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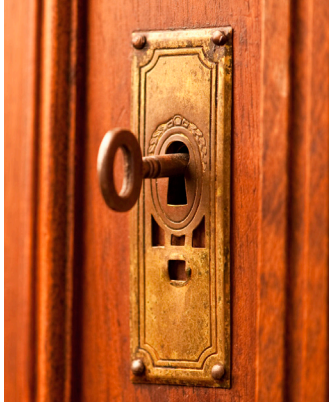

The 1st Report
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Fall 2017

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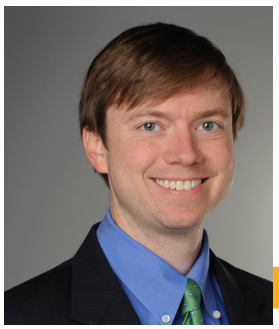

Substantive Changes Recently Made to Board Rule 205

By Mark E. Irby

Effective July 1, 2017, the Board implemented a major change to Rule 205, designed to expedite the authorization or denial of medical treatment. While the WC-205 form has to date been used by some providers to obtain authorization for medical treatment within five days, many providers do not use the form at all due to case law which preserves the employer's right to controvert the compensability of treatment after treatment has been rendered. Simply, providers do not feel the form adequately guarantees payment. Yet claimants have still sought a means to force employers, insurers and third party administrators to make a decision regarding medical treatment.

The amended Rule allows an employee to file a Petition on Board Form WC-PMT requiring an employer to "show cause" why certain medical treatment or testing recommended by the authorized treating physician (ATP) has not been authorized. As a prerequisite to filing the Petition, the request for medical treatment must have been submitted to the employer or insurer at least five business days before the Petition can be filed. The Petition will trigger the issuance of a notice from the Board of a telephonic conference before an Administrative Law Judge (ALJ), to be scheduled for a date and time not more than five business days from the date of Petition.

Postponements of the scheduled conference call will be granted for good cause only, and any party requesting a postponement of the conference call must propose an alternate date within five business days of the original conference call date. Moreover, the requesting party must certify the opposing party is agreeable with such date. It is also important to note that failure of any party to participate in the conference does **not** preclude a ruling on the Petition. Thus, the ALJ may still be moved to rule even if one side does not participate or claims to be unavailable for the call.

Alternatively, in lieu of scheduling a conference call, the employer and insurer have the option to authorize the treatment by completing Section C of the form WC-PMT or controvert the treatment by completing Section D of the same form. The filing of a controvert on the form WC-PMT serves as notice the medical treatment/testing at issue is being denied for the specific reasons stated and no other forms need to be filed. Any scheduled conference call will be cancelled upon completion of the form. In this way, the Board believes the amended rule will (and already has) successfully eliminate "silent denials" and force employers to quickly advise claimant's as to their position on requested medical treatment.

If treatment is denied, claimants retain the right to pursue the denied treatment via a WC-14 Request for Evidentiary Hearing. From here, the evidentiary hearing process looks the same.
If the treatment is neither authorized nor denied such that the conference call takes place, the purpose of the call will be for the employer/insurer to show cause why the treatment or testing at issue has not been authorized. The ALJ may then issue an Interlocutory Order which addresses authorization of the treatment or testing at issue. If the ALJ agrees the treatment or testing in question should be authorized, the Order will require the employer/insurer to provide written authorization to the medical provider.

The Interlocutory Order will take effect absent a timely objection which is actually a request for hear-

ing. Hence, the filing of a WC-14/Request for Hearing within 20 days will operate as a temporary stay. If the objecting party fails to request a hearing within 20 days, the Interlocutory Order will become final and will be construed as consent to payment.

It should be noted the WC-PMT is not intended to be used by medical providers to expedite authorization of their procedures. Board Form WC-205 continues to be medical providers' primary remedy and the rule changes do not affect the form WC-205 process. Medical providers will continue to request advance authorization for treatment and testing by sending a WC-205 via fax or email directly to the insurer/self-insurer. The insurer/self-insurer will then have five business days to respond to the WC-205, indicating that the treatment will be authorized or denied. Failure to respond within 5 days will be considered pre-approval for the requested testing; however, the insurer does not forfeit the right to controvert the entire claim or all unrelated medical treatment. Insurers may also provide initial written refusal on the WC-205, extending the time period for a final determination to 21 days. Then, within 21 days of the initial receipt of the WC-205, the insurer/self-insurer must authorize the treatment or testing in writing, or file a WC-3 controverting the treatment. Again, the forms WC-205 and WC-PMT are used by different parties, and unlike the WC-PMT, the WC-205 need not be filed with the State Board. However, both forms serve similar purposes—to give the claimant (via his physicians and attorneys) tools to expedite authorization of necessary and related medical treatment.

In light of this rule change, it is crucial for employers and insurers to act in a prompt and decisive manner when requests for treatment are submitted, as any delay may result in an immediate conference call with an ALJ, including the possibility of an adverse decision. Again, it is clear the intent of Rule 205 is to create an expedited timetable for resolution of medical issues and leadership at the State Board of Worker's Compensation believes these changes have already proven successful. The underlying basis for the Rule change appears to arise out of concerns medical treatment is unnecessarily delayed by neither formally authorizing nor formally denying same, not necessarily forcing employers to authorize treatment. Whether this new approach ultimately increases litigation over medical treatment is yet to be see but, the immediate result for employer, insurers and TPAs is a strict time constraint and a new, formal mechanism for resolving disputes over medical authorization.

For more information on this topic, contact Mark Irby at 404.888.6118 or at mark.irby@swiftcurrie.com.

Navigating the Georgia Subrogation Lien

By: C. Pari Fakhrzadeh

When a worker is injured on the job, his recovery is usually limited to benefits under the Workers Compensation Act. If, however, a third-party tortfeasor has legal liability for the employee's injury, the employee may bring suit against that third-party. Under certain circumstances, Georgia law allows the employer/insurer to attempt to recover expenses incurred in connection with a workers' compensation claim from any recovery the claimant might make against a third-party tortfeasor responsible for his injury.

In order to determine whether there is a viable claim for workers' compensation subrogation, there are three preliminary questions to consider: (1) Have workers' compensation benefits been paid to the claimant in Georgia? (2) Is there a third-party individual or entity potentially at fault for the injury? (3) Have less than two years passed since the date of accident? If the answer is "Yes" to each of the aforementioned questions, there is potential for a subrogation recovery.

From a procedural standpoint, under Georgia law, the employer/insurer do not have the right to pursue a cause of action against the third-party tortfea-

Settlement Strategies When Dealing with *Pro Se* Claimants

By: Meghan E. Clevenstine

Anyone who has worked on workers' compensation claims for even a short length of time will come to agree with the statement, "a closed file is the best file." Unlike wine, workers' compensation claims rarely get better with age. As such, the ability to negotiate an efficient settlement is crucial. When dealing with *pro se* claimants, negotiation may require extra creativity and finesse if an agreement is to be reached. Four common stumbling blocks to settlement with *pro se* claimants are: (1) The claimant who wants you to be their legal advisor; (2) The claimant who does not understand the limits of the workers' compensation system; (3) The claimant with the overly opinionated family member; (4) The claimant who is concerned about losing employment-related benefits. What follows are some strategies to help navigate the aforementioned situations more easily and achieve more favorable settlements.

(1) *"Do you think this is a fair deal?"* When dealing with an unrepresented claimant, you may have an opportunity to develop good rapport, and the injured worker may come to rely on you for direction with regard to their benefits and medical care. In these cases, you may face some ethical quandaries when it comes time to discuss settlement, as claimants may want you to provide them guidance as to what a fair settlement might be. Creating a situation in which an injured worker respects you and believes you are competent and trustworthy is essential; however, boundaries should be maintained so the injured worker does not come to expect you to provide guidance or expect that you will overpay for a claim because you are "friends."

(2) *"Why don't I get money for pain and suffering?"* Negotiating settlement with a *pro se* claimant is particularly difficult when they do not understand the confines of the workers' compensation system. Often, injured workers fixate on compensation for pain and suffering and, without legal counsel to explain otherwise, they are left feeling grossly undercompensated by any settlement offer. Thus, it is helpful to explain the three types of benefits in a very basic way- weekly benefits, medical benefits, and permanent partial disability (PPD) benefits. It can also be helpful to discuss PPD benefits in the context of pain and suffering, by explaining that, while calculated according to a formula, the PPD rating is intended to reflect loss of function and/or ongoing pain. Thus, while workers' compensation does not pay damages for pain and suffering, PPD benefits allow for a payment to reflect the long term, more permanent challenges that result from an on-the-job injury. Knowing one of the categories of benefits contemplates their long-term "suffering" can be very helpful for an injured worker who otherwise cannot move past the lack of compensation for pain and suffering.

(3) *"Can I have time to discuss with my family?"* If you pay attention, the overly involved family member can usually be identified as an additional challenge early in the claim handling process. Often, they attend medical appointments and may try to call you to discuss issues on the claimant's behalf, even where the claimant is not incapacitated. In these situations, a mediation may prove helpful. Rather than encouraging the *pro se* claimant to attend mediation alone, and attempting to keep the opinionated family member away from the negotiations, request they bring anyone who will be involved in the decision making process to the mediation. Convincing someone to exclude or discount the opinion of a trusted family member almost never works; whereas, inviting them into the process creates a situation where the claimant feels they and their trusted advisor are respected and valued throughout the negotiation process.

(4) *"What happens to my vacation time and retirement accounts?"* Where a *pro se* claimant is being asked to sign a voluntary resignation, there are often questions about what will happen to certain benefits. These questions typically arise where a claimant was a long-term employee. Some employers will pay out vacation time even when a claimant resigns as part of a settlement, while other will not. If you are negotiating with a long-term employee and resignation will be a term of the settlement, it is wise to discuss how vacation time will be handled with your insured ahead of time. If the claimant has vacation that will not be paid out, it may be wise to withhold a portion of your settlement authority and offer it near the end of negotiations to "compensate" the claimant for the loss of the vacation pay. Alternately, where vacation time will be paid out by the employer, you may be able to use that as an additional negotiation tactic by reminding the claimant they will receive that pay in addition to the settlement proceeds.

With regard to retirement benefits, typically a workers' compensation settlement will not affect entitlement to such benefits. One caveat is where benefits have yet to vest. This often proves to be challenging to address with claimants, and in these situations, it is best to direct them to the HR director for the employer, who will be capable of providing more specific guidance. Having the name and contact information for this individual on hand can help expedite the settlement process by allowing claimants to get their questions answered promptly.

Navigating settlement negotiations with a *pro se* claimant can be challenging, but with the foregoing strategies in mind, efficient and cost-effective agreements can still be reached.

For more information on this topic, contact Meghan Clevenstine at 404.888.6132 or at meghan.clevenstine@swiftcurrie.com.

sor during the first year following the accident. If an employee files suit against the third-party tortfeasor within that first year, the employer/insurer is entitled to intervene to assert a subrogation lien against any recovery potentially obtained by the claimant. Following the first year, and before the second anniversary of the injury, *either* the employee or the employer/insurer may bring a cause of action against the third-party tortfeasor.

From a substantive standpoint, with the exception of those very limited circumstances in which the employer-insurer have brought suit directly against the third-party tortfeasor without intervention from the claimant, the employer/insurer will not be entitled to any recovery unless or until the employee has been deemed fully and completely compensated for all economic and noneconomic losses. This is referred to as the "made whole" doctrine. A determination as to whether the employee has been fully and completely compensated is made by considering both the benefits received under the workers' compensation claim and the amount recovered in the third-party case. Practically speaking, where a third-party case has been settled without any delineation between economic and non-economic damages within the settlement documents, it will be very difficult, if not impossible, for the employer/insurer to show the claimant has been made whole. Along these same lines, as to a jury trial in a third-party case, an employer/insurer will want to consider requesting use of special jury verdict forms to delineate between the economic and non-economic portions of any monetary jury award to help enable the employer-insurer to prove full and complete compensation.

In limited circumstances, the requirement that the employer/insurer show full and complete compensation can be avoided if a direct action is brought by the employer/insurer against the third-party tortfeasor. More specifically, when: (1) the employee does not file an action within the first year; (2) the employer/insurer files an action during the second year under O.C.G.A. § 34-9-11.1(c); and, (3) the employee does not intervene. It should be noted the employer/insurer has a legal obligation to put the employee on notice of any action filed on his behalf and, as soon as they do so, he will most likely intervene.

Even though there are significant hurdles in terms of making a workers' compensation subrogation recovery in Georgia, employer/insurers can often use the lien as leverage to encourage a claimant to settle his workers compensation claim in exchange for waiver of the lien. This can help facilitate settlement of the workers' compensation claim.

An employer/insurer will want to keep in mind the above points when attempting to get the most value out of a subrogation lien. While Georgia workers' compensation law is pro-claimant (procedurally and substantively), there is still opportunity for an employer/insurer to benefit from prudently exercising its workers' compensation subrogation rights.

For more information on this topic, contact Pari Fakhrzadeh at 404.888.6189 or at pari@swiftcurrie.com.

Events

Workers' Compensation Annual Client Seminar: "Dialing Up the Classics"
September 29, 2017
9:00 am - 3:30 pm
Cobb Energy Performing Arts Centre
Approved for 15 hours of CE Credit
(visit swiftcurrie.com for details)

Property and Coverage Insurance Client Seminar
November 3, 2017
Cobb Energy Performing Arts Centre

Many Swift Currie programs offer CE hours for insurance adjusters. To confirm the number of hours offered, for more information on these programs, or to RSVP, visit www.swiftcurrie.com/events.

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The First Report is edited by Mark Webb, Crystal Stevens McElrath and Blake Staten. If you have any comments or suggestions for our next newsletter, email mark.webb@swiftcurrie.com, crystal.mcelrath@swiftcurrie.com or blake.staten@swiftcurrie.com.