

# MEMORANDUM

<b>DATE</b>	April 10, 2013
<b>TO</b>	Enforcement Committee Members Medical Board of California
<b>FROM</b>	Kurt Heppler, Senior Staff Counsel Division of Legal Affairs
<b>SUBJECT</b>	<b>Workers' Compensation Complaints</b>

The issue before the Enforcement Committee (Committee) involves the Medical Board of California (Board) and its obligation to investigate complaints against physicians who participate in utilization review activities. Recently, several entities have asked that the Board investigate complaints filed against these physicians, and historically, the Board has declined to do, finding that it did not have jurisdiction over the matter. Please note that this memo is not to be considered a primer on workers compensation; rather, it attempts to explain the policy question of whether complaints regarding workers' compensation should be investigated.

## **Background**

The Board is the state agency that licenses and disciplines physicians and its paramount mission is public protection. The Board shall investigate complaints filed by the public or other licensees that a physician and surgeon may be guilty of unprofessional conduct. (See Bus. & Prof. Code, § 2220, subd.(a).) Inputs into the complaint process also include section 801 and section 805 reports as well as reports submitted pursuant to other statutes.

The Workers Compensation (WC) system, which is not administered by the Board, essentially serves four purposes, as follows: (1) to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society, (2) to guarantee prompt, limited compensation for an employee's work injuries, regardless of fault, as an inevitable cost of production, (3) to spur increased industrial safety, and (4) in return, to insulate the employer from tort liability for his employees' injuries." (*Metea v. Workers Comp Appeals Board* (2006) 51 Cal.Rptr 3d 314.)

One of the fundamental principles of the Workers Compensation Act is that it is the *employer's* responsibility to provide all medical treatment reasonably required to effect the proper care and speedy recovery of injured employees. (*PM & R Associates v. Workers' Comp. Appeals Bd.* (2000) 94 CalRptr.2d 887.)(Emphasis added.)

Please note that medical treatment provided to an injured worker must be consistent with established guidelines. In most cases, the medical treatment must be consistent with an adopted medical treatment utilization schedule (MTUS) or the American College of Occupational and Environmental Medicine Practice Guidelines. It is reasonable to presume that these guiding documents set the standard of care for most industrial injuries.

Another important concept of WC is the utilization review process, which is required by law. (See Lab. Code, § 4610.) The purpose of the UR process is to review, modify, approve, deny, or delay treatment to the injured worker. It is important to note that the Board has stated on its Internet site that UR review cannot be performed with a physician who holds a retired license. Please note that a UR physician need not be licensed in California. \*

Some illustrations may prove helpful. In the UR process, we have essentially three participants: 1) the injured worker or claimant; 2) the worker's treating physician (in this case, physician means certain licensed health care providers and not just allopathic physicians); and 3) the UR physician. It works like this: after injury, the employee files a notice of work injury and the employer is obligated to provide medical treatment initially. The treating physician then recommends a treatment plan, which is then subject to the UR process.

The following is an excerpt taken from the Department of Industrial Relations' (DIR) Internet site regarding UR:

**“Q. What is utilization review (UR) and why is it used for workers' compensation?”**

**A.** UR is the process used by employers or claims administrators to review medical treatment requested for the injured worker, to determine if the proposed treatment is **medically necessary**. All employers or their workers' compensation claims administrators are required by law to have a UR program. This program is used to decide whether or not to approve medical treatment recommended by a treating physician.”

([http://www.dir.ca.gov/dwc/UtilizationReview/UR\\_FAQ.htm#1](http://www.dir.ca.gov/dwc/UtilizationReview/UR_FAQ.htm#1))(Emphasis added.)

As members might surmise, the UR process leads to disputes. The dispute resolution process does not include the Medical Board; it does include lawyers and judges. It is important to note that the UR dispute resolution process has been revised by recent legislation to utilize an Independent Medical Review (IMR) process that would bring more medical and less legal resources to bear on disputes. (See Lab. Code, § 4610.5.) However, even under the new IMR process, there is no explicit role for the Board.

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- This issue is somewhat congruous. The Board has states that UR review cannot be performed by the holder of an inactive license. The Board has also supported Legislation requiring UR physicians to hold a California license.

As the Board understands the issue, sometimes a treating physician will file a complaint against UR physician because the treating physician believes that the UR physician is not following the established standards or guidelines. In other words, the complaint is not based upon an attempt to leverage the outcome of a UR treatment decision or compensation claim but rather to ascertain whether the standard of care is being followed.

To date, the Board, after a preliminary analysis of this type of complaint, has often opted not to proceed as it classifies these matters as non-jurisdictional. Part of this determination may have been based upon the provisions of section 4610, which provided that a dispute arising out of UR decision had to be resolved pursuant to section 4062 of the Labor Code. Section 4062 does not include the Board. Additionally, case law suggests that the Workers Compensation Appeals Board has exclusive jurisdiction over any controversy relating to or arising out of the medical treatment of an injured employee. (See *PM & R Associates, supra*, 94 Cal.Rptr.2d at p. 891.)

However, it may be that a complaint may be filed against a physician not to challenge the treatment decision but rather over a concern of public policy. It is important to note that a complaint process already exists for UR, as indicated by the attachments. The imposition of a monetary fine by the administrative director within DIR may follow a complaint investigation.

### **Recommendation**

Staff suggests that the Board continue its established policy of performing a preliminary analysis of a complaint. If the complaint involves UR issue, then Board staff should inform the complainant of the DIR's complaint process.

**Utilization Review (UR) Complaint Form**  
State of California  
Division of Workers' Compensation Medical Unit

**Utilization review complaint form**

**What it is and how to use it**

Utilization review (UR) is the process used by employers or insurance companies to review treatment to determine if it is medically necessary. All employers or the insurance companies handling workers' compensation claims are required by law to have a UR program. This program will be used to decide whether or not to approve medical treatment recommended by a physician.

The UR process is governed by Labor Code section 4610 and regulations written by the CA Division of Workers' Compensation (DWC). The DWC regulations are contained in Title 8, California Code of Regulations, sections 9792.6 et seq.

Medical providers, injured workers or others who find that UR is not being done according to the regulations can file a complaint with the DWC. The attached form may be used to register a complaint regarding UR services connected with workers' compensation injuries and treatment.

Injured workers may also benefit from reading the UR fact sheet (A) at <http://www.dir.ca.gov/dwc/iwguides.html>.

Please fill out the form as completely as possible, checking all complaint boxes that apply. Please include any additional information or documentation required to clarify the details of your complaint.

Completed complaint forms can be sent by U.S. mail, fax or e-mail to the address provided at the bottom of the form.

**Glossary of terms:**

**Supporting documentation:** All written material related to the complaint(s), including letters or faxes regarding modification, delay or denial of specific treatment request(s).

**ACOEM:** The American College of Occupational and Environmental Medicine. The state of California is currently using the ACOEM Practice Guidelines, Second Edition, as its medical treatment guidelines.

