Utilization Review & IMR: True Impact on Injured Workers/Employers
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In the fall of 2014, the Workers’ Compensation Appeals Board (WCAB) issued two decisions which drastically streamlined the medical treatment dispute resolution process and created a series of bright line rules. The decisions have drastically reduced the frequency of medical treatment decisions being made by Workers’ Compensation Judges (WCJs). However, the net effect may be an upward spike in administrative costs for employers, with being less treatment for injured workers and a legislative backlash.

In 2012, as its latest effort in comprehensive workers’ compensation reform, the Legislature enacted Senate Bill 863. The bill created two new administrative systems whose purpose was to divest the WCAB of jurisdiction over matters perceived to require specialized expertise. The first system targeted medical billing fee disputes by creating an Independent Bill Review (IBR) process. The second system, Independent Medical Review (IMR), was designed as a limited appeal process to complement the Utilization Review (UR) system created by Senate Bill 228.

Prior to SB 228 when a dispute arose between an employee and the employer regarding whether treatment was reasonable and necessary to cure or relieve the effects of the industrial injury, both parties would secure medical reports from doctors and a judge would decide whether treatment was appropriate and, if so, in what form. This led to widely disparate treatment being provided for identical types of injuries.

To cure this inequity, SB 228 made it mandatory that each employer establish a UR program which would apply the same Medical Treatment Utilization Schedule (MTUS) to decide if treatment was medically appropriate. As it eventually evolved after subsequent “reform” efforts, an employer’s only remedy to dispute treatment requested by a treating physician was UR. If an employee disputed the UR decision to deny, alter or modify a treatment request, he or she could request a Qualified Medical Examiner (QME) to address the issue. A WCJ would then make the ultimate decision between the UR decision and an examining doctor’s opinion. This again led to inconsistent results. Many WCJs were reluctant to follow the opinions of a non-examining UR physician over those of the treating physician or an examining QME. Injured workers and their attorneys made every effort to avoid UR decisions. The strict application of timelines and cost involved in litigation made standing by a UR decision a risky and often costly decision.

In an effort to remove all subjectivity from treatment decisions, the IMR process was born. SB 863 divested the WCAB of jurisdiction to decide medical disputes in favor of “medical professionals … using evidence-based medicine.” The idea was to create an appellate unit of physicians to decide all UR appeals. At no point would treatment decisions be made by any non-physician (i.e. WCJ). The challenges began immediately.

In Dubon v. World Restoration, Inc. (2014) 79 Cal. Comp. Cases 1298 [en banc] the WCAB reversed itself and concluded that legal issues regarding the timeliness of a UR decision must be resolved by the WCAB, not IMR. If an UR decision is untimely, the WCAB must decide whether treatment is reasonable and necessary, otherwise, the WCAB has no jurisdiction and IMR is an employee’s only remedy. Dubon left unanswered several questions.

On November 20, 2014 a Panel of three Commissioners issued their Opinion and Order Denying Petition for Removal in the matter of Bodam v. San Bernardino County/Dept. of Social Services (2014) 79 Cal. Comp. Cases 1519 which answered most of those questions. The case was designated as a Significant Panel Decision meaning it is controlling authority for all WCAB panels and WCJs.

In Bodam, the WCAB concluded that for a UR decision to be considered timely, it must “comply with all time requirements in conducting UR, including the timeliness for communicating the UR decision.” The WCAB further concluded that a UR decision untimely communicated is untimely. Finally, the WCAB reaffirmed its earlier holdings that when UR is untimely and therefore invalid. Ultimately, WCJ can only award treatment if based on the old standard of “substantial evidence.”

The effect of Dubon and Bodam is a bright line system:
- An employer does not get to make any decisions regarding treatment requested by a treating physician. Its only options are to authorize the treatment or submit it to UR.
- If UR certifies the treatment, an employer must authorize it.
- If UR denies, modifies or alters a treatment request an employee may appeal it through the IMR system. In general, failure to appeal results in the treatment being denied for a year.
- If any part of a UR decision is untimely, the entire decision is invalid and cannot be used for any purpose.
If UR & IMR do not apply, a WCJ will decide whether treatment is reasonable and necessary based on substantial medical evidence.

Employers can expect three trends to continue as a result of Dubon and Bodam.

1. Every UR denial in a represented case will result in an IMR submission (at a cost of $390 - $515 each). This is because there is no rational reason not to challenge such decisions and no cost to anyone but the employer.
2. Every UR decision not clearly processed and communicated timely will result in an Expedited Hearing. Injured workers and their attorneys know that such hearings are costly and believe they can obtain a better result either through negotiation or litigation than through the application of evidence-based medicine.
3. A trend in employer's costs increasing, even though treatment costs may go down.

Are You Better Off Today Than You Were A Decade Ago?

According to the Workers’ Compensation Insurance Rating Bureau (WCIRB) the cost to employers for IMR in 2013 and 2014 will exceed $77 million with about 1/3 of that coming from self-insureds. The number of IMRs has increased from 35,131 in 2013 Q1 to 61,793 in 2014 Q4. The trend shows no signs of slowing down and has already exceeded the numbers predicted by proponents of the new system.

The concept of evidence based medicine is a good one. In theory, it ensures injured workers' received appropriate treatment and that abuse is eliminated. In practice the effect is quite different. A survey of claims professionals, those in the trenches, will quickly reveal that the present UR system is as much a hindrance as a help. As has always been the case, the “best” treating doctors are not necessarily those that can write the “best” reports. Accordingly, good treating physicians with sound treatment plans often have their requests for treatment protocols denied by utilization review. Many excellent treating physicians have been chased out of the system because they cannot get treatment authorized, or cannot turn a profit with the reduced fee schedule and increased time demands. Conversely, many treating physicians considered “pro-applicant” are often the best report writers and have the best UR success rate. Despite Medical Provider Networks (MPN), injured workers and their attorneys still control the treating physician. Since employers have no appeal mechanism from a UR approval, they do not get to challenge even the most dubious treatment plans.

Employers are not allowed an opinion on medical treatment. The current system prevents employers from objecting to ANY treatment request. Qualified Medical Examiner (QME) and even Agreed Medical Examiner (AME) opinions are not admissible on the issue of treatment. This has resulted in employers paying for treatment deemed unreasonable and unnecessary by an AME. The more sophisticated doctors and applicant’s attorneys are also using temporary disability (TD) and permanent disability (PD) as leverage for getting treatment authorized. In response to a UR or IMR denial of treatment the doctor will simply report that the injured worker will not reach maximal medical improvement until they receive the denied treatment protocol – thus extending TD unnecessarily. Alternatively, the doctor will provide a higher assessment of PD stating the denied treatment would have reduced the ultimate disability.

No matter how you slice it – authorize treatment – UR – IMR – expedited hearing, the employer pays. Cases like Dubon and Bodam drastically reduce the number of medical treatment decisions made by WCJs in favor of a new bureaucratic system. Unfortunately, treatment still varies widely between identical injuries based upon the report writing abilities of the doctors (or their support staffs). As long as the law prohibits employers from fighting medical treatment issues and instead surrender that right to a third party costs will continue to rise. Sadly, the corresponding increase in claims costs will not result in a corresponding increase in benefits to injured workers. Instead, only those involved in the UR and IMR process will profit.

The Pendulum Swings Both Ways

California’s Workers’ Compensation system is, if nothing else, a product of politics. “Reforms” spearheaded by “Big Labor” (see AB 749) are followed up by “reforms” lead by “Big Business” (see SB 899). Workers’ compensation has become a political volleyball. The only constant in the system is that there will be changes in the law. Since 2003, the pendulum has swung in favor of business against labor. However, UR and IMR might be the force which results in the pendulum moving back in favor of labor. Recently,
California State Senator Richard Pan introduced SB 863 which would limit the use of UR in cases with awards of future medical care. The bill would also require additional disclosure from UR reviewers. While this might seem to be a minor “tweak” the system, it could signal the first successful effort to roll back many of the changes introduced over the past 12 years. If the current trends of decreased benefit delivery and increased claims costs continue, both sides will likely throw their political capital behind another “comprehensive reform” bill. Perhaps working together, pendulum can be placed in the middle and the system truly fixed.

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