basis for the award of medical care. It further states that a QME, or authorized treating physician, shall address and report procured pursuant to §4605 and shall indicate whether he/she agrees with the findings and opinions stated in the report.

Labor Code §4605 is a very significant back-up weapon for the worker in the event that there are only non-supporting medical opinions available by the QME or IMR doctors that lack the understanding and sophistication regarding the medical care that the worker seeks, or the relationship as to whether the condition is job-related.

Labor Code §4605 is a Section of the Labor Code that acknowledges the inadequacies of the workers' compensation system at times regarding doctors that lack the sophistication, training or experience in unique areas of medicine.

A current case that has been issued by a San Diego Judge held a decision that the brain cancer was work-related even though there was no presumption. The Judge was provided the opinion of a treating doctor pursuant to Labor Code §4605. This position had a broader specter of information and knowledge than the other physicians had. The employer challenged the decision and argued that the application of §4605 should not be utilized and that the evaluation should be limited to the IMR doctor.

On Appeal the WCAB concurred with the Judge's findings that the Labor Code §4605 doctor provided substantial evidence finding the condition of brain cancer indeed was work-related because of the unique knowledge, information and training that the doctor had pursuant to Labor Code §4605. The treating doctor, pursuant to Labor Code §4605, acknowledged why the injury was a factor in the cancers growth (the inflammatory process following the injury certainly may have expedited its presentation and growth).

The defendants took this doctor's deposition and the doctor reaffirmed that the head blow was a causative factor of the rapid growth of the tumor, and indeed was the compensable consequence of the original injury of brain cancer. Therefore, when cases are evaluated regarding causative factors, a consulting or attending physician's report indeed may be unique and of greater substantial evidence than the IME or QME. The employer attempted to appeal the Judge's finding to the WCAB. On 09/27/2023, the WCAB upheld the Judge's findings pursuant to Labor Code §4605 that the cancer is job-related.

KEEP YOUR ARMORED VEST, KEEP YOUR BACK-UP WEAPON

In review of several contracts that some Union/Associations have with the employer, I have noted that there has been a waiver of protection that Labor Code §4605 provides in some contracts. Again, §4605 is akin to a back-up weapon. There is no rationale to do that (to give up that back-up), it endangers the worker and removes the opportunity of using the back-up weapon of Labor Code §4605 to establish that a condition is job related. One of the documents drawn up by the employer (contracts) expressly states that Labor Code §4605 did not have authority. Other contracts that I have seen speaks indirectly, but curtails protection under §4605 in a very non-generic way, but in a manner that would allow the employer to come back and state that pursuant to the agreement, yet not specific, that the worker does not have the right to use this back-up weapon (Labor Code §4605) to obtain medical care.

Additional consideration is the lack of sophistication that the worker may have in waiving their right for re-employment. The Waiver Risk: https://law1199.com/wp-content/uploads/2019/10/2019-Issue-11.pdf.

The CalPERS, County retirement and the City retirement systems all have a secondary re-evaluation procedure for Workers that retire early because of an industrial disability retirement. This allows the retirement system to compel the Worker (that have a job-related injury, and was forced to leave their employment because of the complications due to the injury and their inability to perform the substantial duties of a job) to undergo a re-evaluation allowing the governmental entity to force a re-evaluation.

There is a practice that some employers use to manipulate the workers and remove the worker's ability to return back to work. This is done by getting the worker to sign a settlement document in the workers' compensation cases that state "the worker was waiving their right to return back to employment". That if the worker was to attempt to return back to work either forcibly, by the retirement system, or on their own unilateral decision that the worker has agreed to waive their rights to be rehired.

The workers' compensation settlement documents which set forth this waiver create a significant complication for the worker.

The caveat to the worker is the understanding that the Compromise and Release (C&R), or Stipulation, although it only speaks to the Workers' Compensation system, it can override and dictate removing the workers' right for returning and reinstatement with the employer.

With this specific language of a waiver in the C&R, or Stipulation, of re-employment where the worker agreed that the lump-sum settlement or Stipulation is also a waiver of any right to reinstatement or be rehired, and the worker agrees not to seek reinstatement with the employer or agrees to not reapply for employment with the employer, without that language, they would be able to return back to work based upon the employer having an available position and, only if there is no waiver.

In summary, there must be awareness on behalf of the Union/Association regarding the risk of harm to the member by giving up protection such as Labor Code §4605 as a BACK-UP WEAPON. The Union/Associations and the employee also need to be aware that the Waiver of Re-Employment is a loss of the ARMORED VEST. The worker could lose retirement benefits and not be able to return to work with the same employer because of the Waiver of Re-Employment. Do not take off your armored vest by agreeing to a Waiver of Re-Employment.

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FIVE YEARS TO OBTAIN MORE JUSTICE; NO TIME LIMIT ON MEDICAL CARE

By Scott A. O'Mara

Two factors occurring with job-related injuries are the level of impairment and the need for medical care. The level of impairment is determined by medical opinions and comparing the objective findings (*i.e.*, test results) with the subjective complaints of the patient using a schedule which has been created to produce this measurement. Once the level of impairment has been determined, a worker has five years from the date of injury to have the impairment level re-evaluated.

Labor Code §5410 indicates that the level of impairment, once it has been legally determined, can be re-evaluated and potentially expanded because of the changes. The Labor Code states that the Workers' Compensation Appeals Board maintains jurisdiction within five years from the date of injury to determine if new and further disability has developed.

A so-called "settlement" can be reached as to the level of impairment, and the worker receives medical care. Even with care, some workers may experience a gradual degradation in activities of daily living and employment opportunities – *i.e.*, an increase in the level of disability. In the case of unrepresented injured workers, very rarely will they be advised by their employer of their right pursuant to Labor Code §5410 to reopen their case and increase their level of impairment.

A factor is injured workers' discussions with their treating doctor regarding their deterioration. When deterioration factors are present, the Labor Code allows workers the opportunity to go back and receive a "full cup of justice" as to their real level of impairment. However, to initiate this avenue of justice, a petition to reopen a case for new and further disability needs to be filed within the set time parameter of five years following the date of injury.

Along the same line, if an injured worker has an increase in disability within the five-year time period following the date of injury, there may be additional ancillary medical care which is needed to deal with a work-related injury. An example would be the following:

If a worker with a work-related heart condition develops non-work-related diabetes after the finding of the heart condition, and the doctor opines that the diabetes is impacting the heart condition and needs to be controlled to minimize the heart condition, the responsibility for providing medical care for the diabetes then falls upon the employer.

This expansion of medical care is *not* limited by five years. But if there is an expansion of medical care within five years, this may be one of the factors to examine as to whether the injured worker has an increase in his/her residual impairment.

An ancillary situation would be in the case of an injured worker with a work-related right knee injury who places more reliance upon his/her left knee to the extent that the left knee eventually becomes disabling. In such a case, the worker would then be entitled to medical care for the left knee also because of its relation to the right knee. Furthermore, if this occurs with five years of the original date of injury to the right knee, the worker would then be in a posture to examine the level of impairment related to both knees.

Another situation which occurs is that the worker has residual impairment related to a body part – say his right wrist – and the residual impairment is found to be 60% job-related and 40% non-work-related. Then, when the worker undergoes surgery, the disability increases – not because of the injury itself, but because of the surgery which did not go well – and the Court, based on case law, determines that the increased disability is because of the surgical process, then the level of impairment cannot be apportioned to non-work-related condition.

The Workers' Compensation system was designed to protect workers and their families, and an awareness regarding medical care and its expansiveness is paramount for the full protection of injured workers. Medical care for particular job-related injuries in more extreme cases can include such benefits as renovating a house, installing a ramp in the bathroom or to an entrance into the house, changing a stairway, having someone come to the house to provide medical care to the injured worker, etc. In the most extreme situations, depending upon the injured worker's medical condition and level of disability, 24-hour assistance may be provided for job-related injuries.

If you have a job-related condition, be aware of the time period to reopen your case for new and further disability. The expansion of medical care is not restricted to five years. And if in fact medical conditions evolve which are not work-related, but which impact a work-related injury, that still could be the economic responsibility of the employer.

As you review your case and consider the care you are receiving, this situation is fluid. Again within the five-year parameter, you can reopen your case to receive adequate compensation to reflect the residual impairment. More expansively, as set forth in Labor Code §4600, the medical care provided for work-related injuries is to "cure or relieve the injured worker from the effects of his or her injury" and this care "shall be provided by the employer".

In preparation for discussing your medical needs with your doctor, it is important to understand the foundation for reopening your case for new and further disability and/or for continuation and expansion of medical care.

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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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GHOST DOCTORS AND THEIR ROLE AS A JUDGE

JUSTICE

The California Constitution (Article 14, Section 4) sets forth the workers' compensation system and LC §4600 is to provide for a complete medical treatment system to cure or relieve the effects of the worker's injuries. This treatment shall be provided by the employer.

CHECKS & BALANCE

The workers compensation system had a Checks and Balance System which was lost by Senate Bill 899. This System was to protect the worker's rights to obtain medical care to cure or relieve the effects of the worker's injuries.

The workers' compensation system was drastically damaged by SB899 signed into law by Governor Schwarzenegger on 4/19/2004.

However, important elements of the law remained after SB899:

a) The workers' compensation Judges are independent of all parties and are subject to review of their findings.

b) The judges are objective and separated from the employer and employee. No payments are made to them by either party. The judges have a code of judicial ethics and are required to be licensed by the California State Bar and have good standing.

If the injured worker or employer has issues with the medical treatment needed to cure or relieve the job related injury, the worker had the right to present evidence to the independent judge on that issue.

This basic right has been severely limited and removed by SB863, signed into law by Governor Brown in 2012. SB863 replaced independent judges with an IMR process where "Ghost doctors" now make crucial decisions regarding denied medical care, instead of independent judges. The IMR doctors (Ghost doctors) are not required to provide any significant information as to the status of their medical license. The IMR doctors (Ghost doctors) never actually sees or examines the injured worker.

Medical doctors who practice in California and who provide medical care to the injured worker are required to be holding a California license and be in good standing. The Medical Board of California provides information as to the physicians' profile, types of license and standing regarding that license, whether their license has been cancelled or suspended. The IMR doctors (Ghost doctors) do not have this standard of disclosure.

This information as to the licensing status of the treating doctor is a necessity for the determination as to the value of their medical opinion. Additional is the review of the information/evidence that is examined by the treating doctor and the basis for their findings as to what medical care is needed or not needed to cure or relieve the effects of the injury. There is a high standard for examination of the information/evidence that has been reviewed by the Treating doctor and the basis for determination as to what additional medical care is needed or not need to cure or relieve the effects of the injury. The IMR doctor (Ghost doctors) are not subject to review regarding the medical information reviewed and granting or denying medical care. The checks and balance should be placed on the IMR doctor (Ghost doctors). The IMR doctor (Ghost doctors) is paid for by the employer or the insurance company. Judges are not paid for by the employer, insurance company or the employee. The parties need to be aware of the IMR doctor's (Ghost doctors) medical license and current status of same, whether there are limitations on the license, a suspension of the license, or if it has been removed. This is a significant element of the Checks and Balances. The parties need to know what the medical evidence that is used by the IMR doctor (Ghost doctors), whether it be testing or other materials and what their reliance was upon for the finding, denying, limiting or granting medical care. Note that the IMR doctor (Ghost doctors) never sees or examines the injured worker and does not make a full disclosure as to the medical documents and records examined.

ACCOUNTABILITY

The current UR/IMR system does not have accountability because of lack of information and the removal of an independent workers' compensation judge. The IMR doctor (Ghost doctors), has been put in the place of the workers' compensation judge. The use of UR/IMR (Ghost doctor) system was not seen at the time of implementation as a veil of secrecy or a substantial problem. However, this UR/IMR system has discouraged some California licensed doctors from continuing to provide medical care to cure or relieve the effects of the injury because of the opinions of the IMR doctor (Ghost doctors) is not subject to transparency, and because the system creates additional obligations on the treating doctors to justify their medical care. In addition there are many times where there is a disparity between the treating physicians' expertise in a particular area of medicine that is lacking in UR/IMR doctor's (Ghost doctor's) education or areas of specialty. Therefore, there is a lack of substantial evidence regarding the reliability of UR/IMR doctor (Ghost doctors) opinion. This lack of expertise and/or evidence cannot be presented to an independent judge, again, because of the legislative enactment of SB863. There is a view that the changing the current IMR (Ghost doctor) system is going to

further discourage the real treating doctors from providing treatment. This is a misunderstanding.

The modification proposed (www.law1199.com Newsletter 2019, Issue #3) will allow the treating doctor a greater opportunity to provide the proper treatment to cure or relieve the effects of the injury with fewer encumbrances placed upon them based upon an alleged medical opinion of the UR/IMR (Ghost doctor). The medical opinions of the UR/IMR (Ghost doctors) are not subject to checks and balance and are not objective because of the lack of physical examination by an IMR doctor. In addition the UR/IMR doctors are paid by the employer.

EQUALITY

The modifications required will provide more equality. The judges are not paid for by the employer such as the IMR (Ghost doctors) are. All parties are aware that the IMR doctor is a Ghost and not required to be licensed in California and is not subject to checks and balances as to what the substantial evidence is used for his/her opinion. The opinions of the Treating doctor, UR doctor or the IMR (Ghost doctors) must be subject to review by and an independent judge not an IMR doctor who acts in the role of a judge.

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FAMILY PROTECTION

BY: SCOTT A. O'MARA

State Senator Tom Umberg introduced Senate Bill 447 on 02/18/2025. This legislation is to amend Labor Code §4856 which provides to the surviving spouse and dependents of the deceased officer who was killed in the performance of his/her duties and dies as a result of this external violence or physical force performing their duties. The surviving spouse and children have entitlements to receive benefits that are particular benefits that are addressed such as health benefits provided to the survivors prior to the death. The health benefits for the children are terminated when the dependent child reaches the age of twenty-one.

Legislation change modification to Labor Code §4856 allows the coverage to continue until the child reaches the age of twenty-six.

The continuum of exposures that safety members have in their work situation is there to protect the citizens and residents of California.

This special requirement that is met by the firefighters and peace officers are a necessity for our society to continue to function.

We, the citizens of California, need to protect the groups of people that provide to us the protection we receive.

The extending from the age of twenty-one to twenty-six for the children is a reasonable benefit that California citizens need to provide to protect the family members of firefighters and police officers.

The idea is that this umbrella of protection extends to the family unit of the decedent and that this umbrella of protection provides additional benefits that are made necessary by the death of the safety member.

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The idea is that this umbrella of protection extends to the family unit of the decedent and that this umbrella of protection provides additional benefits that are made necessary by the death of the safety member.

Senate Bill 447 (Family Protection Bill) as of 09/02/2025 can be sent to the Governor for his signature. The Governor can allow Senate Bill 447 to become law without his signature or veto.

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THE QME DOCTOR'S ROLE IN YOUR LIFE

BY: SCOTT A. O'MARA

With job-related injuries a critical aspect is the garnering care and treatment to cure or relieve the effects of the injury is through medical care. The medical care has to be recommended by the treating physician. This recommendation for care by the treating physician goes through a process of acceptance by the third-party administrator, the adjuster, validation as to the relationship of the job-related injury and whether the medical care is necessary to cure or relieve the effects of the injury. The workers' compensation system has various elements that must be met before the approval is garnered. If not unilaterally approved by the adjusting agency at the onset, the usage of a qualified medical care, Qualified Medical Evaluator (QME) can come into play.

The Qualified Medical Evaluators, QME, are doctors who have been certified by the California Division of Workers' Compensation. The certification is that the doctors that are performing the medical evaluations or recommendations for treatment meet crucial standards justifying either the job-relatedness, and/or the need for medical care.

If the parties are not able to come to an agreement, i.e., (the injured worker and the workers' compensation carrier), a Qualified Medical Evaluator (also known as a QME) is one of three doctors on a panel at the request of either the worker, or the employer to the California Division of Workers' Compensation (known as the DWC). The DWC provides a list of three physicians that have been certified by the DWC.

The QME doctors that are physicians provided by the DWC are to conduct a comprehensive review of medical records and evaluate the patient for determination if this is a job-related injury potentially for the extent of the residual impairment and the eligibility for additional care, treatment and payments for being off of work.

In the workers' compensation system it is not uncommon for the employer, or employee to dispute the findings of the treating doctor. When this dispute occurs and if the parties cannot agree to the care and treatment or usage of an Agreed Medical Evaluator (AME) a panel of three Qualified Medical Evaluator's are selected, not by the employer or by the worker, but by the California Division of Workers' Compensation who has established a panel of three doctors to review and provide their medical opinion as to the causative factors and/or extent of treatment, and/or payments for lost time of work.

The California Qualified Medical Evaluators are required to pass tests that are given by the DWC.

In the event that the worker does not have legal representation the worker will make a selection of one of the three participants in the panel doctor to evaluate him/her. If the patient has counsel, the council will, based upon education, knowledge and experience as to who the participants are will remove one of the doctors that they feel is least likely to be

balanced and be a good evaluator. The employer then can select one of the two remaining doctors to do the evaluation, or the roll can be reversed where the employer first eliminates one of the three doctors and of the two remaining the representative of the employee can make this determination as to who the evaluator is going to be.

The system is very complex relative to the individual knowledge that the parties must have as to who the doctors are in the panel and knowledge that the doctor has. There are some doctors that have great strength and understanding in the various medical and legal systems, but not all doctors have this knowledge. There are some doctors that have limited knowledge as to what the current case laws indicate regarding the elements of causation. There are some workers that obtain an attorney who are in a position to evaluate the doctors. There is a checks and balance that must occur relative to their QME doctor's opinion because if there is no counsel to make this review to ensure that the information provided to the doctor is medically appropriate, this can cause a major failure. The doctor's determination must be a correct determination based upon medical evidence and/or the presumptions that exists for safety members.

The panel medical evaluator or QME doctors are an instrumental element and if the worker does not have the knowledge and information as to who the panel participants are this allows the employer to make the selection. Great power is put in the employer's hand at the expense of the worker. (The employer is not to provide a recommendation to the worker as to which one to select; this would be a failure of the system.) Again, the doctors known as a QME are required to provide an impartial assessment of the worker's injury and the length and type of treatment needed.

One of the ancillary issues that some of the doctors do not want to develop is the secondary problem that may develop for the job-related injury. The secondary problem would be if you injured your right knee and you depend upon the left knee to compensate, and if the left knee becomes symptomatic the left knee can be a compensable consequence, and then becomes job-related. Another element is if you are receiving medical care for the job-related injury and the medical care causes another medical problem, which then becomes the responsibility of the employer. These are simple factors that are not developed by the adjuster in 90% of the cases. The panel doctors that have been selected and are not subject to review by the worker's attorney if there is not an attorney involved.

If the worker seeks an appointment via their counsel and if the Panel QME is unable to provide an appointment within 90-days of the appointment request the worker could waive that right and accept an appointment later no more than 120-days from the date of the initial panel request. In some situations because of whom the panel doctor is, and the attorney's awareness as to this doctor, the attorney can allow the appointment to be extended as long as it is no more than 120-days from the initial request.

The employer will monitor this and look at the time limit. There are certain situations where the worker and the employer can waive the 120-day rule. In another situation depending upon the doctor it can be to the benefit of the worker.

The request for re-evaluation at a later stage also has some time limits of no more than 120-days from the date of the applicant's request for re-evaluation. These timelines and the qualifications and the understanding of the panel doctors are very strong elements that the attorney will on a continuum evaluate and re-evaluate to ensure there is fairness and appropriate determinations made by the panel doctor.

The findings as to the panel doctor can go to causation, types of medical care, nature and extent of disability, time off from work and in many situations they determine if the worker is able to return back to do their substantial duties. The workers' compensation system has become very complex. The participants in this system whether that is the injured worker, the employer, or the medical evaluators, many times will have different avenues that they would like to see the case approach. For the injured worker their goal is to get medical care to cure or relieve the effects of the injury. In the vast majority of all cases the workers want to be able to return back to their substantial duties. The employer has a strong drive to continue to contain and control costs. There are numerous articles as to what the employers have done to contain and control costs. This is by not going forward with medical care that may have caused ancillary problems such as problems that are related to the treatment itself, and/or conditions that develop because of the job-related injury and/or medical involvement.

The unrepresented worker does not have the library of information that the employer maintains as to the doctors qualifications and their predisposed perspectives.

Preparation for the educated worker prior to the medical evaluations are paramount elements. These elements can advise the worker as to areas of examination and questions that the QME doctor will engage in or their staff. If the worker has information as to these areas the response that is provided to the doctor and staff is one of substance and will provide a substantial foundation for the care to cure or relieve.

Therefore, after you have filed your workers compensation case, and the adjuster is talking to you about selecting a particular doctor to do a medical evaluation, be cautious of that. They are not allowed to do that and if they try to communicate as to who they think is the better doctor is, again, have caution. Your goal is to cure and relieve your injuries, and protect yourself and your family.

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