ASAP™

A Littler Mendelson **Time Sensitive** Newsletter

in this issue:

NOVEMBER 2004

On January 1, 2005, the most employer friendly workers' compensation reform of recent times will take effect, allowing California employers to designate a panel of doctors to treat industrial injuries.

California Edition

A Littler Mendelson California-specific Newsletter

California Employers Finally Have the Right to Control Medical Treatment in Workers' Compensation Cases

By Daniel A. Robinson and Ronald A. Peters

With the enactment of SB 899 on April 19, 2004, the California legislature implemented much needed reforms to the State's ailing workers' compensation system. Although there are many employer friendly provisions in this bill,[1] one area of reform stands out. Effective January 1, 2005, employers will have the opportunity to regain full control over medical treatment by selecting the treating doctors who will provide treatment to their industrially injured workers. Specifically, employers will be permitted to create "Medical Provider Networks" (MPN). Once these MPNs are created and approved by the Administrative Director for the Division of Workers' Compensation, employees will be required to choose their treating physician for workers' compensation purposes from these employer-created networks.

The Power of the Primary Treating Physician

The primary treating physician in a workers' compensation case controls not only medical treatment to be provided to an injured worker, but also dictates when and if an injured worker returns to work. Critically, the primary treater specifies how long a worker is off the job receiving temporary disability, how much permanent disability is awarded, and whether an injured worker requires vocational retraining.

Under the current scheme, with only one relatively minor exception, an applicant has the right to designate anyone he or she wishes as his or her primary treater, including a chiropractor. An applicant may then legally switch treaters over and over again. A new doctor is often selected because an applicant seeks a certain result, be it more treatment, more time off work, or a larger settlement, a practice commonly referred to as "doctor shopping." In such circumstances, the injured worker is required to treat with the employer's chosen physician only for the first 30 days after a new claim is filed. Thereafter, he or she may proceed to designate his or her own treating physician. If the applicant has predesignated a treater, then the employer has absolutely no control over treatment, even during the first 30 days.

SB 899 and the Creation of an MPN

With SB 899 the legislature took a major step towards leveling the playing field by eliminating the statutory "presumption of correctness" assigned to the primary treater. This presumption placed the burden of proof on the employer and carrier to prove why the treater's opinions were fatally flawed. This made it quite difficult and often impossible for an employer to rebut the primary treater's medical legal conclusions on issues such as temporary disability, permanent disability, or need for medical treatment. The presumption had been partially eliminated by recent reforms in the fall of 2003, but still applied to those employees who had predesignated a treating physician for workers' compensation purposes. However, after SB 899 this presumption is completely eliminated.

Even with the complete elimination of the treater's presumption, the treating physician still controls all decisions regarding medical treatment. In situations where there may be abuse of such power, the employer and/or its carrier have only limited ability to change the course of treatment if it becomes excessive. However, the employer's ability to create an MPN, from which employees must choose their treating physician, can and should transfer some measure of the control of

[1] See Littler's May 2004 ASAP, "Governor Schwarzenegger Signs Workers' Compensation Reform Bill" for a review of the primary features of the reform legislation.

medical treatment back to the employer and/or its workers' compensation insurance carrier.

What Are the Requirements for the Creation of an MPN?

The Administrative Director recently issued draft regulations which, in final form, will govern the implementation of this reform. These regulations, found at CCR Title VIII Section 9676.1 *et seq.*, set forth the both substantive and procedural requirements for the creation of an MPN.

- *Nonoccupational Treaters* 25% of the physicians on the panel must be "primarily engaged in the treatment of nonoccupational injuries."
- *Division Liaison* An applicant must provide the name, title, address, e-mail address, and telephone number of the person designated as the liaison for the Division, who is responsible for receiving compliance and informational communications from the Division and for disseminating the same within the MPN.
- *Geographical Constraints* A covered employee must have a residence or work place within 30 minutes or 15 miles of (i) an MPN primary care physician and (ii) a hospital for emergency care, or if separate from such hospital, a provider of all emergency health care services. A covered employee must have a residence or work place within 60 minutes or 30 miles of other occupational health services and specialists. Also, the applicant shall have a written policy for arranging or approving medical care if an employee is working or traveling for work or requires treatment outside of the service area when the need for medical care arises.
- *Services from Non-member Providers* The applicant shall have a written policy to allow an injured employee to receive emergency medical treatment from a medical service or hospital provider who is not a member of the MPN.
- *Provision for Non-emergency Treatment* For non-emergency services, the applicant shall ensure that an appointment for initial treatment is available within 3 business days of the applicant's receipt of a request for treatment within the MPN. For non-emergency specialist services to treat common injuries experienced by the covered employees based on the type of occupation or industry in which the employee is engaged, the applicant shall ensure that an appointment is available within 20 business days of the applicant's receipt of a referral to a specialist within the MPN.
- *Second and Third Opinions* If the covered employee disputes either the diagnosis or the treatment prescribed by the treating physician, the employee may obtain a second and third opinion from physicians within the MPN. During this process, the employee is required to continue his/her treatment with the treating physician or a physician of his or her choice pursuant to section 9767.6.

Of some significance is a provision in the regulations which provides that any network that is created may reflect "the specific needs of an employer considering the experience…the common injuries…type of occupation…and the geographic area." It is clear that the regulations are designed to give employers wide latitude in creating an MPN which fits their particular needs.

Why Should an Employer Create an MPN?

Creation of an MPN is optional, but there are many good reasons to create one and the majority of employers in California, irrespective of size, stand to gain by creating one. With medical expenses accounting for more than 50% of the total cost of a workers' compensation case on average, the most significant benefit is economic. The more workers' compensation claims an employer faces, the greater the benefit. For employers with large deductibles, or those faced with recurrent workers' compensation abuse, implementation of a well thought out provider network will provide direct, immediate relief. Also, the employer's hand picked doctors are more likely to provide reasonable opinions concerning return to work issues.

The consequences of failing to create an MPN are significant. If an employer does not enact an MPN, then medical treatment will continue under the current scheme – workers and their attorneys will be allowed to continue to select their own doctors and predesignate treaters for future industrial injuries.

Understandably, many employers are not sufficiently familiar with the new laws and regulations, with the pool of eligible providers, or with the screening and certification process, to select and implement an MPN. Many other employers believe that their industrial carrier or third party administrator is dealing appropriately with the issue.

However, there are distinct disadvantages to an employer that assigns the task of creating an MPN to an insurance company. While not all insurance companies are treating the issue of MPN creation the same, the reality is that workers' compensation carriers have hundreds or thousands of insureds in California and do not have the resources to screen individual medical professionals and create tailored panels on behalf of each of their insureds. Instead, there is a trend by carriers to contract with health care organizations or large, statewide health care networks. While this provides a workable one-size-fits-all solution for the insurance carrier, it also eliminates the potential benefit to the employer. Since injured workers are entitled to change treaters within the provider network, a panel which is too large, or which has even one or two "unfriendly" members, will quickly become useless. A proper medical provider network must only be as large as necessary to cover the employer's work force, and each member must be carefully screened.

Therefore, every employer in the State should be involved in selecting the medical providers that will make up its MPN. The benefits for those employers who take advantage of this new employer right will include lower medical treatment costs, increased control over return to work issues, elimination of medical provider abuse, and more reasonable disability awards. Many employers have yet to see any dramatic reduction in their workers' compensation costs. Premiums have not come down to the degree expected, and the endemic abuse in the workers' compensation system continues. The creation by employers of these MPNs provides by far the best opportunity to realize the kinds of cost controls promised by the authors of SB 899. Employers simply cannot pass up this opportunity.

Why Employers Should Act Now

Employers should have their MPN in place and approved by the Administrative Director as close to January 1, 2005 as possible. As it stands, there are a relatively limited number of physicians who are deemed prime candidates for inclusion in a provider network. A suitable candidate should be attentive to employer concerns, familiar with medical-legal terminology, well versed in the treatment guidelines, and capable of providing effective, efficient medical treatment. Employers and insurance carriers are already in the process of contracting with the desirable providers, and the better physicians will soon be obligated and unable to commit to new employers.

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