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Civil Case No: S232197

SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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Deputy

KIRK KING, et al.,
Plaintiffs, Appellants and Respondents,

vs.

COMPPARTNERS, INC., et al.
Defendants, Respondents and Petitioners

After a Decision by the Court of Appeal,
Fourth Appellate District, Division Two (No. E063527)

Superior Court, County of Riverside (No. RIC 1409797)
Honorable Sharon J. Waters

APPLICATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND PROPOSED BRIEF OF AMICUS CURIAE COUNTY OF LOS ANGELES IN SUPPORT OF PETITIONER COMPPARTNERS, INC.

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APPLICATION FOR PERMISSION TO FILE

AMICUS CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rule 8.520(f) of the California Rules of Court, the County of Los Angeles respectfully requests permission to file the accompanying Amicus Curiae Brief in support of Petitioner.

I.

THE AMICUS CURIAE

The County of Los Angeles (County) is a self-insured public entity with approximately 10 million residents, an area of 4,084 square miles and 88 cities. According to the United States Census Bureau's 2012 estimate, one out of four Californians resides in Los Angeles County. The County, as a public entity, exists to provide essential public services, such as police, fire, roads, health, mental health, welfare, social services, and other crucial public services to its residents with limited resources.[1] Most of the

[1] Annually, the County provides essential public services such as responding to 270,661 emergency calls, providing 540,000 immunizations to protect citizens from everything from diphtheria to polio, furnishing healthcare services to 715,000 persons, investigating more than 150,000 emergency child abuse referrals, serving 2.3 million meals to the elderly, providing case

County's revenue is derived from federal, state and local taxes where the majority of these funds are designated for specific mandatory services. This leaves a small percentage of these funds to be allocated among many competing, yet important, public needs.

The County is one of the largest employers in the state with more than 100,000 employees. The County presently has over 27,500 open workers' compensation claims, many of which involve police, fire, and safety workers. Accordingly, the Court's decision in this matter will have a profound effect on the County and other governmental entities, both in a cost basis and in the provision of services to its constituents. The County's workforce is generally comprised of long-term employees who live out their careers with and retire from the County. The Court's decision could also impact the ability of these employees and former employees to access timely medically necessary care.

II.

INTEREST OF AMICUS CURIAE

The Court is respectfully requested to take note of the practical impact that this case will have upon the County of Los Angeles and its employees. The issues presented in this case, with respect to the Utilization

(...continued)
assistance to approximately 5.6 million indigents, and supplying Medi-Cal coverage to approximately 1.8 million adults and children.

Review and Independent Medical Review process and the imposition of a duty of care upon a review-only physician, will have a direct and dramatic impact upon the County as well as other cities and counties in the State.

Prior to the passage of Senate Bill 899 ("SB 899")(Status. 2004, ch. 34), the workers' compensation crisis in California jeopardized the economic viability of the State.

SB 899 importantly states,

> "This Act is an urgency statute necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are: In order to provide relief to the state from the effects of the current workers' compensation crisis at the earliest possible time, it is necessary for this act to take effect immediately.

This emergency also impacted public entities, causing the cost to state governments to increase up to 55 percent over the last three years, thereby forcing scarce public funding to be diverted from other important

services to workers' compensation costs.[2] This state of affairs caused the California Legislature to enact Senate Bill 899, (SB 899), namely section 49, as an emergency measure to provide relief from the effects of this workers' compensation crisis. Similarly, in 2012, the Legislature enacted Senate Bill 863 (SB 863), which introduced Independent Medical Review to California workers' compensation to ensure that medical professionals would determine the medical necessity of medical treatment, except in specific circumstances. The Court's decision in *King* to place a duty of care on a review-only physician will have a significant cost impact on the County of Los Angeles. Any potential increased costs to the County of Los Angeles would be borne by the resident taxpayers and would be contrary to the legislature's intent in implementing the recent workers' compensation reforms.

These increased costs conflict with the Legislature's intent to rein in the cost of workers' compensation claims to employers. Clearly the Legislature did not intend to increase costs.

[2] In 2003, for example, the State Controller's Office reported public entity workers' compensation costs increased from 18% to 55% *over a period of three years.*

III.

CONCLUSION

For the foregoing reasons, the County respectfully requests status as Amicus Curiae in this action and further requests the accompanying brief be accepted for consideration by this Court. As required, all parties are hereby served with this Application and the proposed Amicus Brief.

DATED: December 15, 2016

Respectfully submitted,

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INTRODUCTION AND SUMMARY OF ARGUMENT

The issue before this Court is whether the Court of Appeal's decision to impose a duty of care between a workers' compensation Utilization Review ("UR") physician and an injured worker is inconsistent with the mandates of the Legislature in Senate Bill 899 and Senate Bill 863.[1] It is the County of Los Angeles's position that sustaining this decision would result in applicants litigating adverse UR decisions outside of the Workers' Compensation Act ("WCA") and would undermine the intent of the Legislature.

In the instant matter, the respondent, Mr. King ("King"), suffered an industrial orthopedic injury, from which he had resulting depression and anxiety. His treating physician prescribed Klonopin to relieve his depression and anxiety from the orthopedic injury. Petitioner, CompPartners, is the UR company that was contracted by King's employer to perform UR services for requests for medical treatment received for industrial injuries. CompPartners, by its physician reviewer, found continued use of Klonopin to be medically unnecessary and decertified the prescription. King alleged that he suffered seizures as a result of the non-certification of the medication.

King challenged the non-certification of Klonopin through the statutory Independent Medical Review ("IMR") process pursuant to Labor Code §4610.5.[2] The non-certification determination was upheld by IMR. Exhausting the medical review

[1] The County submits that the Court of Appeal decision potentially opens up any UR decision, whether to approve or deny medical treatment, to civil litigation once the duty of care of a workers' compensation review-only physician is established, because that physician would have a duty to warn of any negative consequence of medical treatment, including if the medical treatment is approved and the applicant has an injurious outcome from that treatment.

[2] All statutory references are to the Labor Code unless otherwise indicated.

procedures under the WCA, King then filed a civil suit seeking damages. CompPartners filed a demurrer to King's civil complaint. The trial court sustained the demurrer without leave to amend on the grounds that King's claims were preempted by the WCA. King filed an appeal and the Court of Appeal sustained the demurrer but granted leave to file an amended complaint. The Court of Appeal determined that if King claimed that the damages occurred as a result of CompPartners' decision to non-certify the Klonopin, then the complaint would be preempted by the WCA. However, if King claimed that the damages were a result of the reviewing physician's failure to warn about the dangers of Klonopin, then the claim would not be preempted by the WCA. The Court reasoned that the issue of whether there was a duty to warn would be beyond the medical necessity determination made by the reviewing physician. King chose to pursue a civil lawsuit outside the WCA.

Amicus County supports and agrees with CompPartners that a UR physician does not owe a common law duty of care to an injured worker, and that the Court of Appeal erred in granting King leave to amend his complaint. Amicus County focuses on whether the decision of a UR reviewing physician can be challenged outside of the WCA, and urges the Court to reverse the Court of Appeal decision and reinstate the trial court's decision sustaining CompPartners' demurrer without leave to amend.

I.

UTILIZATION REVIEW IN CALIFORNIA WORKERS' COMPENSATION BEFORE SB 899 AND SB 863 WAS BURDENED WITH UNCERTAINTY, DELAYS AND COSTS

Prior to 2004, medical costs in California workers' compensation increased at an alarming rate. According to studies conducted by the Workers' Compensation Insurance Rating Bureau ("WCIRB"), from approximately 1995 to 2002, medical expenditures skyrocketed from $2.6 billion to $5.3 billion.[3] The crisis created by the steep climb in medical costs was a significant part of the foundation for the emergency workers' compensation reforms that took place in April 2004 in the form of SB 899.

The pre-SB 899 UR system in California workers' compensation was beset with uncertainty about the definition of reasonable and necessary medical treatment. In addition, Labor Code §4062.9 imposed a rebuttable presumption that the findings of the treating physician were correct. This resulted in an almost impossible standard under which employers could dispute treatment requests from the treating physician. Because there was no real way to dispute the treating physician's recommendations, the stage was set for medical costs to careen out of control.

A report entitled "*Utilization Review in California's Workers' Compensation System: A Preliminary Assessment*" (July 2001) conducted by the Division of Workers' Compensation ("DWC") studied the workers' compensation UR system in California and

[3] California Commission on Health and Safety and Workers' Compensation (CHSWC): Workers' Compensation Medical Care in California: Costs. Fact Sheet No. 2 August 2003; citing Workers' Compensation Insurance Rating Bureau (WCIRB). *Summary of December 31, 2002 Experience* WCIRB Bulletin No. 2003-09 May 5, 2003

compared it to the UR systems in place for disability insurance (for non-industrial injuries) and managed health care plans ("HMOs").

In both the disability insurance and HMO UR processes, a specific appeals process, Independent Medical Review, was provided for UR treatment denials, but not in the California workers' compensation system. Instead, §4062 provided a process for handling disputes over medical treatment, including disputes about medical necessity, neither §4062 nor the UR regulations specified when a UR denial would require the §4062 dispute resolution process. (*Id.* at pp. 13-14).[4] In practice, this procedure resulted in great delays in resolving UR denial disputes because of delays in getting appointments and receiving reports from agreed or qualified medical evaluators. In addition, under §5502, an expedited hearing before the Workers' Compensation Appeals Board ("W.C.A.B") could be requested to determine the employee's entitlement to medical treatment. The reality was that before SB 899, most medical treatment disputes were either delayed by the §4062 process, or decided at expedited hearings at the W.C.A.B without consulting medical experts.

The DWC stated as follows:

> "An extremely high proportion of requests for expedited hearing result in a settlement with provision of the requested service. In the absence of more detailed medical review, we cannot determine whether these outcomes represent a perception on the part of the insurers that hearings will result in the same outcome at greater cost, or last-minute recognition by insurers that the requested treatment is, in fact, medically necessary. Few files had sufficient medical records

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[4] SB 899 provided for the Panel QME process, in which a three-physician panel in the selected specialty is provided to the parties, who end up with the option of striking one physician and the appointment is scheduled with the remaining physician.

> to make an informed decision regarding the appropriateness of requested treatment, perhaps because issues were resolved without proceeding to hearing.
>
> In another DWC study, many participants in the workers' compensation system have commented on the irony of requiring judges, with no medical training, to make final determinations on medical necessity, often on the basis of scant medical evidence. Existing mechanisms for resolution of disputes over medical necessity in workers' compensation generally take many months. While 'expedited' hearings must occur within 30 days of the request for hearing, it appears that even in cases in which an expedited hearing is set, the time from denial to resolution often exceeds 3 months. The 4062 process may take far longer." (*Id.* at pp. 14-15).

The pre-SB 899 UR dispute resolution process was laden with delays that impacted employee return-to-work rates and increased costs for employers. Decisions on medical treatment were inconsistent, and did not necessarily emphasize the employee's best interests. Attorneys, paralegals, claims examiners and workers' compensation judges were making decisions on medical treatment while court calendars were clogged with expedited hearings. Reform was greatly needed. In response, the Legislature enacted SB 899.

II.

THE PRESENT UR AND IMR PROCESSES PROVIDE CLARITY, EXPEDITE TREATMENT DISPUTE RESOLUTION AND SAVE MONEY

A. UR/IMR RESOLVES MEDICAL ISSUES WITH THE GUIDANCE OF MEDICAL PROFESSIONALS

Workers' compensation in California is a system fraught with conflicting interests. §4600 defines the standard for medical treatment that is collectively accepted across the

often hard-drawn lines of the workers' compensation community. The employer must provide medical treatment "that is reasonably required to cure or relieve the injured worker from the effects of his or her injury". (§4600.) While this standard of "medical necessity" is well-established, the source of contention and litigation lies in how to best deliver such benefits to the injured worker. SB 899 in 2004 and SB 863 in 2013 significantly reformed the managed care process by providing guidance to practitioners in the UR system. The system that is in place today reflects the Legislature's intent of providing professional opinions regarding the efficacy of medical treatment while reducing costs and litigation.

Since the enactment of SB 899 in 2004, every employer is required to establish a UR process that prospectively, retrospectively, or concurrently reviews and approves, modifies, delays, or denies medical treatment services required under Section 4600. (§4610, subds. (a), (b).) Moreover, the administrative director was required to adopt a medical treatment utilization schedule ("MTUS") that incorporates "evidence-based, peer-reviewed, nationally recognized standards of care [...]." (§5307.27, subd. (a).)

The Legislature enacted SB 863 in 2013, establishing IMR to address the costly, time-consuming and inconsistent system of resolving injured workers' challenges to adverse UR decisions. (Stats. 2012, ch. 363, §1.) The Legislature created a remedy through IMR for injured workers who felt aggrieved by UR decisions, and is the *sole* method to review or appeal a UR decision under the WCA. (*Dubon v. World Restoration, Inc.* (2014) 79 Cal. Comp. Cases 1298 (Appeals Board en banc) (*Dubon II*).) The Supreme Court recently declined to review the 1st District Court of Appeal's ruling

which found that IMR is constitutional because the state Legislature has plenary power over the workers' compensation system. *Stevens v. Workers' Comp. Appeals Bd.* (2015) 241 Cal. App. 4th 1074, 1094-1095. As such, IMR applies to disputes over UR decisions for injuries that occurred on or after January 1, 2013, as well as disputes over UR decisions communicated to the requesting physician on or after January 1, 2013, regardless of the date of injury. (§4610, subd. (a).) It is undisputed that IMR is applicable in the instant matter, and is the only remedy available to respondent with regard to the July 2013 UR decertification of Klonopin.

B. THE DUTY OF CARE SHOULD REMAIN WITH THE TREATING PHYSICIAN AS MANAGED CARE PROCEDURES SUPPLY A SUFFICIENT APPEALS PROCESS FOR INJURED WORKERS

When an employee suffers a work-related injury, he or she typically selects a treating physician who is "primarily responsible for managing the care of an employee, and who has examined the employee at least once for the purpose of rendering or prescribing treatment and has monitored the effect of the treatment thereafter." (8 *C.C.R.* §9785, subd. (a)(1).) The treating physician must submit a request for authorization ("RFA") for a specific course of proposed medical treatment, which triggers the UR process. (§4610.) An outside UR organization provides a physician to review all information reasonably necessary to make the determination whether to approve, modify, or deny or the request. (§4610, subd. (d).) This decision is made without the UR physician physically examining the injured worker, and must be consistent with the medical standards of MTUS. (§4610, subd. (f)(2).)

Peer-to-peer review is often part of the UR process. The treating physician may have the opportunity to participate in a one-on-one discussion with the UR physician to explain the medical rationale behind the treatment recommendation before a decision is rendered. Moreover, the treating physician has the opportunity to provide additional information or justification for the treatment to a second UR physician to ensure that an appropriate decision was made.

Notably, if a treatment request is authorized by UR, it is binding on the employer and there is no relief available to review or appeal the authorization. In contrast, if the UR decision denies, modifies or delays a treatment request, the injured worker may request an IMR to challenge the decision. (§4610.5, subds. (f)(1), (d).) As the Court of Appeal summarized in *Stevens*, "[T]he IMR process gives workers, but not employers, a second chance to obtain a decision in their favor." (*Stevens, supra*, at 1090.) This option was taken by King in the instant matter and the UR decision was upheld.

An injured worker may choose to challenge the IMR decision by filing a verified appeal with the W.C.A.B.. (*Id.*, subd. (h).) The IMR determination is presumed correct and will be set aside only upon proof by clear and convincing evidence of one of five grounds for appeal.[5] (*Ibid.*) If an IMR determination is reversed, the dispute is remanded to the administrative director to submit the dispute to IMR by a different review organization. (*Id.*, subd. (i).) Finally, the decision can still be appealed to the Court of

[5] Labor Code §4610.6(h): "(1)The administrative director acted without or in excess of the administrative director's powers. (2)The determination of the administrative director was procured by fraud. (3)The independent medical reviewer was subject to a material conflict of interest that is in violation of Section 139.5. (4)The determination was the result of bias on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability. (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 for review pursuant to Section 4610.5 and not a matter that is subject to expert opinion."

Appeal for a writ of review within 45 days after the W.C.A.B.'s decision. (§5950.) In the instant matter, there are no facts to indicate whether King attempted to dispute the IMR decision.

As stated by the Court of Appeal in *Stevens*, both injured workers and employers benefited from the 2004 and 2013 reforms. (*Stevens, supra*, at pp. 1091-1092.) For injured workers, the reforms ensured that "treatment requests would no longer be modified, delayed, or denied except by a physician", rather than by the employer or claims adjuster; "guarantee[d] that UR decisions rendered in their favor could not be challenged by employers on medical-necessity grounds"; and "ensured faster final resolution of these decisions[...]." (*Id.* at pg. 1091.) "For employers, the reforms promised to reduce insurance costs by creating uniform medical standards and reducing litigation." (*Ibid.*)

UR and IMR have proven to be effective managed care mechanisms, delivering medically necessary treatment to injured workers promptly and consistently. Decisional law upholding the Legislative enactments has resulted in a dramatic reduction of litigation over medical treatment that was part of the pre-SB 899 environment.

C. KING'S TREATING PHYSICIAN CLEARLY HAD THE DUTY, OPPORTUNITY AND OBLIGATION TO WARN OF THE RISKS OF CESSATION OF KLONOPIN

From the legal practitioner's point of view, the managed care reforms operated in *King* as follows: Presumably after examining King, Klonopin was prescribed by King's treating physician to address the symptoms of King's "anxiety and depression". (POB,

9.)[6] It is within this clear doctor-patient relationship that a true duty of care exists, as the treating physician is obligated to periodically examine the injured worker, recommend and provide treatment, as well as warn of any risks and complications that may result therefrom, including the cessation of prescribed medication like Klonopin. King's treating physician clearly had a greater duty and opportunity to warn of the risks of the use of Klonopin than the UR physicians involved in reviewing the continued use of the medication. As the reviewing physicians' actions were limited to the review of the single isolated medical treatment request, the reviewing physicians were not tasked with managing the entire care and treatment of King.

The facts in the present case do not indicate whether King's treating physician engaged in a peer-to-peer review with the UR physicians. A second UR appears to have been conducted, confirming the finding that Klonopin was not medically necessary and upholding the original UR decertification. (Op., at 3.)[7] Certainly, at that point, with two UR requests for Klonopin decertified, the prescribing doctor had ample opportunity and a duty to advise his patient of the risks associated with the medication. Moreover, the fact that King's IMR request of the UR decision to decertify Klonopin was upheld is further proof that the original UR non-certifications were proper, a fact that has been virtually ignored. (PRB, 8.)[8]

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[6] "POB" refers to Petitioner's Opening Brief.

[7] "Op." refers to the Court of Appeal Opinion.

[8] "PRB" refers to the Petitioners' Reply Brief.

D. UR/IMR HAS PLAYED A GREAT ROLE IN REDUCING MEDICAL COSTS IN THE COUNTY OF LOS ANGELES AND STATEWIDE

In its 2011 annual report, the Commission on Health and Safety and Workers' Compensation ("CHSWC") issued a chart comparing the growth of California workers' compensation medical expenses in relation to medical inflation according to the Consumer Price Index ("CPI") since 1998.[9] The chart reflected that from 1998 to 2003, California workers' compensation medical costs drastically outpaced the steady growth of medical inflation in California. While the medical CPI showed steady inflationary growth with a 22.7 percent increase from 1998 to 2003, California workers' compensation medical costs climbed sharply, increasing 120.8 percent during the same period. (CHSWC study, pg. 88.) Similarly, the workers' compensation medical payout for the County of Los Angeles mirrors the California workers' compensation medical cost increase shown in the CHSWC graph, rising from $67.5 million in 1998 to $157.8 million in 2003.

However, workers' compensation costs across the state experienced a dramatic drop in 2004, which can largely be attributed to the managed care reforms that became effective that year. The steep rise in California workers' compensation medical costs declined from 120.8 percent in 2003 to 108.5 percent in 2004, a 12.3 percent reduction. In the same period, the medical cost CPI continued its steady increase by 5.4 percent. The rate of increase in workers' compensation medical expenses still dramatically outpaced the rate of medical CPI. However, the rate of increase in workers'

[9] California Commission on Health and Safety and Workers' Compensation (CHSWC): CHSWC 2011 Annual Report. Released December 2011.

compensation costs continued to drop in 2005 to 73.8 percent, a reduction of 34.7 percent from 2004. Then, starting in 2006 and continuing in subsequent years, medical costs stabilized and more closely approximated the pace of statewide medical inflation.

Similarly, between the 2003 to 2004 fiscal year, the County of Los Angeles saw a drop to $108.1 million in workers' compensation medical payouts, $49.7 million less than the preceding year, followed by a similar stabilization in subsequent years.

Moreover, the WCIRB of California issued a December 10, 2015 report entitled, "Impact of SB 863 on California Workers' Compensation Medical Costs through June 30, 2015".[10] The study found that the enactment of SB 863 in September 2012 contributed to the reduction in overall California workers' compensation medical costs by 8 percent, in contrast with an average 6.5 percent increase in average medical costs per claim from 2005 to 2012. (*Id.* at 6.) Even without sufficient data to quantify the precise impact of IMR on overall medical costs, IMR is thought to be a significant factor in controlling medical costs, particularly for pharmaceutical services. (*Id.* at 12.)

Studies of the SB 899 and SB 863 reforms indicate that in addition to addressing the Legislature's concern regarding California's skyrocketing workers' compensation medical costs, the fundamental goal of prompt delivery of medically necessary treatment is being met as well. In December 2015, the California Workers' Compensation Institute ("CWCI") issued a study entitled "Medical Review and Dispute Resolution in the California Workers' Compensation System". The study found that in total, the estimated

[10] Workers' Compensation Insurance Rating Bureau(WCIRB): Impact of SB 863 on California Workers' Compensation Medical Costs through June 30, 2015. Released December 10, 2015.

approval rate for all workers' compensation medical services is between 95.7 and 96.1 percent.[11][12] (*Id.* at pp. 1, 27.)

The County of Los Angeles workers' compensation program has authorized and provided a large amount of medically necessary treatment. In Fiscal Year 2015-2016, approximately 1.73 million billed lines, representing medical procedures, services or goods were evaluated by the County. Of the medical treatment provided, 23,696 total requests were submitted to UR. Of these treatment requests, only 6,092 resulted in UR denials. The data reflects that the County has been successfully managing a high number of treatment requests with legislatively imposed guidelines that previously might have been subject to individual litigation before the W.C.A.B.

III.

THE COST SAVINGS, CLARITY OF DISPUTE RESOLUTION AND MEDICAL TREATMENT BENEFITS DERIVED FROM UR/IMR WILL BE DIMINISHED IF THE COURT OF APPEAL DECISION IS ALLOWED TO STAND

In the instant matter, the Court of Appeal has granted King leave to amend his complaint, citing "the uncertainty of the allegations in the complaint." (Op. 13.) By allowing King to amend the complaint, the Court below would find an exception to the WCA preemption rule that would permit the injured worker to proceed in Superior Court to determine the "scope" or "discharge" of duty from a UR physician to an injured

[11] California Workers' Compensation Institute ("CWCI"): Medical Review and Dispute Resolution in the California Workers' Compensation System. Released December 2015.

[12] Of all 2014 services requested, 84.7 percent were paid without being requested in RFAs and undergoing UR, either through prior authorization, retrospective authorization, or because no RFA was received and the claims administrator approved the request. (CWCI study, p. 1, 27.) Of the 2014 services that were requested in RFAs and that underwent UR, 59.8 percent of the services were approved by non-physician reviewers (i.e. claims adjuster, nurse or other non-physician reviewer); therefore, only 40.2 percent of requests submitted in RFAs, or an overall 6.1 percent of requests, were forwarded to a UR physician. (*Ibid.*) Of the 6.1 percent of all medical services that went through UR by a physician, 29.9 percent were approved. (*Ibid.*) Thus, only 4.3 percent of all requests were eligible for IMR. Of the denials and modifications that were appealed in 2015, 10.9 percent were overturned by the IMR physician.