NO. 19-_____

In the Supreme Court of the United States

LORI MADDEN-GRAMMER,

Petitioner,

v.

INDUSTRIAL CLAIM APPEALS OFFICE;
POUDRE VALLEY HOSPITAL; and
COLORADO HOSPITAL ASSN. TRUST,

Respondents.

On Petition for Writ of Certiorari to the Colorado Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Colorado's Medical Utilization Review process set forth in Section 8-43-501, *et seq.* of the Colorado Revised Statutes deprives claimants of their statutorily-created property interest without due process of law in violation of the Fourteenth Amendment of the Federal Constitution.

LIST OF PROCEEDINGS BELOW

JUDICIAL PROCEEDINGS

Colorado Supreme Court

Supreme Court Case No: 2019sc45

Lori Madden-Grammer, Petitioner, v. *Colorado Hospital Association Trust, Poudre Valley Hospital, and Industrial Claim Appeals Office*, Respondents.

Opinion Date: July 29, 2019

Mandate Issued: August 1, 2019

Colorado Court of Appeals

Court of Appeals No. 17ca2066

Lori Madden-Grammer, Petitioner, v. *Industrial Claim Appeals Office of the State of Colorado; Poudre Valley Hospital; and Colorado Hospital Association Trust*, Respondents.

Opinion Date: December 13, 2018

Rehearing Denied: January 10, 2019

ADMINISTRATIVE PROCEEDINGS

Industrial Claims Appeal Office

In the Matter of the Request for Utilization Review:
CHA Trust, Insurer, v. *Lori Madden-Grammer*,
Claimant, Concerning the Care Provided by:
Brian Lemper, D.O., Provider.

Case Number: 2017CA2066

Final Order Date: November 14, 2017

Office of Administrative Courts, State of Colorado
Workers Compensation

In the Matter of the Request for Utilization Review:
CHA Trust, Insurer, v. *Lori Madden-Grammer*,
Claimant, Concerning the Care Provided by:
Brian Lemper, D.O., Provider.

U.R. No: 16-05

Final Order Date: May 3, 2017

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Bradley R. Irwin, on behalf of Lori Madden-Grammer, respectfully petitions for a writ of certiorari to review the judgment of the Colorado Court of Appeals.

OPINIONS BELOW

The unpublished opinion of the Colorado Court of Appeals at issue, dated December 13, 2018, is attached below as App.2a. The Supreme Court of Colorado denied Petitioner's for a writ of certiorari to review this decision on July 29, 2019 (App.1a).

JURISDICTION

The judgment of the Colorado Court of Appeals was entered on December 13, 2018. A petition for rehearing was denied on January 10, 2019 (App.33a). A petition for a writ of certiorari to the Supreme Court of Colorado was denied on July 29, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) on the grounds that the state statute at issue herein, as interpreted by the Colorado Court of Appeals, is repugnant to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

Col. Rev. Stat. Section 8-43-501, *et seq.* of the Colorado Revised Statutes establishes the Medical Utilization Review process for Workers Compensation claimants that is at issue in this petition, and states as follows:

> (1) The general assembly hereby finds and determines that insurers and self-insured employers should be required to pay for all medical services pursuant to this article which may be reasonably needed at the time of an injury or occupational disease to cure and relieve an employee from the effects of an on-the-job injury. However, insurers and self-insured employers should not be liable to pay for care unrelated to a compensable injury or services which are not reasonably necessary or not reasonably appropriate according to accepted professional standards. The general assembly, therefore, hereby declares that the purpose of the utilization review process authorized in this section is to provide a mechanism to review and remedy services rendered pursuant to this article which may not be reasonably necessary or reasonably appropriate according to accepted professional standards.
>
> (2) (a) An insurer, self-insured employer, or claimant may request a review of services rendered pursuant to this article by a health care provider. Requests for utilization review shall be submitted on forms promulgated by the director by rule. At the time of submission of a review request, the requester shall pay the division a fee

prescribed by the director by rule. Such fee shall cover the division's administrative costs and the costs of compensating utilization review committee members. If a claimant is successful in a utilization review case brought pursuant to this section, the division shall reimburse the fee charged pursuant to this paragraph (a) and assess it against the insurer or self-insured employer. The state treasurer shall credit fees collected pursuant to this section to the utilization review cash fund, which fund is hereby created. Moneys in the utilization review cash fund are continuously appropriated to the division for the purpose of administering the utilization review program and may not revert to the general fund at the end of any fiscal year. The division shall mail to any claimant, insurer, or self-insured employer a notice that a case is to be reviewed and that the claimant may be examined as a result of such review. The claimant, insurer, or self-insured employer has thirty days from the date of mailing of such notice to examine the medical records submitted by the party who requested the review and may add medical records to the utilization review file that the party believes may be relevant to the utilization review. The division shall maintain a special file for utilization review cases. Such file shall be accessible only to interested parties in a utilization review case and shall not otherwise be open to any person.

(b) Prior to submitting a request for a utilization review pursuant to this section, an insurer, self-insured employer, or claimant shall hire a licensed medical professional to review the services ren-

dered in the case. A report of the review shall be submitted with all necessary medical records, reports, and the request for utilization review.

(c) A claimant may request a utilization review pursuant to this section if the claimant has been refused a request pursuant to section 8-43-404 (5) to have a personal physician or chiropractor attend the claimant. A claimant requesting a utilization review pursuant to this paragraph (c) shall file the request on forms promulgated by the director by rule and shall pay the fee required by paragraph (a) of this subsection (2).

(d) For purposes of this section only, "medical records" means documents and transcripts of information obtained from a patient or his or her medical professional that are related to the patient's medical diagnosis, treatment, and care.

(e) When an insurer, self-insured employer, or claimant requests utilization review, no other party shall request a hearing pursuant to section 8-43-207 until the utilization review proceedings have become final, if such hearing request concerns issues about a change of physician or whether treatment is medically necessary and appropriate.

(f) Once a utilization review proceeding has become final and no longer subject to appeal, the final disposition of the issues in such proceeding shall be binding on the parties and preclude a contrary ruling on such issues in a subsequent hearing under section 8-43-207 unless a preponderance of evidence is shown.

(3)(a) The director, with input from the medical director serving pursuant to section 8-42-101 (3.6) (n), shall appoint members of utilization review committees for purposes of this section and section 8-42-101 (3.6). The director shall establish committees based on the different areas of health care practice for which requests for utilization review may be made. The director shall establish the qualifications for members of the different committees and the areas of health care practice in which each such committee shall conduct requested utilization reviews. Cases of requested utilization review shall be referred to committees appointed pursuant to this subsection (3) by the director based upon the areas of health care practice for which each committee is appointed.

(b) Each committee established pursuant to paragraph (a) of this subsection (3) shall be composed of three members. Committee members shall be compensated for their time by the division out of moneys in the utilization review cash fund, created in paragraph (a) of subsection (2) of this section. Any member of a committee appointed pursuant to this subsection (3) shall be immune from criminal liability and from suit in any civil action brought by any person based upon an action of such a committee, if such member acts in good faith within the scope of the function of the committee, has made reasonable effort to obtain the facts of the matter as to which action is taken, and acts in the reasonable belief that the action taken is warranted by the facts. The immunity provided by this paragraph (b) shall extend to any person participating in good faith

in any investigative proceeding pursuant to this section.

(c) (I) For each case, a committee may recommend by majority vote of such committee that no change be ordered or that a change of provider be ordered.

(II) A committee may also, by unanimous vote, recommend that the director order that payment for fees charged for services in the case be retroactively denied.

(III) A committee may also, by unanimous vote, recommend that the director order that a physician's accreditation status under section 8-42-101 (3.6) be revoked.

(d) In preparing and issuing an order in any case, the director shall review and give great weight to the reports and recommendations of the committee.

(e) In appropriate cases pursuant to this section and section 8-42-101 (3.6), the director may order that an insurer, employer, or self-insured employer be permitted to deny reimbursement to a provider for any medical care or services rendered to a claimant; and such order may be effective for up to three years. Bills for services rendered during the effective period of any such order shall be unenforceable and shall not result in any debt of the claimant. In deciding whether to issue any such order, the director shall give great weight to the fact that:

(I) The provider has, within any two-year period, been the subject of two or more orders

removing the provider from the role of authorized treating physician; or

(II) The provider has, within any two-year period, been the subject of two or more orders retroactively denying the payment of the provider's fees; or

(III) The provider has, within any two-year period, been the subject of two or more orders either retroactively denying the payment of the provider's fees or removing the provider from the role of authorized treating physician.

(4) If the director orders pursuant to subsection (3) of this section that a change of provider be made in a case or that the physician's accreditation status be revoked, the claimant, insurer, or self-insured employer shall have seven days from receipt of the director's order in which to agree upon a level I provider. If the claimant, insurer, or self-insured employer can not reach agreement within the seven day time period, the director shall select three providers. A new provider shall be chosen from the three providers so selected by the party who was successful in the request for review. If no appeal is filed, the successful party shall notify the division of the name of the new provider within seven days of the selection of the three potential providers. If the new health care provider is not selected within such seven days, the director shall select the provider.

(5)(a) Any party, including the health care provider, may appeal to an administrative law judge for review of an order specifying that no change

occur or that a change of provider be made with respect to a case. Such review shall be limited to the record on appeal. The findings of a utilization review committee regarding the change of provider in a case shall be afforded great weight by the administrative law judge in any proceeding. A party disputing the finding of such utilization review committee shall have the burden of overcoming the finding by clear and convincing evidence.

(b) If the director has entered an order specifying that the payment of fees in the case be retroactively denied, or permitting an insurer, employer, or self-insured employer to deny payments for medical services or care rendered pursuant to subsection (3)(e) of this section, the health care provider may request a de novo hearing before an administrative law judge by filing an application for hearing within thirty days from the date of the certificate of mailing of the order. In a hearing held pursuant to this paragraph (b), the record upon which the director based the order shall be admissible in evidence. The findings of the utilization review committee regarding the retroactive denial of payment of fees in a case shall be afforded great weight by the administrative law judge in any proceeding. A party disputing the finding of such utilization review committee shall have the burden of overcoming the finding by clear and convincing evidence.

(c) Any appeal filed pursuant to this subsection (5) must be filed within forty days from the date of the certificate of mailing of the director's order.

(d) Any party dissatisfied with an order entered by an administrative law judge pursuant to paragraph (a) of this subsection (5) may file a petition to review the order pursuant to section 8-43-301.

STATEMENT OF THE CASE

The Colorado Court of Appeals ruled that Petitioner was not deprived of a property interest without due process where she was deprived of the only available source of treatment for her Complex Regional Pain Syndrome via a process established by state statute that deprived her of any opportunity to be heard on the subject. This ruling contravenes Petitioner's right to due process under the Fourteenth Amendment of the Federal Constitution before she can be deprived of a property interest by her state.

This case arises out of a worker's compensation claim in which the Petitioner sustained serious injuries during a one-car accident that occurred in 1988. These injuries eventually caused her to develop a condition known as Complex Regional Pain Syndrome (CRPS), a condition that causes Ms. Grammer to suffer with constant, unrelenting, and excruciating pain.

While there is no known cure for CRPS, there are some treatments that have provided Ms. Grammer relief from her constant and debilitating pain. Ms. Grammer was receiving one form of CRPS treatment known as Platelet Rich Plasma (PRP) therapy, which was virtually the only treatment (after almost 29

years of pain), which would relieve the effects of her industrial injury.

In 2016, Respondent-Insurer initiated a Medical Utilization Review (MUR) of Ms. Grammer's physician who was providing her the PRP treatment. The result of the MUR was to de-authorize Ms. Grammer's physician and retroactively deny payment for his treatment, leaving Ms. Grammer without any PRP treatment or any relief from her ongoing pain. At no time during the MUR process, or the appeal that followed, was the Ms. Grammer provided with a hearing, or an opportunity to present evidence on her behalf, before the PRP treatment was terminated.

On April 13, 2016, Respondent-Insurer requested a Medical Utilization Review (MUR) concerning the care provided to the Ms. Grammer, by her authorized treating physician, Dr. Brian Lemper. Thereafter, the Director of the Division of Workers' Compensation (DOWC) appointed a Utilization Review Panel (UR Panel), consisting of three medical practitioners, to review medical records submitted by the parties, pursuant to C.R.S. § 8-43-501. Based on the findings of the UR Panel, the Director issued an Order on September 30, 2016, requiring a change of provider and retroactively denying payment for all medical treatment provided by Dr. Lemper after August 20, 2015.

Claimant filed a timely appeal of the Director's Order on October 11, 2016. The appeal was assigned to Administrative Law Judge Edwin L. Felter, Jr. (ALJ Felter), on May 1, 2017. Based solely on a review of the record, ALJ Felter issued an Order on May 3, 2017, affirming the Order of the Director of the DOWC.

Claimant filed an appeal to the Industrial Claim Appeals Office (ICAO) seeking both a review of ALJ Felter's Order in this matter and raising constitutional issues. The ICAO issued its Final Order on October 24, 2017, affirming the Director's Utilization Review Order and denying Claimant's appeal. Claimant filed an appeal to the Colorado Court of Appeals. The Court issued its Order affirming the Order of the ICAO on December 13, 2018. Claimant filed a Petition for Re-hearing, which was denied, and thereafter filed a petition for a writ of certiorari to the Supreme Court of Colorado, which was also denied.

At no time was Petitioner provided with any hearing during the Utilization Review process during which she could present evidence, cross-examine witnesses, or call any expert witnesses in her defense. While a hearing is offered to the Claimant's physician during a Utilization Review, at no time does the Claimant have this same right. As such, the Medical Utilization Review process, as stated in C.R.S. § 8-43-501, *et seq.*, deprives the Claimant of her statutorily-created property interests without due process of law, in violation of the Fourteenth Amendment, and is therefore unconstitutional.

REASON FOR GRANTING THE PETITION

This petition should be granted because the state court of appeals' decision is wrong, and the question presented warrants review.

All workers compensation claimants in Colorado have a statutorily-created property interest in the continued receipt of medical treatment. *Whiteside v. Smith*, 67 P.3d 1240 (Colo. 2003). The General Assembly created the substantive right to workers' compensation benefits, and the Colorado Workers' Compensation Act defines this property interest for injured workers in Colorado. *Allison v. Indus. Claim Appeals Office*, 884 P.2d 1113, 1119 (Colo. 1994). This substantive right to workers' compensation benefits is a constitutionally protected property interest. *Id.*; *Colo. Comp Ins. Auth. v. Nofio*, 886 P.2d 714, 719 (Colo. 1994).

The Court of Appeals Ruling alluded to a contradiction between the Colorado Supreme Court's decisions is *Nofio* (Colo. 1994) and *Whiteside* (Colo. 2003). *Id.* Specifically, in *Nofio*, the Court held that an injured worker is not entitled to a de novo hearing where the worker's compensation benefits "have been changed, not terminated." *Nofio*, *Id.* at 719. The Court in *Nofio* also held that, an injured worker "has no protected property interest in receiving care from a specific health care provider or in receiving a particular type of treatment." *Nofio*, *Id.* at 720.

However, in its subsequent decision in *Whiteside*, the Court held that all workers' compensation benefits are a protected property interest. *Whiteside*, *Id.* at 1247. In fact, this subsequent interpretation of medical benefits under the Colorado Workers' Compensation Act is the only interpretation that makes sense—*i.e.*, the only possible way for an injured worker to receive medical treatment, or any particular type of treatment, is through a specific health care provider.

Once a property interest has been established by statute, as is the case here, the Fourteenth Amendment constrains the government from depriving people of their property interest without due process. *See, e.g.*, *Nofio*, 886 P.2d at 719, ("A claimant who has been awarded benefits in a workers' compensation case is entitled to procedural due process before those benefits may be terminated."). *See also Whiteside*, *supra* at 1248.

The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *See*, *Mathews v. Eldridge*, 424 U.S. 319, 333, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L.Ed.2d 62, 85 S.Ct. 1187 (1965)).

In this case, as correctly stated by the Court of Appeals, at no time during the entire Medical Utilization Review process (as stated in C.R.S. § 8-43-501, *et seq.*), does a claimant have the right or opportunity to be heard. The statute is devoid of any hearing process whereby a claimant is allowed to question witnesses, offer testimony and evidence, or to respond to the opinions of the UR Panel physicians, the Director before they issue an Order, or even on appeal before an ALJ. This amounts to a violation of the claimants' Fourteenth Amendment rights with regard to the procedural due process required to affect a property interest such as their workers' compensation medical benefits.

This leaves the Claimant with only the right to a review of the record by an ALJ in which they are allowed to "submit their respective positions in writing." (CF, p. 252). This certainly would not satisfy the fundamental requirement of due process by giving the

Claimant an opportunity to be heard "at a meaningful time and in a meaningful manner." See, *Mathews*, *supra* at 333. At no time during this Medical Utilization Review process was the Claimant allowed to present any testimony or question the UR Panel physicians regarding what documents they reviewed, their opinions and conclusions, or even their qualifications to render an expert medical opinion related to the treatment of CRPS patients or PRP therapy.

To make matters even worse, in the Conclusions of Law contained in the Order dated May 3, 2017, ALJ Felter states as follows: "Conversely, the Claimant failed to prove, by clear and convincing evidence, that Dr. Lemper's treatment of the Claimant was appropriate according to accepted professional standards." (CF, p. 262). This statement begs the question of how it would be possible for the Claimant to "prove" anything, let alone by "clear and convincing evidence," if she has no opportunity for a hearing or any meaningful way to be heard.

To take away the Claimant's medical treatment from Dr. Lemper, or any other physician, and deprive the Claimant of her property interest in ongoing workers' compensation medical treatment without due process violates the Fourteenth Amendment. This issue warrants review because if the Colorado Court of Appeals ruling is allowed to stand, all Colorado Workers' Compensation claimants will continue to suffer a depravation of due process. In the case of the present Petition, Ms. Grammar, this deprivation of due process has resulted and may continue to result in her having to live in constant excruciating pain for which

effective treatment is available and to which she is entitled as a property interest under state statute.

CONCLUSION

For the reasons stated herein, Petitioner respectfully requests that the Court grant certiorari to review the decision below.

Respectfully submitted,

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