

MINUTES

KENTUCKY WORKERS' COMPENSATION REGULATORY ADVISORY COMMITTEE

MEETING March 7, 2019

A meeting of the Regulatory Advisory Committee (RAC) was held on March 7, 2019, beginning at 10:00 a.m., in the Oscar Morgan Conference Room at the Department of Workers' Claims, 657 Chamberlin Avenue, Frankfort, Kentucky.

Chief Administrative Law Judge Douglas W. Gott called the meeting to order. The following members were present: Douglas W. Gott, John B. Coleman, Chris Davis, Dale Hamblin, Peter Naake, Timothy Feld, and Scott M. Miller. Also in attendance was Commissioner Robert Swisher. Judge Gott noted that notice of the meeting had been posted and was being conducted consistent with KRS 61.823(4)(a), the open meetings statute. Mr. Feld moved to approve the minutes of the meeting on February 6, 2019, which was seconded by ALJ Davis. The minutes were approved as submitted.

Judge Gott asked Mr. Hamblin to update the committee on the status of the two regulations on which the committee had advised the commissioner during 2018. For the regulation on the extension of medical benefits, 803 KAR 25:290, Mr. Hamblin said the regulation will be before the Administrative Regulation Review Subcommittee on March 11, 2019. As for the regulation implementing the pharmaceutical formulary, 803 KAR 25:270, the hearing on public comments was held at DWC on February 22, 2019. The Department's statement of consideration will be filed by March 15, 2019, and the regulation will be before the Administrative Regulation Review Subcommittee in April. The statement of consideration will be posted on the DWC web site.

The Commissioner reported that six pre-litigation settlement agreements so far have been approved in which there are open medical benefits for an injury on or after July 14, 2018, the effective date of House Bill 2, and therefore subject to the 780-week limitation on medical benefits.

Judge Gott then turned the discussion to the regulation for the implementation of the treatment guidelines. The committee had a memorandum of talking points from which a draft regulation will be prepared and made available to interested parties before the next meeting.

Mr. Naake asked who made the decision on whether proposed treatment is "recommended" or not under the guidelines. Ken Eichler (ODG) explained the guidelines are symptom and condition based rather than diagnosis based. He went on to explain how the guides work. He said physicians will learn what needs to be documented in order for the injured worker to receive treatment. As to Mr. Naake's question, any denial must still be supported by a medical professional with documentation substantiating the medical rationale for the denial. If treatment is

recommended treatment, approval can be given at the claims level. Mr. Miller said the new process sounds much like the current process and suggested a flow chart of each for comparison purposes. Commissioner Swisher noted that treatment guidelines have been in place as long as the Department has used Utilization Review; the guidelines standardize the process with everyone using the same guidelines.

Regarding a definition of “consistent with the guidelines,” Mr. Naake suggested the word “matching” be replaced with “substantially consistent with.” After discussion it was suggested that the definition may be removed entirely. As for the definition of maximum medical improvement, the proposed regulation uses the definition from the AMA Guidelines; if ODG uses a definition for MMI, Mr. Eichler will make the committee aware of it. It was suggested that the definition of maximum medical improvement incorporate the “cure and/or relief” language from KRS 342.020.

“Conditionally recommended” treatment generated lengthy discussion, particularly as it relates to requiring preauthorization. Mr. Eichler pointed out that conditionally recommended treatment is a sub-category of recommended treatment, and is only not recommended when the criteria is not met. When the criteria is met for conditionally recommended treatment, preauthorization is not required.

Mr. Feld expressed concern with the language on how the presumption of “recommended” treatment as reasonable and necessary is overcome. It was agreed that language expanding on the burden of proof – “treatment guidelines were wrongly applied or the treatment present an unwarranted risk to the injured worker” – could be removed, leaving the clear and convincing standard of proof for rebutting the presumption of reasonableness and necessity.

The section on Preauthorization mimics the formulary regulation and references to the UR reg. The Commissioner noted potential revision may be necessary to the UR reg, i.e., peer-to-peer review, but other than that the UR process seems to be unaffected. He asked the committee for feedback on whether the UR regulation required revision. The final process needs to be consistent with the other applicable regulations.

Judge Coleman mentioned concern over the language that failure to participate in the peer-to-peer conference “shall” result in approval of the pre-authorization request, noting the physician may not be available due to unforeseen circumstances i.e. natural disasters, which could result in further injury to the already injured worker. He suggested the language provide for a good cause excuse for non-attendance, and provide for rescheduling the conference as soon as possible.

As for the effective date of the proposed regulation, January 1, 2020, coincides with the formulary regulation so that everything is effective at the same time.

Judge Gott scheduled the next meeting for Thursday, March 28 at 10:30 a.m.

With no other business, ALJ Coleman moved to adjourn, seconded by Mr. Hamblin. The meeting adjourned at 11:25 a.m.