Francis Stevens v. Outspoken Enterprises:
The Constitutionality of Independent Medical Review?

by Rod Coppedge, Esq.
Law Offices of Rudy H. Lopez A PC
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The views and opinions expressed in this article are those of Rod Coppedge, Esq., and the Law Offices of Rudy H. Lopez A PC, and are not intended to replace legal advice. Before attempting to apply the litigation plans referred to in this article, a legal analysis of the facts of a case should be completed by an attorney well versed with these emerging issues.

For lawyers, oral argument is an exciting event. This particular case may have very far-reaching consequences as to how disputes over medical treatment will be resolved. It was exhilarating to be present for the oral argument in San Francisco on September 30, 2015.

Appellant/Applicant's team was ready to argue that the lack of due process impermissibly hinders an injured worker's right to obtain medical treatment. An anonymous doctor has been delegated judicial authority to resolve treatment disputes, but that delegation is unconstitutional as it is not subject to judicial review and the injured worker has been deprived of his right to bring the dispute to a Court of Law.

Respondent/Defendant was ready to argue that there is an abundance of process in the Independent Medical Review (IMR) process. It is important to shield the anonymous doctor from the workers' compensation process to prevent the doctor from allowing treatment that would otherwise be denied. The application of evidence-based medical treatment standards must be continued to prevent the abuses of the past from returning with an unbearable price tag.

The Justices had an altogether different view of the law in question, Cal. Labor Code section 4610.6. They seemed to dismiss Applicant's concerns about subsection (i) which states: "[...] In no event shall a workers' compensation administrative law judge, the appeals board, or any higher court make a determination of medical necessity contrary to the determination of the independent medical review organization." The Justices, by their questions, clearly believe that the IMR determinations are subject to review in a Court of Law through a verified appeal under subsection (h).

The Justices commented that if the IMR doctor makes a **mistake in applying MTUS** (Medical Treatment Utilization Schedule), that he or she has "acted without or in excess of the administrative director's powers." This brings the IMR decision under review pursuant to LC 4610.6(h)(1).

The Justices (and the recent Panel Decision in McAtee v. Briggs & Pearson Construction, ADJ2068970) seem to indicate that if applicant can show that a **relevant comment by a Primary Treating Physician was not addressed** by the IMR doctor, review is available under 4610.5(h)(5) as: "The determination was the result of 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." Well, this is confusing to me as I thought the entire inquiry as to whether the requested treatment is efficacious for the diagnosed condition was a matter subject to expert opinion. I guess that's just an opinion. Perhaps the statutory language "express or implied" opens a door for foundational matters of ordinary knowledge?

Perhaps when an applicant wants to **rebut the MTUS**, they are entitled to a hearing under LC 4604.5(a). Under this interpretation, all IMR determinations are subject to appeal for applicant to attempt to rebut the MTUS and these appeals are outside of the IMR process, just as medical treatment issues after an untimely Utilization Review decision (or possibly an untimely IMR decision).

The Justices were also concerned about the rational basis for the **anonymity of the IMR doctor**. The three other grounds for appellate review under subsection (h) are fraud, conflict of interest, or bias. How can the inclusion of these grounds have meaning if the IMR doctor's identity is not known? Also, how can a case be resubmitted to the same IMR organization (there is currently only one: Maximus) but to a different doctor if the identity of the doctor is not known?

Applicant's attorney pointed out that the appellate review alluded to by the Justices is functionally not available. Even where the IMR is reversed, the only remedy is a return to the same IMR organization where the same reasoning is applied leading to the same result that was reversed. The most time sensitive questions, provision of medical care, are tied to a circular process where "in no event" shall a Court provide redress other than return to the IMR process. It was as if Marie Antoinette provided the muse and the Courts are to decree, "let them eat cake."

So, what would this cake look like?

Where an applicant can allege that there was a misapplication of MTUS, or that there has been some mistake of an "ordinary knowledge," a verified "appeal" may be filed with the WCAB. Such cases have been heard in district offices of the WCAB. These are subject to appeal to the Commissioners of the WCAB. The Commissioners' determination (or failure to respond) would then be subject to a Writ of Review to

the Courts of Appeal (a Court of Law). The best result for the party challenging the IMR determination on these grounds would be a "re-referral" to IMR.

Interestingly, the "appeal" would appear to allow for the parties to reference evidence which was not previously part of the WCAB record. Evidence supporting grounds under section LC 4610.6(h) subsections (1) through (4) would logically have to be allowed into the record even if produced unilaterally by a party after the IMR review occurred. The only limitation of evidence under LC 4610(h) appears to be in subsection (5) where the mistake of "ordinary" fact must be based on materials previously submitted to the IMR doctor. But even under subsection (5), the mistake can be "express or implied." So it seems as if any appeal (or response) could be based on "new" evidence.

Either party may appeal an IMR determination within 30 days. There is no provision for a response to the appeal, but there is nothing specifically precluding the opposing party from responding.

An Opinion from the Justices should be published by February 28, 2016.

An experienced and wise workers' compensation defense attorney once told me that reforms are short-lived. He said that within about 4 years the attorneys and judges find ways to erode the reforms so that the original "fix" becomes meaningless.

The McAtee decision shows me that my wise mentor was correct. LC 4610.6(1) and (5) will be used to open floodgates for reviews of IMR decisions. If IMR doctors are not anonymous, evidence might be found to support challenges under LC 4610.6(2) – (4). Disputes related to untimely UR decisions, and perhaps even untimely IMR decisions, will be decided outside the IMR process altogether (LC 4610.6(d)).

The question of rebutting the MTUS may also be outside the IMR process, as it is not reviewing the IMR determination but rather the applicability of the standard used as it relates to an individual applicant. Such reviews of IMR determinations under LC 4064.5(a) do not appear to have any time requirements as to their filing with the WCAB. This is perhaps the largest floodgate to be opened.

Defenses to such litigation over treatment requests will need to be mounted with an understanding of MTUS and of the relevant scientific medical evidence and literature relating to the efficacy of the requested treatment for the diagnosed condition. LC 4064.5(d) states: " For all injuries not covered by the official utilization schedule adopted pursuant to Section 5307.27, authorized treatment shall be in accordance with other evidence-based medical treatment guidelines that are recognized generally by the national medical community and scientifically based."

Developing litigation plans to defend employers and insurance carriers on these issues has been a focal point of my efforts for the past several months. The litigation plans are now in place. Given the questions from the Justices during oral argument, I expect that applicant attorneys will not wait for the opinion to be published before applying what was learned. I also expect that the Stevens case, and others, will be taken to the California Supreme Court.

Rod Coppedge is an attorney with the Law Offices of Rudy H Lopez A PC. Mr. Coppedge is a Certified Specialist is the field of California Workers' Compensation Law with over a decade of experience defending employers and insurance carriers.