

## DEPARTMENT OF INDUSTRIAL RELATIONS

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February 23, 2017

Christine Baker  
Director  
Department of Industrial Relations  
1515 Clay Street, 17th Floor  
Oakland, CA 94612

Re: Role of the Workers' Compensation System in the 12/2/2015 San Bernardino  
Mass Shooting

Dear Director Baker:

In light of complaints and inquiries concerning this incident and especially out of concern for the injured workers, you asked us to take a look at the how the County of San Bernardino and the workers' compensation system responded following the December 2, 2015 mass shooting incident. Because most of the victims were County employees attending a work-related function, workers' compensation was the primary means through which medical care and other benefits were provided to those victims. The enclosed report summarizes why this was the case and how the County, as a self-insured employer, attended to the needs of its employees and provided benefits authorized under the workers' compensation laws. Included is an overview of the workers' compensation system and how it addresses liability for job-related injuries.

The incident generated 100 workers' compensation claims, 96 by County employees or their survivors and four involving other employers. Our study focused on the County's employees and the County's handling of their claims. We reviewed summaries of claims and treatment decisions forwarded to us by the County, and we also reviewed information available from independent sources, including Independent Medical Review decisions and Workers' Compensation Appeals Board case files. Our review shows that of the total 2,146 treatment decisions, 90 percent were approved and 3 percent received modified approval.

As the claims matured, the County increased its scrutiny of treatment requests leading to some modifications and denials. A portion of those requests were appealed in the Independent Medical Review (IMR) system. While the IMR decisions generally upheld the County's actions, often because doctors had failed to document or fully explain their requests, employees who were still suffering and expected their doctors' recommendations to be followed were frustrated by the denials. More recently, the County took the positive step of hiring a nurse case manager to serve as an ombudsperson to help facilitate the presentation of treatment requests in a way that will satisfy the workers' compensation system's treatment guidelines. We think this would be an appropriate first step when dealing with an incident of this nature and that having someone

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available throughout to facilitate the approval of claims and treatment requests between providers and claims administrators would likely reduce frustration experienced by some of the victims.

Very truly yours,

A handwritten signature in blue ink, appearing to read "G. Parisotto", with a long horizontal stroke extending to the right.

George Parisotto  
Acting Administrative Director  
Division of Workers' Compensation

Enclosures:

The Role of California's Workers' Compensation System in the San Bernardino Shootings  
Memo on Data Consulted for San Bernardino 12/2/2015 Incident Report

## The Role of California's Workers' Compensation System in the San Bernardino Shootings

### Introduction

On December 2, 2015, two individuals armed with semi-automatic weapons entered the Inland Regional Center in San Bernardino, California, and opened fire on a group of about 80 people gathered for training sessions and a holiday party. The shootings left 14 dead and 22 others seriously injured. The two shooters (a county employee who had been present at the start of the sessions and his wife) also left explosive devices in the Center before fleeing. Both were killed later in a shootout with pursuing law enforcement officers. Two officers also suffered injuries during that gunfight.

Almost all of the victims inside the Center were employees of the County of San Bernardino ("County"). 12 died almost immediately, and two more died at a makeshift triage center set up near the building. Seriously wounded survivors were transported to area hospitals. Others suffered physical injuries that did not require immediate emergency treatment, and many of those present, as well as their families, friends and other co-workers, were traumatized by the event.

In our system of justice, the perpetrators would bear ultimate responsibility for the costs associated with this terrorist incident. However, the shooters had negligible assets, which left the victims to look to other sources to pay for medical treatment and provide compensation for their injuries. Typically, the victims might look to the host of an event or owner of the premises for insurance coverage to pay for these costs. However, since the shootout occurred in a work-related training session conducted on behalf of the County, the County's employees were both entitled and required to seek compensation from the County through California's workers' compensation system.

### Overview of Workers' Compensation

California's current system of workers' compensation was established pursuant to a constitutional amendment first adopted in 1911. Article 14, Section 4 of the California Constitution now states in part as follows:

The Legislature is . . . vested with plenary power . . . to create, and enforce a complete system of workers' compensation, . . . to create and enforce a liability on the part of [employers] to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party. A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workers in the course of their employment . . . ; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage in all its aspects . . . ; full provision for otherwise securing the payment of compensation; and full provision for vesting power, authority and jurisdiction in an administrative body . . . to determine any dispute or matter arising under such legislation . . .

Workers' compensation exists in this and other states as a system for determining liability, providing compensation, and adjudicating disputes for claims and cases involving job-related deaths, injuries and

illnesses. The system governs only the liability of employers to their employees, and it operates as a mandated alternative to the tort principles and litigation process that govern civil liability and damages for personal injuries in most other contexts. The monetary compensation available through workers' compensation is fixed and far less than what might be recovered in a civil action. However, the trade-off for this limitation is that workers' compensation is provided on a no-fault basis, *i.e.* without regard to the parties' relative fault in causing the death, injury or illness; the employer or insurer must bear all the costs of evaluating and resolving claims as well as providing monetary compensation and treatment; and, when functioning properly, the treatment and compensation is relatively swift and certain, rather than requiring years of litigation to resolve.

All California employers are required to secure compensation for their employees through this system, either by obtaining a workers' compensation insurance policy or by obtaining a certificate to self-insure from the Director of Industrial Relations. Like all insurance programs, premiums are calculated to cover and share all anticipated costs. Self-insured employers (typically larger private employers as well as public agencies like the County of San Bernardino) often purchase reinsurance to cover higher claim costs that arise in catastrophic situations involving multiple serious injuries. Employers also pay annual assessments to fund the public costs of administering California's workers' compensation system (making it a "user-funded" system).

Benefits: In a typical job-related illness or injury case, the employee is entitled to medical treatment and services that are reasonably required to "cure and relieve . . . the effects of [the] injury". The employee is also entitled to up to two years of temporary total disability benefits based on a percentage of his or her wages. Once the employee's condition becomes "permanent and stationary," the employee is entitled to permanent disability benefits based on a percentage of wages and on the amount of permanent disability (from 0 to 100%) caused by the job illness or injury. A comprehensive medical evaluation that assesses the lasting effects of the injury in relation to the employee's overall medical history and condition is used to determine the percentage of disability, with the employee's age, occupation, and lost earning capacity are also factored into that determination.

Unlike personal injury cases, where amounts of compensation and damages awarded are largely within the discretion of a judge or jury, workers' compensation is, by design, very detailed and formulaic in specifying what compensation is due for specific types of injuries. American Medical Association guidelines are used to establish permanent disability rating schedules, and, similar to Medicare, there are extensive regulatory guidelines governing the scope and extent of available medical treatment, as well as Official Medical Fee Schedules governing what must be paid for that treatment.

Family members and dependents of employees are not entitled to any form of compensation through workers' compensation unless the employee suffers a job-related death. In those cases, the spouse, minor children, and other dependents of the decedent are entitled to prescribed death benefits of up to \$320,000 depending on the number of dependents (with the cap sometimes exceeded due to the ongoing dependency of children). In addition, the employer is liable to pay or reimburse a claimant for up to \$10,000 for burial expenses, regardless of whether there is a dependency relationship.

Procedure: A workers' compensation claim ordinarily begins when the employee is provided with a claim form referred to as a DWC-1. The employer is required to provide this form within 24 hours after becoming aware of a potential claim, either because of something communicated by the employee or through other available information. Once the employee submits a claim, the employer has 90 days within which to investigate and then accept or deny the claim. Normally the employer turns over the claim to its insurer, or in the case of a self-insured employer such as San Bernardino County, to a claims administrator. The insurer or claims administrator then handles all of the employer's responsibilities, including the responsibility to pay any benefits that are due.

While the investigation is pending and the claim is subject to denial, the employer must authorize and pay for up to \$10,000 in necessary medical treatment. Once the claim is accepted, the employer (through the insurer or claims administrator) assumes responsibility to provide and pay for required medical treatment as well as the weekly wage replacement benefits due to the employee. The employer may also assert control over the employee's medical treatment, usually by directing the employee to seek treatment through an established Medical Provider Network and by requiring documentation to show that a particular procedure or course of treatment is necessary and appropriate for the employee.

Similar to Medicare and private health insurance plans, the employer must have a utilization review (UR) program to help ensure these decisions are made in accordance with evidence-based expert medical guidelines.<sup>1</sup> Initial decisions to approve a treatment request can be made by a claims administrator. However, a decision to deny or modify a request can only be made by a licensed physician with expertise in the clinical issues raised. This level of review is sometimes referred to as "elevated UR." There are strict time limits for making UR decisions, and a treating physician's failure to provide an adequate clinical rationale or documentation to support a request falling outside the established treatment guidelines will lead to denials on that basis.

If a formal UR decision results in the denial, modification, or delay of a recommended treatment, the employee or treating physician has a further right to appeal that decision to the Administrative Director of the state's Division of Workers' Compensation, through a process known as Independent Medical Review (IMR). In IMR, another medical expert, acting on behalf of the state and following the same expert medical guidelines, reviews the documentation and determines whether the requested treatment is necessary and appropriate for the employee.

Accepted workers' compensation claims can be administered and resolved without ever going through formal adjudication. However, in the event of an unresolved dispute over issues such as whether an employee suffered a job-related illness or injury, the extent of that illness or injury, or the amount of compensation due, a party can start a case by filing an Application for Adjudication of Claim (commonly referred to simply as an "Application") with the state's Division of Workers' Compensation. Disputed issues can then be adjudicated before a Workers' Compensation Administrative Law Judge (WCALJ) in accordance with procedures and standards governed by the Workers' Compensation Appeals Board (WCAB). The trial court system is administered by the Division of Workers' Compensation at 24 venues across the state and handles over 300,000 cases a year. WCALJ decisions can be appealed to the WCAB through a process known as a Petition for Reconsideration, and WCAB decisions can be reviewed by one of California's courts of appeal.

Employees may but are not required to be represented by attorneys in these cases. Attorneys cannot charge employees directly for representation but may recover a percentage fee of up to 15% of the benefits due to the employee, plus hourly fees for attending depositions, with all fees subject to approval by the WCALJ and paid directly by the employer.

### San Bernardino County's Immediate Response to the Incident

In the immediate aftermath of the shootings, first responders provided immediate care and transported

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<sup>1</sup> These guidelines are set forth in an extensive set of regulations known as the Medical Treatment Utilization Schedule (MTUS). For treatments or conditions that are not fully addressed in the MTUS, other nationally-recognized evidence-based treatment guidelines may be consulted, including the Occupational Medicine Practice Guidelines established by the American College of Occupational and Environmental Medicine (ACOEM) and the Official Disability Guidelines (ODG) published by the Work Loss Data Institute.

surviving victims to area medical facilities, without regard to who was responsible or authorized to provide or pay for those services. According to County representatives, senior County leaders, including members of the Board of Supervisors and County executives, met that evening to discuss and implement response mechanisms, and at that time learned that nearly all the victims and one of the shooters were employees of the County's Environmental Health Services division attending an off-site training event.

The County reports that it established a team of liaisons to interact with each victim or victim's family individually and address the full range of potential concerns, including pay, benefits, sick leave, workers' compensation claims, and recovering vehicles and personal effects from the training site or other work locations. Claim files were created for each employee believed to have been present at the incident, and the County says that it initiated outreach to known victims and families through phone calls and home and hospital visits. The County reports that within a few weeks after the incident the FBI conducted a closed-door Family Assistance Center event for victims and families, with representatives from federal, state, and local agencies, as well as unions and local charities present to offer a range of information and assistance. Thereafter, there were several meetings with affected employees to discuss benefits and other assistance, with many of these meetings taking place at a "safe house" where victims could gather without drawing media attention.

#### Handling of Workers' Compensation Claims related to the Incident

A review of available data<sup>2</sup> shows nearly 100 workers' compensation claims that may have been related to this incident (based on the date of injury, general location, and description). The County's own records show 96 claims by County employees or their survivors, which break down further into 13 death benefits' claims, 58 injury claims that were accepted by the County, and 25 denied claims. The earliest of these claims was submitted five days after the incident and the latest nearly 11 months later.

Death Benefits Claims: 13 of the 14 decedents were county employees,<sup>3</sup> and the County reports that it identified family members or other contacts from personnel records, and assisted them in filling out forms and obtaining supporting documentation (such as marriage and birth certificates needed to establish dependency relationships). The County says that it paid the allowable funeral costs of up to \$10,000 through the workers' compensation system, and that additional funds to cover higher costs were available through the California Victims Compensation Board. Nine death benefits claims were approved and benefit payments to the eligible dependents commenced within two to four months after the incident.<sup>4</sup> Two claims are open but remain unresolved pending proof of dependency by those claiming entitlement to benefits. For the other two, burial expenses were paid, but no dependents have been identified or come forward to claim monetary benefits.<sup>5</sup>

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<sup>2</sup> See attached memo on data consulted for purposes of preparing this report.

<sup>3</sup> The other decedent was a vendor working at the Inland Regional Center.

<sup>4</sup> The disposition of these claims is shown in formal Stipulations filed with the Division of Workers' Compensation and approved by a WCALJ. This is a necessary step to confirm the identity of dependents eligible for death benefits and the amounts due. As with temporary and permanent disability benefits, death benefits are paid out on a weekly basis until the maximum is reached or the parties agree to a discounted lump-sum payout.

<sup>5</sup> As of mid-January of 2017, the County reported payouts of over \$500,000 in death and funeral expenses benefits, with future incurred liability of approximately \$4.6 million.

Accepted Claims from Survivors: Overall the County accepted 58 workers’ compensation claims filed by employees who survived the shooting. The accepted claims included employees with both physical and psychological injuries and those with only the latter. The County has provided one chart listing all treatments and bills that were authorized and paid as a matter of course without additional scrutiny. Another chart lists the requests that went through Utilization Review (UR), including requests reviewed and approved by the County’s Department of Risk Management and others that went through elevated UR by medical experts associated with County’s UR Plan.

The chart of routine approvals lists 1321 items for 38 employees at an aggregate cost of approximately \$1.6 million. Nearly 70% are categorized as bills for physician services, with the balance covering prescriptions, hospital and surgical costs, physical therapy, and prosthetics.

The chart of UR decisions shows that the County was receiving and approving prospective requests for treatments, tests, prescriptions, and medical equipment within days of the incident. The County was routinely approving nearly all requests through approximately mid-April of 2016, by which time a substantial volume of medical reports had been accumulated for many of the survivors with serious injuries. The County then began submitting more of the requests through elevated UR.<sup>6</sup>

The County’s chart documents 825 UR decisions that break down as follows:

Total Approved	606 (73%)
[Approved by County Risk Mgt.	424]
[Approved in Elevated UR	182]
Modified Approval	73 ( 9%)
Denied	144 (17%)
Other <sup>7</sup>	2

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Adding the routine approvals and UR decisions together yields a combined total of 2146 treatment decisions that break down as follows:

Total Approved	1927 (90%)
Modified Approval	73 ( 3%)
Denied	144 ( 7%)
Other	2

47 of the 58 employees with accepted claims had one or more requests that went through UR. The numbers vary widely, from one employee with over 150 requests going through UR, another with nearly 70, eight with between 21 and 50 requests, fifteen with 11 – 20 requests, twenty-two with 1-10

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<sup>6</sup> 75% of the Utilization Review evaluations fell within categories of requests for particular types of pharmaceuticals, psychiatric treatments, physical therapy, or durable medical equipment. Most UR decisions were made within a few days after receipt of the request, and less than six percent of the decisions, including decisions made through elevated UR, took longer than a week.

<sup>7</sup> One item lists the decision as “disputed liability”, and another provides no information about the request or decision.

requests, and nine with no requests.<sup>8</sup> 27 of the employees had at least one denial or modification of a request. Eleven employees have appealed one or more of their denied requests through the Independent Medical Review (IMR) process. Through the first week of January of 2017, a total of 19 substantive IMR decisions had been issued, addressing 68 separate items.<sup>9</sup> Collectively, these decisions upheld 37 UR decisions to deny or modify a request, overturned 9 UR decisions, and did not review 22 others because the requests had been authorized by the County sometime after the initial denial.<sup>10</sup>

Without access to UR files and decisions it is difficult to make assumptions about what caused some requests to be accepted and others to be modified or denied by the County. However, a review of the IMR decisions, which are available, offers some insight. Typically, the problem identified in IMR decisions was a provider's failure to provide an adequate clinical rationale or appropriate documentation to justify requests for extended or new prescriptions, extended or alternative therapies, or special equipment that veered away from standard medical treatment guidelines and limits. There also appear to have been a fair number of duplicate or overlapping requests. The fact that several requests were denied and then authorized upon further review suggests that better communication by providers to the County's claims administrators and better documentation at the time requests were first submitted might have reduced the number of UR denials and IMR requests.<sup>11</sup>

19 of the employees with accepted claims have filed Applications for Adjudication before the DWC/WCAB. All are represented by attorneys. Only seven of the cases reflect litigation activity in the form of requests for hearings before a WCALJ on claims administration or benefit rights. Two involved Temporary Total Disability payments (continuation or amount), one involved the choice of treating physicians, four (including two in one case) involved claims of untimely or ineffective denials of treatment requests, and one involved obtaining an evaluation of the employee's permanent disability. Six of these disputes appear to have been resolved without need for a trial. One dispute over late denial of treatment went to trial in early October and remained undecided at the end of January. In the other case, the County requested a hearing on getting a medical evaluator, with that hearing still pending.<sup>12</sup>

Denied Claims: The County denied the workers' compensation claims of 25 other employees alleging psychological injury arising out of the incident. According to the County, a common thread among these denials was that the employees were not present at the training center when the incident occurred. Three of the denials were appealed through the filing of Applications for Adjudication with the DWC/WCAB. One was settled by Compromise and Release for \$7,000; one was voluntarily dismissed without prejudice; and the other one remains open. The low rate of appeal and results of those appeals thus far

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<sup>8</sup> The chart identifies one employee for whom treatment and benefits were authorized but declined.

<sup>9</sup> We have not been able to discern whether each IMR request corresponds to an individual UR request or whether some involve combined UR requests.

<sup>10</sup> There were also two dismissals, one because the treatments were authorized when the IMR request was filed, and the other because the type of UR decision being appealed was not subject to IMR.

<sup>11</sup> The fact that a large percentage of the denials was concentrated among a relatively small number of providers further suggests that this was a particular problem with certain providers and not typical or characteristic of interactions as a whole.

<sup>12</sup> Many of the cases were filed within a few months after the incident and with no indication of a genuine dispute or need to litigate any issue in the claim. Although attorneys may file applications to protect the clients' right and ability to litigate future disputes, they also place the employee and employer in an adversarial relationship that may further hinder communication and cooperation.

suggests that the denials were largely accepted as appropriate decisions by the claimants and their advocates.

### Conclusion

The County reported that it had paid over \$ 4 million for benefits and medical care as of mid-January of 2017, and had a reserve amount of nearly \$ 22 million for continuing and future costs. The County's Department of Risk Management continues to administer the claims, but reinsurers are responsible for costs in excess of \$ 2 million, and representatives of the reinsurers have also reviewed case management decisions. Looking at the volume of treatment requests as a whole, denials or modifications of requests that did not fit within MTUS guidelines were clearly an exception to the overall pattern of treatment requests being routinely accepted or approved through UR.

Persons who suffered injuries or other financial losses due to the incident are not limited to claiming workers' compensation benefits. Victims can also seek, and some have received, crime-related expense reimbursements from the California Victim Compensation Board.<sup>13</sup> In addition, we understand that other special funds were set up by other agencies and local charities to aid victims of the mass shooting.

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<sup>13</sup> Expenses that potentially may be covered by this Board include income loss, medical and dental treatment, mental health services, residential security, home or vehicle modifications for disabled victims, relocation, and funeral and burial expenses.

## **Memo on Data Consulted for County of San Bernardino 12/2/2015 Incident Report**

### **San Bernardino Claims Data:**

On January 20, 2017, San Bernardino County sent to the Department of Industrial Relations (DIR) information on the 96 claims filed to date. This information contained the claim status, claim type, county division, claim dates, and claim paid and incurred amounts.

These claims were verified for accuracy with information previously sent to the Workers' Compensation Information System (WCIS) First Reports of Injury and Subsequent Reports of Injury (FRO-SROI) database for San Bernardino claims with a date of injury of 12/2/2015. WCIS found 100 claims that appeared to match the incident. However, the four claims that did not match the County of San Bernardino's list were found to belong to different employers, with injuries similar to those experienced by employees of the County of San Bernardino.

### **San Bernardino Utilization Review (UR) Data:**

San Bernardino County also sent DIR information on the UR activity for the injured workers. This information contained 830 rows of data in a master file, a summation and separate entries for each injured worker with at least one UR. The master file record contained the claim information, request date, request completed date, request category and type, name of the requesting provider, the decision, additional information on the appeal, and additional information on the decision. Five records in the master file did not have a UR decision.

### **San Bernardino Medical Data:**

San Bernardino later provided DIR with a list of treatments approved and bills paid for treatments not subject to UR.

### **Independent Medical Review (IMR) Data:**

DIR reviewed the Maximus Federal Services (MFS) Entellitrak system to identify all requests for IMR and IMR decisions through mid-January. 21 separate IMR determinations, including two dismissals without review and 19 substantive decisions, were obtained and reviewed.

### **San Bernardino County Cases and Electronic Adjudication Management System (EAMS) Data:**

Using the claim data received from San Bernardino County, DIR verified and reviewed each WCAB case in the EAMS system that was filed on behalf of an employee with an accepted or denied claim arising out of the incident on 12/2/15. (Death benefits cases were not reviewed.)