From the Legislature that brought you SB 899!

SB 863
The “New” New and Improved Reform Package
Changes for Resolving Medical Treatment Disputes and Calculating Permanent Disability

Presented by Tom Richard and Kyle Royer
Richard, Graves, Thorson and Royer, LLP
SB 863
The “New” New and Improved Reform Package

Changes to the Medical Treatment Dispute Process

I. Goodbye Expedited Hearing, Hello IMR
II. Tightening of MPN Regulations
III. Cracking Down on Chiropractors
IV. Med-Legal Process Tweaks
V. Other Modifications
I. Goodbye Expedited Hearing, Hello IMR

**Labor Code § 4610.5: The IMR Process**

“LC § 4610.5(a) This section applies to the following disputes:

(1) Any dispute over a utilization review decision regarding treatment for an injury occurring on or after January 1, 2013.

(2) Any dispute over a utilization review decision if the decision is communicated to the requesting physician on or after July 1, 2013.”
I. Goodbye Expedited Hearing, Hello IMR

**Step 1 - Submit treatment request to UR.**

UR timelines and regulations still apply per Labor Code § 4610
LC §4610(g)(6): A UR decision to modify, delay or deny a treatment recommendation shall remain in effect for one year without further action by the employer with regard to any further recommendation by the same physician for the same treatment unless there is a change in the facts material to the basis of the UR decision.
I. Goodbye Expedited Hearing, Hello IMR

**Exception: AOE/COE and/or Part of Body Disputes**

If AOE/COE is denied, a decision from UR can be deferred until after the dispute is resolved.

AME / PQME and/or AOE/COE Priority Conference are the modes of resolving those disputes.
I. Goodbye Expedited Hearing, Hello IMR

Medical providers are liable for treatment provided prior to the completion of the IMR process

- Labor Code § 4610(e): neither the employer nor the employee shall have liability for medical treatment furnished without the authorization of the employer if the treatment is delayed, modified or denied by UR unless the UR decision is overturned by IMR.
I. Goodbye Expedited Hearing, Hello IMR

**Step 2** - If UR denies, delays or modifies a treatment request, the applicant must be sent a one page form prescribed by the Administrative Director to initiate the IMR process:

- Advising that the UR decision is final unless IMR is requested within 30 days;
- Providing notice of employee’s right to provide information regarding treatment recommendation, medical justification and “any additional material the employee believes is relevant” (Labor Code § 4610.5(f) 1-3); and
- Labor Code § 4610.5 does not invalidate UR determinations if the notice of UR determination is not provided timely. The remedy under Labor Code § 4610.5(h)(3) is that the period for applicant to appeal does not run until they receive notice.
I. Goodbye Expedited Hearing, Hello IMR

**Step 3** – If the applicant disagrees with the UR denial, they have 30 days (from notice) to object and request an IMR.

The IMR process is the only recourse. Labor Code § 4062 explicitly prohibits using AME/QME to resolve UR disputes.

Applicants are entitled to be represented through this process.
I. Goodbye Expedited Hearing, Hello IMR

**Step 4** – Upon notice from the administrative director that an IMR has been assigned, the employer shall provide all of the following documents to the IMR within 10 days:

- All medical records relevant to ”employee’s current medical condition” and “medical treatment being provided by the employer;

- All documentation regarding disputed treatment, all documents provided to, received by and/or relied on by UR. Labor Code § 4610.5(l);

- Applicant must be served with all records not previously provided; and

- All records provided by the applicant.
I. Goodbye Expedited Hearing, Hello IMR

Step 5 – IMR reviews the provided materials and determines whether treatment is medically necessary based on “specific medical needs of employee” and “standards of medical necessity" as defined in Labor Code § 4610.5.
Standards for determining medical necessity:

1. The medical treatment utilization schedule adopted by the administrative director (ACOEM as of now, could change at discretion of Administrative Director);
2. Peer reviewed scientific and medical evidence regarding the effectiveness of the disputed service;
3. Naturally recognized professional standards;
4. Expert opinion;
5. Generally accepted standards of medical practice; and
6. Treatments that are likely to provide a benefit to a patient for conditions for which other treatments are not clinically available.

✓ The standards are ranked in order. A lower ranked standard can only be used if the preceding standard is inapplicable.
I. Goodbye Expedited Hearing, Hello IMR

Labor Code § 4610 – The determination of the IMR shall be deemed to be the determination of the administrative director and shall be binding on all parties.

Except for limited circumstances...
Decisions may be appealed to the WCAB. Under Labor Code § 4610.6(h), appeals are limited to the following circumstances:

1. Administrative director acted without or in excess of the administrative director’s powers;
2. The determination was the result of fraud;
3. The IMR had a conflict of interest;
4. Bias based on sex, religion, nationality etc.; or
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 and not a matter that is subject to expert opinion.

But.....
I. Goodbye Expedited Hearing, Hello IMR

The remedy for a successful appeal is to resubmit the treatment request to the IMR, not to authorize the treatment.

Labor Code § 4610(i): In no event shall the WCJ, the appeals board, or any higher court make a determination of medical necessity contrary to the determination of the IMR.
I. Goodbye Expedited Hearing, Hello IMR

Additional IMR Issues

1. Who / What / When is the IMR?
2. What About Compensable Consequences?
3. Will the WCAB Play any Role in Medical Disputes?
4. What Sort of Challenges Should We Expect?
1. **Who / What is the IMR?**

   Labor Code § 139.5 instructs the Administrative Director to contract with “one or more independent medical review organizations and one or more independent bill review organizations to conduct reviews.”

2. **When Does it Start?**

   IMR process is intended in effect by 1/1/2013.
I. Goodbye Expedited Hearing, Hello IMR

Additional Issues

2. What about compensable consequences?

Labor Code § 4660.1 excludes psyche injuries, sleep loss and sexual impairment from PD calculations.

But...

Labor Code § 4660.1 permits medical treatment for these conditions if they are deemed compensable consequences.
I. Goodbye Expedited Hearing, Hello IMR

Additional Issues

How will compensable consequence treatment disputes be resolved?

Step 1: Is the injury compensable?
AME / PQME Process

Step 2: What treatment must be provided?
The PTP subject to the UR / IMR process.
I. Goodbye Expedited Hearing, Hello IMR

Additional Issues

3. Will the WCAB Play Any Role in Medical Disputes?

✓ Applicants can still file for Expedited Hearings if they are challenging compliance with the UR procedures. For example, if a UR determination is not timely, a WCJ can require it be authorized under Sandhagen.

✓ Labor Code § 4610.5(a) is limited to “utilization review decisions,” not any issue regarding medical treatment.
I. Goodbye Expedited Hearing, Hello IMR

**Additional Issues**

4. What sort of challenges should we expect?

- Due Process / Constitutionality.
- Increased scrutiny over UR procedures.
- Increased scrutiny over MPN procedures.
II. Tightening of MPN Regulations

Labor Code § 4062 was amended so that all treatment disputes in the MPN system must be resolved through the “old” IMR process set forth in Labor Code § 4613.3 & Labor Code § 4616.4.
II. Tightening of MPN Regulations

Old law: Applicants who did not receive appropriate MPN notices were permitted to treat outside MPN (Zanette v. Simpson Painting)

New Law: Employer must still notify applicant of the existence of the MPN, the right to change PTP within the MPN and the procedure for doing so. But, applicant may only treat outside the MPN if “it is shown that the failure to provide notice resulted in the denial of medical care.” Labor Code § 4616.3(b)
II. Tightening of MPN Regulations

Making the MPN more user friendly; By January 1, 2013:

Each MPN must list all doctors online with open access per Labor Code § 4616(a)(4); and

Provide medical assistants to help applicants find a doctor in the MPN and assist with making appointments. Medical assistant must be available by phone Monday through Saturday from 7am – 8pm. Additional regulations pending. (Labor Code § 4616(a)(5).)
III. Cracking Down on Chiropractors

Labor Code § 4600(c) (amended)

Chiropractors are not permitted to serve as PTP after the applicant has received the maximum 24 visits permitted under Labor Code § 4604.5.
III. Cracking Down on Chiropractors

Labor Code § 139.2(b)

Old law: Chiropractors exempt from PQME certification requirements.

New Law: Chiropractors must be certified in California workers’ compensation evaluation by a provider recognized by the AD. Program must include instruction on disability report writing (Labor Code § 139.2(b)(1-4)).
IV. Med-Legal Process Tweaks

AME/PQME Opinion not binding for determining treatment disputes subject to UR. The legislature wanted it to be very clear, so they said it at least three times.

Labor Code § 4061 – This section shall not apply to the employee’s dispute of a UR decision nor to the employee’s dispute of the MPN PTP’s diagnosis or treatment recommendations.

Labor Code § 4062 – limited to “any medical issues not subject to Labor Code § 4010 (UR).”

Labor Code § 4062.2(f) – Parties may agree to an Agreed Medical Evaluator at any time, except as to issues subject to the IMR established under Labor Code § 4610.5 (IMR).
IV. Med-Legal Process Tweaks

Will PQME / AME / PR-4 reports outline future medical care?

Probably. And it would probably be good for employers if they did.
Labor Code § 4064(a) — ... Each comprehensive medical report evaluation shall address all contested medical issues arising from injuries except medical treatment recommendations, which are subject to UR as provided by Labor Code § 4610, and objections to UR which are subject to Labor Code § 4610.5.

- Not binding regarding treatment disputes subject to UR.
- Remain valuable for settlement purposes. All workers compensation settlements, including Compromise and Releases, require judicial approval, and the med-legal reports can provide something a WCJ can rely on.
IV. Med-Legal Process Tweaks

Labor Code § 4062.3(g) prohibits ex parte communications with an AME or PQME.

Labor Code § 4062.3(f) - “nonsubstantial” communications with an AME do not constitute ex parte communications.

Ex parte communications with PQME still prohibited per *Alvarez v. WCAB* and *Osequera Links v. WCAB*. 
IV. Med-Legal Process Tweaks

Labor Code § 139.2(h)(3)(B) limits QMEs to performing evaluations at no more than 10 different locations.
V. Other Modifications

Spine surgery second opinion process is gone. It will now be handled the same as all other treatment disputes.
V. Other Modifications

Home Health Care Services

Labor Code § 4600(h) – “shall be provided as medical treatment only to cure or relieve the injured employee from the effects of his or her injury and prescribed by surgeon and physician... Employer shall not be liable for home health care services that are provided more than 14 days prior to the date of the employer’s receipt of prescription.”
V. Other Modifications

Interpreters

Labor Code § 4600(f) and Labor Code § 4620(d) – Injured workers are entitled to interpreters at medical exams if necessary.
SB 863
The “New” New and Improved Reform Package

Changes in Calculating Permanent Disability

1. Increase in PD rates
2. Change in Rating Formula – Zombie DFEC
3. 15% +/- Adjustment Not Offered
4. Labor Code § 139.48
5. Almarez / Guzman and LeBoeuf Endorsed
6. Compensable Consequence Injuries
PD Rates Increase for Injuries on or After January 1, 2013

Maximum PD rate for Permanent Disability from 1-54% remains at $230 / week.
Maximum PD rate for Permanent Disability from 55-69% increases to $270 / week.
Maximum PD Rate for Permanent Disability from 70-99% increases to $290 / week.
Minimum PD rates stays at $180 /week.
Changes in Calculating Permanent Disability

PD Rates Increase for Injuries on or After **January 1, 2014**

Maximum PD rate for all Permanent Disability benefits increases to $290 /week.

Minimum PD rates stays at $180 /week.
Future Earning Capacity Removed From PDRS

Labor Code § 4660.1 applies to all injuries on or after January 1, 2013.

“In determining percentages of permanent partial or permanent total disability, account shall be taken of the nature of the injury, the occupation of the injured employee and his or her age at the time of injury.”
The DFEC is not dead even though Ogilvie was killed. It will live on in the form a 1.4 multiplier in the PDRS.

Instead of using a particular DFEC modifier based on body part, the PDRS will simply multiply all WPIs by 1.4, which was the highest modifier under the 2005 PDRS.
Example: 45 year old teacher with 12% WPI to the low back

Pre 1/1/2013

Post 1/1/2013
12% (x 1.4) 17 - 214F – 17 - 18
Labor Code § 4658(e) covers injuries on or after January 1, 2013. Unlike Labor Code § 4658(d), there is no provision for increasing or decreasing benefits depending on whether or not the employer offers regular or modified work.
To make up for the elimination of *Ogilvie* and the elimination of the 4658(d) adjustment, the Legislature enacted Labor Code § 139.48.

**Labor Code § 139.48** – The Administrative Director is to create a RTW program funded by $120,000,000 annually for the purpose of making supplemental payments to workers whose permanent disability benefits are disproportionately low in comparison to their earnings loss.
Labor Code § 139.48 (cont.) – Eligibility for the payments and the amounts of the payments shall determined by regulations adopted by the administrative director.

Eligibility for and amount of payments to be subject to review at the trial level of the WCAB upon same grounds as petitions for reconsideration.
Labor Code § 4660.1(h) – “In enacting the act adding this section, it is not the intent of the Legislature to overrule the holding in Milpitas Unified School District v WCAB (Guzman).”
Labor Code § 4660.1(g) – Nothing in this section shall preclude a finding of permanent total disability in accordance with Labor Code § 4662.

Labor Code § 4662 was unaffected by the reforms, so presumably LeBoeuf lives on.
Compensable Consequence Injuries

Labor Code § 4660.1(c)(1) – No increases in impairment for sleep dysfunction, sexual dysfunction or a psychiatric disorder arising out of a compensable physical injury.

Nothing in this section limits the applicant’s ability to obtain treatment for sleep dysfunction, sexual dysfunction or psychiatric care.
Psyche injuries arising out of “being a victim of a violent act or direct exposure to a significant violent act” as defined by Labor Code § 3208.3 or “a catastrophic injury, including but not limited to, loss of limb, paralysis, severe burn or severe head injury.”
As a result of these changes, all waste, fraud and abuse were eliminated from the workers compensation system.

The End