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CALIFORNIA SUPREME COURT JUSTICE STATES LEGISLATURE MAY NEED TO EXAMINE UR SAFEGUARDS FOR SUFFICIENT INCENTIVES TO ENSURE COMPETENT AND CAREFUL UR REVIEW

BY: SCOTT A. O'MARA

The California Supreme Court, on August 23, 2018, issued its opinion affirming a Court of Appeal's judgment dealing with the concept of Utilization Review and Independent Medical Review and the limitations placed on employee remedies for work-related injuries as set forth specifically in the Labor Code. Labor Code §3600 sets forth that the remedy for recovery under the Work Comp system differs substantially from tort remedies which exist. The rationale for this is that the Workers' Compensation liability provided is without regard to negligence of the employer for the sustained injury.

The existing system preempts the ability of injured workers to seek remedies in many cases because, effective January 2017, legislation expanded the definition of "employer" in the Labor Code to include the "employer, the insurer of an insured employer, a claims administrator, or a *Utilization Review organization*, or other entity acting on behalf of any of them" (Labor Code §4610.5(a)). Especially significant is the inclusion of Utilization Review within the definition of "employer", removing UR doctors from real responsibility for their determinations as to whether recommended medical care is reasonable and necessary.

The denial of a cause of action for a judgment against a Utilization Review doctor who made a wrongful denial of an injured worker's needed medication was made because of the specific language of in Labor Code §4610.5(a), which was modified in 2017 to add Utilization Review under the definition of "employer". This language essentially exempts UR doctors from their responsibility for wrongful conduct, despite the fact that they determine what other doctors can or cannot provide as treatment to cure or relieve the injured worker.

Some telling comments have been made by members of the Supreme Court regarding the Workers' Compensation system and Utilization Review, but before we review those comments, it must be acknowledged that Labor Code §4610.5(a) was specifically designed to protect Utilization Review doctors. This specific protection is for doctors who work for the employer. The employer has a contract with either a group of doctors or a company which does Utilization Review, and in the case of *King v. CompPartners, Inc.*, the allegations were that the doctor who

stopped a worker's needed medication should be held to the same level of accountability as the treating physician.

Also of note is the fact that even though the limitations as to the monetary amount against the Utilization Review doctor are substantial — *i.e.*, no medical malpractice — yet the Labor Code acknowledges “[the] physician who makes unsound professional judgments in this capacity is subject to professional discipline, which may include the loss of his or her license”. But yet the doctor is not subject to economic sanctions.

The Court of Appeal, again supported by the California Supreme Court, stated that the laws of Workers' Compensation limit and set forth the exclusive remedy employees have, and therefore the wrongs done by the UR doctor could not be pursued:

The Court concluded that the workers' compensation law provided the exclusive remedy for the employee's injuries and that preempted plaintiffs' tort claims. The harm plaintiffs alleged was collateral to and derivative of the industrial injury and arose within the scope of employment for purposes of the workers' compensation exclusive remedy. Because the acts alleged did not suggest that defendants stepped outside of the Utilization Review role contemplated by statute, plaintiffs' claims were preempted.

In other words, the worker suffering damage done by the UR doctor could not pursue medical malpractice. As readers are aware, Utilization Review doctors are a group of doctors who work for the employer and review the treatment recommendations made by a treater who has seen the worker numerous times and then, without ever seeing the worker, the UR doctor makes a *binding* decision as to whether the treater's recommendations are necessary and appropriate. In the event of a denial by a UR doctor, the worker's only recourse is to appeal the denial through Independent Medical Review, which supports the denial by the UR doctor more than 80% of the time.

The Court also acknowledged that claims administrators “stand in the shoes of employers” and therefore have the same protection from prosecution for wrongful conduct related to injured workers' medical care as do UR doctors, pursuant to Labor Code §4610.5(a).

The Court further noted in another case that a utilization reviewer, unlike a treating physician, “does not physically examine the applicant, does not obtain a full history of the injury or a full medical history, and might not review all pertinent medical records”. Justice Leondra Kruger stated that “to permit plaintiffs to bring tort suits against utilization reviewers, in the same manner as they might bring tort suits against treating physicians, would subject utilization reviewers to a second — and perhaps competing — set of obligations rooted in tort rather than statute”. What this ignores is that UR doctors indeed make medical determinations, and they are paid for by the employer. This also ignores the outcome to the worker when UR doctors are not held accountable and can work in a vacuum.

Supreme Court Justice Goodwin H. Liu, after reviewing this subject in great depth, made this finding: “But the undisputed facts in this case suggest that the workers' compensation system, and the utilization review process in particular, may not be working as the Legislature intended.”

Justice Goodwin H. Liu reflected: “The Legislature may wish to examine whether the existing safeguards provide sufficient incentives for competent and careful Utilization Review.”

The Supreme Court followed the legislation which was embraced and enacted to expedite medical care *supposedly*, but yet Justice Goodwin H. Liu acknowledges that “the Legislature may wish to examine whether the existing safeguards provide sufficient incentives for competent and careful Utilization Review”.

This is a recurrent theme which continues to be in place, and the recognition by Justice Goodwin H. Liu should provide some direction with respect to the errors made in the enactment of Utilization Review and Independent Medical Review.

Ultimately, Justice Mariano-Florentino Cuellar opined regarding the failure of UR and IMR, stating: “Even now those safeguards and remedies may not be set at optimal levels, and the Legislature may find it makes sense to change them.”

The Court, speaking regarding Labor Code §4610, stated that “even if defendants fully complied with the relevant requirements, it is questionable whether those requirements are enough to prevent similar injuries from occurring in the future. . . . But the balance that bargain strikes between employers’ interests and workers’ interests presumes that Utilization Review — which is conducted either by the worker’s employer or by an entity ‘stand[ing] in the shoes of [the] employer[.]’ — will be performed ‘with appropriate competence and care’. The limited record here raises doubts as to whether *King*’s Utilization Review was handled properly. Again, as noted by Justice Goodwin H. Liu, “the Legislature may wish to examine whether the existing safeguards provide sufficient incentives for competent and careful Utilization Review”.”

The changes set forth in *Law1199.com Newsletter 2019 Issue #3* will remedy the problems the Justices have identified.



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