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A REVIEW OF THREE NEW LEGISLATIVE PROPOSALS: SB 563, AB 2407 & AB 2577

BY: SCOTT A. O'MARA

Senate Bill 563 has been introduced by Sen. Pan. This legislation is directed towards Labor Code §4610, which addresses the Utilization Review (UR) process presently in place to review treatment recommendations made by injured workers' doctors and either approve or deny those recommendations.

Concerns have been raised — and continue to be raised — as to the economic motivation UR doctors have to continue in their capacity as the reviewers who determine whether recommended treatment is appropriate and necessary. These concerns relate to the economic incentive UR doctors may have to *deny* recommended treatment because they are employed by employers and insurance carriers who are trying to minimize costs.

SB 563 would legislate the following changes:

"This bill would prohibit the employer, or any entity conducting utilization review on behalf of the employer, from offering or providing any financial incentive or consideration to a physician based on the number of modifications, delays, or denials made by the physician. The bill would grant the administrative director authority pursuant to this provision to review any compensation agreement, payment schedule, or contract between the employer, or any entity conducting utilization review on behalf of the employer, and the utilization review physician."

This proposed enactment is a product of the realization that some physicians, unfortunately, are not practicing medicine consistent with their traditional duty as defined by the Hippocratic Oath to uphold specific ethical standards and treat the sick and injured to the best of their ability. Instead, their focus is on creating revenue for themselves. The changes proposed by SB 563 would lessen the likelihood of these doctors simply making denials because doing so is in their best interest — and certainly not in the best interests of the injured workers whose doctors' treatment recommendations are being denied.

An additional concern is that an employer or third-party administrator who has set up a contract with Utilization Review doctors can keep records of the denials made by those doctors. Therefore, even if SB 563 passes — legislating that UR doctors should not receive more

compensation simply for making more treatment denials — there must be recognition that these doctors still have an economic incentive to make denials so they can continue with their contracts with the Utilization Review companies.

(Readers can learn more about this matter by going to the website www.Law1199.com *and reading 2015 Issue #5, which sets forth further legislative changes which need to be made to protect California injured workers and their families, as well as employers.)*

Additional legislation which has been proposed includes Assembly Bill 2407, which was introduced by Assembly Member Chavez on February 19, 2016. This proposal would mandate that the provider of care should determine if an injured worker's chronic pain meets particular criteria for surgery subsequent to a surgical consultation.

AB 2407 states:

"If the employee's injury affects his or her back, the physician or other medical provider shall assess the employee's level of risk for chronic back pain and determine whether he or she meets the criteria for a surgical consultation. After the assessment, one or more of the following covered treatments may be deemed appropriate: acupuncture, chiropractic manipulation, cognitive behavioral therapy, medications, including short-term opiate drugs, but excluding long-term prescriptions, office visits, osteopathic manipulation, and physical and occupational therapy. Surgery may be recommended, but only for a limited number of conditions and only if there is sufficient evidence to indicate that surgery is more effective than other treatment options. Yoga, intensive rehabilitation, massage, or supervised exercise therapy may also be recommended for inclusion in the comprehensive treatment plan."

Review of this legislation indicates a potential for delay in following a treating doctor's recommendation for surgery, as AB 2407 attempts to discount the treating doctor's ability to make a determination that surgery is reasonable and necessary. Therefore, this legislation would appear to create an additional hurdle for workers to overcome to relieve the effects of serious back injuries.

The legislative intent of AB 2407 will benefit employers by delaying treatment, and at the same time cause frustration for many injured workers such that they will no longer want to seek treatment through the Workers' Compensation system because of the new threshold for surgery which must be met. Going outside the Work Comp system then would shift the economic burden for these workers' treatment from employers and insurance carriers, where it rightfully belongs, to employees' personal health plans.

A third proposed legislative enactment is Assembly Bill 2577, introduced by Assembly Member Chu on February 19, 2016. This bill would create additional occupational awareness that workers in certain occupations — such as firefighters and peace officers — have a greater likelihood of developing respiratory conditions because of their occupational exposures. The theory is that the development of such conditions as asthma and chronic obstructive pulmonary disease in these workers would be presumed to arise out of and in the course of their employment.

Again, this presumption would be specific for certain employee group members, such as firefighters employed either by cities, counties, districts and other public, private or municipal corporations or political subdivisions, or by California State University, the University of California, or the Department of Forestry and Fire Protection; and peace officers as defined in Penal Code Sections 830.1, 830.2(a) and 830.37(a) and (b) who are primarily engaged in active law enforcement activities.

AB 2577 states:

"The term 'injury' as used in this section includes respiratory illnesses or diseases, including, but not limited to, occupational asthma, chronic obstructive pulmonary disease, chronic bronchitis, emphysema, asbestos-related lung diseases, and any other lung-related illnesses and diseases caused by inhalation exposure from employment activities."

AB 2577 further states:

"The respiratory illness or disease so developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. . . . This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 120 months in any circumstance, commencing with the last date actually worked in the specified capacity."

This legislation definitely makes sense, as it acknowledges the unique exposures safety members face. Whether it is fighting a fire, directing traffic at a fire scene, going to a meth lab, firing weapons and cleaning them with solvents, breathing diesel exhaust or overhauling buildings — the number of exposures faced by safety workers is too great to quantify. Given the fact that these valuable members of society respond to numerous dangerous situations in the protection of the public interest, the presumption of AB 2577 would provide them greater and easier access to medical care to cure or relieve the effects of their injuries and give them additional benefits to help protect the officers and their families.

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