

THE COMP REPORT

July 15, 2010

Dear Friends and Colleagues:

We, at Lind, Jensen, Sullivan and Peterson, endeavor to provide you with the most up to date and informed legal representation. As you are well aware, the area of workers' compensation is constantly in flux. We feel it is important to regularly analyze recent rules and caselaw. In an effort to involve you in the dialogue, we will be presenting periodic updates with decisions that will alter or advance our understanding of this developing field.

Please accept the following as our review of recently proposed rules and applicable caselaw.

RULES UPDATE

PERMANENCY SCHEDULE

A Hearing was held on March 4, 2010, before Administrative Law Judge Heydinger for a determination on proposed permanent partial disability rules. The PPD schedule was last amended in 1993. The changes proposed by the Department of Labor and Industry make technical changes to address internal inconsistencies, rating gaps and confusing language. Further, some amendments operate to increase or decrease payments. Certain minor impairments will be assigned a zero rating.

At Hearing, the proposed rules that received the most discussion involved amendments to Minn. R. 5223.0450, subp. 3E, which pertains to the rating for a rotator cuff tear and 5223.0435, which pertains to Complex Regional Pain Syndrome, Reflex Sympathetic Dystrophy or Causalgia. The Administrative Law Judge recommended the proposed rules for adoption.

Proposed Minn. R. 5223.0435 provides:

Subpart 1. Applicability. This part applies to dates of injury on or after the effective date of this part...

Subpart 2. Rating. To rate complex regional pain syndrome, reflex sympathetic dystrophy, causalgia, and cognate conditions, determine the impairment to the peripheral nervous system, the musculoskeletal system, the skin, and the vascular system as provided in items A to I. The ratings obtained are then combined for the final rating as described in part 5223.0300, subpart 3, item E. The percent of whole body disability for complex regional pain syndrome, reflex sympathetic dystrophy, or causalgia of a member shall not exceed the percent of whole body disability for amputation of that member. If there is no rating under items A to I, then the final rating is zero percent.

- A. For upper extremity motor loss rate as provided in part 5223.0400, subparts 1 to 5.
- B. For upper extremity sensory loss rate as provided in part 5223.0410, subparts 1 to 6.
- C. For upper extremity vascular loss rate as provided in part 5223.0580.
- D. For loss of range of motion in the upper extremity rate as provided in parts 5223.0450 to 5223.0480.
- E. For lower extremity motor loss rate as provided in part 5223.0420, subparts 1 to 5.
- F. For lower extremity sensory loss rate as provided in part 5223.0430, subparts 1 to 5.
- G. For lower extremity vascular loss rate as provided in part 5223.0580.

- H. For loss of range of motion in the lower extremity rate as provided in parts 5223.0500 to 5223.0530.
- I. For impairment due to disorder of the skin rate as provided in part 5223.0630.

ANALYSIS

The proposed amendment would eliminate the prior requirement that five of the eight conditions listed must be present and persist despite treatment. Additionally, in place of the subjective “mild,” “moderate,” or “severe” categories, the new rule would provide for graduated ratings based on individual factors and actual level of functional impairment based on objective findings. A zero rating is appropriate where there is no functional loss. The Department noted this amendment followed the intent of the permanency schedule to rate functional loss rather than a diagnosis. This is particularly the case where such conditions are difficult to diagnose and physicians often have differing diagnoses.

Proposed Minn. R. 5223.0450 provides:

Subpart 3. Combinable categories.

- A. For dates of injury from July 1, 1993, through the day before the effective date of item E: Chronic rotator cuff tear, demonstrated by medical imaging study, with or without surgical repair:
 - (1) partial thickness, two percent;
 - (2) full thickness, six percent.
 - ...
- E. For dates of injury on or after the effective date of this item: rotator cuff tear, demonstrated by medical imaging study:
 - (1) healed or surgically repaired with no persistent tear, zero percent;
 - (2) partial thickness tear which persists despite treatment, two percent;
 - (3) full thickness tear which persists despite treatment, six percent.

ANALYSIS

This rule was amended to address confusion concerning individuals with a successfully repaired rotator cuff tear. The Department noted the term “chronic” in the current rule was intended to represent a persistent tear after treatment. Repaired tears would be rated zero under Subpart 3.

MEDICAL TREATMENT PARAMETERS

A Hearing was held on March 2, 2010, before Administrative Law Judge Luis for a determination on proposed amendments to the treatment parameters. The amendments were proposed to address new technology, changes in terminology, technology and health care provider techniques and practices, and decisions by the workers’ compensation court of appeals.

Language was clarified or added to adopt changes in terminology and technology, as well as to provide clarification. Significant changes pertain to use of opioid analgesics. The 2007 Minnesota Workers’ Compensation System Report stated drug costs arose in 46% of the 2007 claims and at least 86% of those costs were for prescription medication. Further, the cost of drugs for an average workers’ compensation claim grew 55% between 1997 and 2007.

Proposed Minn. R. 5221.6105 provides parameters for the appropriate use of medications in outpatient treatment. The rule states as follows:

Subpart 1. Scope. Subparts 2 to 4 apply to use of medication in an outpatient setting. Subparts 2 to 4 do not require a health care provider to prescribe any class of drugs in the treatment of any patient.

Subpart 2. [defines nonsteroidal anti-inflammatory drugs].

A. NSAID’s are indicated for the symptomatic relief of acute and chronic musculoskeletal pain. NSAID’s must be prescribed at the lowest clinically effective dose, as determined by the prescribing health care provider, but not to exceed the manufacturer’s maximum daily dose.

B. When treating musculoskeletal pain, a generic nonselective NSAID is indicated unless a COX-2 inhibitor is indicated as specified in item C.

(1) When a nonselective NSAID is used, treatment must begin with generic ibuprofen or generic naproxen. If there is a medical contraindication documented by the prescribing health care provider to each of the medications in this item, then treatment may begin with any other generic nonselective NSAID.

(2) Other generic nonselective NSAID’s are not indicated unless one-week trials of

each of ibuprofen and naproxen have been ineffective in reducing the patient's pain by at least 50% as determined by the prescribing health care provider.

(3) Nonselective NSAID's that are not available as generics are not indicated.

- C. [provides a list of circumstances where a COX-2 inhibitor may be indicated instead of a nonselective NSAID].
- D. [lists time frames for prescribing NSAID's].

Subpart 3. [defines opioid analgesics].

A. [describes the pain for which opioid analgesics are indicated and required they be prescribed at the lowest clinical dose].

B. When treating pain, a generic oral opioid analgesic is indicated.

(1) [provides which medications should be used first].

(2) Other generic opioid analgesics are not indicated for oral use for the symptomatic relief of acute or chronic pain unless one-week trials of each of hydrocodone, oxycodone, and morphine have been ineffective in reducing the patient's pain by at least 50% as determined by the prescribing health care provider.

(3) [permits prescription of generically available combinations of an oral opioid and a nonopioid analgesic as otherwise allowed under subitems (1) and (2)].

(4) Oral opioid analgesics that are not available as generics and combinations... are not indicated.

- C. [lists time frames for prescribing oral opioid analgesics and combinations].
- D. [provides meperidine is not indicated in the treatment of acute or chronic pain].
- E. [provides that transcutaneous opioid analgesic are only indicated in patients with a documented disorder that prevents adequate oral dosing].
- F. [provides that oral transmucosal and buccal preparations are only indicated for the treatment of breakthrough pain and only in patients with a documented disorder that prevents adequate dosing with swallowed medications].

Subpart 4. [describes muscle relaxants].

[Items A-D provide indications analogous to those stated in Subparts 2 and 3].

ANALYSIS

The proposed amendments should enable employers and insurers to mitigate the cost and use of drugs in a workers' compensation claim. Further, they will allow employees to use such drugs in a more effective manner. Misuse of these medications will not provide a beneficial long-term treatment plan for either party.

The Department has drafted a proposed rule for long-term use of opioid analgesics. The rule states that long-term prescription of opioid analgesic medication is not indicated for treatment of workers' compensation injuries unless certain criteria are met. A draft of this rule is located at:

<http://www.dli.mn.gov/PDF/docket/5221Draft2.pdf>.

Interested persons may submit comments or information on the proposed rules.

CASELAW UPDATE

Moe v. University of Minnesota, No. WC 08-208 (W.C.C.A. April 27, 2009)

The employee sustained an injury to her wrist when she slipped and fell. In dispute was whether the injury occurred on the employer's "premises" such that it would be a compensable injury. When the employee fell, she was walking between a parking lot maintained by the employer and the employer's office building. However, she was on a public sidewalk.

The Court, relying heavily on *Weiss v. State, Bemidji State Univ.*, 55 W.C.D. 663 (W.C.C.A. 1996), held the employer's "premises" includes the path across a public street between an employer maintained parking lot and the employee's building.

Pinc v. Stepping Out, Inc., No. WC08-233 (W.C.C.A. March 6, 2009)

The court of appeals determined the treatment parameters do not apply where primary liability is admitted but the insurer denied the subject surgery was causally related to the work injury.

Liability was admitted for the employee's 2004 work injury. Later, a dispute arose over a proposed shoulder surgery. The employer and

insurer denied the surgery was causally related to the injury. An independent medical examination concluded the surgery was not recommended, but conservative measures were reasonable and necessary. The insurer argued the medical treatment parameters applied. The compensation judge agreed and found the employee had not met the treatment parameters. Further, even aside from the parameters, it was determined the surgery was not reasonable and necessary.

The court of appeals reversed citing *Hirsch v. Bartley-Lindsay Co.*, 537 N.W.2d 480, 483 (Minn. 1995), which discussed the purpose and application of the parameters, stating the parameters do not apply after an insurer has denied liability for the injury. Further, an employer and insurer's claim that an injury was temporary in nature, but has fully resolved, negates application of the treatment parameters. *Oldenburg v. Phillips & Temro Corp.*, 60 W.C.D. 8 (W.C.C.A. 1999). A denial of liability includes both a denial of primary liability and a denial of medical causation for subsequent symptoms or conditions.

Peulen v. Anderson Corp., WC09-120 (W.C.C.A. July 1, 2009)

A denial of penalties was reversed where payments made pursuant to an Award on Stipulation were postmarked on January 12, 2007 one day after the due date of January 11, 2007. The W.C.C.A. also awarded penalties on attorneys fees in addition to the amounts due the employee.

The W.C.C.A. awarded penalties on late payment of attorneys fees pursuant to M.S. 176.255, subd. 1 in the amount of \$250. The Court found there was some discretion here and the payment was only one day late. However, a 25% penalty was awarded pursuant to 176.225, subd. 5. If a delay is inexcusable, 176.225, subd. 5 mandates a 25% penalty. Since no excuse was offered, the Court ordered a 25% penalty on the amounts owed to both the employee and the attorney.

Sampson v. Forest Lake Mem. Hospital, WC09-184 (W.C.C.A. November 10, 2009)

This case provides a good discussion of what the Court will consider to be "statutory misconduct," to bar all future TTD benefits.

Wage loss was denied based on alleged misconduct. There were complaints from residents, allegations of negative comments made by the employee and a failure to properly submit rent statements. The compensation judge found the employee's actions did not amount to misconduct and awarded TTD.

The W.C.C.A. affirmed and discussed two types of misconduct. "Statutory misconduct" is that which rises to a level sufficient to apply the punitive provisions of M.S. 176.101, subd. 1(e)(1). Statutory misconduct is "conduct evincing such willful or wonton disregard of employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed misconduct." *Moon v. A Chance To Grow, Inc.*, 68 W.C.D. 41, 49 (W.C.C.A. 2008); *Langworthy v. Signature Flight Support*, slip op. (W.C.C.A. July 8, 1998).

Regardless, a termination for cause unrelated to the work injury suspends an employee's right to wage loss benefits until the employee demonstrates through a diligent job search that the work related disability is a substantial contributing factor in the ongoing wage loss. *Marsolek v. Geo. A. Hormel & Co.*, 438 N.W.2d 922 (Minn. 1989).

The W.C.C.A. determined the employee's conduct did not reach the statutory level. Her evaluations were good and the allegations of misconduct did not occur until after the complaints of injury. Additionally, the employee performed a diligent job search and found various positions that turned out to be physically inappropriate. Therefore, TTD could be recommenced.

For questions or more information, please visit us at:

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