LAW1199.COM NEWSLETTER™

2014 ★ ISSUE #15

safetyofficerattorneys.com ★ www.law1199.com ★ SCOTT A. O'MARA, THOMAS I. HAMPTON
BETH A. WILLIAMS, DANIEL J. PALASCIANO & JOSEPH P. HEATHMAN

THE NEW ADMINISTRATIVE FINES AGAINST EMPLOYERS OF UP TO $5,000 PER CASE DO NOT SOLVE THE MEDICAL PROBLEMS IN THE WORKERS' COMPENSATION SYSTEM

BY: SCOTT A. O'MARA

As most people know who have either sustained work-related injuries themselves or are aware of others who have sustained them, the California Workers' Compensation medical system which has changed as a result of Senate Bill 863 and the implementation of the Independent Medical Review (IMR) process has failed and continues to fail. According to recent information provided by Maximus, the contracted Independent Medical Review company, as of 10/22/14 approximately 19,000 of 42,000 cases were missing medical records after the deadline for submission of same.

This failure was previously identified and dealt with in two cases called *Dubon I* and *Dubon II*. In that matter, it became apparent that the Workers' Compensation carrier, State Compensation Insurance Fund, was withholding pertinent medical documentation and not sending it through the UR process for consideration by their doctors when determining the appropriateness and necessity of recommended medical treatment. Initially, the Court in *Dubon I* recognized this failure and provided a corrective change which allowed a judge to determine the need for medical care and achieve a just resolution in this matter because the IMR process had failed.

On 11/25/14, the Department of Industrial Relations (DIR) created a new protocol in an attempt to embrace and correct the failure of the current medical system as documented in the *Dubon* cases. The new process places a penalty on carriers in the event they fail to provide IMR doctors with all appropriate information relative to their review of recommended medical treatment.

In their *Newsline* dated 11/25/14 (Newsline No. 2014-110), the DIR states that pursuant to California Code of Regulations, Title 8, §9792.12(c)(6), if a claims adjuster fails to provide appropriate records to IMR within a set time limit — *i.e.*, within 15 days from the adjuster's receipt from the IMR reviewing agency of a document called a "Notice of Assignment and Request for Information (NOARFI)" — the Administrative Director may impose a $500 penalty for each day the records in question have not been provided to IMR (up to a maximum of $5,000).

While this action by the DIR Division of Workers' Compensation (DWC) is an absolute recognition that the IMR process is a failure, the assessment of a penalty does *not* provide a solution to the existing problem. Instead, Senate Bill 863 must be changed to allow injured workers access to medical care through a process which is subject to checks and balances.

The initial concept of SB 863 was that doctors — not attorneys or judges — should be making medical decisions. However, the misplaced energy behind this bill lies in the fact that the doctors placed in the position to make these decisions are not "doctors" in the typical sense of a doctor-patient relationship. First of all, *all doctors involved in the IMR review process never see their patients* — the very injured workers whose medical care is in their hands.

Therefore, these doctors do not have the complete and full knowledge that treating doctors have regarding their patients. Secondly, the identities of the IMR doctors conducting the reviews remain unknown, so their background, experience and competence in the appropriate specialty relative to each worker's medical care cannot be examined or, if necessary, challenged.

As a result, *Senate Bill 863 has created a travesty — a very harmful situation which allows manipulation to control medical care*. That manipulation exists in the ability of adjusters to make unilateral determinations as to what records they provide to IMR doctors, thereby opening the door for uncontrolled abuse of the system by allowing adjusters to withhold records unfavorable to their best interests. The end result of this manipulation is a virtual assurance that IMR doctors — seeing only a selective and biased portion of pertinent records for patients they have never seen — will deny their requests for medical care.

Workers' Compensation was established as a bargain between employers and employees a century ago. *SB 863 constitutes a violation of that bargain.* The attempt by the DIR to correct this violation through monetary sanctions is a superficial "band-aid measure" which does not go to the root of the problem. It ignores the principle that injured workers should have the right — an absolute right — to present evidence and obtain independent, unbiased decisions from doctors who have examined them; and the right — again, an absolute right — to have judges weigh and measure the evidence so a just decision can be made as to whether a doctor's recommended care is appropriate and necessary. Therefore, the monetary penalty being placed by the DIR is simply another red flag marking the failure of the existing system and the shift of economic responsibility from the Workers' Compensation system to employees and/or their health care plans.

The new system is ripe for both intentional and unintentional manipulation, but whether such manipulation is intentional or unintentional is not the issue. The issue goes directly to the concept in Workers' Compensation that the purpose of medical care is to cure or relieve the effects of an industrial injury. The material defects which exist in the present system have destroyed the integrity of medical care and the basic foundation of Workers' Compensation.

The system need not ask judges to be doctors; it simply needs to allow judges to weigh substantial evidence and on that basis determine whether recommended medical care should be approved or denied. The concept that secretive IMR doctors — who do not personally see

patients and have limited information about them — can make proper recommendations regarding medical care is not only erroneous, but destructive.

Currently, the Chamber of Commerce has taken the position that the administrative fines are too severe. This position ignores the fact of how harsh denial of care is to injured workers and their families, not to mention employers and the very Workers' Compensation system itself.

Fines — no matter what their monetary value is — do not solve the problem. They do not solve the issue of inappropriate behavior by adjusters, whether intentional or simply the result of negligence.

What do we need? As stated above, a Workers' Compensation system which is just and fair, with independent judges weighing and measuring evidence and testimony to determine whether recommended medical care is reasonable and necessary.

♦♦

LAW1199.COM NEWSLETTER™
THE LAW OFFICES OF
SCOTT A. O'MARA

2370 Fifth Ave.
San Diego, CA 92101-1611

4344 Latham St. – Ste. 250
Riverside, CA 92501-1766

1-800-LAW-1199
(1-800-529-1199)
951-276-1199
www.law1199.com

♦♦