



Kenneth J. Munnely
Chair

ADMINISTRATIVE REVIEW DIVISION
WORKERS' COMPENSATION BOARD
PO BOX 5205
BINGHAMTON, NY 13902
www.wcb.ny.gov

State of New York - Workers' Compensation Board

In regard to [REDACTED], WCB Case #5951 3410

MEMORANDUM OF BOARD PANEL DECISION

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Opinion By: Clarissa Rodriguez
Freida Foster
Mark D. Higgins

The carrier requests review of the Workers' Compensation Law Judge's ("WCLJ's") decision filed on November 15, 2016. The claimant timely filed a rebuttal.

ISSUES

The issues presented for administrative review are:

1. Whether the New York State Medical Treatment Guidelines ("MTGs") apply to treatment rendered to a claimant residing out of state by an out of state provider; and
2. Whether the treatment the carrier objected to in its C-8.1 Part B (Notice of Objection Regarding Further or Future Treatment) forms complied with the MTGs.

FACTS

This case is established for the low back and buttocks as the result of a May 28, 1995, accident. The average weekly wage is \$350.26. Claimant resides in Nevada, and was previously

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Claimant -	[REDACTED]	Employer -	Hospice Inc
Social Security No. -	[REDACTED]	Carrier -	Legion Insurance Company
WCB Case No. -	5951 3410	Carrier ID No. -	W148506
Date of Accident -	05/28/1995	Carrier Case No. -	8995W08325
District Office -	Albany	Date of Filing of this Decision-	05/24/2017

ATENCION:

Puede llamar a la oficina de la Junta de Compensacion Obrera, en su area correspondiente, cuyo numero de telefono aparece al principio de la pagina y pida informacion acerca de su reclamacion(caso).

classified with a permanent partial disability.

The carrier filed a C-8.1B on July 21, 2016, objecting to a July 5, 2016, bill from Dr. Fisher (who practices in Nevada) for treatment on the same date in the amount of \$4,460.40, on the basis that the treatment provided was not based upon a correct application of the Guidelines, as the doctor billed for medications not approved under the MTGs, and the provider is not eligible to dispense medication. The attached bill indicated that the doctor charged \$1,883.90 for LidoPro, and \$2,576.50 for Terocin patches. Also attached to the C-8.1 were informational sheets on LidoPro and Terocin. The LidoPro informational sheet indicated that the ointment's active ingredients include lidocaine and capsaicin. Dr. Fisher previously billed for LidoPro and Terocin patches on at least three prior occasions dating back to December 2015. The carrier filed a C-8.1B on September 27, 2016, objecting to an August 31, 2016, bill in the amount of \$4,460.40 for treatment provided on the same date, on the same bases as were listed in the July 21, 2016, C-8.1B. The attached bill indicated that the doctor charged \$1,883.90 for LidoPro, and \$2,576.50 for Terocin patches.

The most recent medical report in the Board's file is from an August 16, 2012, date of treatment with Dr. Rodriguez, an orthopedic surgeon.


A hearing was held on November 9, 2016, to address the two C-8.1 Part B forms after claimant objected to a September 8, 2016, Notice of Proposed Decision finding the July 21, 2016, C-8.1 in favor of the carrier. At the hearing, the carrier noted that the MTGs would not apply to the treatment in this case, however, the carrier argued that there were no treatment records in the Board's file. The WCLJ found that, as the carrier did not object to the lack of supporting documentation when it filed its C-8.1Bs, the C-8.1 forms were ruled in favor of the medical providers. The WCLJ directed Dr. Fisher to file narrative reports detailing the causal relationship and medical necessity of the LidoPro ointment and Terocin patches in the future. The carrier noted an exception to the WCLJ's finding with respect to the C-8.1Bs.

A November 15, 2016, Notice of Decision was filed finding C-8.1s in favor of the medical provider.

LEGAL ANALYSIS

On appeal the carrier requests that the WCLJ's decision be modified to find the C-8.1Bs in favor of the carrier. The carrier concedes that the MTGs do not apply as the claimant resides out of state and the treatment at issue was rendered out of state. The carrier argues that the C-8.1Bs should be ruled in favor of the carrier because the claimant's doctor did not provide any

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statement of the causal relationship or medical necessity of the treatment.

In rebuttal the claimant requests that the WCLJ's decision be affirmed. Claimant argues that the carrier did not raise the issue of a lack of supporting documentation in its C-8.1B objections. Claimant asserts that the MTGs do not apply as both the claimant and provider are located in Nevada.

Continuing Jurisdiction Pursuant to WCL § 123


The Board has continuing jurisdiction over each case that properly comes before it (WCL § 123). This "broad jurisdiction" grants the Board "the power, on its own motion or on application, to modify or rescind a [WCLJ's] decision ... and ... its continuing jurisdiction embraces the power of modification or change with respect to former findings, awards, decisions or orders relating thereto, as in its opinion may be just" (*Matter of Donovan v BOCES Rockland County*, 63 AD3d 1310 [2009] [internal quotation marks and citations omitted]).

Both C-8.1Bs object to the same treatment on the same bases, including that the treatment provided was not based upon a correct application of the Guidelines. The Board Panel acknowledges, as noted above, that on appeal the carrier conceded that the MTGs do not apply in this case as the claimant resides out of state and underwent treatment out of state. This concession was reasonable in light of the Board's prior handling of such cases (*see, e.g., Matter of Entertainment Partners*, 2013 NY Wrk Comp 09837041; *Matter of Distron*, 2013 NY Wrk Comp 27916536). As a result of the Court of Appeals' decision in *Matter of Kigin v State of New York Workers' Compensation Board*, 24 NY3d 459 (2014), however, the Board Panel is modifying its approach to such cases as will be discussed in depth below. In the interest of justice and pursuant to the Board's continuing jurisdiction under WCL § 123, the Board Panel on its own motion will first address the preliminary issue of whether the MTGs apply to the out of state treatment at issue in this case. In finding that the MTGs apply to out of state treatment, the Board will next address whether the treatment at issue was based upon a proper application of the Guidelines.

Applicability of Medical Treatment Guidelines to Out of State Treatment

If a claimant moves out of state and is no longer a New York resident, the claimant may seek treatment for a causally related injury from a physician located in the claimant's area. In the past, the Board Panel has held that, "The Medical Treatment Guidelines and the various Guidelines processes do not apply if the claimant both resides out of state and receives medical treatment out of state." (*see Matter of Entertainment Partners*, 2013 NY Wrk Comp 09837041;

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Matter of Distron, 2013 NY Wrk Comp 27916536). The Board Panel has previously discussed its handling of out of state treatment with respect to the applicability of the MTGs in conjunction with addressing the applicability of the Board's fee schedule to out of state treatment (*see, e.g., Matter of Entertainment Partners*, 2013 NY Wrk Comp 09837041; Matter of Distron, 2013 NY Wrk Comp 27916536).

The Court of Appeals' decision in *Matter of Kigin v State of New York Workers' Compensation Board*, 24 NY3d 459 (2014), found that the Board's MTGs (see 12 NYCRR 324) reasonably supplement WCL § 13 and promote the "overall statutory framework" of the Workers' Compensation Law "to provide appropriate medical care to injured workers" (*see Kigin*, 24 NY3d 459). WCL § 13(a) establishes the obligation of the employer to "promptly provide for an injured employee such medical, surgical, optometric or other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." The Court also found that the Board was statutorily authorized pursuant to WCL § 13-a(5) to issue a list of pre-authorized procedures, and that the establishment of the variance procedure was within the Board's broad regulatory powers pursuant to WCL §§ 13, 141, and 117(1) (*id.*).

The Board Panel notes, however, that even though it previously held that a non-resident claimant seeking treatment out of state was not bound by the MTGs, Panels have also indicated that the Guidelines remain instructive in such cases in providing an evidence based standard of appropriate medical care (*see Bush Industries Inc.*, 2016 NY Wrk Comp 88906137; Matter of NYS Dept. of Corrections, 2016 NY Wrk Comp 98900423). In Matter of Coca-Cola of NY, 2016 NY Wrk Comp 30203233, the Board Panel cited the general provisions of WCL § 13 to utilize the MTGs as guidance to discontinue medications whose use was not in accordance with the Guidelines.

Matter of Kigin v State of New York Workers' Compensation Board, 24 NY3d 459 (2014), interprets the source of the Board Panel's authority for the creation of the MTGs broadly pursuant to WCL § 13 as a whole. As a result of the Court's interpretation of the Board's authority for the creation of the MTGs, and in accordance with the Board Panel's more recent decisions consulting the Guidelines while addressing out of state treatment to a non-resident claimant, the Board Panel departs from and disavows prior decisions in Matter of Entertainment Partners, 2013 NY Wrk Comp 09837041; Matter of Distron, 2013 NY Wrk Comp 27916536; and their progeny with respect to the ruling that the MTGs do not apply to a non-resident claimant's treatment out of state. The MTGs provide an evidence based medical standard for appropriate medical care. The standards for treatment contained in the MTG ensure that claimants receive the most effective medical care as recommended by best practices in the medical community, and as adopted by the Board in consultation with medical specialists. Such

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recommended treatment and care should be rendered without regard to the location of the claimant's home or the medical provider's practice. As such, the Board Panel finds that the MTGs apply regardless of where or by whom the treatment is rendered. The Board Panel notes that its revised approach provides out of state claimants with the benefit of the pre-authorized procedures enumerated in 12 NYCRR 324.2(d), which out of state claimants did not previously receive.

The plain language of the regulations governing the Guidelines, 12 NYCRR 324, do not limit their applicability to treatment rendered to New York residents or treatment rendered in New York. As the Guidelines (incorporated by reference into 12 NYCRR 324.2) apply to a non-resident's out of state treatment, the variance procedure contained in 12 NYCRR 324.3 applies as well. While it is preferable that an out of state provider utilize Board-prescribed forms such as MG-1 (Attending Doctor's Request for Optional Prior Approval and Carrier's/Employer's Response) MG-2 (Attending Doctor's Request for Approval of Variance and Carrier's Response), and C-4 AUTH (Attending Doctor's Request for Authorization and Carrier's Response), a carrier should not deny a request for treatment by a medical provider licensed in another state solely because the provider failed to use the proper form.

As a result, the MTGs apply to the treatment in this case obtained in Nevada by a resident of that state. The Board next addresses whether the treatment at issue complied with the MTGs.



Whether the Treatment at Issue Complies with the Medical Treatment Guidelines

Both the Mid and Low Back Injury MTGs and the Non-Acute Pain MTGs address the treatment at issue.

Back Guideline D.7.j.i. indicates that the optimal duration for the use of capsaicin is one to two weeks, and that long-term use is not recommended. Back Guideline D.7.j.ii states that topical lidocaine is only indicated when there is documentation of a diagnosis of neuropathic pain. A trial period of no greater than four weeks is recommended "with the need for documentation of functional gains as criteria for additional use."

The Non-Acute Pain MTGs reiterate that capsaicin is not recommended for long-term use (see Non-Acute Pain MTG F.1.e.xi.a), and that topical lidocaine is only indicated where there is a documented diagnosis of neuropathic pain and, even then, only with documentation of functional gains after a trial lasting no more than four weeks (see Non-Acute Pain MTG F.1.e.xi.b).

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The Non-Acute Pain MTGs also note, in discussing neuropathic pain, that concomitant use of multiple drugs in the same class is not recommended (see Non-Acute Pain MTG F.1.d).

In the present case, Dr. Fisher has continued to prescribe LidoPro and the Terocin patch on a long-term basis which is not recommended by the MTGs. LidoPro, which contains lidocaine and capsaicin, has not been utilized in accordance with the procedures recommended above. In her rebuttal, the claimant concedes that LidoPro ointment and Terocin patches are different delivery methods of the same medications, which is also not recommended pursuant to the Guidelines. As such, the Board Panel finds the C-8.1Bs at issue in favor of the carrier.

Therefore the Board Panel finds, upon review of the record and based upon a preponderance of the evidence, that the C-8.1 forms filed July 21, 2016, and September 27, 2016, are ruled in favor of the carrier.


CONCLUSION

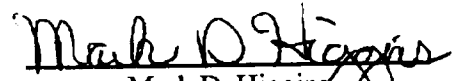
ACCORDINGLY, the November 15, 2016, decision is MODIFIED to find that the Medical Treatment Guidelines apply to the out of state treatment of a claimant residing outside of New York State for the reasons detailed above. The C-8.1 forms filed July 21, 2016, and September 27, 2016, are ruled in favor of the carrier.



No further action is planned at this time.

All concur.


Clarissa M. Rodriguez


Freida Foster


Mark D. Higgins

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