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Workers' Compensation Quarterly

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MEDICARE SET-ASIDES

The Value of Tackling MSAs Proactively

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Goldberg Segalla's *Workers' Compensation Quarterly* newsletter explores the latest rulings and developments, changes in interpretive language used by the courts, permanency determinations, and more from across New York, Connecticut, New Jersey, and Pennsylvania.

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NEW YORK

High Anxiety: The Implementation of the Compassionate Care Act in New York

In June 2014, New York passed a series of new regulations under the heading of the Compassionate Care Act (CCA). The stated intent of the CCA per the regulations is "to allow New Yorkers with serious medical conditions access to medical marijuana under the supervision of their health care provider." The CCA aims to provide a comprehensive plan for the growth, cultivation, supply, and provision of medical marijuana to patients who have a select few medical conditions and monitor the proper prescription and usage of the medication.

To What Claims Will the CCA Apply?

From a workers' compensation standpoint, one of the first considerations for employers and carriers is to what cases the CCA may potentially apply.

In its present form, the regulations provide that it will only apply to "specific severe debilitating or life-threatening condition(s)," including: (i) cancer; (ii) HIV/AIDS; (iii) amyotrophic lateral sclerosis; (iv) Parkinson's disease; (v) multiple sclerosis; (vi) damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity; (vii) epilepsy; (viii) inflammatory bowel disease; (ix) neuropathies; (x) Huntington's disease; or (xi) any other condition added by the Commissioner of Health, provided that those conditions are associated with one or more complications including, but not limited to "severe or chronic pain resulting in substantial limitation of function" or severe spasm.

Although certain occupational disease claims for exposure to communicable diseases such as HIV/AIDS may form a small subset of claims that may fall under the purview of the CCA, what seems more likely to be at play for employers and carriers are subsections (vi) and (ix). With respect to subsection (vi), employers and carriers are well-familiar with low back and neck claims resulting from accidents (both minor and major) or repetitive-type activities that result in disc herniations allegedly causing intractable pain and spasm. Employers and carriers are also well-familiar with these claims resulting in expensive spinal surgery that in some cases result in little, if any, improvement in symptomatology. Interestingly, the vague use of "neuropathies" as stated in the regulations leads one to question whether entrapment-type neuropathies (the most common of which in the workers' compensation system are likely carpal tunnel or cubital tunnel syndromes) fall under the purview of the CCA.

Implementation and Limitations of the CCA

At this time, the CCA is in the very early stages of its implementation.

In July 2015, New York issued five licenses to organizations to act as dispensing facilities. Per regulation, these organizations are required to begin operations to the "satisfaction" of the Department of Health within six weeks subject to the penalty of suspension of their licenses. Each of these organizations is permitted to open four dispensaries only.

Dispensaries are subject to a host of regulations with respect to registration, record-keeping, and inspection of samples as requested and are not permitted to materially alter their policies or procedures without prior written consent. There are also detailed regulations regarding the cultivation, harvest, extraction, and packaging of medical marijuana as well as security of the dispensaries and transportation of the medical marijuana.

Prior to prescribing medical marijuana, medical providers will be required to register with the Department of Health and undergo a four-hour educational course on the prescription of medical marijuana. Of substantial note, however, one of regulations indicates that "[a]n individual shall not serve as a designated caregiver for more than five certified patients at any given time."

What Next? What It Could Mean for Workers' Compensation in New York

Given the mandate that dispensaries be operational within six months, the prescription of medical marijuana is soon to become a reality in New York. However, the exact outcome of the implementation of the CCA is currently speculative given how early we are in the implementation of the act. In its present form, however, the effect of the CCA on workers' compensation may potentially be very limited.

Based on the plain terms of the CCA, it would appear that a very substantial number of spinal injury claims could theoretically fall within the purview of the act along with some neuropathy-type injuries or illnesses. However, given the limited number of organizations and dispensaries permitted to cultivate medical marijuana and the sharp limitations on how many patients will be able to be treated by an individual physician, it remains to be seen whether doctors will be reserving medical marijuana prescriptions for terminally ill patients with severe medical conditions such as cancer, HIV/AIDS, or ALS or whether it will be prescribed for neck and back pain.

Further, putting to one side the controversial topic of whether medical marijuana will serve as a superior treatment option to other modalities, other interesting developments to monitor in the future will be whether New York will see a large number of physicians seeking authorization to prescribe medical marijuana (which may increase the

potential number of patients to whom marijuana will be available such as workers' compensation claims) and whether medical marijuana provides a more cost-effective treatment option for carriers if it becomes a commonly prescribed treatment option.

For more, explore the CCA's website at: compassionatecareny.org.

Board Decisions on Non-Acute Pain MTGs Surface

In the past few months, New York Workers' Compensation Board Panel decisions on the issues arising from the Non-Acute Pain Medical Treatment Guidelines, implemented on December 15, 2014, have begun arriving. The board has provided that the authority for the Non-Acute Pain Medical Treatment Guidelines arise under 12 NYCRR 324, and apply to injuries regardless of date of accident or date of disablement (12 NYCRR 324.2(a)). See Generally *Ballston Spa CSD* (2015 N.Y. Work. Comp. Bd. G0979127 10/7/15); *Aquifer Drilling and Testing* (2015 N.Y. Work. Comp. Bd. G1010967 10/15/15); *Will Poultry Co.* (2015 N.Y. Work. Comp. Bd. G0288418 10/6/15). In addition, the details of how these new guidelines will be interpreted in a practice have also arrived.

In *Walmart* (2015 N.Y. Work. Comp. Bd. 70113672 10/6/15), a case established for the right knee and consequential right foot tarsal tunnel syndrome, the board applied the Non-Acute Pain Medical Treatment Guidelines in denying the request for approval of compound pain cream. This case provided two unique issues. First, the claimant argued that the Non-Acute Pain Medical Treatment Guidelines did not apply to body sites that are not already covered by an MTG. The board simply ignored this argument. The Workers' Compensation Board did not directly address this argument in rendering its decision. Second, the board found that despite the fact that the variance request for pain cream was dated October 7, 2014, two months prior to the implementation dated of the Non-Acute Medical Treatment Guidelines, the guidelines could still be referred to for guidance. Noting that section F.1.c of the Non-Acute Pain Medical Treatment Guidelines provided that topical, oral, and/or systemic compound medications were not recommended, and the claimant's doctor had not provided sufficient justification for continued use of the compound cream, the board denied the variance request for compound cream.

The Workers' Compensation Board has cited the testimony of IME doctors recommending weaning programs where the testimony of the doctor is supported by the Non-Acute Medical Treatment Guidelines. In *Geysir Contracting Corp.* (2015 N.Y. Work. Comp. Bd. 50115959 10/14/15) the workers' compensation law judge (WCLJ) found that the medical evidence, including the testimony of the IME doctor, did not support the medical necessity and causal relationship for Lidoderm Patches or Methocarbamol. In affirming the WCLJ's decision, the board cited the credible testimony of the IME doctor and the board's Medical Treatment Guidelines, which provide that there is no evidence of the efficacy for topical medications, other than Capsicum, for acute or sub-acute back pain or flare-ups, and that certain over-the-counter preparations would likely be as effective as the Lidoderm patches. In addition, the board noted that both the testimony of the IME doctor and the Non-Acute Pain Medical Treatment Guidelines did not support the necessity for the prescription and use of Methocarbamol by the claimant on a chronic basis for non-acute back pain and that the claimant should be weaned from chronic usage of the medication.

In addition, where the claimant has been on long-term opioids, the board has affirmed that it will not immediately cease the claimant's medications, but rather will direct a weaning program. In *SUNY at Buffalo* (2015 N.Y. Work. Comp. Bd. 80412279 10/5/15), the claimant's doctor was prescribing Duragesic and Hydrocodone. The IME doctor found that the claimant, whose opioid medications had been steadily increasing over the years, should be weaned off of Hydrocodone by 10mg per week, and Duragesic patches at 10 percent per week. During testimony, the claimant's doctor admitted that the claimant could be weaned from these medications, and that he had not documented pain levels. Based upon this, the board found that claimant's continued long-term use of opioids was not supported by sufficient evidence in reports or testimony. Citing the Non-Acute Pain Medical Treatment Guidelines, do not provide for immediate cessation of long-term opioids, the board directed that the claimant's doctor provide a narcotic weaning program to the lowest possible opioid amount while documenting the pill and urine control methods and documenting objective measurements of functionality and subsequent documentation regarding possible new treatment options as well as reinstitution of prior effective treatment solutions that represented an effective individual orientated regimen per the Non-Acute Pain Medical Treatment Guidelines.

However, the mere fact that the claimant has been utilizing opioid medications for a long period of time does not mean the Workers' Compensation Board will automatically direct a weaning program. In *Syracuse Telephone Co. et al.* (2015 N.Y. Work. Comp. Bd. 69406535 9/28/15), the board found that the claimant's long-term and continuing use of Oxycodone, Oxycontin, and Celebrex was causally related and medically necessary. The board found that a variance request was not required as the medication was prescribed to the claimant prior to the effective date of the MTGs on December 1, 2010. In affirming the decision of the WCLJ, the board noted that the

evidence demonstrated that the opioid medications maintained and stabilized the claimant's pain level so that she could perform her daily activities and continue to work without any lost time for the past 10 years. However, the board cautioned that the claimant's providers are "required to transition a claimant who has been on long-term opioid therapy to the standard of care set forth in the Non-Acute Pain Medical Treatment Guidelines," including a comprehensive multidisciplinary approach.

Finally, it appears that the Workers' Compensation Board may be ready to utilize impartial specialists in determining issues surrounding opioid medication. In *Coca Cola Beverage Service* (2015 N.Y. Work. Comp. Bd. G0128389 10/20/15), the claimant's doctor found the claimant required further optimized opioid medication use. The board directed the claimant be examined by an impartial specialist on the issue of whether the claimant's narcotic medication regimen was appropriate and if monitoring or weaning was warranted under the Non-Acute Pain Medical Treatment Guidelines (among other issues).

How to File Objections to Orders of the Chair

Objecting to an EC-325 has resulted in a range of responses. Some people file RB-89 and appeal, but then directly highlight it is admin correspondence to the Workers' Compensation Board. Others have been re-sending EC-325 with handwritten notes as if it were an objection to a PD.

The board itself takes the following position:

> "If an Order of the Chair is defective or was improperly issued, the remedy is to make a written request to the Board for a rescission of the Order of the Chair, with notice to the other parties in interest, which will be addressed administratively by the Board. If it is administratively determined that the Order of the Chair should be rescinded, the Board will do so through a form EC-325.1, Rescission of the Order of the Chair. The Board Panel has no authority to direct that the Order of the Chair be rescinded." (*Matter of Brentwood School District*, 2013 NY Wrk Comp G0167813).

Filing an RB-89 with this correspondence results in the board doing two things:

1. It does not respond to the request to address EC-325/Order of the Chair.
2. It then penalizes $500 to the firm and carrier for using RB-89 (if the board catches it).

Therefore, proper protocol would be to treat an EC-325 objection in the same way you would Medical Summations. Draft an argument opposed to the EC-325. CC all parties on the objection. Submit it to the board and follow up repeatedly.

Net of Section 137 Widens, Threatening Admissibility of IMEs in New York

Employers and carriers facing workers' compensation claims in New York must now be extra careful with their submissions of independent medical examination (IME) information to the New York State Workers' Compensation Board. As a communication from the board earlier this month shows, the penalty for filing duplicative IME information, even simply accidentally, may be preclusion of those IME reports or records reviews as evidence — a result that could be disastrous for what otherwise might be a successful defense of the claim.

Last year, the Chair of the Workers' Compensation Board adopted amendments to the regulations governing the conduct and reporting of IMEs, which broadly fall under Section 137 of the New York Workers' Compensation Law. The amended regulation (12 NYCRR §300.2) added a requirement that every record, document, or test result supplied to an IME examiner for review in connection with an IME or records review must be a part of the board file. Any information that is not already part of the board file must be submitted before or at the time the IME or records review is arranged. However, this information should not be submitted to the board via a request for information using an IME-3.

In conjunction with the requirement that records considered by the IME examiner be part of the board file, the amended regulation includes new language regarding requests for information. Specifically, the amended 12 NYCRR §300.2 (b)(11) states (emphasis added):

When any substantive communication consists of documents, records, reports, and items that are part of the official board file and available to all parties at the time they are provided to the independent medical examiner, or his or her office, the documents, records, reports, and **items or copies** thereof shall not be filed with the board.

A recent Board Bulletin (Subject No. 046-769) highlighted the penalty for filing duplicative documents and information with the Workers' Compensation Board. It explained that information filed with the board prior to an IME or records review that is duplicate of information already in the board file will result in preclusion of the IME report or records review.

This is a very harsh consequence for simply filing duplicative information with the board; however, it is important to be compliant to ensure the IME reports and record reviews may be admitted into evidence and

onsidered by the board.
Here are a few tips to ensure compliance:

- Make sure every record or document supplied to an IME examiner for review in connection with an IME or records review is in the board file. Any document or record that is *not* in the board file should be submitted before or at the time the IME or records review is arranged.

- If records from a previous accident are received via subpoena, reach out to your defense counsel to see if they should be included in the IME-3 packet or submitted to the board's file in advance of the exam.

- While it may take a few minutes of your time to review the documents to ensure no duplicative records are filed with the board, it is well worth the extra effort to ensure your report is in compliance with the requirements of Workers' Compensation Law Sections 137 and 300.2.

NEW JERSEY

Does a Claimant Have a Pre-Existing Condition? If So, Future Treatment Could Be Denied If Related to It

Additional treatment for a body part already settled under a prior award is not automatically the responsibility of the employer. In *Wake v. Township of Toms River*, A-5876-13T2 (App. Div. September 16, 2015), the claimant already had pre-existing arthritis. Following a work-related accident, he received an award for the injury, which resulted in surgery to repair a torn meniscus. He filed a reopener for additional treatment. The judge of compensation relied on the report of the treating surgeon and the respondent's expert in deciding that the claimant's need for additional treatment was not related to the work accident. The Appellate Division upheld the court of compensation's decision that the claimant's knee condition was related to a prior arthritic knee condition, not the work injury. The authorized treating physician's opinion does carry more weight than a one-time examiner when it comes to treatment issues. A strong medical expert is crucial when challenging causation of need for treatment following a prior award to the same body part.

Application of Statute of Limitations in Occupational Exposures Claims

As every stage of an occupational exposure claim, respondents should scrutinize whether the claim is barred by the statute of limitations. The Appellate Division addressed application of the statute of limitations when it comes to occupational disease claims. In *Rajpaul v. McDonald's Corporation*, A-4681-13T4 (App. Div. August 28, 2015), the court of compensation granted the employer's motion to dismiss a claim as time barred because it was not filed within two years from the date the claimant knew the nature of his condition and understood its relation to work. The claimant was first diagnosed with bilateral shoulder bicipital tendonitis during the period he worked for the employer. About five months after he stopped working for the employer, he was diagnosed with a torn left shoulder rotator cuff and underwent surgical repair. He filed a claim petition more than two years after the diagnosis of tendonitis but fewer than two years after he was diagnosed with the torn rotator cuff. In reversing the trial court, the Appellate Division determined that the statute of limitations did not start running on the torn rotator cuff diagnosis until it was diagnosed.

This case illustrates one of the nuances of the statute of limitations defense. Employers should still continue to examine and raise the defense in occupational disease claims. It could still help to limit overall, if not all, exposure.

How to Distinguish Between Independent Contractors and Employees

In *Babekr v. XYZ Two Way Radio*, A-3036-13T3 (App. Div. August 6, 2015), the Appellate Division agreed with the court of compensation that a limousine driver for the employer was an independent contractor, not an employee. The employer was a company made up of individual drivers, including the claimant, who were all shareowners and they elected board members to make operational decisions. The driver set his own work hours, used his own car, and paid his own car insurance. Like the other drivers, the employer gave him a computer to install into his car and he received alerts about potential passengers through the computer. He could turn down an offer to pick up a passenger but was subject to a 30-minute period thereafter when he would not receive any other alerts. The employer issued 1099 forms for the drivers and did not deduct taxes.

The company did dictate the specific ways drivers were to dress. All fares went to the company, which then paid a percentage to drivers. The Appellate Division agreed with the court of compensation that the claimant was not an employee because the company exercised little control over the means and manner of claimant's performance. While the independent contractor is still tough to successfully use in New Jersey, it is by no means obsolete.

More and more often, New Jersey is seeing Medical Provider Applications for medical benefits provided to a claimant who resides in New Jersey but is pursuing workers' compensation benefits in a different state. Often, the only tie to New Jersey is that the claimant's residence. Three reserved decisions addressed this issue recently and they were split. Two judges of compensation determined that New Jersey does not have jurisdiction over the Medical Provider Applications in such a scenario because the New Jersey Division of Workers' Compensation court would not otherwise have jurisdiction over the underlying workers' compensation case. *Progressive Spine & Orthopedics v. Krasdale Foods, Inc.*, 14-183 (May 21, 2014), *Cape Regional Medical Ctr. v. Cast and Crew Payroll*, LLC, 12-28812 (April 3, 2014). Residence alone is not enough to establish jurisdiction in New Jersey workers' compensation claims. However, the court of compensation in *Spiros v. Atlantic Ambulatory Anesthesia Assocs. & Shrewsbury Surgical Center*, 12–22032; 13-1069 (October 27, 2014) decided that the New Jersey Division of Workers' Compensation had exclusive subject matter jurisdiction and New Jersey law applies. This issue remains unsettled and we can expect to hear more from the bench. In the interim, defense attorneys should continue to challenge jurisdiction in Medical Provider Application claims where the only tie to New Jersey is the claimant's residence.

PENNSYLVANIA

Clear Indemnification Clauses Critical to Avoiding Liability to Third Parties

Pennsylvania's Worker's Compensation Act generally provides employers with immunity from lawsuits filed by employees that are injured on the job. However, the employee may file suit against a third party who negligently caused his or her accident. The third party may join the employer as an additional defendant in the lawsuit if permitted to do so by an indemnification clause in their written contract. This clause may obligate an employer to reimburse the third party for any judgment entered against it due to the employee's injuries.

An employer cannot be joined in the lawsuit if the contract says something to the effect that "employer shall be brought into the lawsuit for any and all personal injury claims that arise from the worksite." The parties to the contract must specifically state that a named employer agrees to indemnify a named third party from liability for the acts of that party's negligence, which caused harm to the named employer's employees.

We recently dealt with this issue in a construction accident matter. The employee suffered personal injuries after falling off a roof during the course of his employment. He sued our client, which was the general contractor. The court subsequently permitted our client to join the employer as an additional defendant based upon an indemnification provision in a contract between them. The additional defendant then filed a motion with the court asking for dismissal of the claim and argued the contract was too vague. The court partially granted the employer's motion and determined the provision did not permit the general contractor to be indemnified for its own negligent conduct. However, the court found the general contractor was entitled to indemnification from the employer for its own negligence.

This ruling is significant because the court determined the employer waived its right to immunity under the New Jersey Worker's Compensation statute. However, the opinion also exemplified the importance of drafting clear and unambiguous indemnification provisions in a contract. General contractors should ensure their contracts specifically state they are entitled to indemnification even if they are found responsible for an employee's accident.

CONNECTICUT

FAQs: How to Properly Communicate With the Claimant's Medical Providers

Recently, we have received questions from claim professionals on how to properly communicate with the claimant's treating physician. It should be noted on the onset that *ex parte* communications are disfavored between the respondent and the treating physician. *Professional Guide for Attorneys, Physician and Other Heath Care Practitioners Guides for Cooperation,* IV, Revised October 1, 2008. From a Claim Professionals' prospective, the issue often arises in uncontested cases where attorneys are not involved and an answer is needed from the treating physician on a minor issue — work status, maximum medical improvement (MMI), future treatment and the like.

Below are the most common questions and their answers:

Can I ask the treating physician to fill out a form created by the Workers' Compensation Commission? Yes, so long as the claimant or the claimant's attorney is carbon copied on the communication. Typically, this situation occurs when the claim professional wants an update on the work status (Work Status Form) or an opinion on MMI/PPD (Form 42). "The Commission does not ... disfavor inquiries that relate to the [treating] physician's obligation to provide progress notes, forms, etc." *Id*. at B. As a practical matter, we recommend calling the pro se claimant and explaining the purpose of the inquiry before sending the letter. Pro se claimant's often become confused when they receive a form that they do not understand, which adds a level of contention to an otherwise uncontentious claim.

Can I ask the treating physician to clarify a medical record or provide an additional opinion that a WCC form does not cover? Yes, so long as the claimant or the claimant's attorney is carbon copied on the communication and it relates to information that would have been provided in the treating physician's progress notes. *Id.*

Can I provide a surveillance video that is damaging to the claimant's position to the treating physician? Yes, only if you i) provide the claimant or the claimant's attorney with a copy of the video and ii) they are informed in advance that you plan on sending the video to the treating physician.

When there is a dispute as to the claimant's job responsibility prior to the accident/repetitive trauma, can I provide a video created by the respondent showing other employees performing the claimant's job responsibilities to the treating physician? Yes; please see the answer above. However, in all likelihood the treating physician will not answer the question because there is a factual dispute over the claimant's job responsibilities. The best chance you have of getting the treating physician to respond is identifying that a factual dispute exists and asking the following: If it is proven that the claimant's job responsibilities were consistent with the disclosed video, were those actions a substantial contributing factor to bringing about the claimed injuries?

For more on this topic, please see the Connecticut Workers' Compensation Commission's *Professional Guide for Attorneys, Physicians, and Other Heath Care Practitioners: Guidelines for Cooperation*.

MEDICARE SET-ASIDES

The Value of Tackling Medicare Set-Asides Proactively

Goldberg Segalla's Workers' Compensation Practice Group brings clients a distinct competitive advantage to the defense of claims through our exceptional ability to handle Medicare Set-Asides (MSAs), the allocations for the future medical costs of an individual on Medicare (or soon to be on it) following the settlement of a case.

Our team possesses extraordinary qualifications in this area through partner S. Philip Unwin, who has earned the credential of Medicare Set-Aside Certified Consultant. This experience can benefit clients and carriers across the country — and beyond the realm of workers' compensation, as MSAs often into play in general liability claims.

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Goldberg Segalla's Workers' Compensation Practice Group was founded on the premise that the prevailing model of defending employers in workers' compensation claims was inefficient and inadequate. We developed our own unique practice model, one that involves handling each claim from beginning to end, staying abreast of even the most minor changes in interpretive language used by the courts, and developing strategies tailor-made for each unique situation.

For more information on Goldberg Segalla's Workers' Compensation Practice Group, please contact Damon M. Gruber at dgruber@goldbergsegalla.com.

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