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The 1st Report

A Workers' Compensation Update

Summer 2008

Primary Authorized Treating Physicians vs. Referral Physicians: Who Is Really Steering the Ship?

By Rick J. DeMedeiros

Most workers' compensation claims have a relatively short life span, thus making it easy to see the big picture. The claimant suffers a compensable work injury, chooses a primary treating physician from a (hopefully) valid panel, treats for the injury, is released at maximum medical improvement and the case is subsequently settled or closed. In many claims, all of this happens over the course of months, not years. However, when a claim becomes medically complicated, either at the outset or later on, and several physicians enter the picture and time passes, it is a lot harder to see the big picture and to determine who is truly in charge of the medical care.

It is usually easy to identify which doctor is the "authorized treating physician" charged with navigating the employee toward recovery. However, confusion often arises when the initial authorized treating physician makes one or more referrals to specialized doctors, but does not see the employee for an extended period of time after the referral. In these instances, who is the true "authorized treating physician" in control of the employee's care? Does the employee now have more than one treating physician? Can the referral physician make referrals to other doctors?

As is the case with many dilemmas, the first question to ask is, "What does the Act say?" Under O.C.G.A. § 34-9-201(b)(1), the doctor selected from the panel may, "arrange for any consultation, referral and extraordinary or other specialized medical services as the nature of the injury shall require without prior authorization from the Board; provided however, that any medical practitioner providing services as arranged by a primary authorized treating physician under this subsection shall not be permitted to arrange for any additional referrals."

So, the first question answered by the statute is whether the initial authorized treating physician maintains control over the employee's treatment. Under the Act, the initial treating physician selected by the employee from a panel is considered the primary authorized treating physician. Thus, this doctor maintains control over the employee's medical care unless the employee makes the free one-time change on the panel, or the primary treating physician is changed by consent or order of the Board.

One way to think of the relationship between the initial treating physician and the referral physician(s) is to compare them to contractors. The initial referring physician is like a general contractor who subcontracts specific parts of a construction job to specialized subcontractors. Much like a general contractor hires electricians to perform electrical work and drywall installers to take care of the sheetrock details, a primary treating physician will send employees to specialists such as orthopedic specialists, surgeons or pain management doctors, for example. However, just as a general contractor does not relinquish oversight and control of a worksite to an electrical subcontractor, neither does a primary treating physician give up control over an employee's entire medical care to a referral specialist. This remains true even though many months, or even years, may elapse before the employee sees the primary treating physician again. However, if an employee is not experiencing any appreciable improvement and remains out of work despite a long course of treatment with a referral physician, a good way to "stir the pot" is to take the initiative and make an updated appointment for the employee with the primary treating physician. This should be done in order to reign in the medical treatment and costs, and to hopefully get the primary doctor to issue a work release, or at least opine that the employee does not need to go back to the referral physician.

Notably, there can be only one primary treating physician at any given time. However, do referral physicians have the power to make referrals themselves? The answer is essentially no. The statute is clear that referral physicians are not permitted to make subsequent referrals. For example, if an employee is sent to a back surgeon for a fusion by a primary treating physician, the back surgeon cannot make a referral to a pain management doctor. If the employee needs or wants to see a pain management specialist, he must return to the primary treating doctor for the referral. The purpose of this rule is to keep an employee's medical care manageable and efficient.

Of course, if an authorized treating physician voluntarily gives the role of primary treating physician to a referral doctor, such as a pain management physician, then this obviously alters the analysis. In some instances, employees face the prospect of dealing with long-term pain even after their primary treatment for the work-related injury comes to an end. When this happens, a primary treating physician, such as an orthopedist, will discharge an employee from care when he/she has nothing further to offer the claimant and will typically transfer

care to a pain management physician. Afterwards, for all intents and purposes, the pain management doctor becomes the primary authorized treating physician. However, it is a good idea to file a form WC-200a to make the change binding and to document the file in order to avoid future confusion as to who serves as the rightful primary treating physician. This can also prevent any challenges to a WC-104 that is filed as a result of a release to light duty made by the "referral" physician.

As you can see, it is vitally important to determine who the primary authorized treating physician is in a workers' compensation case as this doctor sets the course for the employee's overall medical treatment. Even though a claimant may treat with specialized referral physicians for months or even years without going back to see the primary treating physician, that initial referring doctor remains the primary doctor and retains control over the claimant's treatment. Unless this doctor has nothing further to offer or a change is made by right, agreement or order of the Board, the initial primary treating physician remains captain of the ship.

For more information on this topic, please contact Rick DeMedeiros at 404.888.6118 or via email at rick.demedeiros@swiftcurrie.com.

Case Law Update

By Jon W. Spencer

Smart Document Solutions, LLC v. Hall, et al. 290 Ga. App. 483 (2008) was decided by the Georgia Court of Appeals on March 24, 2008. This case addresses the determination of the appropriate fee structure for medical photocopying services in workers' compensation proceedings. The Court of Appeals was asked to address whether the State Board of Workers' Compensation was required to use the general fee schedule for medical record copying pursuant to § 31-33-3 of the Health Records Act or if they could instead adopt their own photocopying fee structure.

In addressing this issue, the court noted that the Health Records Act, while establishing a general photocopying fee structure, exempted, "Records requested in order to make or complete an application for a disability benefits program." O.C.G.A. § 31-33-3(a). The trial court, on a Motion to Dismiss for failure to state a claim, determined that workers' compensation proceedings fall outside of the Health Records Act's fee requirements. It found the Health Records Act did not apply and dismissed Smart Document Solutions's complaint.

Smart Document Solutions argued that the Georgia Workers' Compensation program does not qualify as a "disability benefits program." However, the Court of Appeals disagreed with this assertion. In fact, it found the General Assembly enacted workers' compensation legislation, "To alleviate the suffering of injured workers and their families by providing immediate and certain financial assistance … 'for work related injures.'" *Bear Corp. v. Lassiter*, 282 Ga. App. 346, 349 (638 SE 2d 812) (2006). This compensation program provides benefits to workers with a total or partial disability. *See* O.C.G.A. § 34-9-261 to 34-9-264. Because the act focused on injury and disability, the court found that the Legislature intended the workers' compensation legislation to function as a disability benefits program.

Smart Document Solutions next focused its arguments on the fee exemptions use of the term "application." However, the Court of Appeals made short work of determining that the workers' compensation statutes do in fact provide for an application for obtaining benefits. As usual, in statutory interpretation, the words employed by the Legislature are given their ordinary and common meaning when the statutory language is plain and unambiguous. *City of Atlanta v. Yusen Air & Sea Service Holdings, Inc.*, 263 Ga. App. 82, 84 (587 SE 2d 230) (2003). Specifically the court found, "The fee exemption, therefore, includes requests for disability benefits such as those available through the workers' compensation scheme."

Because the Board has the authority and responsibility to set service fees in workers' compensation proceedings pursuant to O.C.G.A. § 34-9-205(a), (b), the court determined that the Board's regulatory authority extended to photocopying fees charged by providers like Smart Document Solutions, LLC. Thus, the court determined that the State Board of Workers' Compensation regulates medical photocopying charges in workers' compensation proceedings and found that the trial court properly dismissed Smart Document Solutions complaint for failure to state a claim upon which relief could be granted. Medical photocopying charges are therefore limited by the workers' compensation fee schedule.

Another Court of Appeals case, *McLeod v. Blase*, 290 Ga. App. 337 (659 SE 2d 727) (2008) issued on March 18, 2008, addressed the exclusive remedy provision of the Georgia Workers' Compensation Act. Specifically, the plaintiff alleged that *Downey v. Bexley*, 253 Ga. 125 (317 SE 2d 523) (1984), created an exception to the exclusive remedy provision for professional co-employees charged with fraud, deceit and violation of professional trust. In *Davis v. Stover,* 285 Ga. 156 (366 SE 2d 670) (1988), the Supreme Court applied this exception in a case for medical malpractice where there was no allegation of fraud, deceit or violation of professional trust. In that case, the court explained, "Because of the relationship between physicians and patients, company physicians cannot use the workers' compensation laws as a shield to insulate themselves from individual liability for medical malpractice claims. The workers' compensation laws were not intended to be a grant of immunity from professional malpractice actions."

In *McLeod v. Blase*, the defendant was a certified athletic trainer employed by the Atlanta Hawks basketball team in its "Sports Medicine Department." The plaintiff alleged that the defendant negligently treated his injury and as a result of that negligence, the claimant's otherwise-treatable injury became permanent and he was disabled from playing professional basketball. In addressing the exclusive remedy provision, the Court of Appeals reviewed both *Downey* and *Davis* but opined while these two cases suggest that an exception could apply to other "professionals" in addition to physicians, the exception has thus far been applied only in medical malpractice actions against a company physician.

The Court of Appeals found no authority for applying an exception because the co-employee was a professional who was subject to the authority of a professional licensing board. Furthermore, the court opined that allowing McLeod's suit against Blase would restrict the scope of the exclusive remedy provision of the Workers' Compensation Act. The court also found there was no authority for an employee to bring a medical malpractice action against a certified athletic trainer, while still being consistent with the exclusive remedy provision of the Workers' Compensation Act. Therefore, the Court of Appeals affirmed the trial court's granting of the defendant's Motion for Summary Judgment and affirmed the ruling that a co-employee does have workers' compensation immunity.

For more information about these cases, please contact Jon Spencer at 404.888.6240 or via email at jon.spencer@swiftcurrie.com.

Defense Strategies in Catastrophic Claims

By Todd S. Boyce

At some point, most employers and insurers will be faced with a request for catastrophic designation by a workers' compensation claimant. In such a case, it is important to understand what the law holds about catastrophic designation requests and the defenses available to employers and insurers.

The law regarding catastrophic injury claims is dynamic and has changed a great deal over the last 20 years. Essentially, if the claimant's injury occurred on or after July 1, 1997, the claimant will likely have to prove he is incapable of BOTH his previous work and work within the national economy. If successful, a catastrophic designation has the effect of providing lifetime income benefits to a claimant.

There are several categories of statutorily defined catastrophic injuries. O.C.G.A. § 34-9-200.1(g) defines "catastrophic injury" as any one of six potential injuries. The first five potential catastrophic injuries include: 1) spinal cord injury involving severe paralysis of an arm, a leg or the trunk; 2) amputation of an arm, a hand, a foot or a leg involving the effective loss of use of that appendage; 3) severe brain or closed head injury as evidenced by severe sensory or motor disturbances, severe communication disturbances, severe complex integrated disturbances of cerebral function, severe disturbances of consciousness, severe episodic neurological disorders or other conditions as least as severe in nature as any condition provided above; 4) second or third degree burns over 25 percent of the body as a whole or five percent or more of the face or hands; and 5) total or industrial blindness.

Historically, there has not been much rancor over claims that fall into one of the first five categories. The real disagreements are created when a claimant's attorney requests a catastrophic designation on a claim that falls under the sixth or "catch-all" category. The sixth category of potential catastrophic injury is defined by Georgia law as "any other injury of a nature and severity that prevents the employee from being able to perform his or her prior work and any work available in substantial numbers within the national economy for which such employee is otherwise qualified." It is important to note that the claimant must be able to sufficiently prove both methods of his/her inability to perform work in order for the claim to be considered catastrophic.

After the employer and insurer have confirmed that the claimant's injuries do not fall into one of the first five categories, employers and insurers can rest assured that the claimant will attempt to pigeonhole the injuries into the "catch-all" provisions. In order to defend the claim, the goal is obviously to produce competent evidence that the claimant is able to perform either the work he actually performed in his past—OR—that the claimant is able to perform work available in substantial numbers within the national economy for which he is otherwise qualified.

Although the claimant can request a catastrophic designation via a Board form, the preferred course for employers and insurers to defend a claim is for a hearing to be requested. In litigating the request for catastrophic designation, employers and insurers arm themselves with the discovery procedures allowed by Georgia law. In the discovery process, employers and insurers can learn vital information about the claimant's educational and occupational backgrounds.

In this regard, employers and insurers would certainly need to be able to show that the claimant has been released to work with restrictions. If the claimant has not been released to work with restrictions by the authorized treating physician, employers and insurers would need to strongly consider obtaining another medical opinion via an independent medical examination.

In potentially catastrophic cases, employers and insurers would be best served by producing competent evidence that the claimant is capable of performing any work available in substantial numbers within the national economy for which the claimant is otherwise qualified. Although it is the claimant's burden to show that his claim is catastrophic, employers and insurers will want to tackle the issue and present evidence of their own in the form of expert testimony.

In considering a claim for catastrophic designation, the State Board of Workers' Compensation usually examines the claimant's current diagnoses, the claimant's education level and the claimant's work history for the last 15 years. After having gathered the necessary information regarding the claimant's education and occupational history as well as documentation of the claimant's medical treatment history, the best defense against the claimant's argument that he is incapable of performing jobs of substantial number within the national economy is utilizing a vocational expert. In preparing an opinion, the vocational expert will examine deposition transcripts for educational and occupational history, medical records related to the claimant's work injuries and other related conditions and compare the claimant's transferable skills in determining the jobs available in substantial numbers in the national economy.

Additionally, while employers and insurers can certainly present medical evidence in the way of independent medical opinions to defend a catastrophic claim, the vocational expert will likely serve as the best defense to a request for catastrophic designation. If the Board determines that the claim is catastrophic, employers and insurers retain their usual and customary right to appeal. In the event a claim is deemed catastrophic, a claimant is foreseeably entitled to lifetime income benefits, along with reasonable and necessary rehabilitation services. Accordingly, presenting a viable defense to a request for catastrophic designation is imperative from both a cost and claim handling perspective.

For more information on this topic, please contact Todd Boyce at 404.888.6216, or via email at todd.boyce@swiftcurrie.com

Serving our Community One Project at a Time

Aside from providing our clients with the best legal services possible, Swift Currie is also serving our community. As much as we are here to serve our clients, we are also aware of our duty to do our part in the community and assist those in need. Through the direction of our Community Relations Committee, Swift Currie is able to actively participate in community service projects and hopefully make a positive difference in the lives of others one project at a time.

Most recently, 32 Swift Currie volunteers participated in a project at the Product Resource Center at the Atlanta Community Food Bank and packaged 8,153 pounds of food which equated to 5,435 meals for needy families!

Here are a few of our other upcoming community service events for the next quarter:

June 28, 2008 — Hands on Atlanta - Service Juris Day
8 a.m. - 12:00 p.m.

Swift Currie will be working on a project at Atlanta Charter Middle School. Swift Currie has also been asked to be an event sponsor and will serve on the steering committee for this event.

July 12, 2008 — Samaritan House Café 458
8:30 a.m. - 1:30 p.m.

Ten Swift Currie members will serve the public during Saturday brunch. We encourage you to come out and enjoy a delicious brunch that will be served to you by our own Swift Currie volunteers. All proceeds will benefit Café 458 and their efforts to provide meals to the less fortunate and the homeless in the community.

Later this year Swift Currie will participate in additional activities involving the Atlanta Pet Rescue, Senior Citizen Services and Habitat for Humanity. We hope you will come out and support our community service efforts when possible. We are making a difference one project at a time!

For more information on this topic and about our upcoming Community Service Projects, please contact Lisa Wade at lisa.wade@swiftcurrie.com, Terry Brantley at terry.brantley@swiftcurrie.com or Martine Nelson at martine.nelson@swiftcurrie.com.

E-mail List

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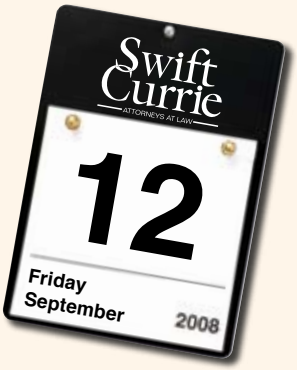
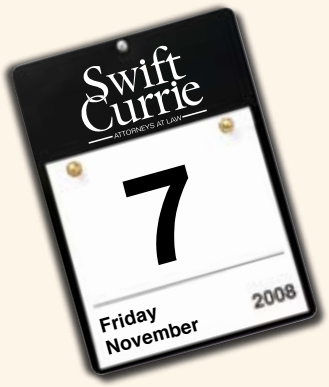


Save the Date

Swift Currie's Annual Workers' Compensation Seminar
September 12, 2008
9:30 AM - 3:00 PM
Villa Christina



Swift Currie's Annual Property and Liability Seminar
November 7, 2008
9:30 AM - 3:30 PM
Villa Christina

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The First Report is edited by Charles E. Harris, IV and K. Martine Nelson. If you have any comments or suggestions for our next newsletter, please contact Chad at chad.harris@swiftcurrie.com or at 404.888.6108. You can also contact Martine at martine.nelson@swiftcurrie.com or at 404.888.6224.