



# LAW1199.COM NEWSLETTER™

2015 ★ ISSUE #14

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## WORKERS' COMPENSATION AT THE EXPENSE OF EMPLOYEES???

BY: SCOTT A. O'MARA

The *Frances Stevens* case is a pivotal case which has now been brought before the California Supreme Court to determine the constitutionality of the Independent Medical Review (IMR) process. On December 4, 2015, Joseph Waxman, Esq., Counsel for Ms. Stevens, brought this matter before the California Supreme Court, seeking review of the First District Court of Appeal's decision in this matter which found against California workers. Counsel Waxman correctly states that the legislative enactments creating the IMR protocol exceeded their constitutional authority by granting the Department of Industrial Relations the right to settle medical treatment disputes through the IMR process.

Mr. Waxman sets forth that the California Constitution requires that any disputes regarding Workers' Compensation benefits are to be resolved either by arbitration, by the Workers' Compensation Appeals Board (WCAB), or by the Courts. He points out that the legislative branches of California government cannot remove the WCAB's constitutionally and statutorily vested rights as fact-finders in Workers' Compensation cases. Currently, under the new rules of IMR (July 2013), the only issue which the Courts can review is a timeline, not the issue of what the expertise of the doctor is, nor if the doctor's opinion is based on substantial evidence. Therefore, the inadequacies of the IMR process preclude the judicial system from assuming its proper role.

As many people are aware, the California Constitution, Article 14, Section 4, specifically sets forth that the Workers' Compensation system is to be a "complete system" which provides medical care to cure or relieve injured workers of the effects of their job-related injuries.

As of July 2013, all California workers, irrespective of their date of injury, are subject to the new mandate of IMR which has restricted and taken away from the constitutional rights set forth in Article 14, Section 4, of the California Constitution.

It is of great significance that many of the workers who have sustained work-related injuries are people who sustained these injuries 20, 30 or 40 years ago, and these workers – who previously prior to the implementation of IMR, were able to access medical care to cure or relieve the effects of their injuries — are now, because of IMR, being denied this care to which they are rightfully

entitled. This same pattern of denial is also impacting workers with current or more recent injuries.

As most readers probably also are aware, the Independent Medical Review process has created a protocol in which the identity of the IMR reviewer — the privately-retained doctor who determines whether a worker's physician's treatment recommendations are appropriate and necessary — is withheld and never made known, creating a secretive process which, for all intents and purposes, cannot be challenged. Yet these doctors, despite never examining the workers, are making significant medical and legal decisions regarding access to medical care.

In the Petition for Review in the *Stevens* case being brought before the California Supreme Court, Counsel Waxman correctly reflects that the IMR process is in direct conflict with the California Constitution. The appeal to the Supreme Court contends that the First District Court of Appeal erred in ruling that the California legislative bodies had not exceeded their constitutional authority when they instituted the IMR process. The Court of Appeal also erred in finding that the Legislature has the authority to remove the Workers' Compensation Appeals Board from its constitutionally and statutorily-vested rights as fact-finders on all Workers' Compensation issues.

The *Stevens* Petition for Review also correctly acknowledges that the IMR process with its secretive protocol "prohibits review of the central question at issue under the statutes, the medical necessity of treatment, and thus prohibits the appellate courts from exercising their constitutionally vested function".

In addition, the *Stevens* petition correctly cites the California Workers' Compensation Reporter's statement in August 2015 that denials of care being "appealed" through the IMR process now average about 15,000 per month (*equaling the staggering total of about 180,000 per year*), and "at least 87% of these denials are upheld by the anonymous, non-examining IMR reviewers" — and these denials are not subject to judicial review to determine if in fact there is substantial evidence which supports the IMR denials of medical care.

As many readers are aware, the original intent of IMR was to create a more expeditious process for evaluating treatment recommendations. However, what IMR actually has accomplished *is a more expeditious process for denying medical care*. This process is not effective; it deprives injured California workers of their constitutional rights; and, in essence, it has "impermissibly established a fourth method for settling workers' compensation disputes" (as stated by Counsel Waxman in the Petition for Review) outside the parameters of the California Constitution.

It is of significance that if this failed system — the IMR process — is allowed to remain in effect, more and more workers will sell their medical care, resulting in a shift of medical care costs from the Workers' Compensation system to private health care.

The Petition for Review in the *Stevens* case sets forth a very substantial thought and the reality that the IMR process — which currently is the one exclusive remedy available for injured workers whose doctors' treatment recommendations have been denied — deprives injured workers from learning the rationale of the IMR doctors in making their decisions, and whether that rationale is based upon substantial evidence or just a quick unsubstantiated review of the

matter so the IMR doctor can move the file and get paid at the expense of the California injured worker.

This denial to injured workers has an overflow effect to all citizens of California. I will advise you further as the Supreme Court reviews the *Stevens* case and sets forth their opinion on the IMR process.



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