

## **MINUTES**

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

#### **MEETING JULY 9, 2018**

A meeting of the Regulatory Advisory Committee (RAC) was held on July 9, 2018, beginning at 2:00 p.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. Roll call was taken with the following members present: Douglas W. Gott, John B. Coleman, Chris Davis, Peter Naake, Kenneth J. Dietz, Scott M. Miller, and Timothy Feld. Also in attendance was Commissioner Robert Swisher. Committee member Dale Hamblin was absent. 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. Meetings of the June 19, 2018 meeting were reviewed. Judge Coleman moved approval of the minutes, seconded by Mr. Feld. The minutes were approved with no changes.

Judge Gott reviewed the three missions of the committee, to establish regulations for extension of benefits beyond the statutory 780 weeks, to adopt regulations for implementation of a pharmaceutical formulary, and to adopt regulations for implementing treatment guidelines, both of the latter of which are to be developed by the Medical Advisory Committee. He noted that the committee will accept public comments from those present at the meeting. Anyone listening via telephonic conference was invited to attend the next meeting in person as well as submit any questions or concerns via email to any member of the committee.

Judge Gott stated that at the previous meeting subgroups within the committee had been assigned to address different aspects of the goals the committee is charged with establishing. Turning first to the subject of regulations for applying for an extension of medical benefits beyond 780 weeks, Judge Gott noted that in developing the process for a claimant to apply for such an extension, the Department of Workers' Claims needs to make every effort to notify claimants of their rights and responsibilities, and to do so as effectively as possible. Given the possibility that since the adjudication of a claimant's original claim his or her address may have changed, a claimant should be able to update his or her contact information. Possible methods to permit that were discussed, including a link on the DWC's website to allow a claimant to update his or her personal information electronically, allowing a claimant to access the LMS system directly, or notifying the DWC via mail or other communication avenues of any changes required. Judge Gott also recommended revising Forms 101, 102 and 103 to include an email address of a claimant at the time an original application for benefits is filed. Additionally, adding information to a Form 110 settlement agreement or an opinion explaining the process required for a claimant to apply for an extension of medical

benefits was discussed. Judge Gott noted that the web-based Form 110 currently includes a paragraph regarding a claimant's waiver of medical benefits. He recommended also including a paragraph that sets out the deadline of the expiration of benefits when a claimant has not waived them, and the requirements that must be met in order to apply for an extension beyond 780 weeks. He presented a handout to the committee members with suggested language to be included in the paragraph regarding non-waiver of medical benefits. A short discussion followed with Mr. Miller noting that notifying a claimant that failure to update his or her address could affect the DWC's ability to timely notify him or her of upcoming deadlines regarding expiration of medical benefits.

Judge Coleman, Mr. Feld and Mr. Miller were assigned the task of setting out the steps for applying for an extension of benefits. Judge Coleman presented a handout with suggestions that included some similar to those already presented by Judge Gott. In addition, the letter from the Commissioner sent to a claimant at 754 weeks should include instructions for making application with clear notification that benefits shall terminate if the process of filing for an extension is not timely completed. Upon such filing by a claimant, a stay would automatically go into effect keeping medical benefits active until final adjudication of the application. Discussion followed as to the length of time an employer and/or its carrier should have to respond by accepting or denying the application as well as the methods to be implemented for notifying all parties. Failure of an employer and/or its insurance carrier to accept or deny an application would be considered an acceptance of current medical treatment resulting in a continuation of benefits. However, accepting current medical treatment will not bar an employer and/or its carrier from denying treatment in the future by way of filing a medical dispute. The length of time an employer or its carrier will be given to respond to an application was discussed with Judge Davis noting that adding too many days may defeat the purpose of the statute.

The committee then discussed the mechanics of determining the process of adjudicating an application, including who has the burden of proof and establishing a schedule for proof time. Details of how the process should be set out were discussed and questions arose as to whether this should be a one- or two-step process, i.e. should the filing of a denial by a carrier be in the form of a motion to reopen or simply a denial with a motion to reopen to be filed subsequently. Should an employer or carrier be required to file a motion to reopen in response to an application for extension of benefits filed by a claimant?

Discussion followed with respect to what should be required in the application for extension of benefits and what form the application should take. A statement from a claimant's medical provider regarding diagnosis and causation should accompany an application. The acceptance of a claimant's application as a motion to reopen was discussed. Mr. Naake expressed concerns regarding the level to which proof must rise when determining whether a claimant has made a *prima facie* showing in filing an application for extension of benefits. The committee noted that other states, particularly Texas and Tennessee have developed processes which may be useful in forming the processes for DWC.

A suggestion was made as to whether the actual date of expiration of medical benefits could be added to a Form 110 or Opinion. Commissioner Swisher noted that 780 weeks does not equal 15 years and is actually 19 days short of fifteen years. Judge Gott noted that should the parties wish to make the exact calculation and add it to any settlement agreement, they would be free to do so. The language added to the forms developed by DWC applies to every claim and cannot include specific expiration dates but will clearly state that benefits will expire 780 weeks from the date of injury with the DWC notifying a claimant six months prior to the date of expiration.

Judge Davis, Mr. Naake, Mr. Dietz and Mr. Miller presented recommendations regarding adjudication of an application. They indicated that following assignment of an application to an ALJ, the first conference should be held within 30 days. Discovery schedules should be controlled by the ALJ to allow for the variances of obtaining medical records, utilization reviews and medical examinations in each claim. Following a determination, the standard appeals process would apply. Discussion followed regarding how to handle applications that are filed prior to the final 75 days of benefits; whether to hold the application or immediately accept it for determination. It was discussed that the DWC should acknowledge all applications received in a timely manner and, following a determination of how and when an application will be accepted, provide an explanation to the claimant of the next steps involved. Mr. Miller asked if DWC could request the General Assembly to "clean up" some of the wording of the statute to make it more clear as to when applications should be filed. Commissioner Swisher stated that he would have a discussion with the I.T. department to determine the electronic ability of DWC to accept and process applications for extension. Judge Gott felt that the time limit for an employer or carrier to file an acceptance or denial should be less than 60 days. Mr. Feld and Mr. Dietz agreed to ask KEMI what a reasonable time limit would be for a carrier to obtain utilization review or provide medical records and statistics of benefits paid for two years prior to the date of filing an application. These findings will be reported at the next meeting.

Judge Gott expressed his pleasure with the work performed by the committee and the discussions held regarding development processes. He noted that many ideas had been discussed and further consideration is needed. He suggested that Commissioner Swisher prepare a proposal to present to the committee at the next meeting, and the Commissioner agreed to do so.

Following a short break, the meeting resumed at 3:15 p.m. Judge Gott led the meeting to the topic of developing regulations for implementing a pharmaceutical formulary. He gave the committee members a copy of a response submitted by IWP which supports and applauds the efforts of the Kentucky Legislature and the DWC in taking on the task of developing and implementing a drug formulary. He noted that he had reviewed the formularies developed by other states, and noted that Texas and Tennessee had done very good jobs. He suggested that this committee could benefit from the example of these other states.

Judge Coleman reported that the members of his subgroup had reviewed the formularies developed by Tennessee, Texas, Montana and other states. He indicated that the time limit to have the formulary completed is "very ambitious". A short

discussion followed regarding using the guides developed by Tennessee and substituting Kentucky. It was noted that Tennessee had a medical director, Dr. Snider. Commissioner Swisher has talked with Dr. Snider and believes that the volume of disputes filed each month regarding prescribing medications is about the same as experienced by Kentucky. He indicated that Dr. Snider was willing to address this committee to discuss the practices adopted by Tennessee, and that scheduling a joint meeting of this committee and the Medical Advisory Committee may be of great benefit should Dr. Snider come to speak. The committee was agreeable to that suggestion, and Commissioner Swisher agreed to contact Dr. Snider regarding a meeting to be scheduled in mid- or late August. Commissioner Swisher also reported that the Medical Advisory Committee will be having presentations from representatives of ODG and ACEOM, and he would file a report once those meetings were concluded.

Judge Gott brought the subjects of legacy claims and first fill regulations to the table. Members of the audience participated in the discussions regarding regulations in place in other states and treatment available through Kentucky emergency rooms. Ms. Rosalie Faris told the committee that a prescription for opioids already has a three or seven days limit in Kentucky emergency rooms. Mr. Dietz raised an issue with respect to the obligation of a medical provider to verify coverage or verify that a work injury has been reported before requiring that an employer be obligated to pay for first fill. Following a short discussion of how notification is obtained in other states, a member of the audience noted that Texas has a more complex system for reporting employees making verification of coverage easier than it currently is in Kentucky. The committee discussed the possible limitations of a first fill regulation. Ms. Faris explained to the committee that, pursuant to ODG guidelines, drugs are labeled "Y" or "N" for purposes of determining whether a carrier will accept a medication for payment. "Y" drugs are accepted as payable by a carrier, while "N" drugs require additional documentation before a determination is made regarding acceptance. She noted that "N" drugs are not automatically denied, only require additional documentation prior to approval. Mr. Feld indicated that the committee may need to wait until the Medical Advisory Committee determines whether or not it will adopt ODG guidelines before deciding if an open or closed formulary will be adopted. Judge Davis indicated that the committee may want to exclude some medications from the first fill list noting the example of compound medications. First fill medications should be limited to the "N" drugs that require additional documentation for necessity, and should be limited to a three to seven day supply.

A discussion followed concerning the time limit for accepting legacy claims. Six to twelve months was discussed. Mr. Naake noted that patients who have been on long-term opioids must have a weaning time period. Mr. Dietz noted that the goal is to either wean a claimant from medication or to change the prescription to one that is accepted as compensable by the carrier. The need to inform and educate medical providers regarding the implementation of such a regulation was addressed. It was suggested that the Kentucky Medical Association be notified of the regulations when adopted, and to look for as many avenues as possible in getting out the notice to medical providers of changes being made. Commissioner Swisher indicated that he may attend a board meeting of the Kentucky Medical Association to inform them of what is being done at DWC. He felt that legacy claims should be given a longer adjustment

time than first fill claims, and indicated one year for legacy claims and six months for first fill claims. Insurance carriers and management care networks will also be notified of the regulations when adopted.

Judge Gott noted that a lot more thought and study is needed on the drug formulary portion of the regulations. There are many more questions to be answered. He again asked Commissioner Swisher to prepare an outline of his thoughts to be given to the committee for future discussion.

Judge Gott scheduled the next meeting for Monday, July 30, at 1:00 p.m.

Mr. Dietz moved for adjournment, seconded by Mr. Miller. The meeting was adjourned at 4:20 p.m.