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

THE NEGATIVE IMPACT OF SB 863 AND THE NEED TO REMOVE THE SHROUD OF SECRECY

BY: SCOTT A. O'MARA

Senate Bill 863, which was signed into law on 9/18/12, had a significant negative impact on the California Workers' Compensation system because it eliminated the checks and balances (*i.e.*, the judicial process) which previously existed regarding injured workers' access to medical care when a treating doctor's treatment plan was not followed because the employer's contracted doctor/reviewer did not approve it. That judicial process, and the right to challenge a disputed utilization review denial, exist no longer — *in conflict with the State Constitution*.

Before 1/1/13, injured workers had the constitutional right to present to a judge — an impartial third party *not paid for by the employer* — medical evidence from the treating doctor in support of care which had been recommended. This evidence would be from a doctor who has seen the patient and knows him/her personally — not someone who has never seen the patient and has only reviewed records, as is the case with utilization review (UR) doctors, who are paid by the employer or carrier and, based on their own interests, can never be truly impartial in making determinations regarding an injured workers need for medical care.

SB 863 also created a new review process — Independent Medical Review (IMR) — which purportedly would give injured workers the right to further consideration of their treating doctor's recommendations when utilization review had denied said care. However, the track record of this new protocol has proven Independent Medical Review to be an abject failure, as about 80% of all IMR reviews merely uphold UR denials of care recommended by treating doctors. The IMR process removed the constitutional right of the injured worker to present real medical evidence regarding his or her treaters medical opinion based upon real interaction with the worker. This new system forces the injured worker into a process shrouded in secrecy, as the identity of the IMR doctor (who, as noted above, never sees the patient) is not disclosed.

On the bright side, Senate Bill 863's unconstitutional approach has recently been challenged in a case called *Dubon*. This very significant case has presently restored some transparency and accountability to the Workers' Compensation system by allowing injured workers to step

outside the UR and IMR processes when certain case factors exist, enabling them to obtain the care they truly need. *And the end result of this opportunity?* Injured workers recover more quickly; return to work sooner, and with less residual disability. *Who benefits from this change?* The injured workers *and, ultimately, their employers*, who save money because of their workers', reduced disability from job-related injuries.

However, the *Dubon* case is currently under challenge by State Compensation Insurance Fund, who, like many other carriers and defendants, seeks to place a blanket of secrecy on injured workers' access to real medical care, camouflaging their actual needs and denying them the treatment they need. Again, as stated above, the *en banc* decision in *Dubon* is corrective in addressing this issue, and *it protects both employees and employers*.

The bottom line: Labor Code §4610.5 must be reviewed and revised to comply with the California Constitution to legislate transparency and accountability in the California Workers' Compensation system. The blanket of secrecy created by the IMR process must be removed to allow injured workers to know the identity of their doctors, and to restore workers' constitutional right to present to an impartial judge real and meaningful facts from a doctor who is familiar with the patient and his/her medical needs — not an unidentified doctor who never sees the patient and operates in secrecy.



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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

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