



WORKERS' COMPENSATION COMMENTARY



September 2005

Volume 15, Issue 1

POTENTIAL ISSUES ARISING REGARDING MEDICAL PROVIDER NETWORKS

By: John C. Martin, Esq.

With the advent of the medical provider networks in the workers' compensation system it is expected that a good deal of resistance will be encountered among the applicants' attorneys and the purpose of this dissertation is to try to identify those areas where there exists some vulnerability and what sort of action we might anticipate from the applicants' attorneys.

1. Issues surrounding the transfer of care. There are two times when the transfer of care issue may arise under the medical provider network. The first is when the medical provider network is initially established, and an attempt is made to bring covered employees in to the network and away from the care of their chosen treating physician. The second occasion is when a doctor is either removed from or leaves the medical network panel, and the employer desires to move the employee to treatment with another doctor who remains a member of the network panel.

With regard to the change of treating doctors, the current argument being advanced by the applicants' attorneys is that good cause should be required to be shown as required by Labor Code § 4603. This is actually somewhat humorous, considering that the applicants' attorneys have spent their entire careers, up to the present, fighting changes of treating physicians under that Labor Code section (and, rather successfully, I might add, it being an impractical and toothless remedy, for the most part).

In any event, a case was filed on behalf of two treating applicants (one of whom was named D'Amato), who were "model" injured workers. Those workers complained that, if they were moved from their treating doctor, it would delay their medical treatment and worsen their condition. The court dismissed the case at this point, however, because neither of the employers had medical provider networks, there was no imminent threat of a change of treating doctor, and therefore, neither party was aggrieved. This means that at some point in the future, when an employer has a medical provider network and attempts to effect the indicated change, this issue may have to be determined on its merits, and we will see what position the courts take.

Under Labor Code § 4616.2, a transfer into the medical provider network is permitted with, however, some statutory restrictions. These restrictions are:

a. If the individual is suffering from an acute condition; that is, a medical condition that is expected to last for less than 90 days or less and requires intensive medical care, the transfer cannot be effected during that period of time.

b. If there exists a serious chronic condition; that is, a chronic condition that has flare-ups, something that will be treated for less than 12 months, then the transfer into the MPN cannot be effected during that

period.

c. Terminal Illness. If the employee has a condition that will be fatal within a year or less, no involuntary transfer is permitted.

d. If surgery is scheduled within 180 days, no involuntary transfer is permitted until it takes place and the condition has stabilized thereafter.

Because of these statutory exceptions, we certainly expect the applicants' attorneys to get the doctors to make these assertions. If a doctor is going to do so, the report of the doctor setting forth that contention has to be submitted within 20 days of the request by employer. If the report is not submitted within that time frame, then the applicants' treatment may be moved to the medical provider network. If the physician objects to the change (as, of course, they generally will), then the parties need to resolve the dispute within the dispute resolution procedures of Labor Code § 4062, and no change may be made during the period of time it takes to resolve the issue. If, of course, the doctor agrees, then the change may be effected immediately.

The administrative director has also included in the regulations a prominent statement that an employer is certainly permitted to provide or continue non-network treatment for a covered employee.

2. Issues surrounding the selection of a doctor.

a. Within one day of the submission of the claim to the employer, the employer must refer the applicant for care and pay up to a total of \$10,000.00 in treatment costs, unless the claim is denied within the prescribed 90-day period.

b. Under the MPN, the employer will select the first doctor to whom the applicant will be sent (unless the applicant has properly pre-designated a treating physician).

c. After that first visit, the employer is required to furnish to the employee a regional list of physicians in the appropriate specialty from which the applicant may choose a new treating doctor. Alternatively, the applicant is certainly permitted to continue on with the initial doctor to whom he or she was sent.

Once an employee is within the medical provider network, that employee may make unlimited changes of treating doctor within the network without having to request permission to make any change. Most networks, however, will (*and should*) have some notification requirement with respect to such changes.

d. Employers should be aware of the fact that, once they have established a medical provider network, *they can no longer submit a petition for a change of treating physicians, so long as the employee is treating within the network.* This is an important feature of this issue, particularly for those employers who, instead of hand-selecting a custom listing of physicians, have instead purchased a network with thousands of unknown physicians listed therein. I can foresee the applicants' attorneys arranging a "clearing house" concerning many of the larger networks to identify "worker-friendly" physicians.

e. When an applicant selects a new doctor from a regional area listing, the employer must advise the employee as to a right to a copy of the medical records, must send a copy of the applicant's medical records to the new doctor selected, must notify the doctor of its role, and must advise the nature of the medical problem or dispute.

3. **Issues relating to the employee's access to out of network doctors.** There are multiple ways for a determined applicant to get out of the network for medical treatment. Most of the time, this will occur when the employer cannot comply with some of the more stringent network requirements.

a. The employer may not be able to provide access to a treating doctor who is accessible to within 30 minutes or 15 miles of either the place of employment or the residence of the employee, as required.

b. Likewise, the employer may not be able to provide a specialist in an appropriate field within either 60 minutes or 30 miles of the place of employment or the residence. That is also a requirement.

c. Any emergency service must be furnished by the employer out of network if necessary.

d. If the treating doctor refers a covered employee for services in a specialty for which there is no specialist within the network, the employee may be sent to, or select, an out of network specialist.

e. The employer may not be able to provide three physicians in each specialty, so as to be able to comply with the requirement for second and third opinions in every geographic area; if not, the employee may be sent to or select a doctor out of network.

f. When an examination needs to be set for a covered employee on a non-emergency basis, it must be available within three business days for non-emergency treatment, or within 20 business days for a specialist, or the covered employee can undoubtedly go out of network.

All of those areas can be "gamed" by applicants' counsel intent on getting their clients out of the network for treating purposes.

4. Issues relating to medical treatment itself.

a. ACOEM guidelines govern all medical treatment, whether it is out of network or within the MPN.

b. An employer can control the cost of medical treatment through their utilization

review program, whether the treatment is in or out of the network. However, an out of network physician may have more of a tendency to "push the envelope" concerning medical treatment that still may be approved by utilization review and not violate the guidelines, but may be somewhat more than is really necessary under the circumstances.

c. If there is a treatment dispute with the primary treater, then the second and third opinions are available to the covered employee. If that employee does not make an appointment within 60 days for the second or third opinions, then his or her dispute concerning the treatment issue is considered waived. There is no hard and fast definition as to what the Code means insofar as "make" and "the appointment". Does it mean when the employee calls up and books the appointment? Does it mean that the employee must keep the appointment at the doctor's office? This will be further defined in the future.

d. If there are insufficient doctors in the network for an employee to exercise his or her right to unlimited changes from physician to physician, then undoubtedly the applicant will claim that he or she may then go out of network.

e. If the second or third opinion physician, or the independent medical review physician agree with the covered employee, then that employee may treat out of network but, of course, the medical treatment will be governed by the ACOEM guidelines (or such future treatment guidelines as may be adopted by the Administrative Director. After that employee treats out of network for that particular issue, presumably the employee will have to come back into the network for any further medical treatment. These are certainly areas where applicants' counsel will be contesting the power of the employer to keep employees within the network.

Employers must keep in mind that, while the MPN structure has been created so as to provide the employers with more medical

control, this entire system was forced on a legislature that is far more oriented toward expanding the rights of the injured employees than helping employers save money. We can therefore anticipate future legislation tending to liberalize these various rules at the prompting of the applicants' attorneys and their union allies. Keep in mind the long-established practice of individuals turning into lobbyists once they leave political positions, where they can influence legislation that they had previously written.

"GUIDANCE"

Following the dramatic changes in the workers' compensation law embodied in SB 899, we decided to prepare a synopsis and analysis of the major provisions of the new law.

This project, which we call "Guidance," is now complete and will be provided to all of our clients. The term "complete" is, of course, a relative term in the ever changing landscape of workers' compensation. In fact, that prompted us to issue our "Guidance" in a loose-leaf format so that future changes, additions and deletions may be accommodated.

We intend to issue quarterly supplements to all of our subscribers and that, with any additional comments, will take the place of our "Commentary," except for occasional issues when momentous events take place. We request your cooperation in keeping us up-to-date concerning any change in your address. That includes electronic addresses, as well, for those who wish to receive updates by e-mail. Thanks to all for allowing us to be of service to you through the years.

LISTER, MARTIN & THOMPSON
E-mail Address: jcm@listermartin.com

PAUSE TO REFLECT

The images of suffering and despair that have been seared into our consciousness this past week compel us to consider what we may do, in some way, to help alleviate the misery of our fellow citizens. Generosity and prayer are both urgently needed at this trying time.

We also need to reflect on the always-present potential for destruction and injury in our fragile local environment and ensure that we prepare plans and supplies to take care of ourselves and safeguard our families in the event of a local catastrophe.

LISTER, MARTIN & THOMPSON



This newsletter contains only personal opinions and suggestions by the writer, which may be of general application in the subject area being discussed. This letter is not intended as specific legal advice as applied to any fact situation, and it is recommended that if legal advice is desired concerning the application of any of the information contained herein to a particular factual situation, direct contact with an attorney be sought.