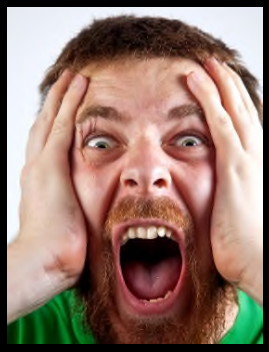
The Crazy World of UR/IMR



By Donald Barthel
Law Offices of Bradford & Barthel

HISTORY LESSON

2

HISTORY LESSON

2003: UR (Gov. Davis, SB 228)

2004: UR expanded (Gov Schwarzenegger, SB 899)

2012: IMR established (Gov Brown, SB 863)

SB863

THE BIG COMPROMISE

IWs get more PD
(definitely!)
ERs get a more expeditious system
(hopefully)

UR/IMR Saves $$

- 2013-2014: med services dropped 7.3%
- 2014-2015: 5.4%
- 10/16 WCIRB rep projected average medical cost of 2015 indemnity claim was 9% below 2011…

"largely a result of medical cost savings arising from SB863"

IMR Process

- Requested by IW/AA
  - 30 days from UR determination
- Complete IMR application:
  - Signed, completed IMR Form
  - Authorized Representative?
  - Copy of UR determination
  - Copy of application sent to claims
- IMR may be terminated at any time if treatment is approved

Eligibility for IMR

- Initial review of application for eligibility
  - Incomplete application despite attempts to obtain missing documentation
    - Was application signed? UR decision attached?
    - Was the application modified?
  - Timelines not met
  - UR denied due to absent medical records

IMR Determinations

- 30 days (supposedly) from request and receipt of records. Labor Code §4610.6(d)
- Reviews must include
  - Individual assessment of case
  - Determination on disputed medical treatment
    - Based on specified treatment guidelines
  - Qualifications of reviewers
    - (License jurisdiction, subspecialty)

IMR Appeals

- 8 C.C.R. section 10957.1 (WCAB Rules)
  - For both eligibility and final determinations
  - Must be filed within 30 days of decision (+5 for mailing)
  - Served on adverse party (and atty) and DWC Medical Unit
  - DWC Medical Unit download record to EAMS
  - DOR must be filed
- If reversed, case must be remanded to AD for a second IMR determination. Labor Code §4610.6(i)

IMR Determinations

- Available on DWC website
- Automation of the posting process

https://www.dir.ca.gov/dwc/IMR/IMR_Decisions.asp

IMR Resource

- Independent Medical Review
  - http://www.dir.ca.gov/dwc/IMR.htm
- Frequently Asked Questions
  - http://www.dir.ca.gov/dwc/IMR/IMR_FAQs.htm
- Regulations
  - http://www.dir.ca.gov/dwc/DWCPropRegs/IMR/IMR_Regs.htm
- Forms
  - http://www.dir.ca.gov/dwc/forms.html
- DWC Medical Unit
  - http://www.dir.ca.gov/dwc/MedicalUnit/imchp.html

Where do the IMRs originate?

Los Angeles	20,000	25%		Contra Costa	3,751	5%
Orange	5,213	6%		Sacramento	3,521	4%
San Bernardino	5,041	6%		Santa Clara	2,687	3%
Riverside	4,587	6%		Ventura	2,398	3%
Alameda	4,097	5%		All Other Counties	25,167	31%
San Diego	3,912	5%		TOTAL	80,874	100%

7/15 – 12/15

2015: 19% volume increase in IMR requests over 2014

- 163,826 IMR determination letters = 2015
- Remember being told disputed treatment requests would decline when they learned the system?
- Is someone trying to crash the system?

More recently…

- "Overall, we found that for 91% of the services, the review upheld the UR decision…So when you see uphold percentage, that means they agreed that the service was not medically necessary and the overturn rate of 8.6% means they felt it was medically necessary."

Rena David, COO/CFO for CWCI,
quoted by WorkCompCentral, (3/23/15)

Hot off the presses…

IMR Upheld 91.6% of UR Decisions in 2016

Workcompcentral, *July 14, 2017*

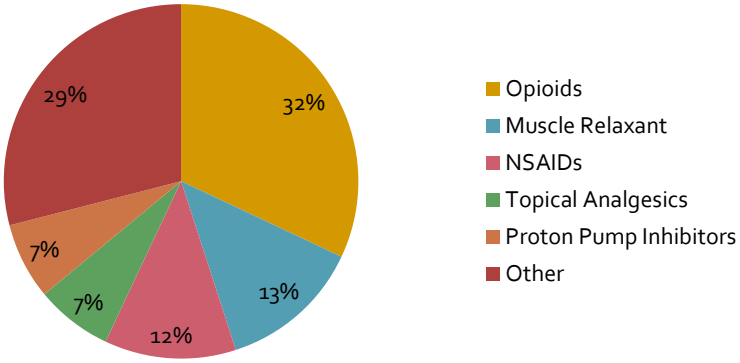
Does claims send ALL

RFAs med request to UR/IMR?

- *75% = <u>approved</u> by claims <u>without</u> further review

Most Requested Pharmaceuticals 2015

Top 5 = 71% of all pharmaceutical classifications



Where the fight *really* is in 2016

DIR report: pharmaceuticals

"Were by far the most common treatment category"

= 43.5% IMR decisions

rehad = 13.6%
diagnostic testing = 13.3%

Better speeds…

assignment to decision date nearly halved!

Beginning of 2016 = 24 days

End of 2016 = 14 days

How many requests for medical authorization make it to IMR?

6%

- "Rather than a wholesale denial of care, we're estimating anywhere between 94% and 95% of treatment requests are approved"

Rena David, COO/CFO for CWCI, quoted by WorkCompCentral, (3/23/15)

Just the facts (and figures)

- 84.7% approval w/out request for authorization or UR
  - ex. stitches, X-ray
- 59.8% going to UR were approved by a non-physician (adjuster)
- 40.2% going to UR go to physician for review

It depends who you ask…

% of RFAs sent to UR varies among claim administrators

1.5%
to
45.9%

Highest rate of denial?

PT = 92.7

Acupuncture = 92.4%

"CWCI Analysis Examines Claims Administrator UR Compliance in California"

(4/15 CWCI announcement)
97.2% = average compliance score overall (2009-2013)

GOAL?
85% (set by DWC)
<1% = extent to which ratings varied in years measured

Average Audit Scores Increase for UR Organizations in 2015

Workcompcentral (3/16)

- 2015 average score = 95%
- 2014 = 93.8%
- 2013 = 93.1%

"Adjusters To Pay Millions For Missing Records"

WC Executive, Vol. 25, No. 21 (11/18/15)

- Destie Overpeck, AD Dir. "We have issued a number of orders to show cause in the IMR process for failing to provide documents…We started with the worst offenders, and there are about eight of them out there today"

It's getting better….MUCH!

2014: 20,000+ IMR requests w/missing records

11/15: 1,500 files

BAD NEWS

"DWC to Fine Administrators for Not Submitting Medical Records for IMR"

The California [DWC] announced…it will begin…assessing penalties against claims administrators that fail to submit relevant medical records for [IMR]…on or after Dec. 1."

WorkCompCentral, 11/26/14

Penalties? Who cares?

YOU DO!!!

"DWC Proposes Penalties of $8.25 Million for Untimely Submission of IMR Records"
Workcompcentral, 3/16

8 claims administrators = $8.25 million
R: untimely med records to Maximus

Starting summer 2015: DWC alleged 1,650 cases of records 10+ days late

Size of penalties per administrator…

- largest = $3.525 = 705 violations
- smallest = $255,000 = 51 violations.
- Don't jump to conclusions…ERs may prevail at hearing

What's the process?

1. OSC
2. Pay, negotiate or contest
3. Hearing

EEs are getting the hang of it!

Fewer applications, but more are eligible

- 249,436 appls = 2016; eligible = 172,452
- 253,779 = 2015; eligible = 165,427

IMR Penalties

- Admin Penalties
  - Order to Show Cause by AD
- IMR Penalties – 8 C.C.R. § 9792.12(c)
  - Failure to include IMR Application in UR decision
  - Failure to advise IW of IMR process
  - Failure to provided med records (contrast with UR!)

Most common mistakes

most common:

- failure to include UR decision (9,744)
- IMR request not timely (4,109)
- not signed (2,129)
- not signed and didn't include UR decision (404)

Naughty players

top 10% of docs reviewed by IMR
(1,276 physicians)

=

85% of the disputed service requests

Where are those "hard workers" from?

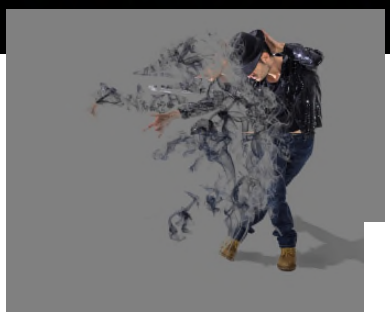
Dah!

LA = 2/3 IMR decisions (per CWCI)

Examples of UR/IMR denials?

- RFA to fuse lumbar of arthritic 76-year old?

RFA to give propofol (drug killed MJ) b/c pt



was anxious about an epidural

Rena David, COO/CFO for CWCI,
quoted by WorkCompCentral, (3/23/15)

Stevens v WCAB (1st DCA, 10/15)

1. CA Constitution arguments
   IW, YOU LOSE!
2. Federal Constitution arguments
   IW, YOU LOSE!

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CA Constit., Section 4, says

Legislature is "expressly vested with plenary power, *unlimited by any provision of this Constitution*, to create and enforce a complete system of workers' compensation, by appropriate legislation."

Section 4 trumps CA's:

Separation of Powers clause
Due Process clause

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UR/IMR has plenty of "due process"

1. there is no such thing as an absolute right to appeal
2. IW obtained:
   i. UR review
   ii. internal UR review
   iii. IMR

Three "bites at the apple" is PLENTY "due process"

IW claims IMR conflicts with constit. demand for:

"substantial justice in all cases expeditiously, inexpensively and without encumbrance of any character"

WRONG

Legis. provided IMR b/c old system failed constitutional dictate

"…In sum, the Legislature found that, far from conflicting with Section 4's mandate to provide substantial justice, the IMR process furthers it."

IMR Doesn't Violate Fed Due Process:

duh!

What does CA w/ have to do with feds?

VERY LITTLE!

IMR Doctor Anonymity

Who cares?

- No constit. right to cross-exam IMR
- UR/IMR explains reasons for denial/mod
- Many chances to submit evidence/challenge decisions

45

But IMR takes FOREVER…!

"…We are unconvinced that the lack of a mechanism to enforce time limits renders the IMR process unconstitutional. In the absence of a penalty, consequence, or contrary intent, a time limit is typically considered to be directory, and its violation does not require the invalidation of the action to which the time limit applies."

Stevens

Houston, we have a problem…

Stevens

UR/IMR say "no HHC"

R: HHC w/personal attendant not covered by MTUS

H: WCAB can't change med. necessity decision

BUT CAN DECIDE…

Whether decision was

1. adopted w/out authority, or
2. based upon a plainly erroneous fact

If yes, WCAB can reverse and send it back

"The denial of a particular treatment request on the basis that the treatment is not permitted by the MTUS would be reviewable on the ground that the treatment actually is permitted by the MTUS. An IMR determination denying treatment on this basis would have been adopted without authority and thus would be reviewable."

Remember grounds of IMR appeals have always included:

1. IMR decision exceeded AD's powers.
2. plainly erroneous express or implied finding of fact

Even if IMR appeal is success, what's the remedy?

Submit issue to another IMR reviewer

Stevens fallout

WCAB Comm Zalewski: "In the underlying Stevens case the [WCAB] panel said we can't get into the merits of the medical decision making employed by Maximus. So when an injured worker comes in and says they misapplied or ignored a provision in the MTUS, we pretty much said we can't get into that."

"In Stevens the court said not so fast. If there are questions of improperly or failing to apply the MTUS that constitutes the AD acting in excess of her authority."

The rest of the story…

Stevens v. Outspoken Enterprises, Inc
2017 Cal. Wrk. Comp. P.D. LEXIS 228

FACTS: 1st DCA returned matter to WCAB

HOLDING: WCAB found that RFA for housekeeping and personal care services was denied without authority.

REASON:

- 2009 MTUS, which applied to the case, was unlawful and invalid
- 2009 MTUS failed to address the medical treatment in the form of personal home care services
- MTUS revision now addresses personal home health care

3rd DCA Accepts Review of Constitutional Challenge to IMR

Ramirez v. WCAB (SCIF), No. C078440

If you liked the 1st DCA, you'll LOVE the 3rd

(Workcompcentral, 5/18/14)

Ramirez v WCAB

Good news…

…3rd DCA rules for ER

Great news….

…cert for publication

Ramirez

FACTS:

- EE claimed UR used wrong medical standard therefore, asserted WCAB should review his IMR

HOLDING:
wrong medical standard is not a proper ground to appeal UR

REASON: "it goes to the heart of the determination of medical necessity. The [IMR] is in the best position to determine whether the proper standard was used to evaluate the medical necessity of the requested treatment, and the statutory scheme requires the independent medical reviewer to use the proper standard in determining medical necessity."

Ramirez

Ramirez also claimed IMR violated CA's Constitution

3rd DCA says, "NOPE"

Same reasoning as Stevens (1st DCA)

3rd DCA Joins 2nd DCA in Treating Untimely IMR Decisions as Valid

Workcompcentral 7/1017

- *Baker v. WCAB* (Sierra Pacific Fleet Services), No. C080895
- Untimely IMR (not issued w/in 30-day window) = valid and binding

"The interpretation of Section 4610.6, subdivision (d), as directory rather than mandatory is consistent with case law and implements the Legislature's stated policy that decisions regarding the necessity and appropriateness of medical treatment should be made by doctors, not judges," the 3rd DCA said.

What the heck is MTUS?

=

medical treatment utilization schedule (MTUS)

- treatment guidelines
- framework for eval and treatment

OBJECTIVE: help doctors understand which evidenced-based treatments have been effective

Devil In The Detail

LC 5307.27, MTUS:

employs evidence-based, peer-reviewed, nationally recognized standards,

Devil In The Detail

LC 4604.5

1. "presumptively correct" re: on the
   a. extent of treatment,
   b. scope of treatment
2. Rebuttable via "preponderance of the scientific medical evidence"

Devil In The Detail

LC 4604.5

Injury <u>not</u> covered by MTUS?

61

Look to:

"other evidence-based medical treatment guidelines" "recognized…by the national medical community and scientifically based."

CCR 9792.20 et seq.:

http://www.dir.ca.gov/dwc/DWCPropRegs/MTUS_Regulations/MTUS_Regulations.htm

2004: LC 4600's "reasonable & necessary" redefined:

"medical treatment that is reasonably required to cure or relieve an injured worker from the effects of an injury"

=

treatment based medical treatment utilization schedule (MTUS)

Gibson v. OC Transit Authority (Panel, 2015)

Facts: RFA for tinnitus amplification (TA)

UR says,

"MTUS doesn't discuss"

"ACOEM doesn't discuss"

UR denies based on:

CMS/Medicare

"EXPERIMENTAL"

Gibson

Holding: UR overturned

- Reasoning: Hierarchy not followed:

1. MTUS
2. Peer reviewed scientific & medical evidence
3. Nationally recognized standards
4. Expert Opinion
5. Generally accepted standards
6. "Treatments that are likely to provide a benefit to a patient for conditions for which other treatments are not clinically efficacious"

Instead of using #2, IMR relied on Medicare guidelines

Gibson

Hierarchy not followed?

- in excess of AD's powers
- plainly erroneous as a matter of ordinary knowledge

"one does not need to be an expert to see that the IMR reviewer did not apply the…hierarchy of standards."

AA asks PTP to draft ML re UR dispute

PTP bills for ML

ML = expensive

Sometimes more than:

PR-2

PR-3

cost of requested treatment

Must defense pay for ML-102 reports addressing UR denials?

Can defense deny payment?

Defense answer...

ARE YOU...

Defense answer:

- 4062(b) If the employee objects to a decision made pursuant to Section 4610 to modify, delay, or deny a request for authorization of a medical treatment recommendation made by a treating physician, the objection shall be resolved only in accordance with the independent medical review process established in Section 4610.5.

4064

(a) The employer shall be liable for the cost of each reasonable and necessary comprehensive medical-legal evaluation obtained by the employee pursuant to Sections 4060, 4061, and 4062. ***Each comprehensive medical-legal evaluation shall address all contested medical issues arising from all injuries reported on one or more claim forms, except medical treatment recommendations, which are subject to utilization review*** as provided by Section 4610, ***and objections to utilization review determinations, which are subject to independent medical review*** as provided by Section 4610.5.

Physicians who perform MLs are prohibited from

a. treating or
b. soliciting to provide medical treatment
(just a little too self-serving!)

CCR 41(a) All QMEs, regardless of whether the injured worker is represented by an attorney, shall:
(4) Refrain from treating or soliciting to provide medical treatment, medical supplies or medical devices to the injured worker.

What's the upshot?

SB 863 requires IMR be the **only method** for resolving disputes over UR decisions.

MLs re UR are prohibited

Received a bill for a ML? OBJECT!

AA/PTP warns of upcoming examination/report for ML purposes:

75

"medical treatment" or "medical-legal"?

WHO CARES?

If "treatment", UR/IMR applies!!!

PROBLEM

- much treatment = diagnostic
- NOT used to "cure & relieve" (LC 4600)
- IDs problems so <u>can</u> "cure & relieve"

Case law says…

- Treatment?
- Medical-Legal?

Get ready for a good fight!

Dubon II (En banc, 10/14)

Holding 1

- UR decisions = invalid (not subject to IMR) only if ***untimely***

Dubon II

Holding 2:

Legal issues re UR timeliness are resolved by WCAB only

If untimely, WCJ "plays doctor"

Dubon II

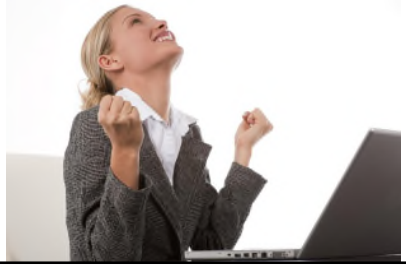
Holding 3

3. All other disputes re UR must be resolved by IMR only

CAAA Prez Says re: Dubon II

"disappointed"

Then it MUST be good for the defense



CAAA hates UR/IMR…?

ABSOLUTELY!

Some reasons?

1. Lost medical control;
2. IMR upholds denials 80-90% of the time;
3. UR appeals and Petitions for Expediteds cost AA time & money…with few positive outcomes

Increased motivation to C&R the case?

Implications of *Dubon II*

WCAB retains jurisdiction to decide treatment disputes if

- UR was untimely, or
- no UR was performed
- WCAB has no such authority on grounds of a "material procedural defect" in UR
- Such "defects" must be resolved via IMR

Dubon II

A defense win?

- You bet?
- AA would much rather litigate treatment in front of a WCJ

- Do you really think ERs win treatment issues more than 85% of the time in front of a WCJ!?!?

Dubon II gives little to AA

- *Ramirez v. WCAB* (2017) 82 CCC 327: UR failure to apply the MTUS does not give the appeals board jurisdiction
- *Reyes v. Target, Inc.*, 2014 Cal. Wrk. Comp. P.D. LEXIS 582: UR failure to sign a UR decision was not a basis for invalidating the decision
- *Carrico v. Law Offices of Stephen Belgum*, 2014 Cal. Wrk. Comp. P.D. LEXIS 589 No WCAB jurisdiction just b/c UR fails to review or list medical records
- *Reis v. Silvas Oil Co.*, 2014 Cal. Wrk. Comp. P.D. LEXIS 605: No WCAB jurisdiction just b/c UR failed to review an AME report

Czech v Bank of America

81 CCC 856
(2016)

FACTS:

- RFA sent to DA (not defendant)
- missed deadline for UR
- DA claims no duty to give RFA to def

87

Czech

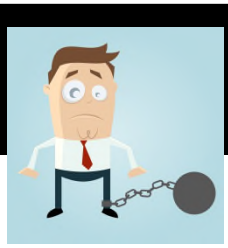
DA argues: RFA can only be "received by the claims administrator or its [UR]" because to hold otherwise

would "add[] an additional, completely unintended step to the [UR] process"

AND…

88

Czech



- result in DAs being "chained to their fax machines to ensure that the requests for medical treatment get processed on time"…resulting in an "undue and unreasonable burden to place upon defense attorneys."

89

Czech

- WCAB says, "Nice try"

- TRUE: UR is only triggered by receipt of RFA by:
  - claims adjuster, or
  - UR (see LC 4610)

But…

90

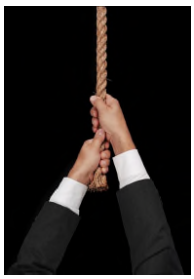
Czech

- Def = continuing duty to conduct good faith investigations

91

Shanley v. Henry Mayo Newhall Memorial Hospital - (2014 Panel)

WCJ: UR valid



WCAB says, "Hang on there, buddy"

Shanley

Holding: UR determinations…

Shanley

- REASON: failure to timely communicate decisions to PTP by phone, fax or email w/in 24 hours.

"communicated"

Shanley

UR decision said phone messages were "left" for PTP

WITHOUT specifying

1. nature of message.
2. content messages

Dallas v. Pan Pacific Petroleum
2016 Cal. Wrk. Comp. P.D. LEXIS 116

picky, picky

FACTS:
- UR timely communicated decision to PTP via fax

HOLDING: untimely

REASON: didn't also communicate in a second writing

Dallas

2-step process pf LC 4610(g)(3)(A)…

UR decision must be

1) communicated by "telephone or facsimile" to the requesting physician within 24 hours of the decision; and
2) communicated to the physician and employee "in writing" within 24 hours for concurrent review, or within two business days for concurrent review

Murphy v. Petsmart, Inc

FACTS:

- aoe/coe foot/psyche
- RFA: oral surgery
- UR ok's
- Def delays advance payment ($26,000) for surgery for 7 months

Murphy v. Petsmart, Inc

ISSUE: penalty?

WCJ: heck yes—25% LC 5814

Murphy v. Petsmart, Inc

WCAB says "wrong"

Doctor:

a. asked for pre-payment as part of RFA,

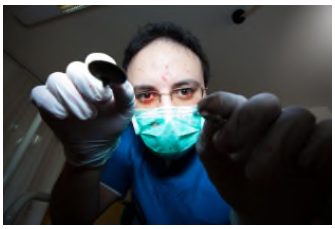
b. insisted pre-payment was customary

Murphy v. Petsmart, Inc

WCAB says… 

1. no legal obligation to pay in advance [LC 4603.2(b)(2)]:
   - payment for treatment must be made within 45 days **after** services are rendered.
2. def had a legit genuine doubt as to liability to pay in advance

Murphy v. Petsmart, Inc

WCAB says… 

1. UR only addresses "medical necessity", and thus
2. UR can't authorize pre-payment for treatment

Bodam v SBR County (Significant Panel, 11/20/14)

What does *Dubon II's* "timely" mean?

- HOLDING: *<u>each</u>* step of UR must be "timely"…NOT just the end result

Matute v. LA Unified
(9/18/15, en banc)

FACTS: IMR says "no" = 11/6/14
IW appeals = 12/10/14

Math?

34 days

Matute

WCAB (en banc), says:

LC 4610.6(h)'s "mailing" = "served by mail"

RULE: count 30 days from the date of mailing, plus 5 days for service

CCCP 1013(a)

Proving *timely* "communication"...

not a factual issue
is a proof issue

Most URs are faxed to PTP w/in 24 hours

Problem: lack of documentation proving transmittal complies with AD's rule

Need: evidence documentation of the transmittal (in report or fax transmittal cover)

Bucio vs County of Merced (2015 Panel)

Facts: admitted back

- RFA: fusion
- UR: denied
- self-procures
- wants TD

Bucio

Issue: Does IW receive TD

Holding: YES

Bucio

- IW's failure to challenge UR via IMR does not preclude TD, b/c:

UR/IMR procedure involves disputes over "medical treatment" per 4600,

i. not self-procured via LC 4605, nor
ii. entitlement to TD

Hypo

1. AA picks PTP
2. PTP refers IW to consult
3. Consult issues "RFA"

UR needed?

MY  ?

Heck no!

At least one WCJ agrees

Reg. 9785(e)(4)(4) The primary treating physician shall be responsible for obtaining all of the reports of secondary physicians and shall, unless good cause is shown, within 20 days of receipt of each report incorporate, or comment upon, the findings and opinions of the other physicians in the primary treating physician's report and submit all of the reports to the claims administrator.

HUH?

MY  ?

PTP must incorporate consult's reporting into his/her PR-2.

RECOMMENDATION?

- always send consult's RFA to UR/IMR (until we get some citable case law)

Unfortunately…LOTS of panels go the other way!

Lopez v. City and County of San Francisco
2016 Cal. Wrk. Comp. P.D. LEXIS 206

Klein v. Warner Bros. Studio
2016 Cal. Wrk. Comp. P.D. LEXIS 236

HOLDING:

- laws mandating UR do not specify "primary treating physician."
- refers only to treatment recommendations by "physicians"
- provide for communication of UR determinations to "requesting physician"

Lopez & Klein

LOGIC:

- if secondary physician's opinion is req'd, it's often b/c PTP lacks the necessary expertise
- inappropriate to require unqualified PTP request authorization

NEVERTHELESS, a properly drafted RFA is req'd of "requesting physician"

We can be helpful

(if we want to…)

ER may accept RFA that doesn't utilize form DWC RFA only if it

1. clearly includes "Request for Authorization" at top of first page;
2. lists all requested medical services, goods or items on first page; and
3. accompanied by docs substantiating medical necessity

You're going to love this…

FACTS:

- no RFA submitted
- treatment rendered
- Lien claimant (LC) seeks payment

HOLDING: oh HECK no!

Lopez v. Warner Brothers
2015 Cal. Wrk. Comp. P.D. LEXIS 677

Don't forget duty to provide medical care

General rule: ER must proactively provide medical care or risk risk of losing medical control

Same rule applies to UR

FACTS:

- RFA uses wrong form

YOU

a. follow-up with requesting doctor
b. demand proper form

"3rd DCA to Weigh In on Validity of Untimely IMR Decisions"

WCCentral, 10/19/14

Hallmark Marketing v. WCAB (Southard)

I: whether 30 day IMR deadline is mandatory

H: NOPE!

2nd DCA Grants Review to Dispute Over IMR Timeline Requirements

Workcompcentral, 3/16/16

Issue: Whether a Maximus failure to timely return IMR determination

=

treatment issue goes to WCAB?

CHP v. WCAB (Margaris) = 2nd DCA

California Highway Patrol v. WCAB (Margaris) (2016) B269038, 2nd DCA

HOLDING:

a. 30-day time limit in LC 4610.6(d) for IMR is "directory" only
b. an untimely IMR determination is valid and binding (that is, an AD "final determination")

Margaris

REASONING:

a. time limits are "directory" unless the Legislature expresses contrary intent
b. allowing WCAB to decide treatment issues for an untimely IMR would perpetuate the time-consuming litigation

How important is this…?

The better Maximus gets…

…the less important Southard & Margaris are

- 2014: wait = 130+ days
- late 2015: ave = under 24 days

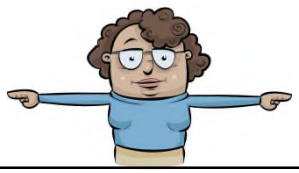
Ly v. Loral Space Systems (panel)

FACTS:
- 100% PD w/further med
- RFA: prescription for Lyrica modified by UR physician
- EE request expedited

HOLDING:
WCJ ordered the matter off calendar
REASON:
"no jurisdiction to proceed with an Expedited Hearing"

UR/IMR & Expediteds?

Depends on your PJ…
WCAB Dist. Offices go both ways!



UR/IMR & Expediteds?

Request for Expedited says it covers:

- "Entitlement to medical treatment…except issues determined pursuant to Labor Code §§ 4610 and 4610.5."

LC 4610/4610.5
=
UR
Many WCABs set for conference

Adamson v. Gallagher Bassett (ADJ2621517, Panel, 2/18/15)

Facts:

- AME says, "HHCS"
- PTP says, "HHCS"
- ER timely URs & non-certs PTP's only

Issue:

- Does LC 4600(h) require a prescription issue only from a PTP to trigger UR?

Adamson

- What does 4600(h) say?
  - "Home health care services shall be provided as medical treatment only if reasonably required to cure or relieve the injured employee from the effects of his or her injury and ***prescribed by a physician and surgeon***…"

    "a" is important here
- Holding: Defense loses!

Is this GREAT news?

LC 4610(g)(6):

"A utilization review decision to modify, delay, or deny a treatment recommendation ***shall remain effective for 12 months*** from the date of the decision without further action by the employer ***with regard to any further recommendation by the same physician*** for the same treatment ***unless the further recommendation is supported by a documented change in the facts material*** to the basis of the utilization review decision.

LC 4610(g)(6)

1. Def gets 1 year rest unless "material" change of "facts"

BUT

2. Different doctor = "facts material"!

Garza v. Roll Global/Del Rey Juice Plantnts 2017 Cal. Wrk. Comp. P.D. LEXIS 61

FACTS:

- PTP RFA for surgery to burn
- denied 5/20/16 b/c "cosmetic"
- PTP 2nd RFA:
  - not cosmetic; to alleviate pain
  - and restore functionality
- 6/3/16 UR authorized
- ER denies

Garza

ISSUE:
Does original denial remain in effect for 12 months pursuant to Labor Code § 4610(g)(6)?

HOLDING: no

Garza

REASONING:

- loophole to 12 months

=

"a documented change in the facts material to the basis of the utilization review decision"

- UR's initial decision based upon incorrect assumption re RFA's purpose = "documented change"

IF goes to TRIAL

And if UR was

untimely

IW must prove treatment is consistent with

- LC 4600(b) 4600(b):
  - "medical treatment that is reasonably required to cure or relieve the injured worker from the effects of his or her injury means treatment that is based upon the guidelines adopted by the administrative director pursuant to Section 5307.27."

IMR "FINAL DETERMINATION" says…

Defendant…

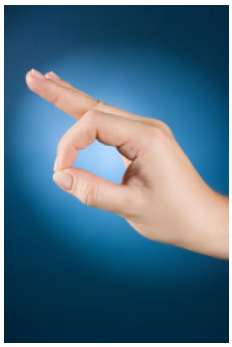
IMR "FINAL DETERMINATION" says…

ADJUSTER:

authorize disputed treatment within 5 "working days" of receipt of the IMR Final Determination [8 CCR § 9792.10.7(a)(2)]

Appeal Process

IMR determination is "presumed correct"



STATUTORY GROUNDS FOR APPEAL

Five Grounds

- ONLY grounds for appeal in LC 4610.6(h) apply:
  1. AD acted <u>without or in excess of AD's powers.</u>

STATUTORY GROUNDS FOR APPEAL

Five Grounds

2) Determination of AD was procured by <u>fraud</u>

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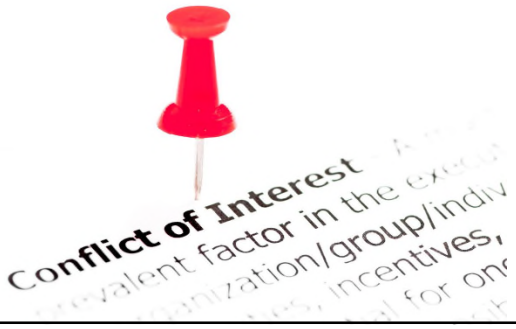
STATUTORY GROUNDS FOR APPEAL

Five Grounds

3) IMR was subject to a <u>material conflict of interest</u> (in violation of LC 139.5)



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STATUTORY GROUNDS FOR APPEAL

Five Grounds

4) Determination was result of bias (race, nat'l origin, ethnic group, religion, age, sex, sex, orientation, color, or disability).

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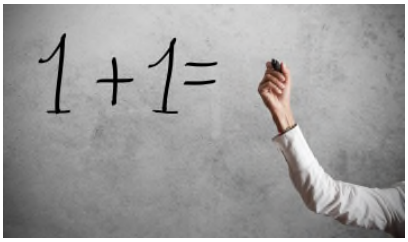
STATUTORY GROUNDS FOR APPEAL

Five Grounds

5) Determination was result of a plainly erroneous express or implied finding of fact, provided that the mistake of fact is a matter of ordinary knowledge based on the info submitted for review pursuant to LC 4610.5



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HOW HARD ARE GROUNDS 4610.6(h)(1)-(4)

TO PROVE?

But not always easy

REMEMBER!

(1) reviewer is anonymous
(2) AD's decision:
   a) "shall be presumed correct", and
   b) " shall be set aside only upon proof of clear and convincing evidence"

Successfully Appeal IMR Determination? What happens?

NOT MUCH!

"submit the dispute to [IMR by a different [IMR] organization…"

WHO?

- IF "a different [IMRO] is not available…the [AD] shall shall submit the dispute to the original medical review organization for review by a different reviewer…"

MAXIMUS®
HELPING GOVERNMENT SERVE THE PEOPLE®

Hayworth v. KCI Holdings USA, Inc.

HOLDING: IMR violated LC 4610.5 b/c:

PTP's RFA "left dorsal medial branch block injection"

BUT

IMR considered RFA for "facet injections of cortisone and lidocaine"

Hayworth

LC 4610.6(h)(5):

The determination was the result of a plainly erroneous express or implied finding of fact, provided that the mistake of fact is a matter of ordinary knowledge based on the information submitted for review pursuant to Section 4610.5 and not a matter that is subject to expert opinion.

Hayworth

Result?

1. IMR is set aside;
2. Dispute submitted to different IMR org.
   (if not available, goes to a different reviewer in original IMR)

Stone

Facts:

- IMR says, knee cartilage transplant was "medically necessary" and "not"
  - Def appealed
  - WCJ denies appeal

WCAB reverses!

Stone

Reason:

1. IMR determination issued "in excess of AD's powers" [§ 4610.6(h)(1)],
2. contained "plainly erroneous findings" not subject to expert opinion [§ 4610.6(h)(5)]

IMR contained "patent discrepancy"; stated surgery was "medically necessary" and "not medically necessary" = no need for "expert" involvement

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McKinney v. Enterprise Rent-A-Car 2016 Cal. Wrk. Comp. P.D. LEXIS 495

Different Rule For Getting Records to UR!

FACTS:

- ER failed to provide medical reports and records to UR for RFAs
- WCJ sanctioned by LC 5813

HOLDING: rescinded

McKinney v. Enterprise Rent-A-Car 2016 Cal. Wrk. Comp. P.D. LEXIS 495

REASONING: WCAB is authorized to impose sanctions for bad-faith tactics or actions that are frivolous or solely intended to cause unnecessary delay (even when the underlying process concerns claims-handling of an RFA)

McKinney v. Enterprise Rent-A-Car 2016 Cal. Wrk. Comp. P.D. LEXIS 495

HOWEVER

Given CCR 9785(g) and CCR 9792.6.1(t)(2) requirement that an RFA include documentation substantiating the need for the requested treatment, it is the PTP—not the adjuster—who knew what records substantiated the RFA

Nungaray v. Remediation Constructors, Inc. 2017 Cal. Wrk. Comp. P.D. LEXIS 16

FACTS:
- RFA for epidural in left L5-S1
- UR dealt with right side (and denied)

HOLDING: IMR appeal granted

REASONING:
when treatment requested is altered during UR process, this equates to ER not performing UR
- if UR not performed, not timely

WCAB Panel Decision Continues Erosion of UR/IMR Jurisdiction

Workers' Compensation Daily News (2/2/16)
Arroyo v Inland Concrete Enterprises

- F: AME says motor scooter reasonable & necessary
  - def accepted and provided
  - 5 years later, need replacement
  - PTP issues RFA
  - def sends to UR
  - UR didn't address replacement/repaired, only reasonableness & necessity (timely)

Arroyo v Inland Concrete Enterprises

- WCJ says, "no jurisdiction"
- R: UR timely
- WCAB says, "jurisdiction"
- UR issued, but didn't address question raised by RFA (therefore, untimely)

Arroyo v Inland Concrete Enterprises

WCAB says,

- When def authorizes a type treatment, not req'd to provide forever
- Ex. PT, drugs, etc…may use UR to determine if reasonable to continue to authorize the treatment
- Ex. EE's circumstances or condition that raise a question about the necessity for continued provision of the treatment

Arroyo v Inland Concrete Enterprises

BUT…the UR must address <u>the</u> treatment for which RFA issues

Not done here = no valid UR

Garibay-Jimenez v. Zurich (Panel, 4/15)

- Facts:
  - UR denies RFA
  - IMR upheld denial
  - IMR did not get AME report supporting RFA

Garibay-Jimenez

WCAB says,

1. burden is ER's to provide IMR is with all relevant medical (in a timely fashion), and
2. failure to do so means IMR, and thus the AD acts ***without or in excess its powers***

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Garibay-Jimenez

- Authority?
- 4610.5(1) = mandatory obligation to provide all relevant records
- Rule 9792.10.5 = "shall" relative to supplying records.

Picky…but not THAT pickey

Hacker v. County of San Bernardino
2015 Cal. Wrk. Comp. P.D. LEXIS—

Facts:

- IMR failed to ID date/author of each report
- IMR did list docs reviewed by name and by range dates of service

Hacker

WCJ:

1. IMR not "substantial evidence";
2. Set aside IMR as "plainly erroneous express or implied finding of fact"

WCAB says, "WRONG"

Hacker

REASON:

1. Reg provides only that IMR decisions include a "list of the documents reviewed"
2. Even if IMR should have stated the specific date of each report, LC 4610.6(h)(5) isn't applicable b/c failure to do so doesn't involve any "findings of fact"

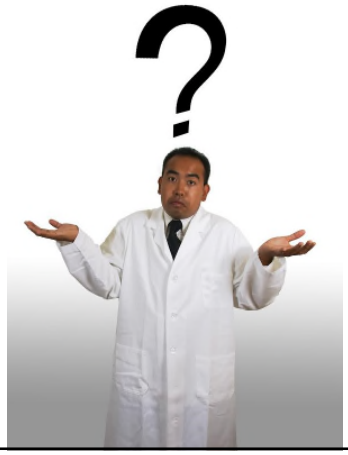
October 26, 2015, WCCentral - DWC Working to Improve Listing of IMR Records

Peter Melton (DWC spokesman):

- DWC believes IMR determinations "do need to contain some detail about the actual records that were reviewed, not just a range of dates."
- "DWC has been working with Maximus to find a balance to providing enough detail to know what was reviewed and also not overwhelm the worker"

Question…

No RFA Form…No Need for UR/IMR?



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Torres-Ramos v. Felix Marquez

(Panel)

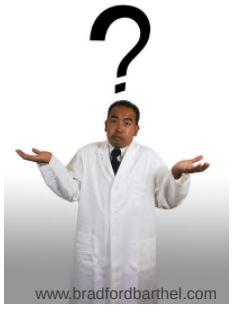
Facts: PTP sent PR-2 (and only a PR-2)
UR denial = untimely

Torres-Ramos

Does the clock start ticking once you realize that it's an attempt at a RFA?

OR

Must there be a real "RFA"?



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Torres-Ramos

HOLDING:

- Doctor MUST send RFA...

...until then, no obligation to perform UR.

[See Reg. 9792.9.1(a)]

Torres-Ramos

unless RFA is properly filled out and submitted,
"no request for authorization has occurred."

Torres-Ramos

DO NOT  BET ON IT!

Desperate?
Untimely UR?
Use *Torres-Ramos*

Torres-Ramos

But… 

1. Only a panel decision;
2. WCAB panels have gone OTHER WAY

(*Musettie v. Golden Gate Disposal*, 2013 Cal Wrk Comp P.D. LEXIS 220)

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Reg 9792.9.1(c)(2)(A) & (B)

"Upon receipt of a [RFA]…that

- does not identify the employee or provider,
- does not identify a recommended treatment,
- is not accompanied by documentation substantiating the medical necessity for the requested treatment, or
- is not signed by the requesting physician, a non-physician reviewer…"

WE HAVE TWO CHOICES

TWO CHOICES

- Treat it as an RFA and apply normal time frames

OR TREAT IT AS

1. "return it to the requesting physician marked 'not complete',"
2. "specify[] the reasons for the return of the request no later than five (5) business days from receipt"

Deadlines "shall begin anew upon receipt of a completed DWC Form RFA"

Belling v. United Parcel Service, Inc. 2015 Cal. Wrk. Comp. P.D. LEXIS 738

FACTS:
- denied case
- WCAB ruled aoe/coe
- 6+ months thereafter, ER performed UR

HOLDING: untimely; WCAB has jurisdiction re necessity

REASONING:
not required to UR during denial, but must timely do so after accepted

Belling v. United Parcel Service, Inc. 2015 Cal. Wrk. Comp. P.D. LEXIS 738

- Failure to take affirmative acts re necessary treatment after aoe/coe rule = potential referral to audit unit
- Should have provided **"retrospective" UR**

Weimer v. Hillyard, Inc. 2017 Cal. Wrk. Comp. P.D. LEXIS 104

FACTS:

- RFA contained wrong claim number
- ER returned RFA to PTP marked "INCOMPLETE request for MEDs" and indicated wrong claim number

HOLDING: who cares

REASONING:

- CCR 9792.6.1(t) does not require a claim number while the RFA had inaccurate number, adjuster correctly id'd EE and ER received info reasonably necessary

McKenny v. Southern California Edison 2017 Cal. Wrk. Comp. P.D. LEXIS 200

FACTS:

- spine admitted
- other body parts deferred
- psych issues RFA for HHC
- ER submits to UR
- UR denies
- EE seeks to litigate re whether UR was timely

ISSUE: Can ER continue disputing need treatment on threshold issues following a UR denial of care

McKenney

HOLDING: yes; ER may continue disputing need treatment on threshold issues following a UR denial of care

REASONING:

- ER not req'd to UR RFA re disputed injury
- could defer until liability was determined
- however, compensability is not waived when ER conducts UR reasonableness and necessity of requested treatment was not "ripe for adjudication" until compensability is determined

"Imminent & Serious" Timelines (Expedited Review)

Rodriguez v. Air Eagle, Inc., 2015 Cal. Wrk. Comp. P.D. LEXIS –

FACTS:

- RFA received 10/28/13 for Home Health Care (HHC)
- UR decision issued nine days later (timely for *regular* UR: Reg 9792.9.1)

HOLDING:

- UR = untimely = invalid = awarded HHC (if IW proves "reasonable & necessary")

REASON:

- PTP checked RFA box: "imminent and serious threat" requires UR decision w/in ***72 hours*** of receipt of info reasonably necessary

Hacker v. County of San Bernardino 2017 Cal. Wrk. Comp. P.D. LEXIS 162

FACTS:

- WCJ determined IMR's use of a family practitioner rather than a specialist in pain was "plainly erroneous"
- WCAB reverses;

REASONING:

1. use of a family practice physician was not a "finding of fact" nor was it "plainly erroneous as a matter of ordinary knowledge" [LC 4610.6(h)(5)]
2. it is not w/out or in excess of AD's powers to have family practice physician review prescriptions for meds

McCool

FACTS:

- 1980's: low back injury
- 1993: awarded future medical
- 20 years later, UR non-cert'd four meds
- WCJ awards med and orders meds continue until no longer reasonably req'd

McCool

WCAB panel says:

"Prescriptions by their very nature are limited in frequency and time; the UR denial in this case notes that each prescribed medication has a finite number of doses."

McCool panel addresses concerns re UR denial of opioid medications

McCool (con't)

"Each new prescription requires a new request for authorization that must be submitted to UR. Authorization of one prescription does not automatically mean that recurring prescriptions of that medication must be authorized indefinitely; the treating physician has an obligation to document the need for each recurring prescription, especially when the prescriptions are for heavily regulated opioid medications."

IW disputing UR decision?

- IW disputing MPN PTP's "diagnosis or treatment recommendations"

- Want to go to QME or AME?
  CAN'T (eff 1/1/13)

(usually…don't forget…*Bertrand*!)

(LC 4061)

Bertrand v County of Orange (2014)

Facts: Cased stip'd 2004

"Settlement based upon the report of AME Lynn Wilson…For any future disputes regarding treatment or permanent disability, the parties will return to the A .M .E."

Bertrand

Which trumps? (get it?)

1. Labor Code creating IMR, or
2. Stipulation?

Bertrand

WCAB says…
Applicant gets:

1. UR: if treatment authorized…Applicant wins!
   if not, "dispute" arises so goes to…
2. AME (UR/IMR requirement waived)

Flores de Lopez v. Facey Medical 2016 Cal. Wrk. Comp. P.D. LEXIS 423

FACTS:

- Stips - (a) ER would provide transportation for medical appointments
- (b) any dispute re transportation would be decided by WCAB
- PTP later reported that the applicant needed transportation to medical appointments, physical therapy, pharmacy trips, errands and grocery markets
- denied by UR/IMR

Flores de Lopez v. Facey Medical

HOLDING:

1. b/c of stip
   a. ER must continue to provide transportation for medical appointments
   b. not subject to UR/IMR
2. the additional transportation requested is subject to UR/IMR

Chamberlain v. Humphrey & Giacopuzzi Veterinary Hospital

FACTS:
3/22/13: PTP report received; RFA for:

- chiropractic treatment
- home health assistance
- gym membership

3/27 & 3/29: UR asks for more chiro info only

NEVER received

4/2/2013 (12 days post request) UR denial issued

Chamberlain

UR was timely!!!

Chamberlain

Note: request for more info dealt with chiro only

Denial late re home health & gym?

Looks like you can rely on *Chamberlain* (at least for now!)

Favila v. Arcadia Health Care
2016 Cal. Wrk. Comp. P.D. LEXIS 181.

Favila

FACTS:

- RFA for 2-level dics replacement
- UR nurse requested info re # of in-pt days
- UR timely denied requested surgery with in-pt of one day
- EE claimed delay to obtain info applied only
  - length hospital stay
  - didn't act to delay 5-day period to complete UR re surgery

HOLDING…

Favila

You lose, AA!

- CCR 9792.9.1 says RFA triggers the timelines for completing UR
- CCR doesn't provide different timelines for different treatment requests w/in an RFA.

UR/IMR Doesn't Cover Everything...

Witterman v. Henry Mayo Newhall Memorial Hospital
2014 Cal. Wrk. Comp. P.D. LEXIS 633

FACTS:
- PTP requested modified van to accommodate wheelchair
- submitted to AME (guess what he decided!!!)
- parties disputed type of lift needed

ISSUE:
Does type of lift need an RFA submitted to UR/IMR
or
submit to AME

HOLDING: nope; nope

Witterman

REASONING:
type of lift was outside a physician's expertise

ORDER: obtain evidence from qualified expert

Can't agree on an expert?
Each party to obtain own and submit to WCJ

MSAs vs UR/IMR

Friends?

Foes?

Medicare requires

- MSA include "future costs of medical treatment"
- including "prescriptions"

- What does CMS say when CA says, Recommended treatment = NOT ALLOWABLE

WCMSA Reference Guide, Section 9.4.3, says:

Section 9.4.4 says,

- "CMS will recognize or honor any state-mandated, non-compensable medical services and will separately evaluate any special situations regarding WC cases. A submitter requesting that CMS review the applicability of a state WC statute must include a copy of the statute with the submission and indicate to which topic in the submission the statute applies."
- BUT only in effect 12 months
- Shorter if change of "material" facts

Not that it was much of a problem (at all)

- But effective 1/1/18, new LC 4610 prohibits implicity bribes:
- A utilization review process that modifies or denies requests for authorization of medical treatment shall be accredited on or before July 1, 2018, and shall retain active accreditation while providing utilization review services, by an independent, nonprofit organization to certify that the utilization review process meets specified criteria, including, but not limited to, timeliness in issuing a utilization review decision, the scope of medical material used in issuing a utilization review decision, peer-to-peer consultation, internal appeal procedure, and requiring a policy preventing financial incentives to doctors and other providers based on the utilization review decision. The administrative director shall adopt rules to implement the selection of an independent, nonprofit organization for those accreditation purposes.

Looking into the future…

1. DOI o/a 1/18, and
2. body part(s)/condition(s) accepted?

Emergency treatment and medical treatment to be provided within 30 days of the initial DOI

Why have these new rules?

Expedite treatment at beginning of claim (when treatment is most needed and most helpful)

Is there a "delay"?

UR still applies!

- Body part/condition to which RFA applies is under investigation?

UR still applies

UPSHOT:

- new rules apply only where ER accepts some/all of claim w/in first 30 days

30 day rule not triggered by:

a. date injury reported
b. date of ER's knowledge

Based on DOI

- That is, prospective UR is precluded for "30 days following the initial date of injury"

Why is this important:

- 30-day period could lapse entirely if EE delays reporting an injury.

LC 4610 general rule: prohibits prospective UR w/in 30 days following DOI

Per LC 4610(c), some services are still subject to prospective UR w/in 30-day period:

1. pharmaceuticals, to the extent they are neither expressly exempted from prospective review nor authorized by the drug formulary adopted per LC 5307.27;
2. nonemergency inpatient and outpatient surgery (including presurgical & postsurgical);

LC 4610 general rule: prohibits prospective UR w/in 30 days following DOI

3. psych treatment;
4. home health-care;
5. imaging and radiology services, excluding X-rays;
6. all durable medical equipment whose combined total value exceeds $250, as determined by the official medical fee schedule;

LC 4610 general rule: prohibits prospective UR w/in 30 days following DOI

7. electrodiagnostic medicine, including, but not limited to, electromyography and nerve conduction studies; and/or
8. any other service designated and defined through rules adopted by the AD

PTP doesn't get a break

PTP must still

a. complete LC 6409 form (5 day initial exam report)
b. complete RFA w/in 5 days after initial visit and eval LC 4610(b)

PTP fails?

- ER may suspend ability to provide further treatment to EE who is exempt from prospective UR

PTP wants to get paid for treatment provided w/in first 30 days?

Request for payment must:

a. comply with LC 4603.2 (very detailed), and
b. be submitted w/in 30 days of DOS

Naughty Doctors!

- Imagine this…a doctor is—let's say Los Angeles (OF COURSE!)—takes advantage of this law to continuously provide unnecessary treatment

NOW WHAT

Naughty Doctors!

LC 4610(f) allows for "retrospective [UR]…"

- solely for the purpose of determining if the physician is prescribing treatment consistent with the schedule for medical treatment utilization."

Naughty Doctors!

LC 4610(f)(1) adds,
"If it is found after retrospective utilization reviews that there is a pattern and practice of the physician or provider failing to render treatment consistent with the schedule for medical treatment utilization, including the drug formulary, the employer may remove the ability of the predesignated physician, employer-selected physician, or the member of the medical provider network or health care organization under this subdivision to provide further medical treatment to any employee that is exempt from prospective utilization review.

LC4610(f)(1) continued

- The employer shall notify the physician or provider of the results of the retrospective utilization review and the requirement for prospective utilization review for ***all subsequent medical treatment***."

Naughty Doctors!

UPSHOT?

REAL TEETH!

1. ERs can audit doctors applying MTUS
2. audit shows pattern & practice of MTUS violation?
3. send letter to doctor advising further care is subject to prospective UR
4. Not allowed to treat IW, who are exempt from prospective review

Can we refuse to pay naughty doctors?

Probably not

- Retro UR is "solely for the purpose of determining if the physician is prescribing treatment consistent with the schedule"

UR + Formulary = ?

Good question!

What does the law say?

NOTHING

AB 1124:

- directs the DWC to adopt a formulary by 7/17
- doesn't even mention UR

Any other "tea leaves" to read?

NOPE!

DWC's Calendar

1. 5/16: post draft rules
2. 11/16: formal rulemaking process
3. 7/1/17: implementation deadline

Um…last word was public hearing on 5/1/17

"Formulary Rules Still in Development as Implementation Deadline Passes"

WorkCompCentral, 7/7/17

DWC spokesman Peter Melton:

- Division must post revised rules for a 15-day comment period before submitting to the Office of Admin Law for final approval
- OAL has 30 days to give final approval
- not aware of any timeline for when updated rules will be published
- effective date = likely early 2018 (could be as early as 9/17…but don't bet on it!)

So much for following the law!

EXPECTATIONS

- formulary will be based ACOEM's formulary in MD Guidlines
- "preferred" meds can be prescribed w/out prospective UR
- "non-preferred" & those not listed in formulary would require prior approval
- some special emergency fills for some "non-preferreds", such as painkillers, to allow access after surgery or for serious injuries.

Do UR docs owe EE a "Duty of Care"?

Facts:

- injury aoe/coe = anxiety = Klonopin RFA
  - RFA UR'd and ok'd
  - Years later, f/u prescription
  - RFA: not medically necessary; decertified
  - Klonopin w/drawal usually over time (EE=seizures)
  - PTP, noting seizures, issues another RFA
  - RFA: not medically necessary

King v CompPartners (DCA)

Holding:

EE could assert a tort claim against UR doc for failing to warn about withdrawal risks

- Reasoning: UR doc, by providing a medical opinion as to the reasonableness and necessity, had a doctor-patient relationship with EE

=

duty of care

=

may be held liable for breach of duty

What does B&B say about King?

Louis Larres, a defense attorney with Bradford & Barthel, said he thought the King case arguably is providing "a chance for civil damages arising out of the comp arena, thereby giving the injured worker benefits above and beyond the standard comp benefits," but "only if the complaint is in the vein of a malpractice claim."

If the claim is "characterized as anything else," Larres said he believed it would be dismissed as barred by the exclusive remedy rule.

Workcompcentral (1/11/16)

King

- Def wants "depublished"
- CAAA says NO!
  - Who decides?
    - CA Supreme Court!

STAY TUNED

"Supreme Court to Review Malpractice Suit Against UR Provider"

(WorkcompCentral, 4/15/16)

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