

UTILIZATION REVIEW- FOUR YEARS LATER

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The 2005 amendments to the Illinois Workers' Compensation Act contain a provision making Utilization Review (UR) of proposed or provided health care services available to employers. The provision requires that the UR be conducted under a program certified by URAC and registered with the Department of Financial and Professional Regulation. Section 8 (j) of the Act provides in part:

When an employer denies payment of or refuses to authorize payment of first aid, medical, surgical, or hospital services under Section 8(a) of this Act, if that denial or refusal to authorize complies with a utilization review program registered under this Section and complies with all other requirements of this Section, then there shall be a rebuttable presumption that the employer shall not be responsible for payment of additional compensation pursuant to Section 19(k) of this Act and if that denial or refusal to authorize does not comply with a utilization review program registered under this Section and does not comply with all other requirements of this Section, then that will be considered by the Commission, along with all other evidence and in the same manner as all other evidence, in the determination of whether the employer may be responsible for the payment of additional compensation pursuant to Section 19(k) of this Act.

This section of the Act provides a rebuttable presumption against penalties if a denial is based on a UR opinion. The scope of a UR is limited to the appropriateness of treatment. In many cases we have seen purported UR reports which contain opinions on issues of causation or ability to work. These opinions take the report out of the scope of a UR and leave the employer with merely a record review. Record reviews have always been available to respondents but do not carry the statutory presumption against penalties which attaches to a UR.

The question of how the UR evidence would be viewed by the Commission follows two schools of thought. One school is that the inclusion of the provision indicates an intention of the legislature that URs be taken seriously. This line of reasoning is supported by the fact that the 2005 amendments were claimed to be an agreed bill in which employees got increased benefits and employers were promised a decrease in medical costs resulting from the Medical Fee Schedule, which was also introduced into the Act, and Utilization Review, which would be a tool with which to dispute unreasonable and unnecessary medical treatment. In order for this trade-off to be balanced, URs which dispute the necessity of treatment must be given great weight and often followed. This rationale would lead to the conclusion that the UR should often determine the necessity of treatment.

Another school of thought is that, as stated in the Act, UR reports are received and considered by the Commission along with and in the same manner as any other evidence. Under this line of reasoning, one could conclude that the treating physician, who has worked with the patient and the ailment, usually has a better understanding of the condition and appropriate treatment than an examiner who only saw the patient once for an evaluation, and even more so than a UR physician who only reviewed records. Under this

rationale the UR should be expected to receive relatively little weight.

Experience has shown that the second line of reasoning has generally prevailed. Utilization Reviews have usually been unsuccessful in supporting a denial of treatment. The cases in which URs have been successful have often been ones in which the facts of the case are so overwhelmingly one-sided that the trier of fact merely uses the UR as justification for a conclusion which he or she has already reached. In selecting a physician to conduct Utilization Reviews, it is imperative that the physician be available for testimony, usually by deposition. According to the Act, UR testimony is received like any other evidence, which includes being subject to the hearsay objection, so we must have be able to present the doctor's testimony in a deposition. It is also helpful if the physician is available within a reasonable distance to perform an examination pursuant to Section 12. If the Utilization Review is favorable to respondent, that opinion could then be bolstered by an examination. In the reported cases in which treatment has been denied, the evidence from the UR was frequently coupled with a favorable IME.

URs may have value as a screening device by which the employer can obtain an independent opinion on medical treatment at a lower cost than an IME. If the UR supports a denial, a follow-up IME may give the employer the evidence it needs to successfully dispute unnecessary medical treatment.

For questions, please contact your Evans & Dixon attorney.

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