California Workers' Compensation Institute
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VIA E-MAIL to dwcrules@dir.ca.gov

Maureen Gray, Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation, Legal Unit
Post Office Box 420603
San Francisco, CA 94142

RE: 1st Forum Comments – Medical Treatment Utilization Schedule (MTUS)

Dear Ms. Gray:

These Forum comments on draft revised Medical Treatment Utilization Schedule (MTUS) regulations are presented on behalf of members of the California Workers' Compensation Institute (the Institute). Institute members include insurers writing 70% of California's workers' compensation premium, and self-insured employers with $42B of annual payroll (24% of the state's total annual self-insured payroll).

Insurer members of the Institute include ACE, AIG, Alaska National Insurance Company, AmTrust North America, Chubb Group, CNA, CompWest Insurance Company, Crum & Forster, Employers, Everest National Insurance Company, Farmers Insurance Group, Fireman's Fund Insurance Company, The Hartford, Insurance Company of the West, Liberty Mutual Insurance, Pacific Compensation Insurance Company, Preferred Employers Insurance Company, Springfield Insurance Company, State Compensation Insurance Fund, State Farm Insurance Companies, Travelers, XL America, Zenith Insurance Company, and Zurich North America.

Self-insured employer members are Adventist Health, Agilent Technologies, City and County of San Francisco, City of Santa Ana, City of Torrance, Contra Costa County Schools Insurance Group, Costco Wholesale, County of San Bernardino Risk Management, County of Santa Clara Risk Management, Dignity Health, Foster Farms, Grimmway Enterprises Inc., Kaiser Foundation Health Plan, Inc., Marriott International, Inc., Pacific Gas & Electric Company, Safeway, Inc., Schools Insurance Authority, Sempra Energy, Shasta County Risk Management, Southern California Edison, Sutter Health, University of California, and The Walt Disney Company.

The Institute offers these general recommendations, followed by recommendations for specific modifications to the proposed regulations.

General Recommendations

Introduction

The Institute strongly supported the Administrative Director's (AD) original decision to anchor the statutory definition of medical care with the ACOEM guidelines. That policy decision followed both the spirit and the letter of SB 899 in establishing evidence based medicine as the cornerstone of proper medical care in the California workers' compensation system.

The consequence of that social policy decision by the Legislature was to require reliance on evidence-based medicine and the ACOEM guidelines at every level of the workers' compensation system. The Supreme Court affirmed that determination in SCIF v WCAB (Sandhagen) (2008) 73 CCC 981stating, in essence, that reasonable and necessary medical care under section 4600 is any treatment provided in accordance with the medical treatment utilization schedule. We are disappointed to see that the proposed regulations for revising the Medical Utilization Treatment Schedule (MTUS) have significantly diluted the standard of medical care established by the Legislature with the adoption of evidence based medicine.

The regulations must be very clear that treating physicians, claims administrators, medical treatment evaluators for utilization review and independent medical review, and adjudicators have to apply the hierarchy of scientific medical evidence, the ACOEM guidelines, and other evidence based, peer-reviewed, nationally recognized treatment guidelines that meet similar high-grade standards to determine whether any proposed treatment is safe, efficacious and therefore presumed to be appropriate under the statute. The regulations supporting that determination must strengthen, not dilute the statutory foundation of high-grade evidence-based medicine and the ACOEM guidelines.

The Statutory Mandate

The statutory scheme adopted by the Legislature in 2004 made fundamental changes to the provision of medical care to injured workers. The amendments to section 4600 and the addition of section 5307.27 defined the employer's liability to provide all medical care "reasonably required to cure or relieve the injured worker from the effects of his or her injury." Section 4600 now states:

> (b) As used in this division and notwithstanding any other provision of law, medical treatment that is reasonably required to cure or relieve the injured worker from the effects of his or her injury ***means*** treatment that is based upon the guidelines adopted by the administrative director pursuant to Section 5307.27 or, prior to the adoption of those guidelines, the updated American College of Occupational and Environmental Medicine's. (Emphasis added)

Section 5307.27, therefore, defines medical care as follows:

> 5307.27. On or before December 1, 2004, the administrative director shall adopt … a medical treatment utilization schedule, that shall incorporate ***the evidence-based, peer-reviewed, nationally recognized standards of care*** recommended by the commission pursuant to Section 77.5, and that shall address, at a minimum, the frequency, duration, intensity, and appropriateness of all treatment procedures and modalities commonly performed in workers' compensation cases. (Emphasis added)

To the extent that the proposed regulation to revise the MTUS repeatedly includes references to "best available research evidence with clinical expertise and patient or community values", they violate the statutory mandate established by the Legislature. The DWC should be strengthening the treatment guidelines by restricting the use of low level, unsupported, or unsubstantiated modalities of medical care, not authorizing them.

Eliminate the Acupuncture Guidelines

The most obvious example of treatment guidelines that violate the evidentiary standard of care established by the Legislature are the Acupuncture Guidelines, as they have no evidence base and are not nationally recognized standards of care. The AD in order to bolster the standard of care for injured workers should eliminate these guidelines from the schedule.

The MTUS established both the preeminence of the ACOEM methodology and philosophy and the process to review and adopt guidelines of comparable quality. When the acupuncture guidelines were included in the schedule, they constituted an independent set of guidelines that supersede ACOEM and were not vetted by the established methodology or the hierarchy of evidence. Labor Code section 4600 includes acupuncture as a legitimate form of treatment for injured workers; it does not endorse acupuncture as a system of medicine.

Hierarchy of Scientific Medical Evidence

"Hierarchy of evidence" should be strengthened in order to more clearly establish the relative weight to be given to scientifically based medical evidence. Guidelines that do not meet the standards of evidence based medicine or are not supported within a meaningful hierarchy of evidence should not be included. Within the hierarchy of evidence, only research of greater scientific reliability on the scale should be afforded the presumption under section 4604.5.

The hierarchy of scientific medical evidence is the yardstick by which all medical evidence relating to the nature, scope, duration, and intensity of treatment are judged. The social policy decision has been made by the Legislature and the regulations must unambiguously reflect the paramount importance of this scale and the ACOEM guidelines in the prompt and definitive resolution of treatment issues. In this way, the hierarchy and the treatment guidelines will provide predictability and stability and will facilitate the delivery of consistent, high quality medical care, which is the goal of the legislative mandate. It should be clear in the regulations that guidelines, which do not measure up to the standard of scientific reliability cannot be used to counter the recommendations of the ACOEM guidelines.

Under SB 863, the MTUS will be used by treating physicians, utilization reviewers, and the independent medical reviewers to determine the most appropriate modalities of treatment and whether untested, unreliably treatment should be eliminated. All of these users should be able to rely on the credibility and consistency of the schedule. The use of the AGREE II protocol as proposed will only dilute the statutory standard and create inconsistency among reviewers that will result in contradictory, unpredictable decisions – all of which will be presumed "correct" under the MTUS. The regulations, as proposed, give greater weight to a single study published within the past three years than to relevant ACOEM or ODG guidelines in the schedule. In some areas "expert opinion" carries greater weight. These vague, subjective standards must be eliminated.

The Institute believes that it is appropriate for the Administrative Director and the Medical Director to use the AGREE II protocol to evaluate guidelines to determine and adopt the most effective guidelines, but that its use by reviewers as proposed is impractical at best.

Recommendations

Section 9792.20(e) Definitions, section 9792, 21(b) Medical Utilization Treatment Schedule

Recommendation

Delete "with clinical expertise and patient or community values."

Discussion

These sections use the phrase "clinical expertise and patient or community values" to serve as a basis for medical treatment guidelines and are an example of how far the proposed schedule has drifted away from the statutory standard of "evidence based, peer-reviewed, nationally recognized treatment guidelines" to determine whether any proposed treatment is safe, efficacious and presumed to be appropriate under the statute. Clinical expertise, patient values, or community values as standards to assess the appropriateness of medical care are wholly subjective and meaningless. The MTUS has to be definitive and the statutes provide ample direction for establishing useful, clear, and scientific treatment guidelines.

Section 9792.20(f) Definitions

Recommendation

Restore the definition of functional improvement.

Discussion

The elimination of the concept of functional improvement as a means of determining whether proposed treatment is or will be effective is inappropriate. In practice this definition is often used in UR decisions to evaluate a treatment plan. If the treatment plan fails to discuss functional improvement as a benchmark, then the plan is unjustified. This definition should be retained.

Section 9792.25(a)(14) Definitions
Recommendation
Delete this definition of expert opinion.

Discussion
As drafted "expert opinion" is similarly ineffective as it is defined as "evidence based thinking" by "an expert". Medical treatment guidelines are controversial, as evidenced recently by the publication of the DSM-V-R. There will always be experts who disagree with any guideline regarding the practice of medicine and to permit a minority opinion to trump other evidence based medical guidelines is to make the MTUS, which is now the definition of reasonable and necessary medical care, worthless. Therefore, this empty language must be eliminated from the schedule.

Section 9792.25.1(f) Determining Reasonable and Necessary Medical Care
Recommendation
Delete this search sequence requirement.

Discussion
The proposed "search sequence" defines a medical literature search that ignores the time restraints of medical reviewers. The 3-year limitation effectively nullifies the ACOEM guidelines, ODG, and the MTUS. It is the function of the MTUS to establish evidence based medical treatment guidelines for reviewers and physicians to apply in the real world. This process should be eliminated and the AD should reconsider how the MTUS can be structured to apply scientific evidence promptly to specific treatment issues.

The ACOEM Practice Guidelines
The Institute supports returning to the use of the ACOEM Practice Guidelines and updating them to the most current version, and eliminating from the MTUS the ODG pain management guidelines. ACOEM Guidelines are nationally recognized, evidence based, and comprehensive. The use of a single treatment guideline will improve the consistency of application, improve timely decision making, and reduce disputes. It is essential that all medical care reviewers apply the same rules, so that effective treatment is provided in a timely manner and disputes are kept to a minimum.

Simply stated, the ODG guidelines use ungraded medical evidence, often fail to provide specific recommendations, include vague, ambiguous language to qualify their conclusions, and fail to follow the Strength of Evidence and Rating methodology in the schedule. Yet, by including them in the MTUS, they will be afforded the legal presumption of correctness contained in Labor Code section 4604.5.

Needless ambiguity in the treatment schedule serves no one. Guidelines with ungraded evidence or that offer contradictory or conditional recommendations do not facilitate the legislative goal of identifying the best medical care for injured workers. Where guidelines are not clear, reviewers may be powerless to prevent injured workers from receiving inappropriate or unnecessary care.

It is important to eliminate medical care that does no harm but does no good when ensuring high quality treatment. If the MTUS is so open to interpretation and so subjective that no decision by a utilization reviewer (or the IMR) is sustainable, then the treatment guidelines will fail to effectuate the Legislature's social policy and the statutes will be rendered meaningless.

Thank you for considering these recommendations and comments. Please contact me if additional clarification is needed.

Sincerely,

Brenda Ramirez
Claims & Medical Director

BR/pm

cc: Christine Baker, DIR Director
Destie Overpeck, DWC Acting Administrative Director
Dr. Das, DWC Executive Medical Director
CWCI Claims Committee
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