



California Workers' Compensation Institute
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December 15, 2005

DELIVERED BY HAND AND VIA E-MAIL

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

RE: Physician Pre-designation

Dear Ms. Gray:

These comments on regulations regarding Physician Pre-designation are submitted on behalf of California Workers' Compensation Institute members. Recommended modifications are indicated by underline and ~~strikethrough~~.

9780 Definitions

Recommendation -- 9780(f) -- Personal physician

(f) "Personal physician" means (1) the employee's regular physician and surgeon, licensed pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code, (2) who has been the employee's primary care physician, and has previously directed the medical treatment of the employee, *and* (3) who retains the employee's medical records, including the employee's medical history, *and (4) who agrees, prior to injury, to treat the employee for work-related injuries or illnesses.*

Discussion

In order for an employee to "have the right to be treated by that physician from the date of injury," the employee must have "notified his or her employer in writing prior to the date of the injury that he or she has a personal physician" (Labor Code section 4600(d)(1)). According to Labor Code section 4600(d)(2), for the purpose of that section the physician must meet all Labor Code section 4600(d)(2) conditions, including condition (C) "the physician agrees to be predesignated." If not, the physician does not meet the personal physician test; the employee does not have the right to predesignate or to be treated by that physician from the date of injury. The "personal physician" definition therefore must include the physician's agreement to treat under Labor Code Section 4600(d)(2)(C).

9780.1 Employee's Predesignation of Personal Physician

Recommendation -- Section 9780.1 -- Pre-designation Form

If an employee wishes to be treated by a "personal physician" selected pursuant to Labor Code Section 4600, the employee shall notify his employer in writing. The notice need not be in any particular form, and may be in a form reasonably required by the employer and shall advise the employer of the name and address of such personal physician. Nothing in this Article shall prohibit an employer from permitting an injured employee to be treated by a physician of the employee's choice.

Discussion

This language, which is to be stricken from the regulation, is necessary and should be retained because on the basis of this provision many employers and claims administrators have developed their own predesignation forms. The new form being proposed by the AD is (and should be) optional, so claims organizations will be able to continue to use and modify the forms they have previously provided to their employees.

Recommendation -- 9780.1(a)(3) – Consent to Treat

(a)(3) The employee's personal physician agrees to be predesignated prior to the injury. The personal physician ~~may~~ shall sign the optional predesignation form (DWC Form 9783) in Section 9783 as documentation of such agreement. The physician may authorize a designated employee of the physician to sign the optional predesignation form on his or her behalf. ~~If the personal physician or the designated employee of the physician do not sign a predesignation form, there must be other documentation of that the physician's agreement agreed to be predesignated prior to the injury in order to satisfy this requirement.~~

Discussion

The claims administrator will have no way of knowing whether a physician has designated an employee to acknowledge the treatment of injured workers, unless the physician provides a signed statement to that effect.

Proposed regulation 9780.1(a)(3) requires documentation of the pre-designated treating physician's consent to treat by signing Form 9783 or by providing other documentation. In the Institute's commentary on this issue, we have been attempting to ensure the pre-designation of a physician who is willing to treat and whose pre-designation is valid under section 4600(d)(2). It is essential for the provision of prompt medical care that these issues are resolved before the need for treatment arises.

While the procedure established in subsection 9780.1(i) will ensure that medical treatment is not delayed, the shifting of providers from the MPN to the pre-designated physician has disadvantages, too. Anything that could disrupt the prompt provision of care by the appropriate physician should be eliminated by the regulation. A signed consent form in advance of the need for treatment of a work-related injury promotes the provision of timely medical care.

Recommendation – 9780.1(f) – Physician Status Verification

(f) Unless the employee agrees, neither the employer nor the claims administrator shall contact the predesignated personal physician ~~to confirm predesignation status or contact the treating physician~~ regarding the employee's medical information or medical history prior to the personal physician's commencement of treatment pursuant to Section 4600 of the Labor Code, but may communicate with the pre-designated physician to confirm that the physician is willing to treat work-related injuries or illnesses and meets the statutory requirements for pre-designation.

Discussion

Authority: Labor Code Section 4600(d)(2) states:

- (2) For purposes of paragraph (1), a personal physician shall meet all of the following conditions:
- (A) The physician is the employee's regular physician and surgeon, licensed pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code.
 - (B) The physician is the employee's primary care physician and has previously directed the medical treatment of the employee, and who retains the employee's medical records, including his or her medical history.
 - (C) The physician agrees to be predesignated.

The pre-designated treating physician's consent to treat is a statutory requirement, which cannot be altered or amended by regulation. The employee cannot make a valid pre-designation of a physician who does not meet the statutory criteria set forth in section 4600(d).

Government Code section 11342.2 states:

Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.

Under this section of the Administrative Procedures Act (APA), the Division has no discretion with regard to the requirement of the physician's consent to treat and cannot promulgate a regulation that is inconsistent with the enabling statute. Pulaski v. California Occupational Safety and Health Standards Board (1999) 90 CR 2d 54, 75 CA 4th 1315, modified on denial of rehearing; Communities for a Better Environment v. California Resources Agency (2002) 126 CR 2d 441, 103 Cal.App.4th 98, as modified. The procedures woven into the proposed regulations would preclude the verification of the pre-designated treating physician until the work-related injury occurs. If the pre-designated treater fails to meet the statutory criteria, then the pre-designation will fail entirely and it will be too late to assign another physician, defeating to purpose of the statute.

If the pre-designated physician has not acknowledged the designation at the time the employee notifies the employer, then the employer or claims administrator should be allowed to follow up with the physician to resolve the question. The consent to treat

must be clarified before the need for treatment and if the physician is unwilling to provide care under the parameters of the workers' compensation system, then the employee, employer, and claims administrator need to know that before the injury occurs.

The claims administrator must now provide medical treatment within 24 hours of receiving the claim form, and if the injured worker has pre-designated a treating physician, the claims administrator is expected to authorize medical care with that physician immediately. Subsection (f) precludes any communication prior to the injury that would allow an automatic authorization of care when the injury occurs. Allowing the confirmation of the physician's status before the need for treatment would obviate the need to assign an injured worker to one physician, only to reassign him to the pre-designated physician later.

A simple verification form could be devised, based on the requirements of section 4600(d)(2), on which the pre-designated treating physician could affirm that he/she:

- Is licensed pursuant to Business and Professions Code Section 2000, and is the employee's regular physician,
- Is the employee's primary care physician,
- Has previously directed the employee's medical treatment, and retains the employee's medical records, including his or her medical history, and
- Agrees to be the pre-designated physician and treat work-related injuries or illnesses.

There need be no discussion of confidential medical history or personal health information in the communication. The employer or the claims administrator could send the verification form to the physician or the employee to confirm the physician's status, if the physician fails to sign the pre-designation form. The regulation should make it clear that the employer or the claims administrator is permitted to contact the pre-designated physician to confirm the consent to treat and the other statutory prerequisites, once the employee notifies the employer of his or her selection. If this verification process is adopted, then DWC Form 9783 will have to be revised to reflect this procedure.

The regulations should also make it clear that if the employee pre-designates a physician other than a medical doctor (MD) or a doctor of osteopathy (DO), or otherwise does not meet the requirements of section 4600(d), then that pre-designation is invalid.

Section 9781 Employee's Request for Change of Physician

Recommendation – 9781(a)

(a) *This section shall not apply to self insured and insured employers who offer a Medical Provider Network pursuant to Section 4616 of the Labor Code. When medical care is provided through a Medical Provider Network, a request for a change of treating physician shall be determined pursuant to Labor Code Section 4616 and Labor Code section 4601 shall not apply.*

Discussion

The Institute recommends clarifying the applicability of Labor Code section 4601 in the context of the MPNs. While this section exempts the employers, who provide medical care through a medical provider network, the revisions leave the application of section 4601 vague.

Recommendation -- 9781(b) and (c)

The term “claims administrator” should replace “employer” in (b)(3) and (c)(1) since it these matters are the responsibility of the claims administrator.

Recommendation 9781(c)(2),

~~(c)(2) If so requested by the selected physician or facility, the employee shall sign a release permitting the selected physician or facility to report to the employer's claims administrator as required by Section 9785.~~

Discussion

Section (c)(2) requires the employee to sign a release that is unnecessary and misleading. The employee’s release is not required in this context and should not be requested. The statutes and regulations permit a free flow of information between the treating physician and the claims administrator. If the employee refuses to sign the release, the physician is still required to communicate with the claims administrator pursuant to section 9785.

9783 DWC Form 9783 Predesignation of Personal Physician

Recommendation

In the event you sustain an injury or illness related to your employment, you may be treated for such injury or illness by your personal medical doctor (M.D.) or doctor of osteopathy (D.O.) if:

- your employer offers group health coverage;
- the doctor is your regular primary care physician, has previously directed your medical treatment, and retains your medical records including your medical history;
- prior to the injury your doctor agreed to treat you for work injuries or illnesses;
- prior to the injury you provided your employer the following in writing: (1) notice that you want your personal doctor to treat you for a work-related injury or illness, and (2) your personal doctor’s name and business address, and (3) documentation of your personal doctor's agreement to treat you for work-related injuries or illnesses.

Discussion

Consistency: Government Code section 11349 states:

The following definitions govern the interpretation of this chapter: ...

(d) "Consistency" means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law....

For consistency, this form should replicate the definitions used in sections 9780(f) and 9780(g).

Requiring the documentation of the physician’s agreement to be predesignated prior to an injury will avoid any delays in medical care and unnecessary changes in treating physician that will otherwise occur. If the Administrative Director ultimately requires a physician signature, then the language of this form should reflect that, as well.

9783.1 DWC Form 9783.1
Notice of Personal Chiropractor or Personal Acupuncturist

Recommendation

You may not predesignate a chiropractor or acupuncturist as your initial primary treating physician. However, after the initial treatment by a physician selected by your employer or a predesignated personal physician, If if your employer or your employer's insurer does not have a Medical Provider Network, you may be able to change your treating physician to your personal chiropractor or acupuncturist following a work-related injury or illness. In order to be eligible to make this change, you must give your employer the name and business address of a personal chiropractor or acupuncturist in writing prior to the injury or illness. Your claims administrator generally has the right to select your treating physician within the first 30 days after your employer knows of your injury or illness. After your claims administrator has initiated your treatment with another doctor during this period, you may then, upon request, have your treatment transferred to your personal chiropractor or acupuncturist.

Discussion

To avoid unnecessary disputes over the predesignation of a personal chiropractor or an acupuncturist prior to the injury, the language on the form must clearly indicate the specifications for personal chiropractor or acupuncturist contained in Labor Code section 4601(b) and (c), and parallel the definition of "personal physician" contained in section 9780 (f)(1), (2) and (3).

Thank you for your consideration. Please contact for further clarification or if we can be of any other assistance.

Sincerely,

Brenda Ramirez
Medical and Rehabilitation Director

Michael McClain
Vice President/General Counsel

BR:MMc/pm

cc: Carrie Nevans, DWC Acting Administrative Director
Linda Pancho, DWC Counsel
CWCI Claims Committee
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