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New DOL Rules Discourage Utilization Review



The Department of Labor recently amended its regulations governing the utilization review process. The first change will effect the qualifications of physicians who review the medical necessity of recommended procedures.

Effective November 12, 2009, UR physicians issuing denials must be "Advisory Medical Practitioners" who are licensed to practice medicine in Tennessee and specialize in the area of the claimant's injury. Accordingly, physicians who are not licensed in Tennessee may no longer render a decision in utilization review in Tennessee.

Strict Timeframes

Further, the timeframes and potential penalties for noncompliance have also been revised. Employers must submit recommended treatments to utilization review within three *business* days of receiving notification of the request. It is prudent for the employer to make this submission using a format that will timestamp the documents (i.e., facsimile), to obtain objective proof of compliance with the time requirement.

Mandatory Forms

After sending the request to utilization review, adjusters must ensure that a

Utilization Review Notification Form (Form C-35) is immediately filed, as the failure to do so will result in fines of \$25.00 for every fifteen *calendar* days past the initiation of the claim. Utilization review agents then have seven *business* days in which to render a decision and communicate it in writing to all parties.

Further, the employer must ensure that, upon conclusion of this process, a Utilization Review Closure Form (Form C-36/C-37) is immediately filed, as again, the failure to do so will result in the employer being fined \$25.00 for every fifteen *calendar* days past the conclusion of the claim

Costs of Appeals

If the treatment has been denied, the employer must give written notice of the denial within three *business* days to the employee and authorized treating physician. If an appeal is then filed, it is the employer's responsibility to remit the "standard appeals fee" and any "consultation fee" to the Workers' Compensation Division within ten *business* days, as 10% of the applicable fee will accrue each day until the fee is paid.

Penalties for Non-Compliance

It is imperative that employers diligently comply with these new requirements, as the failure to comply with any of the above-mentioned rules will subject that party to penalties ranging from \$100-\$1,000 per violation. While the new rules should reduce the current regulatory confusion surrounding denials, they definitely warrant careful calendaring

By: Alex Morrison

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“Acceleration” of Pre-Existing Condition Found Compensable

When Did Your Back Pain Start?



A May 2009 Supreme Court Case Expands the Compensability of Injuries to Pre-Existing Conditions

Pre-existing conditions can be tempting. When pre-injury medical records reveal similar symptoms, it's easy to deny a claim as unrelated to work. But a recent Supreme Court opinion provides a reason to be wary when denying claims on the basis of a pre-existing condition. The Court ruled that the claimant sustained a compensable aggravation of a congenital condition that would have required surgery anyway.

The employee alleged that she aggravated a pre-existing condition in her right hip. Her symptoms gradually worsened until, she advised her supervisor of her symptoms.

An Inevitable Hip Replacement

The claimant was referred to Dr. Philip Karpos, an orthopedic surgeon who specialized in hip surgery. Dr. Karpos performed a hip replacement procedure and the employer argued at trial that the claim was not compensable because the claimant's congenital condition would have required surgery regardless of her employment.

The central issue was whether or not the employee's work aggravated her pre-existing Perthes disease. Perthes disease is a congenital disease that affects the blood flow to the hips and ultimately causes arthritis to develop in the hip joint.

Increase in Pain Insufficient

The Supreme Court held that employees do not suffer a compensable injury where the work activity aggravates the pre-existing conditions merely by increasing the pain. However, if the work injury advanced the severity of the pre-existing condition, or if, as a result of the pre-existing condition, the employee suffers a new distinct injury other than increased pain, then the work injury is compensable.

In this case it was undisputed that the employee had Perthes disease, a congenital condition unrelated to her

work. It was also undisputed that Perthes disease caused arthritis to develop in her hip joint, and that, as a consequence of that arthritis, she was required to undergo hip replacement surgery.

The question was whether her work activities “in some way advanced the severity of the pre-existing condition or caused a new, distinct permanent disability as a result of the pre-existing condition.” The Court determined that the issue was whether or not the employee's work activities “accelerated” the progression of her arthritis and thereby the need for the resulting surgery.

No Causation...

Dr. Karpos also stated that a person with Perthes disease “is almost doomed to have arthritis developing sooner or later regardless of job activity.” He also testified that regardless of her work activity, employee was at the age this would start bothering the average person who had this syndrome, and that he didn't “think the job caused the need for a total hip replacement. But I don't think there was causation.”

...But Acceleration

Nevertheless, the Supreme Court found the claim compensable because the employee's work “accelerated” her need for the inevitable surgery. This case offers a prime example of the pitfalls of establishing a pre-existing condition defense. Dr. Karpos testified that the hip surgery was inevitable and that there was no causation. However, because he stated that work activities accelerated the necessity for the hip surgery, the claim was in fact compensable.

Thus, the key to prevailing on a pre-existing condition defense is securing medical testimony that the employment did not “aggravate” a condition or “accelerate” the need for surgery.

By: Daniel Starnes

“Construction Industry” Redefined



The Tennessee legislature recently changed the statutory definition of the “construction industry,” along with the provisions regarding workers’ compensation claims in this field. These amendments become effective on December 31, 2009.

Most importantly, “construction industry” will now be defined by a rate service organization, rather than by statute. The effect of this change means that the “construction industry” is now more broadly defined, and includes such fields as landscaping, in addition to the traditional jobs involving building and renovation.

Sole Proprietors

Further, changes have been made to the provisions regarding the necessary insurance coverage for persons employed in the construction industry. Now, as a general matter, sole proprietors and partners are required to carry workers’ compensation insurance on themselves, as well as their employees and subcontractors.

Essentially, the only exception to this requirement is where a person(s) is building or repairing a structure on their own property for their own use. However, even if in that situation, the sole proprietor or partner must carry workers’ compensation insurance on any contractors and subcontractors assisting them.

Finally, the amendments have removed all population requirements regarding the applicability of these provisions. Now, the same provisions will apply in all counties in Tennessee, regardless of population.

By: Todd I. Heird

The New Definition of Construction Industry is **so important**, the Tennessee Legislature is Considering a Special Session to Delay the Change in the Law.



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This is a legal advertisement. The articles are intended to provide background and general guidance to the TN workers' comp system. They are not intended as legal advice as each lawsuit is unique and requires specific analysis. Please contact MIJS to discuss the details of your claim.

Eliminating Exposure Part II: Recorded Statements

Recorded statements are one of the most effective ways to keep a claim from spinning out of control. Freezing a claimant's testimony early can prevent an injury from spreading to multiple body-parts and provide valuable impeachment evidence.

This is especially important with suspicious claims. When an initial investigation reveals a lack of witnesses, gradually occurring injury, or a history of claims, recorded statements should be obtained as soon as practicable.

Building Rapport

Recorded statements are not without risk. If a claimant feels intimidated or believes their truthfulness is being questioned, the chances of them getting an attorney increase exponentially. Therefore, it is important to make sure a claimant is as relaxed as possible. One way to build rapport is to begin by asking background questions to break the ice.

Ask them where they are from and how they ended up at their job. Learning about their work-history and education level also makes it easier to predict the degree of vocational disability and lets the claimant know they are more than just a claim number. If a claimant feels comfortable with you, they will provide more information and will be less inclined to seek representation. Getting the right info without alienating a claimant is the art of the recorded statement

Standard Questions

While every claim is different, there are a few things we need to know about all claimants. Be sure to find out who the claimant's PCP is, what hospitals they've treated at, where they pick up their prescriptions, and what other jobs they've had. Other necessary inquiries include:

1. Where specifically were you injured?
2. When was the first time you experienced your symptoms?
3. Have you ever experienced these symptoms before the accident?
4. How long did you wait before telling your employer about your symptoms?
5. Were there any co-workers around when you got hurt?
6. Is this your first workers' compensation claim?

Never Have I Ever...

An easy way to beef up the impeachment value of a recorded statement is to confirm denials with a follow-up leading question. For example, "If I'm understanding you correctly Mr. Jones, you've never experienced these symptoms before?" Leading questions suggest the answer or contain the information the examiner is looking for. If a claimant is holding something back, this technique makes it extremely difficult to get out of a lie. Striking the right balance in a recorded statement is critical. By establishing rapport and confirming critical answers, you can make the most of this valuable tool.

By: Gregory H. Fuller

About Moore Ingram Johnson & Steele...

MIJS is a value oriented law firm focused on providing customized solutions for our clients. Based in Marietta, GA, MIJS offers a full spectrum of legal services ranging from general liability to transactional tax planning.

Our Tennessee offices specialize in workers' compensation defense allowing us to aggressively minimize the overall expenses of claims. By leveraging the experience of eight comp attorneys, we help employers and insurers navigate Tennessee's workers' compensation system with an eye towards cutting costs.

We are pleased to announce the opening of two new offices in Nashville, TN and Jacksonville FL. These new facilities will allow us to better serve our clients by reducing travel time. Please contact Troy Hart to see how MIJS can help you meet your workers' comp goals.