ARMSTRONG & PEAKE PLLC

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UPDATES IN KENTUCKY'S WORKERS' COMPENSATION

The below update discusses three cases that involve the ODG Guides regarding narcotic medication given by treating physicians to plaintiffs. This is something that we are seeing frequently in Kentucky. Please note the Toler decision – Toler v. Oldham Cnty. Fiscal Court, 657 S.W.3d 914 (Ky. 2022) is still effective, and utilization reviewers must still have a Kentucky license, otherwise their opinions are not admissible as evidence. If you do not have a Kentucky licensed utilization review physician, contact me.

Also, along with Ryan Hathcock of Chartwell Law, I recently started co-hosting a podcast through DRI called "Comp Conversations." We are going to cover various workers' compensation topics, and our first guest on this podcast is Rafael Gonzalez of Cattie and Gonzalez who is discussing Medicare Secondary Payer issues and compliance.

Ryan Hathcock: www.chartwelllaw.com/attorney/ryan-hathcock

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Please check out our podcast "Comp Conversations" on the DRI site, iTunes, Google Podcasts, SoundCloud, or Spreaker.

McAfee v. Daylight Farm

Claim No. 2009-86955, Workers' Compensation Board Opinion entered June 29, 2023

Issue:: Whether judge's denial of treatment based on application of the ODG Medical Treatment Guidelines (ODG Guides) was in error.

Holding: The Administrative Law Judge held in a post-award medical dispute oxycodone and tizanidine were non-compensable and ordered the treating physician, Dr. Ballard Wright, to attempt to wean Plaintiff from oxycodone and tizanidine. The judge further ruled that the medical payment obligor (employer/insurer/third-party administrator) must pay for either inpatient or outpatient facility to assist with weaning the Plaintiff off oxycodone and tizanidine.

Facts: Plaintiff McAfee suffered a work injury April 25, 2009 while training a horse for the employer farm, when her feet fell out of the stirrups on the saddle, and she hit the ground. This injury apparently resulted in two right shoulder surgeries and a cervical discectomy and fusion at three levels in 2011. The Administrative Law Judge made an award of a 30% whole-person impairment rating for permanent partial disability by the triple multiplier, awarding future medical treatment for the right shoulder, cervical spine, and psychological overlay.

Kentucky maintains a 30-day rule post-award/post settlement where future medical benefits are left open such that the employer has the burden of proof that post-award treatment is not reasonable and necessary. Treatment has to be formally disputed by a motion to reopen with the Form 112 Medical Dispute within 30 days of the request for treatment. Under Mitee v Yates, 865 S.W. 2d 654 (Ky. 1993) and other cases, the payment obligor has the burden of proof post settlement/post award to show that treatment is not reasonable and necessary. This Kentucky Supreme Court case and others shift the burden of proof on reopening onto the employer. As the Court stated in Yates:

> "Consistent with this Court's interpretation that KRS 342.020(1) shifts to the employer the burden to prove that contested medical expenses are unreasonable or unnecessary, we also believe that it places on the employer an affirmative burden to prove that contested medical bills were received no more than 30 days before the motion to reopen was filed." (See Mitee v Yates, 865 S.W. 2d 654, at 656 (Ky. 1993)).

There was a prior medical dispute in 2017 and Judge Neal ruled that the Plaintiff's tizanidine, a muscle relaxer, and Percocet tablets (oxycodone) were reasonable and necessary and thus compensable previously.

The employer, Daylight Farm, filed a subsequent motion to reopen with a Form 112 Medical Dispute in March 2022 challenging compensability of oxymorphone, gabapentin, oxycodone, diclofenac and tizanidine as well as monthly office visits and urine drug screens based on a new utilization review. Obviously, the employer won on the medical dispute regarding oxycodone and tizanidine, but apparently lost the other issues on the medical dispute, and thus the judge ruled in the employer's favor and in the plaintiff's favor in part as well.

With its motion to reopen and Form 112 Medical Dispute, the employer filed into evidence the Kentucky licensed physician Dr. Paul Loubser's utilization review report who indicates that the ODG Guides only recommend diclofenac for acute to chronic musculoskeletal complaints, but it is not recommended for ongoing NSAID use. The first step in almost any post award medical dispute on the issue of reasonableness and necessity is to obtain a utilization review, which is found here.

Dr. Loubser indicated that regarding tizanidine, the ODG Guides indicates that evidence-based guidelines do not recommend muscle relaxers for routine use, and he did not find this medication reasonable and necessary. Likewise, he opined that oxymorphone hydrochloride and oxycodone are not reasonable and necessary under current evidence-based guidelines which do not recommend opiates for long-term use. Dr. Loubser noted that the clinical records he reviewed did not clearly demonstrate the extent of pain relief. He further gave his opinion in general that the medication regimen was not reasonable and necessary and there was no need to continue monthly office visits.

The employer had filed into evidence a medical records review report from Kentucky licensed physician Dr. Russell Travis, Neurosurgeon, now deceased, who had previously evaluated Plaintiff McAfee in 2016. It was his opinion that she had become addicted to opioids, and he referenced the actual ODG Guides regarding some of these medications.

This case went to a hearing on this medical dispute in October 2022. Plaintiff McAfee apparently testified about her pain and the efficacy of her pain medications. She testified under oath that tizanidine helps with muscle spasms, and without the Percocet/oxycodone, her pain level increases to pain at nine on a 10 scale. In his ruling, Judge Davis found that Plaintiff was likely addicted to opioids and ruled in specific reliance on Dr. Travis' report that the oxycodone and tizanidine should be non-compensable. On the other hand, he also ruled in reliance upon Dr. Wright that the diclofenac and gabapentin were compensable, and that the office visits and urine drug screens remained compensable as well.

Plaintiff McAfee filed a motion to dismiss arguing that the reopening was barred by *res judicata* given that a prior Administrative Law Judge had ruled on some of these same issues just a couple of years before.

In its review, the Board mentioned that the doctrine of *res judicata* does apply to claims for workers'

compensation benefits citing Turner v. Bluegrass Tire Company, 330 S.W.3d 605, 608 (Ky. 2010). Having said that, the Board noted that the reasonableness and necessity of treatment for the Plaintiff may change over time and thus just because one judge made one ruling a couple of years ago on roughly the same issue, a new judge can rule differently at a later date.

The Board then noted, regarding the ODG Treatment Guidelines, that 803 KAR 25:260, which concerns the use of the treatment guidelines, in particular the ODG, became effective on September 1, 2020. That regulation specifically states in Section 5, “The treatment guidelines apply to all treatment administered on and after September 1, 2020.” Thus as of September 1, 2020, the judges have to abide by this new regulation as do physicians.

It clearly pays to read and apply 803 KAR 25:260 which concerns the use of treatment guidelines, in particular the ODG which became effective September 1, 2020. That regulation further incorporates the pharmaceutical formulary adopted in 803 KAR 25:270.

The Board further reviewed the utilization review from Dr. Loubser, and they found that his opinions revealed that at least for the gabapentin and diclofenac, the use of these drugs may not deviate from the ODG Guides.

Because the employer appealed as well in a cross appeal, and because the judge did not delineate his findings regarding the compensability of gabapentin and diclofenac, the frequency of office visits and urine drug screens, the Board remanded for further decisions on those issues.

Judge Alvey indicated in his concurrence that the ODG Guides state that in order to overcome the "N" designation - for not compensable - set forth in the ODG Guides, the Administrative Law Judge is required to cite or explain the "sound medical reasoning" upon which the judge relies in reaching his determination in deviating from the ODG Guides recommendation. Judge Alvey mentions that in prior cases, the ODG Guides essentially creates a rebuttable presumption that treatment is compensable or not compensable and while the regulations. Whereas 803 KAR 25:260 does not specifically create a rebuttable presumption, the regulations *de facto* have such an effect. Any judge must specifically state his or her reasons for deviating from the ODG guides.

The question is - what is "sound medical reasoning?” Has the treating physician issued a report with an opinion stating why she or he is deviating from the ODG guides? Has the treating physician even read the ODG Guides regarding such medications or any evidence in the record to that effect? Judge Alvey mentions that a medical provider must outline the clinical rationale for deviating from the ODG guides with such treatment. Likewise, the judge as the finder of fact must specifically articulate her or his specific findings regarding the sound medical reasoning in support of her or his determination for rejecting the ODG recommendations.

Key Takeaway:

You must have a Kentucky licensed physician performing utilization review, and then in order to win a medical dispute on reasonableness and necessity of medications, the utilization reviewing physician needs to cite the ODG Guides and say why these medications are not reasonable or necessary pursuant to the ODG Guides.

Perry County District v. Miller

Claim No. 1994-51177, Workers' Compensation Board Opinion entered March 17, 2023

Issue: Did the judge err in finding oxycodone and office visits 56 days reasonable and necessary and therefore compensable? Did the treating physician's treatment plan satisfy the requirements of 803 KAR 25:260, specifically that it provided **sound medical reasoning** as to why it deviated from the ODG Guides?

Ruling: The judge sufficiently stated how she felt the treating physician's deviation from the ODG Guides constituted sound medical reasoning.

Facts: Plaintiff had a cervical and lumbar spine injury moving a patient in July 1994, and was awarded future medical benefits by an Opinion and Award from an Administrative Law Judge in 1995. At that time, almost any award of future medical benefits was for the plaintiff's natural life.

The employer filed a motion to reopen in Form 112 Medical Dispute in July 2021 challenging compensability of tizanidine, oxycodone, SI joint injections, and frequency of office visits with treating physician, Dr. Thomas Karelis, as well as other treatment. As a side note, once a judge awards future medical benefits, Kentucky's 30-day rule shifts the burden of proof onto the employer that treatment is not reasonable and necessary, and the employer has a statutory and case law duty to move to reopen the claim through counsel within 30 days of the treatment request. At day 31, the treatment becomes compensable, generally speaking, as a matter of law.

The first step in almost any reasonableness and necessity post-award/post settlement medical dispute is to obtain a utilization review which is required by 803 KAR 25:195.

In this case, the employer Perry County filed into evidence a utilization review from Dr. Freimark who found the tizanidine not medically reasonable or necessary citing the Official Disability Guidelines ("ODG") which states that muscle relaxants are only recommended on a short-term basis for acute back pain. Likewise, Dr. Freimark stated that the ODG does not recommend opioid use for non-specific low back pain, and she found that oxycodone was not medically necessary or appropriate for the 1994 work injury, thus recommending a tapering schedule in accordance with the ODG Guides.

Also in dispute were CT scans being requested by the treating physician along with SI joint injections. The Administrative Law Judge found the CT scans not work-related and therefore not compensable, and she found the SI joint injections unreasonable and unnecessary and therefore not compensable. She did find that tizanidine and oxycodone reasonable and necessary, however – despite the UR physician's opinions and despite the ODG Guides. On appeal, the employer argued that the ALJ's finding that the oxycodone was reasonable and necessary was not supported by substantial evidence and that the ALJ failed to address how Dr. Karelis's treatment plan meets the requirements of 803 KAR 25:260 specifically on how the treating physician's plan was "sound medical reasoning" sufficient to deviate from the ODG Guides. See here.

Of note, this author has reviewed multiple ODG Guides cases, and the Board appears to copy the entirety of the regulation 803 KAR 25:260 in most of these cases. They clearly want this recent regulation to be read by all parties. The Board also notes that while this regulation does not specifically state that the ODG constitutes presumptive weight, that the Board further states that it *de facto* has such an effect.

Simply put, the Board notes that when overriding an ODG recommendation, a sound medical opinion supporting such deviation is required. As the Board noted in this case:

> "For approval of treatment that is not recommended by the ODG, medical providers must articulate in sound medical reasoning why it is necessary. Or as in this instance, the medical provider must outline the clinical rationale for continuing with such treatment."

The Board notes that the medical provider may articulate sound medical reasoning for deviating from the formulary, which may include:

1. documentation of reasonable alternatives allowable in the formulary that have been adequately trialed and failed,
2. a clinical rationale that justifies the proposed treatment plan, and
3. any other circumstances that reasonably preclude approved formulary options.

The bottom line is this was a split decision and the judge found CT scans and SI joint injections not compensable. On the other hand, she found the oxycodone, the office visits every 56 days, and the tizanidine compensable. She found the tizanidine compensable but only for short-term exacerbation of low back pain, not for chronic use. Because the ALJ decision was supported by substantial evidence and because of the treating physician's report apparently constituted "sound medical reasoning," the judge's decision was not overturned on appeal.

Key Takeaway:

The ODG Guides continue to represent a hurdle for treating physicians who prescribe medications contrary to the ODG Guides. As the Board mentions, when the physician prescribes an "N" drug under the ODG Guides, this shifts the burden of proof back onto the plaintiff and the plaintiff's treating physician to show how any deviation from the ODG Guides is appropriate.

Monticello Flooring & Lumber Company Inc. v. Stinson

Claim No. 2013-67044, Workers' Compensation Board Opinion entered March 17, 2023

Issue: What suffices for “sound medical reasoning” to overcome the presumption found in the ODG Guidelines (adopted by Kentucky in 2020) that certain medications are not reasonable and necessary.

Holding: Here, the Board vacated the ALJ's findings regarding compensability of hydrocodone APAP and bi-monthly office visits and remanded to the judge so that the judge could state her basis for her finding of fact that “sound medical reasoning” should allow the deviation here from the ODG Guides.

Facts: Plaintiff alleged back, leg, and hip injuries while pulling a cart, in 2013, in the course of his work. Plaintiff's treating physicians diagnosed him with disc disease in the lumbar spine, with moderate compression, and treated him with epidural steroid injections, physical therapy, and medication. The case was settled in 2015. Future medical left open for reasonable and necessary care for the cure and relief of plaintiff's injury. Plaintiff treated with multiple physicians ending with the plaintiff treating with Dr. Ballard Wright, who continued prescribing hydrocodone and Meloxicam, one to two per day as needed.

The employer filed a Motion to Reopen in 2021, challenging the reasonableness and necessity of ongoing pain management, bimonthly office visits, and prescriptions of hydrocodone.

The employer filed into evidence a utilization review from a Dr. Fadul. For the uninitiated, utilization reviews in Kentucky are the first mandatory step toward filing a motion to reopen a Form 112 Medical Dispute on reopening if the issue is reasonable and necessity of care and treatment. See here.

The utilization reviewer here opined that hydrocodone should be tapered substantially till no longer used, then without the hydrocodone prescription, the bimonthly pain management follow-ups would also therefore be unreasonable and unnecessary.

It is also important to note that in this particular case, the plaintiff was *pro se* and did not provide any testimony or file any medical evidence in this medical dispute on his behalf. The employer likely had to file the actual disputed medical records of Dr. Ballard Wright into evidence when it filed the Form 112 Medical Dispute. The Administrative Law Judge reviewed records from the utilization reviewer, Dr. Fadul, but also from the defense expert, Dr. Henry Tutt, Lexington neurosurgeon, and then compared those with the treatment records from Dr. Ballard Wright, ultimately relying upon and finding most credible the opinions from Dr. Wright to find that the hydrocodone and bimonthly office visits were reasonable and necessary treatment for plaintiff's work injury.

The employer argued that the ODG Guides did not support the continuing hydrocodone and bimonthly office visits, which should therefore before found noncompensable. 803 KAR 25:260, section 3(8) requires a finding that there is "sound medical reasoning" that supports treatment deemed "not recommended" under the ODG Guides. The employer further argued that the opioid use was not recommended by ODG, which is essentially what Dr. Fadul stated in his report. Further, the employer argued that Dr. Fadul and Dr. Tutt were the only physicians of record to address the ODG and their recommendations were uncontradicted evidence.

As with most if not all the other cases that concern the ODG Guides, the Board cited the entire regulation verbatim. That regulation can be found here.

The Board noted that "while 803 KAR 25:260 does not specifically state the ODG constitutes presumptive weight, it *de facto* has such an effect." Any time a judge is overriding an ODG recommendation, "a sound of medical opinion supporting such deviation is required." Section 3 of 803 KAR 25:260 provides the steps necessary to overcome the presumption. For treatment that is not recommended by the ODG, medical providers must articulate in sound medical reasoning why this non-recommended treatment is necessary. The Board noted that the judge found Dr. Wright's medical treatment records equated to sound medical reasoning, however she failed to provide or outline the specific sound medical reasoning supporting her decision. Clearly the Board wanted more detail on why the judge ruled the way she ruled.

Key Takeaway:

The Board vacated the judge's decision and required her on remand to point to the sound medical reasoning contained in the record to permit her to deviate from the ODG Guides. This case is more useful as an example of what judges do and the rules they have to follow instead of actually defining what is "sound medical reasoning."

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