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SACRAMENTO JUDGE RECOGNIZES MISCARRIAGE OF JUSTICE; FINDS “ROGUE UTILIZATION REVIEW” INVALID

BY: SCOTT A. O'MARA

Under the California Workers' Compensation system, the provision of medical care is a byproduct of the medical necessity to cure or relieve an injured worker from the effects of his or her industrial injury. However, as stated previously, the Utilization Review process created in 2004 has been a significant failure in satisfying that medical necessity as it has continually denied injured workers access to the medical care they need to cure or relieve the effects of their Industrial injuries.

Recently, a judge in Sacramento who formerly practiced law in San Diego, Robert Thiessen, rendered a decision finding that a Utilization Review doctor who denied the medical recommendation for bathroom modifications to accommodate wheelchair access for an injured worker (Don Smith) had gone outside the UR template and failed to address the actual disputed issues presented to him, instead basing his denial on factors and information he was not requested to review. Labeling this decision a “rogue utilization review” by a doctor who “did not do his job”, Judge Thiessen determined that, in essence, Utilization Review had not actually occurred and the UR denial was therefore invalid.

The carrier in this matter, CIGA, appealed this decision, but Judge Thiessen's opinion was subsequently upheld by the Workers' Compensation Appeals Board. CIGA has therefore taken this matter to the Third District Court of Appeal for review.

As readers will recall, in current law created by *Dubon I* and *Dubon II*, the Workers' Compensation Appeals Board ultimately determined that the only basis for rendering a UR decision invalid and therefore ineligible for appeal to the next protocol of review – Independent Medical Review (IMR) – is untimeliness.

The finding made by Judge Thiessen reflects the necessity for having a system of checks and balances to ensure injured workers fair access to the medical care they need. The concept that an

employer-contracted Utilization Review doctor can unilaterally make his decision regarding the appropriateness and necessity of recommended medical care based on factors and information not directed to him for review shows the prejudicial nature of the UR process and reflects the economic ties which someone who wears the hat of a doctor — but who in reality is first and foremost a businessperson — actually has to the employer. For him to go outside the established parameters of Utilization Review to find basis for denying recommended medical treatment is a strong indicator that, above all, his priority is establishing good will with the employer who contracts his services.

A checks-and-balances system which allows a judge to review the evidence in a given case — and determine whether minimum standards have been met in the determination of whether a doctor's recommendations for an injured worker are appropriate — is a medical necessity. However, the defendants in the Don Smith case are presenting evidence to support their contention that the judge does not have the authority to review a Utilization Review decision, and that the only allowable avenue for review of a UR denial is the Independent Medical Review process; and an injured worker can only take his/her case before a judge if a UR denial is untimely.

Defense Counsel Thomas Richard has stated that appeal of the Utilization Review denial is inappropriate at this point because Smith has not yet exhausted the administrative remedy of Independent Medical Review. He maintains that even if IMR were to uphold the UR decision, Smith would still have the opportunity to appeal the IMR decision under Labor Code §4610 as having been based on a clearly erroneous finding of fact.

However, requiring an injured worker to go through both Utilization Review and Independent Medical Review based upon invented factual patterns which do not reflect the reality of his condition is a gross miscarriage of justice. This whole process requires considerable time, delays recovery, and continues to undermine the established Workers' Compensation principle regarding the necessity to provide injured workers the care they need to cure or relieve the effects of their injuries.

Another defense attorney, commenting on the Don Smith case and Judge Thiessen's intervention, maintains there is no basis for a judge to make inquiry into the decision-making processes or reasonableness of Utilization Review. Again, this view encourages and allows the present system to bypass the needed system of checks and balances, creating a protocol shut off from critical review and exposure to the light of day, such that contracted UR doctors can say what they want without being subject to scrutiny. Furthermore, this highly prejudicial system ignores the economic relationship the reviewers have with the employers who contract them.

