1999 HOUSE HUMAN SERVICES

HB 1136

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1136

House Human Services Committee

❑ Conference Committee

Hearing Date 01-11-98

Tape Number	Side A	Side B	Meter #
1	x		0
Committee Clerk Signature			

Minutes:

Chairwoman Price opened the hearing on HB 1136 at 10:00.

Mr. John Olson, ND Board of Medical Examiners,

(see attached written testimony)

Mr. David Peske, ND Medical Association, Is in favor of the bill. He is lobbyist and represents members who need controls.

Rolth Sletten, ND Board of Medical Examiners,

(see attached written testimony)

Ms. Bonnie Staiger, ND Psychological Association, is in favor of the bill.

Mr. Tom Smith, HIAA, Bismarck, ND,

(see attached written testimony)

Mr. Dan Ulmer, Blue Cross Blue Shield of ND, Is neutral on the bill. They are against mandates because they lose control.

Mr. Chis Edison, ND Insurance Dept. is neutral on the bill. Controls are necessary, however, there are exceptions to every situation.

Chairwoman Price closed the hearing on HB 1036 at 10:50.

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1136

House Human Services Committee

❑ Conference Committee

Hearing Date January 19, 1999

Tape Number	Side A	Side B	Meter #
4		X	14.5 - 18.9
Committee Clerk Signature Susann Lindteigen			

Minutes:

Committee Discussion:

Rep. CLARA SUE PRICE asked if Workers Comp Burearu would fall under this bill and stated another companion bill may be in the Senate.

JUDY LEER, Attorney, Workers Compensation Bureau submitted testimony and amendment (attached).

Rep. ROXANNE JENSEN asked to have Workers Compensation Bureau come in to present their views on the bill.

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1136

House Human Services Committee

❑ Conference Committee

Hearing Date January 26, 1999

Tape Number	Side A	Side B	Meter #
2		X	16.1 - 47.4
Committee Clerk Signature	Susanne Lindstrom		

Minutes:

Rep. CLARA SUE PRICE stated this is information from the Workers Compensation Bureau for inclusion in Chapter 26.

TERRY TRAYNOR testified (proposed amendment from Workers Compensation attached) we are not opposed to the utilization review portion of what we do in managed care with workers compensation. We are not opposed to having those doctors licensed. We would do so voluntarily. Discussed the proposed amendments. Workers Comp, we are a monopoly, we have no competition. As a state agency, we are not regulated by the insurance commissioner. It puts this into Chapter 65. The effective date is August 1, 2000.

Rep. CLARA SUE PRICE asked when are the RFP's going out? TERRY TRAYNOR stated the RFP will go out this spring. The utilization review is pre-certification or diagnostic imaging tests. Medical cost containment does not allow CO-pays in managed care in Workers

Compensation. Managed care is different because the injured worker cannot be subject to paying to go in because they gave up that right to sue their employer in exchange for sure and certain relief. It wouldn't be sure and certain if the injured worker had to pay a CO-payment.

Rep. WANDA ROSE asked about the last sentence on page 2 of the amendments and how that differs from utilization review? TERRY TRAYNOR sated that Chapter 65-05-28 reads the independent medical exam must be for the purpose of review of the diagnosis, prognosis, treatment, or fees. We never used one for fees. Rep. WANDA ROSE asked for 65-02, Sections 20 and 21 be read. TERRY TRAYNOR stated the bureau must establish managed care program with a third party administrator and a contract for administration of managed care program. Rep. WANDA ROSE asked who is a managed care administrator? TERRY TRAYNOR stated it would be the company that we contract with to perform these services. We currently contract with ENCOMPASS, most of the facilities are in Minneapolis. They have a doctor and nurses on staff that preauthorize an MRI, diagnostic imaging test. We have a bill review which is POST, the treatment of LOOK, to ensure that the Bureau is not being billed for services that are unrelated to the work. That's generally where we see the disputes in Workers Compensation.

Rep. CLARA SUE PRICE explained we did not discuss Workers Comp in the regular hearing on insurance coverage. I had questions to see if there would be any crossover. When I talked to the attorney at Council for Workers Comp, they said it could be argued. We had no opposition for this. We didn't want anything in Chapter 26 to confuse the issue. That is why they brought the amendment for chapter 65.

Rep. WANDA ROSE asked is the independent medical exam paper work or is it an actual hands on medical exam by a second opinion? TERRY TRAYNOR stated it can be both. It can be a file review but if they need an examination they can request one further.

Rep. AMY KLINISKE moved to ADOPT AMENDMENTS proposed by Workers Comp.

Rep. ROXANNE JENSEN second the motion

Committee Discussion.

ROLL CALL VOTE #1: 13 yeas, 2 nays, 0 absent

Rep. WANDA ROSE moved to FURTHER AMEND to accept amendments as written and exclude the last sentence. The rationale is, if indeed there is such a small number that are actually being reviewed, there would be no problem with the fact that we are eliminating that particular section. Its such a small number that it's not going to change the content of this bill.

Rep. SALLY SANDVIG second the motion.

ROLL CALL VOTE #2: 4 yeas, 10 nays, 1 absent

Motion Failed.

Rep. CHET POLLERT moved DO PASS As AMENDED

Rep. TODD PORTER second the motion

Further Committee Discussion.

ROLL CALL VOTE #3: 11 yeas, 3 nays, 1 absent

CARRIER: Rep. ROBIN WEISZ

FISCAL NOTE

(Return original and 10 copies)

Bill/Resolution No.: _____ Amendment to: HB 1136

Requested by Legislative Council Date of Request: 1-29-99

1. Please estimate the fiscal impact (in dollar amounts) of the above measure for state general or special funds, counties, cities, and school districts.

   Narrative:

   See attached.

2. **State** fiscal effect in dollar amounts:

	1997-99 Biennium		1999-2001 Biennium		2001-03 Biennium	
	General Fund	Special Funds	General Fund	Special Funds	General Fund	Special Funds
Revenues:						
Expenditures:						

3. What, if any, is the effect of this measure on the appropriation for your agency or department:
   a. For rest of 1997-99 biennium: _____
   b. For the 1999-2001 biennium: _____
   c. For the 2001-03 biennium: _____

4. **County, City, and School District** fiscal effect in dollar amounts:

1997-99 Biennium			1999-2001 Biennium			2001-03 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

If additional space is needed, attach a supplemental sheet.

Signed J. Patrick Traynor

Typed Name J. Patrick Traynor

Date Prepared: 01-29-99

Department Workers Compensation Bureau

Phone Number 328-3856

NORTH DAKOTA WORKERS COMPENSATION BUREAU
1999 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

***BILL DESCRIPTION*:** **Utilization Review**

BILL NO: **HB 1136**

***SUMMARY OF ACTUARIAL INFORMATION*:** The Workers Compensation Bureau, with the assistance of its Actuary, Glenn Evans of Pacific Actuarial Consultants, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

The proposed legislation requires licensure for psychologists and physicians performing utilization review from their respective North Dakota state boards. The effective date for this act would be August 1, 2000.

***FISCAL IMPACT*:** The proposed legislation will have no quantifiable fiscal impact.

***DATE*: 1-29-99**

PROPOSED AMENDMENTS TO 1999 HOUSE BILL NO. 1136

Page 1, line 1, after "subsection" insert "4 of section 26.1-26.4-02 and subsection"

Page 1, line 2, after "to" insert "the definition of utilization review and to"

Page 1, line 4, after "Subsection" insert:

"4 of section 26.1-26.4-02 of the North Dakota Century Code is amended and reenacted as follows:

4. "Utilization review" means a system for prospective and concurrent review of the necessity and appropriateness in the allocation of health care resources and services that are subject to state insurance regulation and which are given or proposed to be given to an individual within this state. Utilization review does not include elective requests for clarification of coverage.

SECTION 2. AMENDMENT. Subsection"

Renumber accordingly

Adopted by the Human Services Committee
January 26, 1999

YK
1/27/99

HOUSE AMENDMENTS TO HOUSE BILL NO. 1136 **HUMSERV 1-27-99**

Page 1, line 1, after "Act" insert "to create and enact a new section to chapter 65-02 of the North Dakota Century Code, relating to managed care for workers' compensation;" and after "reenact" insert "subsection 4 of section 26.1-26.4-02 and"

Page 1, line 2, after "relating" insert "to the definition of utilization review and" and after "agents" insert "; and to provide an effective date"

Page 1, after line 3, insert:

"**SECTION 1. AMENDMENT.** Subsection 4 of section 26.1-26.4-02 of the North Dakota Century Code is amended and reenacted as follows:

4. "Utilization review" means a system for prospective and concurrent review of the necessity and appropriateness in the allocation of health care resources and services that are subject to state insurance regulation and which are given or proposed to be given to an individual within this state. Utilization review does not include elective requests for clarification of coverage."

Page 1, after line 10, insert:

"**SECTION 3.** A new section to chapter 65-02 of the North Dakota Century Code is created and enacted as follows:

Licensure required for psychologists and physicians performing utilization review. Psychologists making utilization review determinations under sections 65-02-20 and 65-02-21 shall have current licenses from the state board of psychologist examiners. Physicians making utilization review determiniations under 65-02-20 and 65-02-21 shall have current licenses from the state board of medical examiners. This requirement does not apply to psychologists or physicians conducting independent medical examinations under section 65-05-28.

SECTION 4. EFFECTIVE DATE. Section 2 of this Act becomes effective on August 1, 2000."

Renumber accordingly

Date: 1-26-99
Roll Call Vote #: 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1136

House Human Services Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Adopt Amendments

Motion Made By Kliniske Seconded By Jensen

Representatives	Yes	No	Representatives	Yes	No
Clara Sue Price - Chairwoman	X		Bruce A. Eckre	X	
Robin Weisz - Vice Chairwoman	X		Ralph Metcalf	X	
William R. Devlin	X		Carol A. Niemeier	X	
Pat Galvin	X		Wanda Rose		X
Dale L. Henegar	X		Sally M. Sandvig		X
Roxanne Jensen	X				
Amy N. Kliniske	X				
Chet Pollert	X				
Todd Porter	X				
Blair Thoreson	X				

Total (Yes) 13 No 2

Absent 6

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date: 1-26-99
Roll Call Vote #: 2

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1136

House Human Services Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Further Adopt Amend

Motion Made By Rose Seconded By Sandvig

Representatives	Yes	No	Representatives	Yes	No
Clara Sue Price - Chairwoman		X	Bruce A. Eckre		X
Robin Weisz - Vice Chairwoman		X	Ralph Metcalf	X	
William R. Devlin		X	Carol A. Niemeier	X	
Pat Galvin		X	Wanda Rose	X	
Dale L. Henegar		X	Sally M. Sandvig	X	
Roxanne Jensen					
Amy N. Kliniske		X			
Chet Pollert		X			
Todd Porter		X			
Blair Thoreson		X			

Total (Yes) 4 No 10

Absent 1

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date: 1-26-99
Roll Call Vote #: 3

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1136

House Human Services Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass As Amended

Motion Made By Pollert Seconded By Porter

Representatives	Yes	No	Representatives	Yes	No
Clara Sue Price - Chairwoman	X		Bruce A. Eckre	X	
Robin Weisz - Vice Chairwoman	X		Ralph Metcalf	X	
William R. Devlin	X		Carol A. Niemeier		X
Pat Galvin	X		Wanda Rose		X
Dale L. Henegar	X		Sally M. Sandvig		X
Roxanne Jensen					
Amy N. Kliniske	X				
Chet Pollert	X				
Todd Porter	X				
Blair Thoreson	X				

Total (Yes) 11 No 3

Absent 1

Floor Assignment Weisz

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1136: Human Services Committee (Rep. Price, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (11 YEAS, 3 NAYS, 1 ABSENT AND NOT VOTING). HB 1136 was placed on the Sixth order on the calendar.

Page 1, line 1, after "Act" insert "to create and enact a new section to chapter 65-02 of the North Dakota Century Code, relating to managed care for workers' compensation;" and after "reenact" insert "subsection 4 of section 26.1-26.4-02 and"

Page 1, line 2, after "relating" insert "to the definition of utilization review and" and after "agents" insert "; and to provide an effective date"

Page 1, after line 3, insert:

"**SECTION 1. AMENDMENT.** Subsection 4 of section 26.1-26.4-02 of the North Dakota Century Code is amended and reenacted as follows:

4. "Utilization review" means a system for prospective and concurrent review of the necessity and appropriateness in the allocation of health care resources and services that are subject to state insurance regulation and which are given or proposed to be given to an individual within this state. Utilization review does not include elective requests for clarification of coverage."

Page 1, after line 10, insert:

"**SECTION 3.** A new section to chapter 65-02 of the North Dakota Century Code is created and enacted as follows:

Licensure required for psychologists and physicians performing utilization review. Psychologists making utilization review determinations under sections 65-02-20 and 65-02-21 shall have current licenses from the state board of psychologist examiners. Physicians making utilization review determiniations under 65-02-20 and 65-02-21 shall have current licenses from the state board of medical examiners. This requirement does not apply to psychologists or physicians conducting independent medical examinations under section 65-05-28.

SECTION 4. EFFECTIVE DATE. Section 2 of this Act becomes effective on August 1, 2000."

Renumber accordingly

1999 SENATE HUMAN SERVICES

HB 1136

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1136

Senate Human Services Committee

❑ Conference Committee

Hearing Date MARCH 2, 1999

Tape Number	Side A	Side B	Meter #
1	X		
Committee Clerk Signature	Carol Kolodejchuk		

Minutes:

The committee was called to order by SENATOR THANE. All senators were present.

The hearing was opened on HB1136.

JOHN OLSON, ND Board of Medical Examiners, explained the bill. (Written testimony)

SENATOR DEMERS: Why on line 11 does it appear not to want that coverage for types of programs that are not regulated by state health insurance? Why not workers' comp? MR. OLSON: Those are concerns that were expressed by Workers' Comp and there were those in the House that did not want to support the bill unless those exemptions were made. Philosophically there is really not a distinction to be made there. We hope that the state agency is governed by a little different requirements that we wouldn't find someplace else. ROLF SLETTEN answered that the line 11 language was at their request. They agreed that the same requirements should be imposed on them in another bill and that is in another bill. They simply didn't want to be

regulated under this chapter. It is recorded in section three of this bill. TOM SMITH said that the independent medical examiners don't have to be licensed but the other physchologist and physicians that do the utilization reviews have to be. This is how insurance companies do managed care. They say it is the practice of medicine. We don't think it is. SENATOR LEE asked about telemedicine is considered here. MR. OLSON stated that utilization review is separate from telemedicine. We don't want to prevent experts out of state from offering advice and opinion. If your physician is contacting him for consultation that is a far different aspect than some doctor sitting on his boat in Florida setting up a technician in Kirkwood Mall and having patients by electronic images rather than one actually practicing in the state. If he is practicing in the state, he should be licensed and regulated in the state. SENATOR KILZER asked if other states are approaching this in a consistent manner. MR. OLSON didn't really know. He stated that insurance is practice of medicine. SENATOR THANE has a problem with what my doctor tells me I need and then someone 200 miles away sitting at a desk makes the decision. SENATOR DEMERS: Where do we find Workmen's Comp inclusion in another bill? MR. SLETTEN: In section 3 of this bill; page 2 top two lines.

DAVID PESKE, ND Medical Assoc., supports bill as it started out. The concern was section 2 that amends the utilization review statute which ND legislature passed 3-4 sessions ago. Line 17 takes out the fact that they had to be licensed somewhere. It is natural that we should agree to move the licensure into ND. Complications began when Workers' Comp said they did not want to be regulated by this bill; we want to regulate the doctors working for us under our section. The Board and Medicine accepted that but then on page 2 the last sentence was not the original

amendment from Workers' Comp. That line was added by the House when there was opposition about these independent examinations; doctors coming into ND for one day or a patient flying to Minneapolis for one examination. That exemption was not agreed to by everyone, but the House put it on anyway. We still support this bill.

TOM SMITH, HIAA (Health Insurance Association of America) ATTORNEY, opposes the bill with written testimony.

Pages of the Day were introduced from SENATOR THANE'S district, Chadler Grant and Kyle Althoff.

SENATOR FISCHER: If utilization review is not the practice of medicine, why would they be verifying medical necessity and appropriateness of inpatient admission? MR. SMITH stated that they do it in the confines of their insurance contract. They are not medically treating patients.

SENATOR KILZER: Do your commercial insurance companies have in house managed care or do they contract it out to party venders? MR. SMITH: The companies that I am aware of do it internally. They may have an arrangement with a physician and he may not be full time.

SENATOR LEE requested that the representative of the Insurance Department comment on the bill. VANCE MAGNUSON, Insurance Department, agreed to answer questions. SENATOR KILZER asked how the Insurance Department dealt with complaints. MR. MAGNUSON: We try to go with the insured in compliance with the contract. We will contact the company and they will take another look at it. SENATOR THANE: Is it rare or common that the insurance department gets involved. MR. MAGNUSON replied that it was not all that common; the insurance department will expedite the process.

The hearing was closed on HB1136.

Discussion resumed on March 11.

SENATOR KILZER moved a DO PASS. SENATOR DEMERS seconded it. Roll call vote carried 5-1-0. SENATOR KILZER will carry the bill.

Date: 3/10/99
Roll Call Vote #: 1

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1136

Senate HUMAN SERVICES COMMITTEE Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number Amendment failed -

Action Taken _____

Motion Made By Sen DeMers Seconded By Sen Mutzenberger

Senators	Yes	No	Senators	Yes	No
Senator Thane		✓			
Senator Kilzer		✓			
Senator Fischer	✓				
Senator Lee		✓			
Senator DeMers	✓				
Senator Mutzenberger	✓				

Total 3 (yes) 3 (no)

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date: 3/10/99
Roll Call Vote #: 2

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1136

Senate HUMAN SERVICES COMMITTEE Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Sen Kilzer Seconded By Sen DeMers.

Senators	Yes	No	Senators	Yes	No
Senator Thane	✓				
Senator Kilzer	✓				
Senator Fischer	✓				
Senator Lee		✓			
Senator DeMers	✓				
Senator Mutzenberger	✓				

Total 5 (yes) 1 (no)

Absent 0

Floor Assignment Sen Kilzer

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1136, as engrossed: Human Services Committee (Sen. Thane, Chairman) recommends **DO PASS** (5 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). Engrossed HB 1136 was placed on the Fourteenth order on the calendar.

1999 TESTIMONY

HB 1136

North Dakota State
Board of Medical Examiners

ROLF P. SLETTEN
Executive Secretary and Treasurer

LYNETTE LEWIS
Administrative Assistant

TO: CHAIRPERSON PRICE AND THE MEMBERS OF THE HOUSE HEALTH AND HUMAN SERVICES COMMITTEE

FROM: ROLF P. SLETTEN, EXECUTIVE SECRETARY AND TREASURER

RE: HOUSE BILL NO. 1136 & John Olson,

DATE: JANUARY 11, 1999

The following points are offered by the North Dakota State Board of Medical Examiners in support of House Bill No. 1136:

1. It is the responsibility of the Board of Medical Examiners to make sure (a) that the physicians who practice medicine in this state meet certain qualifications, and; (b) that if those physicians violate the standards of practice in this state they will be held accountable for their actions.

2. Sec. 26.1-26.4-04(8), NDCC, currently provides that physicians who make utilization review decisions must have a license from some state. We feel very strongly that these physicians should be required to hold a North Dakota license.

3. The physicians who make these decisions are employed by insurance companies, HMO's and other managed care entities. If, for example, your local doctor makes a determination that you need gall bladder surgery, he/she will seek authorization from your insurance company for that operation. A physician who is employed by that company (the utilization review agent) will make a determination as to whether or not that gall bladder operation is "medically necessary". If he agrees with your local doctor,

CITY CENTER PLAZA • 418 E. BROADWAY AVE., SUITE 12 • BISMARCK, NORTH DAKOTA 58501
PHONE (701) 328-6500 • FAX (701) 328-6505

then presumably you're in luck and the operation will proceed. However, if the utilization review agent decides that your operation is not medically necessary, then you can either pay for it yourself or do without.

4. If the utilization review agent has made his decision for valid medical reasons then, of course, it should stand. But if that person has made the decision for other reasons (e.g. - to further his company's financial interests), then that doctor should have to answer to the Board of Medical Examiners just like every other doctor who practices medicine in this state.

5. These physicians make decisions that affect the health care of North Dakota citizens - which tests will be performed, which surgeries we will have, how long we will stay in the hospital, etc.

6. These physicians should undergo the same scrutiny, and should meet the same qualifications as all the other doctors who provide care to the citizens of North Dakota.

7. These physicians should be subject to the same disciplinary process as all the other physicians who provide health care to the citizens of North Dakota.

8. Under current North Dakota law, one of these physicians might hold a license in Maine, live in Nevada, work in California, and make decisions about health care that is being provided to folks in Linton or Cando or Bottineau. If that physician denies coverage for a North Dakota patient, and if he does so for financial purposes or other invalid reasons, then where does the North Dakota citizen complain? In Maine?

9. It is very important to note that in a recent landmark decision, the Arizona Supreme Court found that making these utilization review decisions is the practice of medicine.

A summary of that case is attached here.

10. We have also attached a copy of a letter from the North Dakota State Board of Psychologist Examiners indicating their support for this bill.

11. It is also important to note that Blue Cross/Blue Shield of North Dakota is not here to oppose this bill. We have discussed it with them and they do not oppose it.

12. Attached here is a copy of a letter which we received last week from a North Dakota physician. Please understand that no one has yet made any determination as to whether the utilization review agent he refers to acted improperly in any way. We are attaching the letter only to illustrate the sorts of concerns that we are asked to review. If this particular doctor (the UR agent) has a North Dakota license, then we can investigate the complaint. If he doesn't, then we have to tell the complainant and his patient that the insurance company's doctor is not bound by the rules that regulate every other doctor who practices here - and we can't do anything for them.

13. Obtaining a license for one utilization review agent is a very small price for an insurance company (or other managed care entity) to pay for the privilege of doing business in North Dakota. Surely North Dakota citizens deserve to know that the physicians who make these decisions are bound by the same rules, and meet the same qualifications, as their local North Dakota doctor.

14. The Board of Medical Examiners exists for just one purpose. That purpose is to protect the public. We are here seeking one of the tools which will help us do so effectively.

CITIZEN ADVOCACY CENTER

NEWS & VIEWS

DEC 18 1997

Third Quarter, 1997 *A Health Care Public Policy Forum* Volume 9 Number 3

ARIZONA COURT UPHOLDS BOARD'S DISCIPLINE OF MEDICAL DIRECTOR FOR UTILIZATION DECISION

In a decision with broad implications for licensing board authority over managed care plan utilization review decisions, an Arizona appeals court found in July, 1997 that the **Arizona Board of Medical Examiners (BOMEX)** has jurisdiction to investigate complaints arising from medical utilization review decisions, in this case a pre-certification decision by a physician employed as a medical director of insurance for the state **Blue Cross** plan. In December, 1992, the medical director of Blue Cross, Dr. Murphy, refused to pre-authorize gallbladder surgery for an insured patient, concluding that surgery was not "medically necessary." He did offer to seek the opinion of a third-party specialist at Blue Cross expense. The patient and her surgeon, Dr. Johnson, chose to proceed with the surgery despite the absence of pre-authorization. When the pathology reports later confirmed that the surgery had been justified, Blue Cross paid the claim.

Subsequently, the patient filed a complaint against Blue Cross with the state insurance department. That agency found no violation of the insurance statute and dismissed the complaint. Dr. Johnson filed a complaint with BOMEX charging medical director Murphy with "unprofessional conduct" and "medical incompetence" for denying pre-certification to proceed with surgery. Dr. Johnson alleged that Dr. Murphy's decision caused the patient to waiver in her decision to have the surgery and to question her surgeon's (Dr. Johnson's) professional judgment. He alleged that the physician-patient relationship suffered "to a dangerous degree."

Dr. Murphy cooperated with BOMEX's investigation of the complaint, even though he questioned whether he was subject to the board's jurisdiction because he was "not involved in patient care and not involved in the practice of medicine." Blue Cross maintained that BOMEX had no jurisdiction over Dr. Murphy because he was not "practicing medicine" and, because, as the employee of an insurance company, he was subject to the jurisdiction of the insurance department.

BOMEX issued a letter of concern to Dr. Murphy pointing to "an inappropriate medical decision which could have caused harm to a patient." Blue Cross sued, challenging BOMEX's jurisdiction over Dr. Murphy's utilization review decisions. The trial court ruled that BOMEX had limited jurisdiction over Dr. Murphy's medical decisions. It held that "the board is limited to a review of whether the decision was medically reasonable in light of the record given to Dr. Murphy to review."

After a second suit by Blue Cross and a complicated series of appeals and cross-appeals by both sides, the litigation ultimately found its way to the court of appeals. The central issue before the appeals court was "whether BOMEX has jurisdiction to regulate the conduct of a licensed physician whose position as medical director for a managed health care company requires him to render decisions that potentially affect patients' medical care." The court concluded that BOMEX *does* have jurisdiction over Dr. Murphy. The decision reads, in part:

Inside This Issue

Dr. Murphy is a BOMEX licensee.... Although Dr. Murphy is not engaged in the traditional practice of medicine, to the extent that he renders medical decisions his conduct is reviewable by BOMEX. Here, Dr. Murphy evaluated information provided by both the patient's primary physician and her surgeon. He disagreed with their decision that gallbladder surgery would alleviate her ongoing symptoms. (The patient's) doctors diagnosed a medical condition and proposed a non-experimental course of treatment. **Dr. Murphy substituted his medical judgment for theirs and determined that the surgery was "not medically necessary." There is no other way to characterize Dr. Murphy's decision: it was a "medical" decision.** (emphasis added)

Nothing in the insurance statutes prevents BOMEX from reviewing medical decisions made by state-licensed physicians performing duties as a medical director for an insurance company.... Dr. Murphy is not a provider of insurance. Instead, Dr. Murphy is an employee who makes medical decisions for his employer on whether surgeries or other non-experimental procedures are medically necessary. Such decisions are not insurance decisions but rather medical decisions because they require Dr. Murphy to determine whether the procedure is "appropriate for the symptoms and diagnosis of the (c)ondition," whether it is to be "provided for the diagnosis," care or treatment, and whether it is "in accordance with standards of good medical practice in Arizona."

The court's decision made note of the public policy issues raised by the parties in the case:

Plaintiffs and their *amici* support their position with significant policy reasons. They predict that if BOMEX has jurisdiction over the medical decisions of an insurance company's director in charge of pre-certification requests, a flood of complaints by disgruntled doctors and patients who dispute an insurer's denial of benefits as "not medically necessary" will result. On the other hand, the Board and its *amici* caution that if we reject BOMEX's jurisdiction, we would frustrate consumers who purchase health insurance yet find themselves facing a stone wall when their insurer opposes their physician's treatment recommendations. According to BOMEX, patients without insurance coverage find the cost of medical procedures prohibitive, and denial of pre-certification has the practical effect of causing patients to forgo treatment. We leave it to the legislature to consider the consequences predicted by the parties and resolve underlying policy conflicts presented by this situation." ***(Editorial Note: See IN THE LEGISLATURES below for evidence that many states are turning to legislation to assert licensing board jurisdiction over medical director decisions.)***

Some followers of this litigation warn that it will be difficult to retain good medical directors if qualified candidates think they will be brought before the medical board whenever patients and their doctors want to challenge a payment denial. Others suggest that at least some medical board members have a conflict of interest because of their bias against managed care. Arizona medical board Executive Director, **Mark Speicher**, says the board's role is protecting the public from inappropriate medical decisions, regardless of who may benefit financially. Blue Cross is expected to appeal the case to the Arizona Supreme Court. ***(John F. Murphy, M.D. and Blue Cross Blue Shield of Arizona v. Board of Medical Examiners, 1-CA-CV 95-0327 and 1-CA-CV 96-0182 [consolidated]; opinion filed July 15, 1997.)***

Editorial Note: If followed by other states, this decision will place boards of medicine squarely in the middle of managed care utilization review decisions. It will be interesting to see how often boards of medicine exercise jurisdiction in these kinds of cases, and with what results.

Citizen Advocacy News & Views is published quarterly by the Citizen Advocacy Center, 1424 Sixteenth Street, NW, Suite 105, Washington, DC 20036, (202) 462-1174; FAX (202) 265-6564; E-Mail: CACenter@msn.com. Editor-in-Chief: Rebecca Cohen; Contributing Editor: David Swankin; Subscription Services Manager: Charles Hawkins.

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Ariz. court: Boards can discipline medical directors

By Linda Prager
AMNEWS STAFF

The Arizona Supreme Court last month let stand a ruling that makes health plan medical directors accountable to the state medical board.

The state high court declined to consider an appeal filed by Blue Cross and Blue Shield of Arizona, which had argued that the board had no authority to discipline physicians who make review decisions.

Such a function, the insurance plan had claimed, was strictly a coverage decision and not the practice of medicine.

But an appellate court disagreed. It ruled late last year that the Blues' medical director had applied clinical judgment, going beyond a mere insurance decision, in deciding to deny coverage for a patient's gallbladder surgery. Such action brought that physician under the board's purview, the court ruled.

The Supreme Court's refusal to take up the case ends this seven-year-old battle, one that has been watched closely by medical boards across the country.

Many now are poised to move into this realm, as a way to protect patients from medical necessity decisions that breach the profession's standards.

And similar cases, put on hold pending the high court's decision, are waiting in the wings.

HMO officials warn that granting boards the authority to issue sanctions for review decisions could lead to a spate of complaints against medical directors any time a patient or doctor is disgruntled about a coverage denial.

Having to defend against such charges will increase HMOs' administrative costs and undermine utilization review and other practices critical to managing care, they've argued.

ND STATE BOARD OF PSYCHOLOGIST EXAMINERS

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December 4, 1998

DEC - 7 1998

Mr. Rolf P. Sletten
Executive Secretary-Treasurer
ND State Board of Medical Examiners

Re: Licensure of Utilization Review Agents

Dear Mr. Sletten,

The North Dakota State Board of Psychologist Examiners reviewed your October 1, 1998 letter requesting support of a proposed amendment to Section 26.1-26.4-04 (8), NDCC at our meeting today. It was the unanimous decision of the Board to support the ND State Board of Medical Examiners to pursue passage of this amendment.

Please consider this letter as a formal statement of the Board's support.

Please contact me is you have any further questions.

Sincerely,

Peter C. Peterson, Ph.D., Clinical Psychologist
Board Member
ND State Board of Psychologist Examiners

Towner County Medical Center

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January 5, 1999

JAN - 8 1999

Rolf Sletten
Executive Director
North Dakota State Board of Medical Examiners
City Center Plaza
Suite 12
418 East Broadway
Bismarck, North Dakota 58501

Dear Rolf:

I feel obligated to report to the North Dakota State Board of Medical Examiners a unique encounter with an insurance Company . As you know, pursuant to recent Legislation I must report alleged poor medical practice.

a forty-two year old male patient of mine, presented with left sided abdominal pain on December 1, 1998. He underwent an IVP (found normal) for borderline microscopic hematuria. He was treated for a supposed diverticulitis, but failed to improve after a clinical trial of antibiotics. With a continuing left hemiabdomen pain he was scheduled for a colonoscopy (it was believed that a sigmoidoscopy might fail to reach the diagnostic level). On the morning of December 07, 1998 he presented NPO after a successful GoLYTELY prep to find that the insurance Co. had denied coverage for his colonoscopy.

the insurance Co. indicated by phone and letter that the colonoscopy was deemed "not medically appropriate or necessary". Further, we were not allowed to bill the patient directly for the services if performed.

At my request Dr. Medical Director for this insurance Co. sent written confirmation of the denial dated December 21, 1998. In the letter he alleges that we refused to supply medical information. At no time did I or my staff refuse to furnish information. We have no history of such refusal and do not plan any refusal in the future. Upon receipt of his letter I did, however, send a complete copy of Mr. s chart.

Upon the insurance Company's denial my options were to proceed on with the study - free of charge - or not perform the study and risk failure to diagnose. The patient elected to not have the study done. He remains now with pain, limited ability to work, and no diagnosis. He has sought legal counsel (Law Firm at

That the actions of the Insurance Co. interferred in the treatment of my patient is indisputable. More importantedly it is my belief that directly causing a medical study to be done or not be done, as well as determining that a study is or is not

"medically necessary", constitutes the practice of medicine. In this case medicine was practiced by Dr. over the phone by having his nurse reviewer speak with my Medical Records clerk. He has never met, spoke with, nor examined the patient.

If the board finds a precedent in reviewing this case and comparing actions to the established definition of the practice of medicine in North Dakota, then it may help to circumvent legal remedy in future managed care cases

Enclosed please find a copy of the letter of denial dated December 7, 1998, and correspondance of December 21, 1998, as well as a copy of the letter to Dr.

Happy Holidays, and thank-you for your attention to these issues.

Sincerely,

Gregory L. Culver, M.D. FAAFP
Towner County Medical Center
Cando, North Dakota

GLC/rg
Enclosures

North Dakota State
Board of Medical Examiners

ROLF P. SLETTEN
Executive Secretary and Treasurer

LYNETTE LEWIS
Administrative Assistant

January 12, 1999

Rep. Clara Sue Price, Chairperson
And Members of the House Human
Services Committee

Re: House Bill 1136

Dear Chairperson Price and Members of the Committee:

Thank you for hearing our testimony regarding the proposed amendment to the utilization review statute. We feel that it is very important that the physicians who make these decisions hold a license to practice medicine in North Dakota. If the out-of-state physician (utilization review agent) does not hold a North Dakota license, then this Board has no jurisdiction over that physician even though he/she routinely makes decisions affecting the health care provided to North Dakota citizens. This means that if that out-of-state utilization review agent makes a determination that a particular procedure is not "medically necessary" for a North Dakota citizen, then the North Dakota patient has no meaningful place to complain about the doctor's conduct even if the decision was made for the most invalid of reasons, for example, to further the financial interests of the insurance company for which the utilization review agent works.

During the hearing yesterday, the insurance industry's lobbyist was questioned about this scenario. He responded that the North Dakota patient has an adequate remedy because he can file a lawsuit against the offending insurance company. That suggestion is absurd. The insurance industry suggests that if one of its companies makes these decisions for wrongful reasons, the patient's remedy is to dig into his own pocket, hire a lawyer, and file suit against a giant out-of-state insurance company. In other words, the insurance industry suggests that the patient should choose between using his dollars to seek the medical care which has just been denied to him, or to hire a lawyer to file a lawsuit. In real life the patient probably has no money to hire the lawyer or to purchase the needed medical care.

There are few things in life that a physician holds more dear than his/her license to practice medicine. Furthermore, every physician knows that if one state takes an action against his/her license, then every other state in which he/she holds a license is sure to follow suit. There is

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no doubt that a utilization review agent who knows that his personal license to practice medicine is subject to scrutiny will be less tempted to deviate from acceptable standards than one who is merely aware that some day some far away patient might try to file a lawsuit against his insurance company.

The physicians who make utilization review decisions should meet the same qualifications and should be subject to the same scrutiny as every other physician who provides medical care to the citizens of North Dakota.

Sincerely,

ROLF P. SLETTEN
Executive Secretary
and Treasurer

RPS:kg

ZUGER KIRMIS & SMITH

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January 12, 1999

TOM Smith

Rep. Clara Sue Price, Chairman
ND HOUSE HUMAN SERVICES COMMITTEE
State Capitol Building
Bismarck, North Dakota 58505

Re: **HB 1136 - Utilization Review**

Dear Chairman Price:

At the hearing on HB 1136, you inquired as to the number of states which had enacted legislation dealing with utilization review agents similar to North Dakota's law set forth in Chapter 26.1-26, N.D.C.C. In addition, you requested information as to which states do have some type of requirement for "same-state" licensure as to physicians or psychologists. I contacted the Health Insurance Association of America, and I was provided certain information.

There are 38 states which have passed some form of legislation dealing with utilization review agents in managed care settings for health insurance. Out of those 38 states, there are five states which have some type of requirement for "same-state" licensure -- Mississippi, Missouri, Oklahoma, Oregon, and Vermont.

The type of licensing requirement does vary amongst these states. For example, Missouri and Vermont provide that the medical director must be licensed in those states. It appears that some utilization review may be done by physicians licensed in other states so long as the medical director is licensed in those states. In Mississippi, all adverse determinations must be reviewed by and concurred with a physician who is licensed in Mississippi. In Oklahoma, the law states that "same-state" licensure is required for appeal and for a health professional's supervising UR activities. In Oregon, an Oregon-licensed doctor of medicine or osteopathy must be responsible for all final recommendations regarding UR

determinations, and must consult with appropriate medical and mental health specialists in making such recommendations.

I also call your attention to the laws of Maine and Virginia. In Maine, although "same-state" licensure may not be required, when an application is submitted to perform a utilization review, it must report if the health professionals performing utilization review are licensed in Maine. In addition, the law in Virginia specifies that individuals who render appeals determinations must not have been involved in the original determination and must be licensed in Virginia or under a comparable state licensing law. Virginia law appears to provide a licensure under Virginia state law or any other state that has a similar licensing statute to Virginia.

Hopefully, this information will assist you in your deliberations.

Very truly yours,

Thomas O. Smith

tsmith\011299 ltr price

1999 HOUSE BILL NO. 1136
TESTIMONY BEFORE THE HOUSE HUMAN SERVICES COMMITTEE
JANUARY 19, 1999

Madame Chairman, Members of the Committee:

My name is Julie Leer and I am an attorney for the Workers Compensation Bureau. I am here today to share the Bureau's concerns about House Bill No. 1136.

House Bill No. 1136 would require psychologists and physicians making utilization review determinations to be licensed by their respective North Dakota licensing boards. This requirement is included in chapter 26.1-26.4. Typically, Title 26.1 is not used to regulate workers' compensation coverage provided by the Bureau. Many of the chapters in Title 26.1 either specifically identify the type of insurance product or provider being regulated or identify exemptions. Chapter 26.1-26.4 does neither.

The Bureau has had the opportunity to review a bill draft that includes a change similar to this one. That draft has language that would exempt the Bureau's utilization review process from the regulations imposed by chapter 26.1-26.4. While that bill apparently had not been introduced as of late Monday, I have prepared amendments that would parallel those found in the draft the Bureau reviewed.

The legislature and the courts have consistently recognized that workers' compensation coverage in North Dakota is not an insurance product that is subject to regulation by the insurance commissioner. For this reason, the Bureau requests an exemption from this chapter if the committee recommends that this bill "Do Pass".

Thank you.

John M. Olson
Attorney

eph J. Cichy
ttorney

OLSON CICHY
ATTORNEYS

TO: CHAIRMAN THANE AND MEMBERS OF THE SENATE HUMAN SERVICES COMMITTEE

FROM: JOHN M. OLSON, SPECIAL ASSISTANT ATTORNEY GENERAL TO THE NORTH DAKOTA STATE BOARD OF MEDICAL EXAMINERS.

RE: HOUSE BILL NO. 1136

DATE: MARCH 1, 1999

The following points are offered by the North Dakota State Board of Medical Examiners in support of House Bill No. 1136:

1. It is the responsibility of the Board of Medical Examiners to make sure (a) that the physicians who practice medicine in this state meet certain qualifications, and; (b) that if those physicians violate the standards of practice in this state they will be held accountable for their actions.

2. Sec. 26.1-26.4-04(8), NDCC, currently provides that physicians who make utilization review decisions must have a license from some state. We feel very strongly that these physicians should be required to hold a North Dakota license.

3. The physicians who make these decisions are employed by insurance companies, HMO's and other managed care entities. If, for example, your local doctor makes a determination that you need gall bladder surgery, he/she will seek authorization from your insurance company for that operation. A physician who is employed by that company (the utilization review agent) will make a determination as to whether or not that gall bladder operation is "medically necessary". If he agrees with your local doctor, then presumably you're in luck and the operation will proceed. However, if the utilization review agent decides that your

operation is not medically necessary, then you can either pay for it yourself or do without.

4. If the utilization review agent has made his decision for valid medical reasons then, of course, it should stand. But if that person has made the decision for other reasons (e.g. - to further his company's financial interests), then that doctor should have to answer to the Board of Medical Examiners just like every other doctor who practices medicine in this state.

5. These physicians make decisions that affect the health care of North Dakota citizens - which tests will be performed, which surgeries we will have, how long we will stay in the hospital, etc.

6. These physicians should undergo the same scrutiny, and should meet the same qualifications as all the other doctors who provide care to the citizens of North Dakota.

7. These physicians should be subject to the same disciplinary process as all the other physicians who provide health care to the citizens of North Dakota.

8. Under current North Dakota law, one of these physicians might hold a license in Maine, live in Nevada, work in California, and make decisions about health care that is being provided to folks in Linton or Cando or Bottineau. If that physician denies coverage for a North Dakota patient, and if he does so for financial purposes or other invalid reasons, then where does the North Dakota citizen complain? In Maine?

9. It is very important to note that in a recent landmark decision, the Arizona Supreme Court found that making these utilization review decisions is the practice of medicine. A summary of that case is attached here.

10. We have also attached a copy of a letter from the North Dakota State Board of Psychologist Examiners indicating their support for this bill.

11. Attached here is a copy of a letter which we received from a North Dakota physician. Please

understand that no one has yet made any determination as to whether the utilization review agent he refers to acted improperly in any way. We are attaching the letter only to illustrate the sorts of concerns that we are asked to review. If this particular doctor (the UR agent) has a North Dakota license, then we can investigate the complaint. If he doesn't, then we have to tell the complainant and his patient that the insurance company's doctor is not bound by the rules that regulate every other doctor who practices here - and we can't do anything for them.

12. Obtaining a license for one utilization review agent is a very small price for an insurance company (or other managed care entity) to pay for the privilege of doing business in North Dakota. Surely North Dakota citizens deserve to know that the physicians who make these decisions are bound by the same rules, and meet the same qualifications, as their local North Dakota doctor.

13. The Board of Medical Examiners exists for just one purpose. That purpose is to protect the public. We are here seeking one of the tools which will help us do so effectively.

Thomas O. Smith
Health Insurance Association of America

PREPARED TESTIMONY ON ENGROSSED HOUSE BILL 1136
SENATE HUMAN SERVICES COMMITTEE
TUESDAY, MARCH 2, 1999

The Health Insurance Association of America (HIAA) is an insurance trade association representing insurance companies that write accident and health insurance on a nationwide basis. The HIAA and its members support the present status of the law requiring physicians and psychologists making utilization review determinations to have current licenses from a state licensing agency in the United States. The HIAA strongly opposes Engrossed HB 1136.

Section 2 (p. 1, lines 14-20) amends subsection 8 of § 26.1-26.4-04. The amendment requires psychologists and physicians making utilization review determinations to have North Dakota licenses in order to do so.

Utilization review is not the practice of medicine. Insurance companies, through the utilization review process, should be permitted to verify the medical necessity and appropriateness of inpatient admission, continuing stay, and outpatient care pursuant ot the terms and conditions of its insurance contract. In doing do, HIAA and its members support the use of licensed physicians; however, insurance companies should not be limited to the use of physicians licensed in any particular state.

There are 38 states which have passed some form of utilization review agent legislation in managed care settings for health insurance. Out of those 38 states, there are five states which have some type requirement for "same-state" licensure — Mississippi,

Missouri, Oklahoma, Oregon, and Vermont. Even amongst these five states, the licensing requirement varies. For example, Missouri and Vermont provide that only the medical director must be licensed in those states. In these two states, utilization review may be done by physicians licensed in other states so long as the medical director is licensed in that state.

In Mississippi, although utilization review, to some extent, may be done by physicians licensed in other states, all adverse determinations must be reviewed by and concurred with by a physician who is licensed in Mississippi. Similarly, in Oklahoma the law states that "same-state" licensure is required for appeal and for a health professional supervising utilization review activities.

In Oregon, an Oregon licensed doctor of medicine or osteopathy must be responsible for all final determinations regarding utilization review determinations. Oregon law requires the consultation with appropriate medical and mental health specialities in making such recommendations.

Thirty-three states enacting utilization review laws do **NOT** require "same-state" licensure. Engrossed HB 1136 will have a dramatically adverse impact on commercial insurance companies.

Noridian Mutual Insurance Company, dba Blue Cross Blue Shield, is the dominant carrier in North Dakota. Noridian controls up to 70 percent of the market in North Dakota and only does business in this state. It is in compliance with the proposed amendments as contained in Engrossed HB 1136 since it only does business in this state. The "same-

state" licensure requirement for psychologists and physicians will seriously impact the other health insurance companies trying to compete with Noridian.

The enactment of Engrossed HB 1136 will continue to assure Noridian's dominance in the health insurance market. Engrossed HB 1136 sends a message to out-of-state insurance companies that North Dakota is making it as difficult as possible for them to do business in this state.

We respectfully request the committee to reject the concept of "same-state" licensure as set forth in this legislation.