REVIEWED COSTS

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WORKERS' COMPENSATION, INSURANCE, CLAIMS AND LAW FOR THE EMPLOYER

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NEW YORK STATE WORKERS' COMPENSATION BOARD ANNOUNCES MAXIMUM WEEKLY BENEFIT TO INCREASE 7/1/18

The maximum weekly benefit for Workers' Compensation in New York is based upon two-thirds of the claimant's "average weekly wage". The maximum benefit is indexed to the New York State average weekly wage, as reported by the NYS Department of Labor (NYSDOL), for the preceding calendar year. The DOL had previously reported that the 2017 NYS average weekly wage was $1,357.11. Effective with accidents that occur on or after July 1, 2018, the maximum weekly benefit will increase from $870.61 to **$904.74**.

NEW YORK RATING BOARD SUBMITS REQUEST FOR 11.7% DECREASE IN LOSS COSTS, EFFECTIVE OCTOBER 1, 2018

The New York Compensation Insurance Rating Board (NYCIRB) has filed a request for an 11.7% decrease in Loss Costs (rates) with the New York State Department of Financial Services (NYSDFS). NYSDFS has until July 2018 to approve or deny NYCIRB's request.

You may well ask, how can the maximum benefit increase by 4% while Loss Costs (rates) decrease by 11.7%? This is particularly interesting to ponder since, in addition to the increase in the maximum benefit, the New York Medical Fee Schedule has also been revised to increase the physician reimbursement by 23%. Some of the decrease in the Loss Costs has to do with certain projections about the 2015 and 2016 policy year experience, which forms the basis for NYCIRB's request. Some is based on assumptions stemming from provisions of the 2017 Workers' Compensation Reform legislation, specifically the 2018 revisions to the Impairment Guidelines for Schedule Loss of Use Awards. Finally, since this is an election year, we can assume that Newton's law, "What Goes Up (benefits) Must Come Down (rates)" also applies.

Time, and the actual decisions made by the Workers' Compensation Board will ultimately determine whether these projections and assumptions play out or whether there will be a price to be paid down the road. It will be interesting to see how the workers' compensation market reacts to NYCIRB's filing. We suspect it may curb the market's underwriting enthusiasm. (we can't believe we worked Isaac Newton and Larry David into the same article) Our advice to employers is to enjoy the savings for the moment, but don't assume this will continue, and don't let your guard down on workplace safety and claims.

OPIOID ABUSE AND MEDICAL MARIJUANA CONNECT IN BOARD DECISION

It is no secret that opioid abuse has been one of the primary causes of the rising medical costs impacting the Workers' Compensation system across the nation, as well as other aspects of daily life. The New York Workers' Compensation Board has struggled with balancing the needs of the injured worker with the rising cost of medical care. Although New York adopted reforms in 2014 to limit opioid use to a few weeks after an injured worker's accident or surgery, carriers and self-insured employers are still dealing with physicians who over-prescribe, as well as claimants who have abused opioids.

Recently, the Board decided the case of a claimant who requested reimbursement of *medical and travel expenses* relating to the purchase of medical marijuana. The claimant received the drug from an authorized physician to assist in the weening process from opioids.

On September 15, 2014, the Board adopted the Non-Acute Pain Medical Treatment Guidelines, to address long term treatment of pain, and opioid use. The guidelines recommend the use of non-opioid regimes and only allow for an opioid trial between 30 and 60 days, if non-opioid measures are not successful. Claimants are to be monitored weekly. Claimants are to

be screened for risk factors for substance abuse. High risk claimants are to be treated by physicians who specialize in addiction medicine. The treating physician must obtain informed consent from the claimant before starting a trial of long-term opioid therapy. Prescriptions must be prescribed from a single practitioner and pharmacy. The physician must show measurable improvement in the claimant's condition before additional treatment is approved. Most importantly, tapering or discontinuation of opioids may require inpatient treatment in complex cases. The Board did not consider medical marijuana in the equation.

The Board has, in the past, denied payment for medical marijuana. Now that New York State Public Health Law Section 3360 (7) has extended medical marijuana to treat chronic pain, the Workers' Compensation Board is faced with including this mode of treatment to the Medical Treatment Guidelines. The Board determined that the use of medical marijuana would be approved as long as it was prescribed by a duly authorized doctor, and the physician submitted a variance or application to the Board outlining how and why the drug should be used. Although the physician failed to file a variance in the instant case, and payment was denied, it is anticipated we will see more cases where the physician properly files a variance.

In a perfect world, the use of medical marijuana would be treated like any other drug. However, the challenge for most carriers and self-insured employers will be its misuse for recreational purposes. Interestingly, medical marijuana is not regulated by the Food and Drug Administration. It is also said to have higher levels of CBD, which has very little psychoactive effect. The THC compound in the plant produces the "high" that is commonly known. There is no way, however, to know if an employee is using medical or recreational marijuana, other than proof of a doctor's prescription, and if the employee requests reimbursement from the carrier.

The use of medical marijuana may create other problems that are unique to employers. Some employers may find themselves in a "Catch 22" situation where the employer has a drug testing policy, and an employee who returns to work is being treated with medical marijuana for pain and, thus, he or she fails the drug test. Would the employer need to distinguish the use of medical marijuana from the recreational version? Would the employer be vulnerable to discrimination claims from other employees who also failed the test? The answer may well depend on what the employee is "smoking" and why.

Judith Brodsky, Esq. contributed this article

TURN YOUR LEGAL INTENTIONS INTO ESTABLISHED PROTOCOLS

Some employers are large enough to have the expertise and resources to consolidate and clearly articulate written personnel policies. Some employers may have an Employee Handbook with organizational policies in one place, addressing all the required personnel protocols, including FMLA, ADA, NYS Paid FMLA, Fitness-for-Duty, Drug & Alcohol use, Zero Tolerance for Harassment and Bullying, Discipline, etc. On the other hand, many of OUR clients are smaller employers. For such employers, one person often wears many hats, and management creates policies as needed, or simply reacts without policies, as issues arise. It is not uncommon for our small to medium-sized clients, many of which are family-operated businesses, to find themselves behind the "eight-ball" due to these very familiar circumstances.

A few scenarios experienced by some of our clients may seem all-too-familiar:

- A long-term employee has been afflicted with an incurable illness. Although accommodations have been made to date, further accommodation is not feasible. The employer is worried about the safety of the employee, as well as other employees.
- An employee is out on maternity leave, and has filed for disability, but is also claiming paid NYS Family Medical Leave. She has not submitted any medical report for the Disability, which is a precursor to be able to file for paid NYS leave.
- An employee's performance on the job is deteriorating. It is unclear if it is due to a developing addiction problem, or to a medical ailment, or, perhaps, to the side effects of medical treatment.

It is more difficult to build a legally defensible position for doing what any employer should do next, in any of these circumstances, without having clear and pre-existing written policies, which are provided to employees. The employees should have reviewed and acknowledged receipt of these policies, and updates, when provided. Some employers will write a policy after an event occurs, for future use, but that can make the current situation even more precarious. We, at GCG, have assisted some of our clients in strategizing how to take the best route forward and address matters such as these in the absence of existing polices. However, it is a better solution to have clear policies in place beforehand. GCG Risk Management can review your existing Employee handbooks, and/or policies, and assist you in addressing potential issues before they reach a crucial stage.

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