

State of Connecticut
Connecticut General Assembly
Attn: Labor and Public Employees Committee
Legislative Office Building, Room 3800
Hartford, Connecticut 06106

**Re: Raised Senate Bill No. 61 - Session Year 2010;
An Act Removing the Requirement of Employer or Insurer Preapproval for the Provision of
Certain Medical Examinations and Treatment to Injured Workers**

Good afternoon ladies and gentlemen of the Connecticut General Assembly. My name is Eric Desmond, and I am an attorney licensed in the State of Connecticut. I have become familiar with the workers' compensation system due to the fact that my wife, Sandhya Desmond, suffered a workplace injury, which required according to her physicians quick and decisive treatment. Despite the fact that liability has been long accepted by the employer, care has been delayed, or denied, on many occasions. The delays have contributed significantly to the worsening of the condition. In this regard, I am submitting testimony in relation to Senate Bill 61, which is intended to address the problem of undue delay of medically necessary treatment.

In 1913 the Connecticut legislature enacted the Workers' Compensation Act (hereinafter, the "Act"), with the purpose of "... compromis[ing] an employee's right to a common law tort action for work related injuries **in return for relatively quick and certain compensation.**"¹ The Act compromised the constitutional rights of a segment of the Connecticut citizenry, otherwise enshrined at Article First, § 10 of the Connecticut Constitution.² The Connecticut supreme court, however, did note in that case that "the legislature [could not] abolish a legal right existing at common law prior to 1818 without also establishing a 'reasonable alternative to the enforcement of that right.'" Senate Bill 61 is an attempt to ensure that this reasonable alternative remains 'reasonable,' especially given that undue delays in treatment not only lengthen recuperation time but cause increased impairment and permanent incapacity.

The Act clearly "was designed to hold the employer liable for job related injuries, without regard to fault; Klapproth v. Turner, 156 Conn. 276, 279, 240 A.2d 886 (1968); so that employees may obtain relatively quick and certain compensation, while employers generally avoid the risk and expense of litigation stemming from common law tort actions. Mingachos v. CBS, Inc., [196 Conn., 91, 97, 491 A.2d 368 (1985)]." Suarez v. Dickmont Plastics Corp., 229 Conn. 99, 114-15 (1994). The goal is to deliver medically necessary care to injured workers, in this no fault system, to return them to work as quickly as possible. The no-fault system was designed to save money, and returning injured workers to work saves money, Thus, the WCC has held that the

[Compensation Review B]oard has been unequivocal on this issue. 'Our workers' compensation system is designed . . . [to] provid[e] medical care for injured workers, diagnos[e] their conditions and degrees of impairment, and facilitat[e] their return to work once they are physically ready.' McCarthy v. Hartford Hospital, 5079 CRB-1-06-3 (March 8,

¹ Martinez v. Southington Metal Fabricating Co., 101 Conn. App. 796, 800 (2007) (emphasis added).
² Mello v. Big Y Foods, Inc., 265 Conn. 21 (2003).

2007). . . . The Supreme Court has also opined on many occasions that the General Assembly enacted Public Act 93-228 for the purpose of reducing the cost of the workers' compensation system, Pasquariello v. Stop & Shop Cos., 281 Conn. 656, 674 (2007); Rayhall v. Akim Co., 263 Conn. 328, 348 (2003). Obviously, an employee who returns to health and returns to work reduces the cost of workers' compensation."³

The purpose of the Act seems so clear that it is hard to believe employer's, and insurer's, motivations of money have caused such divisiveness in the processing of claims. At the same time, such divisiveness is at least understandable in the face of potential employee fraud. I believe that this is why the WCC is, as the legislature intended, the arbiter of claims for compensation under the Act. Passage of Senate Bill 61 reaffirms this fact.

Now, please let me tell you briefly (but obviously not wholly) about the experience of my wife, Sandhya Desmond. Sandhya is a highly-educated, intensely-motivated physician assistant. She was injured on December 30, 2004, while six-months pregnant, and suffered bilateral nerve injuries to her upper extremities (hands/wrists). The injury has been long accepted as compensable. Despite this fact, she has suffered delays in treatment, or had treatment denied to her. Treating physicians have stated to a medical certainty that such delay, and denial, has rendered her permanently disabled, and permanently in pain. She is in constant pain, remains unable to work, and has been forced to endure indignities that any person would find unconscionable.

Sandhya has many times faced undue delay in the delivery of medical care, or outright denial. For example, the employer filed a Form 43 following Sandhya's giving birth to our daughter. The employer called birth an 'intervening trauma,' and relieved itself of liability under the Act. The lack of certainty as to authorization and payment resulted in the surgeon approving the cancelation of the prescribed, previously approved and medically necessary surgery. The surgeon was an employee of the same hospital as Sandhya, and the surgery was to be performed on its premises. The employer's attorney then immediately filed a Form 36, seeking the termination of all benefits under the Act because Sandhya allegedly delayed the performance of the surgery. Thus, the employer unilaterally revoked benefits, without any medical substantiation, and then sought removal of all benefits for the delay its own unilateral action caused.

A second example again involves the employer filing a Form 36 seeking the removal of all benefits. On August 26, 2009, the employer filed a Form 36 seeking to discontinue all medical treatment, including acupuncture. The hearing on the Form 36 was held on October 10, 2009, and my recollection is that the commissioner denied the employers request. The employer then authorized treatment, specifically acupuncture, on November 3, 2009, nearly one month after its request was denied. Sandhya underwent the treatment, at the rate authorized, from the first available appointment with the treating until the authorization expired by its own terms, except for the period of time the physician was on vacation. The employer then filed a Form 36 seeking the removal of all benefits again, on February 10, 2010, alleging that Sandhya unduly delayed the acupuncture treatments. The alleged undue delay appears to be during the timeframe that the first Form 36 was pending, and no authorization had been issued, and during the physician's Christmas holiday. Such forced hearings, and denials of medically necessary care are more divisive than necessary and antithetical to the Act itself.

As to empowering the commissioners to make decisions as to medical necessity, the concerns of opponents to Senate Bill 61 may have some merit. And, I do agree that physicians should make decision as to

³ Houlihan v. City of Waterbury Police Department, 5141 CRB 5-06-10 (September 26, 2007).

treatment, and what is medically necessary under the particular circumstances of any case. I do, though, reject the assertion that physicians should have such authority to the total exclusion of commissioners. It has long been held that the commissioner decides whether contested medical care is reasonable and necessary, based on all available evidence, at a hearing.⁴ The concern of said opponents appears then not to be the holding of hearings themselves, but that the companies they represent should not bear the burden of first challenging medical treatment because this costs them money. They argue that obligating injured workers, many of whom are unrepresented or may be poorly educated, to request hearings to reinstate treatment is proper.

In the first several years of the administration of Sandhya's accepted claim, she was subjected to a large number of utilization reviews. In one instance, the employer sought the removal of Sandhya's first treating surgeon, arguing that a neurologist (whom had already observed Sandhya) would be more appropriate as a treating physician. The switch was agreed to at a hearing. Immediately thereafter the surgeon was removed as a treating physician, and then all treatment recently prescribed by her was put through utilization review. The utilization reviewer did not speak to the surgeon, but instead spoke to the neurologist about said treatment. The treatment was determined by the utilization reviewer not to be medically necessary because the prescribing surgeon had been de-authorized as a treating physician, and because the neurologist had not been 'administratively facilitated' as the treating physician by that time (though he did agree with the treatment plan). Thus, the employer created an administrative delay in authorizing the neurologist to be Sandhya's treating physician, took advantage of that delay to seek a utilization review, and then accepted opinion of the reviewer to decertify that medically necessary care. The dilatory appeals process began as the regulations require. The final internal appeal was to the chief executive officer of the medical care plan who, not being a physician, refused to reverse the decertification of care. It is unfortunate that the CBIA's concern that "[o]nly healthcare providers should make determinations regarding the necessity of medical care" does not extend to executives of medical care plans who make these very same decision, but with a vested interest to be served. A second utilization review similarly resulted in the loss of medically necessary care when the utilization reviewer called the treating surgeon one time, when she was not in the office. The reviewer held that because of the inability to talk to the treating physician, the care was not certifiable as medically necessary. The employer accepted the reviewer's recommendation, and the regulatory appeal the process began and ended with the non-physician refusing to reinstate care.

Utilization reviews in the workers' compensation context only seem to improvidently disrupt care, and are not reversible by commissioners except under an abuse of discretion standard. Even the WCC Chairman has recognized that this process heavily favors the employer, which "already enjoys a superior bargaining position in the . . . administration of compensation claims."⁵ Thus, endowing commissioners with the authority

⁴ Covert v. Patterson, No. 4094, CRB-03-99-08 (September 29, 2000).

⁵ The WCC Compensation Review Board recognizes "a flaw inherent in the regulatory dispute resolution process . . . [in that it] creates the potential for a person with both no medical background and a vested interest in the employer or insurer to make the ultimate determination over whether a procedure should be authorized, rather than a qualified practitioner in the appropriate medical field of specialty;" (b) found "it troubling that the review process set forth in § 31-279-10(e) so favors a party who already enjoys a superior bargaining position in the employment relation and the administration of compensation claims;" and (c) has determined that the WCC, "as an administrative review body, . . . lacks the authority to hold that § 31-279-10(f) is invalid based on constitutional principles of due process." Figueroa v. Rockbestos Company, Case No. 4633 CRB-1-03-2 (2004).



under the Act, which the utilization review process endows upon the medical care plan itself, seems proper. One would hope that there is less to fear from an independent commissioner than a non-physician executive with a 'vested interest in the employer or insurer.' No one should be subjected to the loss of care in the same manner that Sandhya has lost it, and certainly not with the employer having been warned of the medical consequences of such denials and delays.

Senate Bill 61 does not "erode the due process rights of . . . employers" as the DAS suggests, nor does it "unfairly compromise[] the legitimate interests of employers/insurers" as the Insurance Association of Connecticut suggests. Senate Bill 61 recognizes that the Act was intended to ensure delivery of "all necessary and appropriate medical treatment" to injured employees.⁶ Pointedly, as to utilization reviews, affirming the authority of the commissioners under the Act would provide protections afforded under the Pennsylvania Workers' Compensation Act, which provides that "[i]f the [utilization reviewer] finds in favor of the insurer, the employee may appeal the determination to a workers' compensation judge for a **de novo review . . .**" American Manufacturers Mutual Ins. Co. v. Sullivan, 526 U.S. 40, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999) (emphasis added). Pennsylvania has not imploded, and I question the fear-mongering of the Insurance Association of Connecticut that extending such protections to Connecticut citizens will result in "clearly excessive, even inappropriate treatment" and "bring harm to the system . . . [and the] injured worker."

In conclusion, for my part, I support Senate Bill 61 to the extent that the legislature deems that it promotes the legislative trade-off envisaged by the Act. The principal goal of the Act was to provide an administrative enforcement mechanism to address workplace injuries, and it ". . . compromis[ed] an employee's right to a common law tort action for work related injuries **in return for relatively quick and certain compensation.**"⁷ Reducing litigation, and the expense to employers of such litigation, is found in the exclusivity of the Act. Ensuring that employees, under a no-fault system, receive relatively quick and certain compensation, is found in the right of the employee to be treated by a physician and in the authority of commissioners to adjudicate the issue of medical necessity. Reducing the integrity of the system by permitting employers, and insurers, to put money ahead of patient care, just to save money, only impairs the delivery of 'relatively quick and certain compensation' in the form of medical treatment. This obstructs the goal of returning injured employees to work. If Sandhya had received the care that her physicians both prescribed and pleaded for, for years, she might not be considered to a medical degree of certainty to be 100% disabled without such treatment, not forced to relinquish her career or joys of motherhood, and not be in constant pain. If Senate Bill 61, or any other legislative enactment, achieves such a goal, and prevents such a tragedy from happening again, it is hard to see the legitimate argument against it.

Thank you for your time and consideration.

Very truly yours,



Attorney Eric Desmond

⁶ See <http://www.wcc.state.ct.us/gen-info/if-injured/medcare.htm>.

⁷ Martinez v. Southington Metal Fabricating Co., 101 Conn. App. 796, 800 (2007) (emphasis added).

