All About Claims

Colorado Department of Labor and Employment
Division of Workers' Compensation
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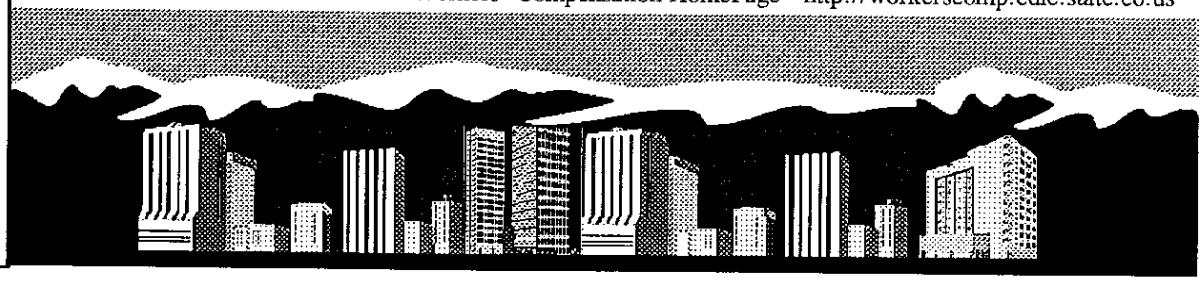

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All About Claims is a newsletter published by the Claims Services Section of the Colorado Division of Workers' Compensation. It is designed to provide a forum for information exchange among claims handlers working in this area of specialization. Comments or suggestions for future topics may be directed to JoAnne Ibarra, Manager of Claims Services, at (303) 575-8816, or by mail at the above Division address.

From the Director's Desk . . .

SB 99-161, Use of Controlled Substances

by Mary Ann Whiteside, Director

In the past several months, the Division has received letter and telephone inquiries, regarding interpretation of SB 99-161. The main questions are:

1) *whether blood tests must be used instead of breath tests,*
2) *what procedures are to be used to test samples, and*
3) *what it means for laboratories or medical facilities to be "certified."*

Under section 8-42-112.5, as amended by SB 99-161, nonmedical benefits are reduced if a worker is injured either because nonmedically prescribed controlled substances or certain levels of alcohol are found in his or her system. As Director of the Division of Workers' Compensation, it is my opinion, after consultation with the Attorney General's Office, that the statute does not require a laboratory to use blood tests instead of tests of other substances such as urine, saliva or breath to determine the blood alcohol level or the presence of a not medically prescribed controlled substance.

The new statute provides as follows:

> Nonmedical benefits otherwise payable to an injured worker shall be reduced fifty percent where injury results from the presence in the worker's system, during working hours, of not medically prescribed controlled substances ... or of a blood alcohol level at or above 0.10 percent ... as evidenced by a forensic drug or alcohol test conducted by a medical facility or laboratory licensed or certified to conduct such tests. A duplicate sample from any test conducted shall be preserved and made available to the worker for purposes of a second test to be conducted at the worker's expense. If the test indicates the presence of such substances or of alcohol at such level, it shall be presumed that the employee was intoxicated and that the injury was due to such intoxication. This presumption may be overcome by clear and convincing evidence.

The statute authorizes tests to ascertain an injured worker's blood alcohol level or the presence of controlled substance in the worker's system. The statute does not require any particular type of test. The reference to "blood" is in the context of blood *alcohol level*, not blood test. References in state

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HB 99-1049, Selection of an Independent Medical Examiner

by Mary Ann Whiteside, Director

A question raised on HB 99-1049 is how this new legislation applies to workers injured after July 1, 1991 and before August 5, 1998, who objected to a Final Admission of Liability concerning MMI and/or impairment, but who have not requested a Division IME.

The concern is that HB 99-1049 might be interpreted to require these individuals to commence the IME process within 30 days of September 1, 1999, the effective date of the legislation. As Director of the Division of Workers' Compensation, it is my opinion, after consultation with the Attorney General's Office, that HB 99-1049 should not be interpreted as requiring the described individuals to commence the IME process by filing an application by September 30, 1999. The terms of HB 99-1049 clearly reflect that there must be a triggering event, a new or revised Final Admission, or a medical report, before the 30-day time period to request a Division IME begins to run.

Section 8-42-107.2 (1) states that "This section governs the selection of an independent medical examiner .... to resolve disputes arising under section 8-42-107." Section 8-42-107.2(2)(a) lists specifically the events that trigger the commencement of the time for selection of a Division IME, and the one exception to those events. If there has been no triggering event, the 30 days has not yet begun to run.

Section 8-42-107.2 (6) of the new legislation states that the purpose of the legislation is to "improve and simplify remedies already existing for the enforcement of rights and the redress of injuries under the workers' compensation laws of Colorado." Any interpretation which would require individuals with "post 218, pre 1062" injuries to commence the IME process within 30 days of September 1, 1999, would not "improve or simplify" the IME procedures; rather, it would greatly complicate the process. Further, the problem of lack of notice to claimants would present due process concerns.

A question has also been raised concerning the standard of review of an IME where the parties agree upon an IME physician and do not rely upon the Division selection process. Prior to the adoption of HB 98-1062, section 8-42-107(8)(b.5)(I)(D) provided that if the parties agreed upon an examiner, the results of that examination would be binding. That language was deleted in the HB 98-1062 amendment, to make it more likely that the parties would agree upon an IME physician. (It was felt that if an agreed upon IME was binding, it was much less likely that the parties would agree to an IME.) The section now reads that the parties may select an IME physician in accordance with section 8-42-107.2, and that the finding of such examiner "shall be overcome by clear and convincing evidence." Procedural changes in statute are applicable to all cases pending at the time the new statute became effective, unless a contrary legislative intent is expressed. Since the standard of review is procedural, it is my opinion that the clear and convincing standard applies to all IMEs, whether agreed upon or selected through the Division. *Kinniger v. Industrial Claim Appeals Office*, 759 P.2d 766 (Colo. App. 1988); *Krumbach v. Dow Chemical Co.*, 676 P.2d 1215 (Colo. App. 1983).

Frequently Used Telephone Numbers at DOWC & DOAH

Administrative Hearings	
Docket	(303) 764-1401
Setting Line	(303) 764-1405
Confirmation Line	(303) 764-1404
Grand Junction	(970) 248-7340
Claims Services	(303) 575-8821
Fax	(303) 575-8877
Grd Jct Office	(970) 248-7347
Grd Jct Fax	(970) 248-7342
Coverage Enforcement	(303) 575-8744
Fax	(303) 575-8891
Customer Service	(303) 575-8700
Toll Free	1-888-390-7936
Fax	(303) 575-8882
Dispute Resolution	(303) 575-8730
Fax	(303) 575-8886
Document Entry	(303) 575-8862
Fax	(303) 575-8860
Education	(303) 575-8802
Fax	(303) 575-8131
Employer Services	(303) 575-8873
Fax	(303) 575-8883
IME	(303) 575-8840
Setting Phone	(303) 575-8846
Setting Phone	(303) 575-8847
IME Appt. Line	(303) 575-8845
Fax	(303) 620-4242
Medical Cost Containment	(303) 575-8760
Fax	(303) 575-8884
Physicians Accreditation Program	(303) 575-8763
Fax	(303) 575-8884
Special Funds	(303) 575-8786
Fax	(303) 575-8885
Utilization Review	(303) 575-8850

Continuation of Authorized Medical Care

by Mary Ann Whiteside, Director

In order to clarify what may be a question relating to continuation of medical treatment by an attending physician when there has been a designation of a health care facility, I would direct your attention to § 8-43-404(5)(a) of the Colorado Revised Statutes (1999 Cum. Supp.):

> "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of injury, the employee shall have the right to select a physician or chiropractor...."

While it is acknowledged that in practice employers will often predesignate a treatment facility rather than a specific physician to attend their employees, the statute recognizes that it is the "attending physician", or an "authorized treating physician" or an "authorized treating physician providing primary care", who bears the responsibility for determining such things as maximum medical improvement, permanent impairment and return to regular or modified employment. *See § 8-42-107(8)(b)(I); and § 8-42-105(3)(c) and (d).*

The Colorado Workers' Compensation Act provides that an employer or insurer shall not be liable for treatment provided unless such treatment has been prescribed by an authorized treating physician. Authorized treatment and referrals, therefore, emanate from the individual physician and not the health care facility.

Further, it is imperative that medical records are made available to an authorized treating physician if he/she takes up practice at another facility. The cost of providing or reproducing these records are not to be borne by the claimant in such an event.

SB 99-161, Use of Controlled Substances *continued*

statutes to blood alcohol level refer to the alcohol present in the blood as distinguished from testing methods. The statute does not specify what types of tests are to be used to detect drug or alcohol levels in the injured workers. Therefore, testing facilities may test blood, breath or urine for the presence of alcohol or controlled substances in an injured worker's system.

The statute is also silent on what testing procedures must be used, aside from requiring a sample to be made available to the injured worker for independent testing. There are diverse guidelines available for various types of drug and alcohol testing. Two examples of detailed testing procedures are the Rules and Regulations concerning Testing for Alcohol and Other Drugs of the Division of Laboratory and Radiation Services in the Colorado Department of Health and Environment, 5 Colo. Code Reg. 1005-2 and the Procedures for Transportation Workplace Drug Testing Programs of the U.S. Department of Transportation, 49 C F.R. pt. 40. Under the statute, it is up to the laboratory facility to select the procedures to be used for testing.

With respect to "licensed or certified to conduct such test," the statute does not specify any one certification program. Therefore, facilities may be certified under any widely recognized programs for certification purposes. This is consistent with the practice of the Division of Employment Training, Colorado Department of Labor and Employment regarding unemployment benefits claims involving issues of the presence of alcohol or controlled substances.

The statute does not expressly address who keeps the second sample and for what period of time. Because the statute does not require the laboratory to keep the second sample, I believe that the best practice would be for the laboratory to give the second sample to the worker at the end of the test, that is, at the time the original sample is taken, a second sample is taken and handed to the worker immediately. As to how the second sample would get tested, the statute clearly provides that the test on the second sample is to be paid by the worker. As to what testing procedure or method might be used, I assume that will depend on the facts of each individual case at the discretion of the worker.

This does not answer all of the questions that may arise. Many answers will depend on the facts of each individual case and will be addressed in that context.

Claims Mentoring--What's up with that?

By JoAnne Allen Ibarra, Manager, Claims Services

A program that is currently in development at the Division is the Claims Mentoring Project (CMP). We propose to align a Claims Manager from the Claims Services Section in tandem with a Carrier Practices Officer as liaisons to individual insurers. This will allow greater provision of services in areas of education and risk reduction. The reconfiguration should also allow the Division to redirect resources to areas of greatest need. A possible feature would be diagnostic reviews by the Carrier Practices Unit. These would precede formal reviews in an effort to identify areas requiring support and provide feedback to insurers on claims handling performance.

The purpose is to effect behavioral changes by providing resources that are timely and specific. We believe that timely notification, interactive discussion and review will result in reduction of errors. Further, we anticipate the production of reports for use both by the claims manager and the insurer. Staffings with Division claims personnel will be afforded the insurer to review specific issues, trends, and comparative behaviors.

The program's success will be measured, in large part, by improvement in insurer performance. Benefits to the system include avoidance of penalties and attendant costs, greater access to Division resources, and the fostering of mutually beneficial relationships. We anticipate implementation by July 1, 2000. We'll keep you posted.

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