NEW RULE FOR LUMBAR FUSION PLACES UNREASONABLE BURDEN ON INJURED WORKERS AND THEIR DOCTORS

On January 1, 2018, a new rule, Ohio Administrative Code 4123-6-32, regarding authorization of lumbar fusion surgery, took effect. The rule sets forth a long list of preconditions both the injured worker and surgeon must meet in order to receive approval for a lumbar fusion surgery. Presumably, this rule was promulgated to not only cut claim costs by reducing the number of approved fusions, but to also ensure that a lumbar fusion is used only as a procedure of last resort.

In theory, a rule that requires certain measures be taken prior to such a significant surgery may make some sense. However, as currently written, the requirements contained in OAC 4123-6-32 are so stringent and unrealistic that even the most deserving claimant will be unable to receive this treatment. In these cases, the injured worker will unnecessarily suffer and will likely spend more time on disability seeking treatment that will not ultimately fix their problems.

While only enacted several months ago, the effects of OAC 4123-6-32 are already being felt. In some instances when the requirements of this rule have not been met, MCO's have dismissed the treatment request before it can even be addressed by the Bureau or Industrial Commission. When the fusion requests reach the Industrial Commission, hearing officers have denied them solely because all preconditions of the rule have not been met. One of the biggest issues with this rule is that it has taken what should be a purely medical determination and has made it into a legal issue. Virtually all other treatment requests before the Commission are approved or denied based upon whether the treatment is reasonable and necessary for the allowed conditions in the claim. This is how treatment requests always have and should be addressed. However, even in cases where the fusion is reasonable and necessary to treat the allowed conditions, the Bureau and self insured employers will certainly use the claimant's inability to meet all of the 4123-6-32 requirements as a basis for denying the request. Is this how we should be treating injured workers who are in need of surgery and want to improve medically?

Another negative impact of this rule is that it may reduce the number of Ohio BWC certified physicians who will be willing to perform lumbar fusions in these claims. Physicians have already expressed their frustration with the rule and its unreasonableness. This is understandable as it is apparent these physicians' opinions, expertise and motive are all under attack. Before being able to request a fusion, the rule dictates what treatment the surgeon must attempt, the type of testing that needs to be performed, how many times the surgeon needs to examine the injured worker, and what needs to be documented in his exam report. Amazingly, one of the many additional requirements is that the provider shall avoid catastrophizing the lumbar MRI findings. This provision suggests that providers aren't always acting in the claimants' best interest. The rule further dictates the surgeon's post operative care and requires the surgeon to treat the injured worker until he has reached maximum medical improvement. If the providers fail to comply with the requirements of this rule, they may even be subject to the peer review committee on their eligibility to treat through the BWC system.

Finally, the injured worker, surgeon and physician of record must review and sign the appendix to 4123-6-32: "What BWC wants you to know about Lumbar Fusion Surgery." This form lists statistics regarding the ineffectiveness of fusion surgeries from unnamed studies that are not verified or properly cited in the rule. This may be the most ridiculous provision of the rule. Clearly this form is meant to scare and

dissuade the claimant from pursuing surgery. However, and more importantly, it will be difficult, if not impossible, to convince a physician to sign this form. Several OAJ members have already been contacted by surgeons who were instructed by their malpractice carriers to not sign this form as it essentially admits fault in performing the fusion. Honestly, I wouldn't blame a physician for refusing to sign a form indicating the surgery they are about to perform will likely not work. One of the challenges of any workers' compensation practitioner is obtaining appropriate medical care and paperwork from a Bureau certified medical provider. This rule will only make it more difficult to find physicians willing to comply with these demands. Again, without physicians who are willing to aggressively treat and fight for claimants, injured workers will be the ones unjustly harmed by this rule.

I urge you to spend some time and read this rule in its entirety. I am confident that after you read this rule you too will be frustrated and concerned about obtaining the necessary treatment for your clients. OAJ is and will continue to communicate with the BWC about its concern with the rule. We need to collectively voice our thoughts on these requirements or a BWC approved lumbar fusion will be a thing of the past.

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