

## **MINUTES**

### **KENTUCKY WORKERS' COMPENSATION REGULATORY ADVISORY COMMITTEE**

#### **MEETING AUGUST 30, 2018**

A meeting of the Regulatory Advisory Committee (RAC) was held on August 30, 2018, beginning at 11:00 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 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 the meeting is held in accordance with KRS 61.823(4)(a), the Open Meetings statute, and that notice of the meeting was published as required. Minutes of the July 30, 2018 meeting were reviewed. Mr. Hamblin moved approval of the minutes, seconded by Mr. Miller. The minutes were approved as submitted.

Judge Gott reviewed the three mandates of this committee, to promulgate regulations for the continuation of medical benefits, and to develop regulations for the implementation of both a drug formulary and treatment guidelines. He noted that the members of the committee were chosen to develop and make recommendations to benefit the workers' compensation system, and not to represent any one side or a particular group. Judge Gott indicated that the members were to be commended for their willingness to perform these duties. The deadline for submitting regulations for the continuation of medical benefits is November 30, 2018. The deadline for submitting regulations for the adoption of a drug formulary is December 31, 2018, and the deadline for submitting regulations for adopting treatment guidelines is December 31, 2019.

Copies of a draft of regulations for the continuation of medical benefits prepared by Commissioner Swisher and Mr. Hamblin were given to the committee members and any members of the audience who wished to receive them. Judge Gott indicated that drafts of the drug formulary and treatment guidelines were not ready for review. Those will become available once the Commissioner has received recommendations from the Medical Advisory Committee and made the final decision on which guidelines will be adopted for use by the DWC. Discussion followed concerning submitting proposed regulations under the emergency adoption procedure. Commissioner Swisher indicated that both the regulations for continuation of medical benefits and adoption of a drug formulary would be submitted as emergency regulations. The adoption of treatment guidelines will not be considered an emergency submission due to the additional time available with regard to the deadline date.

The committee reviewed and discussed the draft of regulations for continuation of medical benefits along with two forms attached. The first form was an application for

continuation of medical benefits to be completed by the injured worker, and the second was a medical report form to be completed by a physician recommending continuation of treatment. Judge Coleman asked if the forms might be combined into one. Commissioner Swisher indicated that it may be possible but the decision had not been made regarding whether these would be strictly web forms or made available in paper form. He will have to inquire as to whether a web form can be filled out as a combined form. Judge Davis suggested a change on the plaintiff's application to replace the request for explanation to simply "why I need continued medical treatment" with the thought being to keep it as simple and concise as possible. Commissioner Swisher stated that discussion is ongoing regarding how the applications will be handled internally. He indicated that a system must be developed for identifying claims that fall under the 780-week filing deadline, the tracking of those claims and sending out notifications when application deadlines near. Mr. Hamblin indicated that the final forms would be incorporated with the final regulations for LRC approval. Discussion followed regarding adding a change of address form. Mr. Miller suggested that the forms be attached to 110 settlement agreements. A discussion followed regarding additional language to be added to the Form 110 as well as to Opinions with respect to waiver and non-waiver of medical benefits. Mr. Hamblin indicated that changes to the Form 110 would be attached to a different regulation and will be submitted to LRC for approval.

Ken Eichler asked if ICD and CPT codes would be added to the medical form, but Commissioner Swisher indicated that such an addition would limit any treatment that might be deemed appropriate. He agreed to take a look at that in the future.

Melissa Stevens expressed concern about the wording that a defendant/carrier be required to file a medical report if the plaintiff has not met its burden when filing an application. She asked that the word "shall" be removed and "may" added with respect to the filing of a medical report. The committee discussed the implications of making such a change, and Commissioner Swisher agreed to consider the suggestions.

Commissioner Swisher asked Mr. Hamblin to explain the process of submitting regulations to LRC, and the expected timeframe required for final approval. Mr. Hamblin indicated that once the regulations are submitted, a public hearing is scheduled for anyone wanting to address the LRC. Additional comments are also accepted with suggested changes. LRC will hold a second meeting to consider changes, and when the regulations are in final form, they are adopted. He expects that procedure to take approximately three months from the date of initial submission. He again explained the need for the emergency regulations.

Ms. Stevens noted that nothing in the proposed regulations addresses how a carrier will be notified when an application is filed. Commissioner Swisher stated that the DCW is required to notify the employer. Ms. Stevens expressed concerns should an employer be out of business. She felt an applicant may receive a default judgment against a carrier that has not been notified of the action. Judge Davis indicated that service and notification is controlled by case law. Mr. Feld suggested that carriers wanting to be notified of cases that are still open should notify the DWC requesting they be added to the service list for a particular claim. Commissioner Swisher suggested the wording in the regulations be changed to identify to will be on the service list, including

plaintiff, employer, carrier, unemployed insurer's fund and any guaranty funds applicable to a claim. He indicated that the regulations will be redrafted and send to all committee members prior to the next meeting.

Commissioner Swisher reported that the Medical Advisory Committee has held two meetings where presentations were made regarding adoption of a drug formulary and treatment guidelines. On July 19, 2018, the Reed Group presented information from ACOEM, and on August 9, 2018, ODG made a presentation of its product. Both companies gave committee members access to their websites for testing and review. In a joint meeting to be held at 2:00 p.m. today, Dr. Snyder from the state of Tennessee will address both committees regarding the experience Tennessee has just had during the recent adoption of guidelines. Commissioner Swisher indicated that the Medical Advisory Committee will meet again in mid-September and discuss any additional action or research required to make a decision on which drug formulary and treatment guidelines will be adopted. He indicated, however, that the final decision fell to the Commissioner but he welcomed all suggestions and input from interested parties. He expects a decision to be made by the end of September with regulations ready for filing with the LRC by mid-November.

Discussion followed with respect to the current process of utilization review. Requests for faster peer-to-peer reviews have been made. Commissioner Swisher indicated that a process for scheduling the availability of treating physicians and reviewing physicians will be addressed. He noted that the utilization review regulation may require modification once the process changes have been decided. Ms. Faris stated that peer-to-peer is used only in the appeal process and is not practical for an initial denial. The Commissioner agreed that peer-to-peer is for requests for reconsideration of a denial. If the parties are unable to agree on treatment, then the claim will revert back to the medical dispute process but there will be specific reasons for the denial identified during the peer-to-peer discussion.

Mr. Eichler stated that in the ODG drug formulary, some medications are considered Y when prescribed to treat one condition but that same medication may be considered an N drug when prescribed to treat a different condition. Dr. Travis stated there is the danger of the regulations being "cut and pasted" to denials. Commissioner Swisher stated that that is something that is most likely out of the Department's control.

Ms. Stevens asked that the committee look into post award/post settlement N drugs that should not require a fee dispute. The Commissioner agreed to look into that.

Mark Pew asked how long a utilization review was good, and Commissioner Swisher stated that that is not addressed in the regulations. Ms. Faris stated that the carrier generally looks at the treatment plan and the appropriateness of the length of time that treatment is needed. Ms. Stevens stated that the utilization review is good until it is challenged again unless a weaning process is in place.

Commissioner Swisher indicated that training will be needed to bring physicians and carriers up to speed once regulations have been adopted, and there will be a time

period before any new regulations become effective in order to have sufficient time to get the word out before implementation begins.

Judge Gott recommended that the committee meet again on October 3, 2018 at 1:00 p.m., and again on October 31, 2018, at 10:00 a.m.

With no other business, Judge Davis moved to adjourn the meeting, seconded by Judge Coleman. The meeting was adjourned at 12:45 p.m.