June 12, 2023

TO: Members, Assembly Insurance Committee

SUBJECT: SB 636 (CORTESE) WORKERS' COMPENSATION: UTILIZATION REVIEW
OPPOSE – AS AMENDED APRIL 10, 2023

The California Chamber of Commerce and the undersigned organizations are respectfully **OPPOSED to SB 636 (Cortese)**, which would destabilize the medical treatment approval process in California's workers' compensation system by making utilization review (UR) unworkable. Specifically, the bill requires any psychologist or physician who conducts UR to be licensed in California and would also require them to "have the same duty of care to an employee as a treating physician". Taken together, these two provisions would undermine the effective use of UR in workers' compensation by limiting the number of doctors available to conduct UR and imposing on those doctors a misapplied and unmeetable duty of care.

Utilization Review is Vital to the Efficient Operation of the Workers' Compensation System

The legislature established the UR process to resolve disputes over medical treatment recommendations quickly and efficiently. California law requires employers to establish a utilization review process through which a physician reviewer can assess the validity of a treatment recommendation according to a comprehensive schedule of treatment guidelines that was adopted by the legislature and implemented by state regulators. While employers can unilaterally approve a treatment recommendation, only a licensed physician can deny or modify a treatment recommendation. The labor code dictates the standards to be used by reviewers, the timeframe in which decisions must be made (5-14 days), and how decisions are communicated to injured workers and their treating physicians.

Before UR was implemented in California injured workers suffered significant delays when an employer questioned a treatment recommendation. Instead of a quick review in 5-14 days, an injured worker faced months of delay while the employer secured a medical evaluation and sought a hearing at the Workers' Compensation Appeals Board (WCAB). The establishment of UR, and the subsequent implementation of IMR, have reduced friction and delays for injured workers.

Claims administrators and Utilization Review Organizations are subject to audit, investigation, and penalties for their conduct in administering UR. The data suggests UR has been a successful tool for quickly and accurately resolving disputes over recommended medical treatment. For example, the most recent annual report from the Commission on Health and Safety and Workers' Compensation (CHSWC) indicates that not a single URO has failed an investigation since 2015. Studies by the California Workers' Compensation Institute estimate that well over 90% of medical treatment requested by physicians in the workers' compensation system is approved. The small number of IMR denials that are contested through the IMR system have been upheld as accurate at a rate above 90% since its inception, which is a strong indication that UR reviewers make appropriate decisions at a very high rate.

Exclusive Remedy in the Workers' Compensation System

Workers' Compensation law is based on what is referred to as "the grand bargain", which means that employers agreed to assume liability for all industrial injuries and deaths without regard to fault in exchange for limitations on the amount of that liability. This compromise gives injured workers relatively quick and certain provision of medical treatment and wage replacement and disability benefits without having to prove fault but requires them to forego potentially higher damages available in the tort system. The labor code directs judges that resolve disputes in the workers' compensation system to "liberally construe" the law for the purpose of providing benefits to injured workers. The result is that the vast majority of claims are accepted, and the vast majority of medical treatment for those claims is approved.

To fully effectuate this grand bargain, the labor code generally limits an employee's ability to seek remedy for work-related injuries outside of the workers' compensation system, including causes of action that are collateral to or derivative of the work-related injury. This limitation includes causes of action that stem from conduct occurring in the workers' compensation claims process, including those actions undertaken by a third party that is "standing in the employer's shoes" such as insurers, third party administrators, and utilization review organizations. Instead, the labor code provides remedies for various injuries that can occur as part of the claims administration process. Injured workers can appeal bad UR decisions through binding state-run Independent Medical Review (IMR), employers are liable for new or aggravated injuries that result from medical treatment provided for a workplace injury, and there is a system of significant financial penalties that punish bad behavior in every level of the claims administration process.

Exclusive remedy is a critically important aspect of the workers' compensation system that would be significantly undermined by the provision in **SB 636** that would inappropriately apply the "duty of care" owed by a primary treating physician to a utilization review physician. The sole purpose of this language is to pierce exclusive remedy for conduct occurring in the claims process by creating a new cause of action against the UR physician.

SB 636's Duty of Care Language Undermines Utilization Review

The April 10 amendment requires employers to ensure that a utilization review physician has "the same duty of care" to the employee as a treating physician. The physicians and psychologists that conduct UR in the workers compensation system perform a completely different function than the physicians who serve as an injured worker's primary treating physician, and for that reason should not be held to the same standard. Utilization review physicians are practicing medicine, but they are not providing care to the injured worker.

Physicians and psychologists conducting utilization review do not have the same relationship with the patient as a treating physician. These doctors are responsible for delivering quick and accurate administrative determinations about whether specific treatment recommendations are medically necessary and consistent with California's Medical Treatment Utilization Schedule (MTUS). UR physicians do not interact with the patient, they do not examine the patient, they do not diagnose the patient, they do not have access to all the history or medical records, and the injured worker didn't select and place their trust in the UR doctor.

Utilization review physicians and psychologists are not providing treatment to an injured worker. They are performing an administrative task whereby they use only the records provided to them to measure a provider's treatment recommendation against state-dictated treatment guidelines. Assigning UR reviewers with the same duty of care as a treating physician serves only to create an impossible burden and expose these physicians to litigation that would otherwise be barred under current law. Imposing a duty of care that cannot be met would undermine the integrity of the utilization review as a tool for quickly and accurately evaluating treatment recommendations.

Imposing the duty of care in **SB 636** would reduce the number of physicians willing to work as reviewers, which would impact the ability of employers to perform timely and accurate utilization review as part of the claims administration process.

California Licensure of UR Doctors

SB 636 would require any psychologist or physician who conducts utilization review in a workers' compensation claim involving a private employer to be licensed in the State of California. There is no evidence that this would improve care for injured workers. This requirement is entirely unrelated to the effective execution of the duties entrusted to a utilization review psychologist or physician. All decisions made by utilization review psychologists and physicians are required to be based on the medical treatment utilization schedule that has been adopted by the Administrative Director for the Division of Workers' Compensation. If treatment varies from that schedule, it must be based on evidence-based, peer reviewed, nationally recognized standards. Because the utilization review standards are nationally based, there is no scenario in which a California psychologist or physician would be more qualified to make a utilization review decision based solely on the fact that they are licensed in California.

California psychologists and physicians do not have specific knowledge that would make this process any more fair or efficient. Conversely, a requirement that such professionals be licensed in California would only limit the number of doctors available to perform utilization review services, thereby creating a logjam of cases that need to be reviewed. Additionally, this limitation would likely drive up the cost of utilization review services because the demand for those services would increase relative to the number of providers who are legally able to perform them. Utilization review enables employers to hold psychologists and physicians to evidence-based medical treatment standards and to ensure that employees receive the best medical treatment possible while keeping costs under control.

Indeed, Governor Brown vetoed a similar bill in 2011:

> *I am returning Assembly Bill 584 without my signature. This bill would require that the physician conducting utilization review of requests for medical treatment in Workers Compensation claims be licensed in California. This requirement of using only California-licensed physicians to conduct utilization review in Workers Compensation cases would be an abrupt change and inconsistent with the manner in which utilization review is conducted by health care service plans under the Knox-Keene Act and by those regulated by the California Department of Insurance. I am not convinced that establishing a separate standard for Workers Compensation utilization review makes sense. Sincerely, Edmund G. Brown Jr.*

For these and other reasons, we respectfully **OPPOSE SB 636** and urge you to vote "no" when the bill comes before the Assembly Insurance Committee.

Sincerely,

Jason Schmelzer
Shaw Yoder Antwih Schmelzer & Lange, on behalf of California Chamber of Commerce

Acclamation Insurance Management Services (AIMS)
Allied Managed Care (AMC)
American Property Casualty Insurance Association
Arriba Data Systems
Associated General Contractors (AGC)
Association of California Health Care Districts (ACHD)
Association of Claims Professionals (ACP)
California Alliance of Self-Insured Groups (CA-SIG)
California Association of Joint Power Authorities
California Chamber of Commerce
California Coalition on Workers' Compensation
California League of Food Producers
Coalition of Small and Disabled Veteran Businesses
Encompass Health Solutions
Flasher Barricade Association (FBA)
Housing Contractors of California
National Association of Independent Review Organizations (NAIRO)
Nexus Enterprises
ProPeer Resources
Public Risk Innovations, Solutions, and Management (PRISM)
Rural County Representatives of California

cc: Legislative Affairs, Office of the Governor
Evan Fern, Office of Senator Cortese
Claire Wendt, Assembly Insurance Committee
Bill Lewis, Assembly Republican Caucus

JS:am