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January 2016 Workers' Compensation Law Update

Division of Labor in the Division's Field Offices

The Division announced early this month that it is maintaining the four-region split of Field Offices (North, Coastal, South, and West) and the respective Team Leads over each (Cheryl Dean, Ken Huchton, Carol Fougerat, and now Teresa Hartley, replacing Don Woods). In an interesting twist, however, it was announced that the Team Leads will supervise not only the Hearing Officers in their regions, but the BROs as well. The former BRO team leads will now be acting as "liaisons" between the BROs and the new Team Leads.

Jennifer Hopens and Allen Craddock will serve as regional Managers over the North/West and South/East halves of the state, respectively.

You Heard it From SLS First: Division Cracking Down on DD Position Statement Letters that "Exceed the Intent" of Rule 127.10(a)(2)

There is talk of a push by the Division to scrutinize DD analysis letters that "exceed the intent of Rule 127.10(a)(2)." Rule 127.10(a)(2) allows treating doctors and insurance carriers to send the designated doctor an "analysis of the injured employee's medical condition, functional abilities, and return-to-work opportunities." The Rule states that the analysis "may include supporting information such as videotaped activities of the injured employee, as well as marked copies of medical records," and the analysis "may only cover the injured employee's medical condition, functional abilities, and return-to-work opportunities as provided in Labor Code §408.0041." (Labor Code §408.0041 states that the treating doctor and the carrier may send the DD an "analysis of the injured employee's medical condition, functional abilities, and return-to-work opportunities.") If the carrier sends an analysis, a copy must be sent to the treating doctor, the claimant, and the claimant's representative, if any. (Likewise, if a treating doctor sends an analysis, a copy must be sent to the above parties, as well as the carrier.)

There is no indication as to what language, exactly, the Division interprets as "exceeding the intent" of Rule 127.10(a)(2). We suspect, however, they may be looking at letters that advocate strongly for a particular position, cite one-sided legal authority, and/or give instruction to the DD on how he or she is supposed to opine. Word on the street is that the Division is already looking at samples of letters it deems possible violators.

More to come, surely. To that end, we recommend carriers (or vendors who send letters on their behalf) review their DD analysis letters to ensure they are not running afoul of the intent of Rule 127.10(a)(2).

Air Ambulance Provider Seeks Declaration that Fee Schedule Doesn't Apply to Them

Air Evac EMS, Inc., a provider of emergency air ambulance services, has filed suit in the U.S. District Court for the Western District of Texas seeking declaratory and injunctive relief. Air Evac seeks a declaration that the Airline Deregulation Act (ADA) preempts Texas Labor Code Sections 401.001–401.026, and related regulations (which establish a fee schedule and fee guidelines for reimbursement for air ambulance services to workers' compensation claimants) as applied to federally-regulated air carriers. Air Evac also seeks to permanently enjoin the Division from enforcing any provision of the Texas Labor Code (and accompanying reimbursement rules) that cap the price for Air Evac's services. Alternatively, Air Evac is requesting that the Court declare Texas Labor Code §§ 415.021, 415.0215, 413.042, and any other section, rule, or regulation that establishes or limits the price or rate charged, inapplicable to air ambulance providers, and to permanently enjoin the Division from enforcing these statutes and regulations against air ambulance providers.

Air Evac claims that the ADA preempts the above provisions because "the ADA requires that it is the free market, not administrators or courts, that sets an air carrier's prices." The complaint alleges that the Division establishes and enforces a fee schedule and fee guidelines under state law and regulations that limit the amount that air ambulance providers can receive for emergency transportation of injured workers, and that this reimbursement rate is "well below Air Evac's billed charges, and the usual and customary fare it charges for its services." Air Evac alleges that the ADA expressly preempts any state law or regulation that purports to restrict or economically regulate the prices or services of air carriers within the United States, citing 49 U.S.C. § 41713(b)(1).

The complaint alleges that in 2015, Air Evac provided air ambulance services to several workers' compensation patients, and has been paid only a "small fraction" of its billed charges because of the Texas Labor Code's reimbursement scheme.

Save the Date! Division Announces 2016 Workers' Compensation Education Conferences

The Division announced it will host two education conferences in 2016: one in Austin and one in Dallas. The Austin conference will be September 19 and 20 at the Crowne Plaza Austin Hotel, and the Dallas conference will be October 24 and 25 at the Renaissance Dallas-Richardson Hotel. The conferences will be geared to health care providers, medical office staff, employers, employee organizations, carriers, and third party administrators, and will feature general and breakout sessions on a variety of topics and issues in the Texas workers' compensation system. Conference registration will be available beginning Spring 2016.

NNNNOOO To These Drugs: **Fentanyl Transdermal Patches, MS-Contin, Levo-Dromoran, and Embeda**

Effective February 1, 2016, Fentanyl Transdermal Patches, MS-Contin, Levorphanol (Levo-Dromoran), and Morphine ER/Naltrexone (Embeda) will change status from "Y" to "N" drugs in the ODG's Appendix A. Accordingly, beginning February 1, 2016, prescriptions for these drugs will require preauthorization. The Division is encouraging system participants to discuss and coordinate the ongoing course of treatment of claimants who are currently being prescribed these drugs.

Sigh . . . More Pill Mills?

A Dallas doctor and an Arlington pharmacist are among dozens charged in a "pill mill" operation in Texas and Louisiana that allegedly hired homeless people to pose as patients and obtain prescriptions for pain medications.

Richard Andrews, DO (of Dallas) and pharmacist Ndufola Kigham (of Arlington) were arrested on January 20, 2016 on federal charges of conspiracy to distribute a controlled substance. The indictment alleges that the clinic, McAllen Medical Clinic, allegedly handed out prescriptions for more than 150,000 oxycodone pills between January 2013 and July 2014, despite knowing "there was no legitimate medical purpose" for them. Prosecutors involved in the case described that these operations typically utilize drivers to pick up recruits to pose as patients. The recruits are given money to pay for their visit to the clinic, and are paid a fee (usually around $30) for their work. The recruits are coached on what to say to get a specific prescription. The driver takes them to the pharmacy and pays for the prescription; the drugs are then sold on the street for a profit. If convicted of the conspiracy charges, Dr. Andrews and Dr. Kigham face up to 20 years in federal prison and $1 million in fines.

Discount Rate and Interest Rate Increased to 4.19%

On December 28, 2015, the Division announced that the interest and discount rate as of January 2, 2016 will be 4.19 %. The rate is effective as of January 1, 2016, and will remain in effect through March 31, 2016. The rate was previously 3.96 %.

The Division is required to compute and publish the interest and discount rate quarterly, on January 1, April 1, July 1, and October 1. Prior to January 1, 1991, the rate was fixed at 4%. As of June 17, 2001, however, the Division is required to calculate the rate based on the treasury constant maturity rate for one-year treasury bills. .

Ick Factor: Permanent Injunction Entered to Prevent Dallas Compounding Pharmacy from Distributing Adulterated Drugs

At the request of the U.S. Food and Drug Administration (FDA), the Department of Justice filed a complaint in the U.S. District Court for the Northern District of Texas on January 4, 2016, alleging that Downing Labs LLC has been engaged in manufacturing drugs that, by virtue of their labeling

and/or route of administration, purport to be or are intended to be sterile, but that fail to meet the safety protections provided under federal law.

The complaint alleges, among other things, that Downing Labs and the individual defendants violate the Act by introducing or delivering sterile drugs that are prepared, packed, or held under insanitary conditions whereby they may have been contaminated with filth and/or rendered injurious to health. The complaint also alleges the drugs are adulterated because the methods used in, or the facilities or controls used for, their preparation do not comply with current good manufacturing practices requirements. For example, during one of the inspections conducted by the FDA of Downing Labs and its predecessor, NuVision Pharmacy Inc., test records showed excessively high levels of endotoxins. Endotoxins are substances found in certain bacteria that can cause a wide variety of serious reactions in humans, including high fever and shock. These products were not distributed. In 2014, records showed that 19 lots of supposedly sterile drugs had tested positive for the pathogens Staphylococcus haemolyticus and Nocardia nova. These products were not distributed, but the FDA alleges that the company failed to adequately investigate the cause of these sterility problems. The complaint alleges that Downing Labs has a long history of manufacturing drug products under conditions that fall short of the minimum requirements to ensure safety and quality.

The permanent injunction requires Downing Labs and the individual defendants to bring their processes into compliance with the law. Until then, the defendants are enjoined from manufacturing, holding, or distributing drugs manufactured at or from their McEwen Road facility (located at 4001McEwen Road, Suite 110, Dallas, Texas). In addition, the FDA has been authorized to order Downing Labs to stop drug manufacturing should it determine that Downing Labs has violated the terms of the decree, and may also order Downing Labs to recall drugs or to destroy drugs that are in the process of being manufactured.

BFOEs must provide the physical and time requirements of the offered position, not just what the job will *not* entail

In Appeals Panel Decision No. 152184, decided December 29, 2015, t he Appeals Panel reversed the hearing officer's determination that the employer tendered a valid bona fide offer of employment (BFOE) to the claimant, and rendered a new decision that the employer did not tender a BFOE to the claimant. The hearing officer had found that the employer had issued two offers of employment, both of which had complied with Rule 129.6.

The two offers, dated approximately one week apart, stated, "The position will entail the following physical and time requirements" and then listed various work restrictions as noted on the DWC-73, such as "No standing for more than 1 hour per day," "No [kneeling]/squatting more than 1 hour per day," "No pushing/pulling more than 2 hours per day," "Must wear splint/cast at work," and "No driving or operating heavy equipment." The claimant appealed the hearing officer's determination that these were valid BFOEs, arguing that both offers of employment fail to comply with Rule 129.6(c)(4) because they merely list the restrictions given by the claimant's treating doctor rather than state the actual physical and time requirements that the position will entail.

The Appeals Panel agreed, noting that Rule 129.6 sets out the requirements for a BFOE and provides, in part, that "an employer's offer of modified duty shall be made to the employee in writing and in the form and manner prescribed by the [Division]," that "a copy of the [DWC-73] on which the offer is being based shall be included with the offer as well as . . . a description of the physical and time requirements that the position will entail."

The Appeals Panel noted that it has previously held that the language in Rule 129.6 is clear and unambiguous, and that the rule "contains no exception for failing to strictly comply with its requirements." In this case, neither offer of employment listed the physical and time requirements the offered position would entail, nor did they state the specific job position that was being offered. Instead, both offers of employment only listed restrictions of what the job would *not* entail, which does not meet the requirement listed in Rule 129.6(c)(4). Accordingly, the employer did not tender a BFOE to the claimant.

This decision is a reminder to carriers and employers to ensure their BFOEs to claimants include a full description of the requirement of the offered position. It is not a bad idea to clarify that the employee will not be required to perform duties that he/she is specifically prohibited from performing as noted on the DWC-73; however, the job offer must also include the physical requirements, time requirements, and state the specific job position that is being offered in order to meet the requirements of a valid BFOE under Rule 129.6. Appeals Panel Decision No. 152184, decided December 29, 2015.