Ancillary Issues in Ohio Workers' Compensation: Listserv Conundrums

Sam Marcellino

Nager, Romaine & Schneiberg Co., L.P.A.

Overview

- Who Has Authority? – MD's, CNP's and OG's
  - Causation
  - Medco14s
  - Etc.
- $15K Program
  - Benefits/Added Responsibility.
- The Substantial Aggravation of Substantial Aggravation
- F-Issues
  - OAC 4123-6-31(F)
  - ORC 4123.56(F)
- Other Misc. Issues (Time Permitting)
  - Things to look out for…

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Any preliminary issues?

Who Has Authority? – MD's, CNP's and OG's

- Recently, there has been much discussion regarding who can and can't do what.
- For example:
  - Can a Nurse Practitioner provide causation?
  - Can a Physician's Assistant sign a Medco14?
  - Who can testify at a trial?
- Like all great legal quandaries, it depends…

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Who Has Authority? – Causation

- **IC Memo M5:**
- Medical documentation submitted by an Advanced Practice Nurse, a Certified Nurse Practitioner, a Clinical Nurse Specialist operating within the scope of his or her standard care arrangement, or by a Physician Assistant who is practicing under an approved supervision agreement is evidence to be considered by a hearing officer…
- …An Advanced Practice Nurse, a Certified Nurse Practitioner, or a Clinical Nurse Specialist, depending upon his or her area of specialization, may submit documentation regarding the evaluation of the injured worker's wellness, preventive or primary care services required by the injured worker, and care for the injured worker's complex health problems. Under an approved supervision agreement, a Physician Assistant may submit documentation assessing injured workers and developing and implementing treatment plans for injured workers that are within the supervising physician's normal course of practice and expertise, and that are consistent with the approved physician supervisory plan or the policies of the health care facility in which the Physician Assistant is practicing.
- **Practical Tip:** A CNP or PA can sign a FROI or C30 for Causal Purposes.

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Who has Authority? - TTD

- **During the first six weeks after the date of injury, TTD can be certified by any of the following if they have examined the Claimant:**
  - MD, DO, DC
  - CNP, PA, Clinical Nurse Specialist
  - Psychologist
- **After six weeks from the date of injury, certification of TTD for physical conditions may be submitted by:**
  - MD, DO, DPM, DC
- **Note: For psychological conditions may only be submitted by a**
  - Psychologist, MD or DO
- **Review: OAC 4123-5-18 & Commission Memos M5, M6, D8**

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Who Has Authority? –Miscellaneous

- **TTD by LPN's and Social Workers:**
  - That's a negative, Ghost Rider.
  - Medical documentation, regarding an injured worker's diagnosis of mental and emotional disorders and their treatment, submitted by a Licensed Professional Clinical Counselor or a Licensed Independent Social Worker is not sufficient evidence, in and of itself, to support an award of compensation.
- **Prescriptions:**
  - Prescription drug and therapeutic device documentation submitted by a Physician Assistant, Advance Practice Nurse, Certified Nurse Practitioner, and Clinical Nurse Specialist, who has been granted prescriptive authority under the provisions of R.C. Chapters 4723 or 4730 or Ohio Adm.Code Chapters 4723 or 4730, is evidence to be considered by a hearing officer.

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Who Has Authority? - Testifying

- Litigation:
  - Can a NP or PA render an opinion on causation and testify to it?
    - Previously, no. There was a time where NPs and PAs could not make diagnoses or prescribe.
    - That is no longer the case, as they can do either given their specialized knowledge.
    - As a result, it is the Claimants Bar's belief that a PA or NP can render an opinion on causation, and testify to it.
      - Note: This comes from M5.
- Practical Tip: Get the supervising doctor to testify instead.

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- Questions?
- Comments?
- Experiences?

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$15K Program

- Ohio Adm.Code 4123-17-59 – Fifteen thousand dollar medical-only program.
- How it works…
  - State fund employers who choose to participate pay up to $15,000 in medical and pharmacy bills.
  - An EOR need not formally apply, but must elect to participate by phoning the bureau.
  - Can enroll for this by calling the BWC or sending an email to Employerprogramunit@bwc.state.oh.us.
  - This only applies to ‘Medical-Only’ claims.
  - As a result, employer’s experience is not charged.
  - Must be current on payments.
  - Can opt-out at any point.
    - Note: EOR cannot elect to pay some bills, but not others. All or nothing…
  - Especially beneficial for smaller businesses.

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$15k Program Continued… Benefits

- Why do it?
  - It allows the employer to control BWC costs.
  - By participating employers agree to pay up to the first $15,000 in medical and pharmacy expenses directly to the medical provider for allowed claims.
  - Employers have freedom to choose which eligible claims they want to pay for directly.
    - Note: Employers may choose to remove a claim from the program or opt-out entirely at any time.
  - Because the employer's experience is not charged, it may result in reduced premium costs.

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$15k Program Continued… Responsibility

- Some employers may choose not to participate given the increased responsibility.
- When an employer elects to participate in this program they must:
  - 1. Notify the employee.
  - 2. Notify the medical providers.
  - 3. Notify the BWC (Within 14 days)
  - 4. Notify their MCO.
- Because the MCO & BWC aren't involved, the employer takes on additional responsibility.

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$15K Program Continued… More Responsibility

- In Order for employers to maintain eligibility, they must:
  - 1. Maintain records of the injury and payments (for 5 years post last paid bill)
  - 2. Supply bills paid and proof of payment to BWC within 30 days.
  - 3. Inform employees and medical providers of decision to participate.
  - 4. Pay provider within 30 days in accordance with the BWC's fee schedule.
  - 5. Not deny treatment or bills if claim/condition is allowed.
  - 6. May need to report some claims to Medicare.
    - Note: Once Maxed out, the employer must notify the BWC, MCO and Medical Provider. Then must send proof of bills and payments to BWC, and from there the MCO will take over.

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$15k in Practice

- From the Claimant's Bar
  - Occasionally, an employer will not act in good faith.
  - If an employer is delaying treatment or payment, you should advise the BWC immediately.
  - If problem persists, you can file a C92 to force the claim out of the $15k program.
  - Payment of bills does toll the SOL.
- From the Defense Bar
  - This is a beneficial program for smaller employers who may see only a few smaller claims.
  - Also, they can elect which claims become part of it, so it really gives some freedom for EORs.
  - Not 100% clear, but it is unlikely EOR is not a stator subrogree under 4123.93(B) if third-party claim is involved. I think there is room for interpretation.

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- Questions?
- Comments?
- Experiences?

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The Substantial Aggravation of Substantial Aggravation

The Substantial Aggravation of Substantial Aggravation - Historically

- Effective August 25, 2006, the provisions of SB 7 amending R.C. 4123.01 and R.C. 4123.54 became effective. The law requires a showing of "substantial aggravation" which is defined as follows:
  - "a substantial aggravation must be documented by objective diagnostic findings, objective clinical findings, or objective test results. Subjective complaints may be evidence of such a substantial aggravation. However, subjective complaints without objective diagnostic findings, objective clinical findings, or objective test results are insufficient to substantiate a substantial aggravation." R.C. 4123.01(C)(4).

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Substantial Aggravation – IC Memo

- Memo B2 | Substantial Aggravation
  - Further, when allowing a claim for substantial aggravation of a pre-existing condition, the hearing officer shall cite in the order evidence that documents the substantial aggravation by objective diagnostic findings, objective clinical findings, or objective test results**. The determination as to whether a "substantial aggravation" has occurred is a legal determination rather than a medical determination.** Therefore, although it is necessary that the hearing officer rely on medical evidence that provides the necessary documentation pursuant to the statute, it is not necessary that the relied-upon medical evidence contain an opinion as to substantial aggravation.
- That being said, it has been largely held that objective "before" evidence is NOT necessary.
- While you need not show objective evidence, you must show some baseline that proves it was pre-existing.

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Substantial Aggravation – Case Law

- ***Smith v. Lucas County*, 6th Dist. No. L-10-1200, 2011-Ohio-1548**
- ***Brate v. Rolls-Royce Energy Sys., Inc.*, 5th Dist. No. 12CA000001, 2012-Ohio-4577**
- ***Gardi v. Bd. Of Ed. of Lakewood School Dist.*, 8th Dist. No. 99414, 2013-Ohio-3436**
- ***Plfanz v. Pilkington LOF*, 1st Dist. No. C-100574, 2011-Ohio-2670**
- ***Lake v. Anne Grady Corp.*, 6th Dist. No. L-12-1330, 2013-Ohio-4740**
- ***Cassens Transport v. Bohl, 3rd* Dist. No. 13-11-36, 2012-Ohio-2248**
- ***Harrison v. Panera, L.L.C.*, 2nd Dist. No. 25626, 2013-Ohio-5338**
- ***Strickler v. Columbus*, 10th Dist. No. 13AP-464, 2014-Ohio-1380**
- ***Haynik v. Sherwin-Williams Co.*, 8th Dist. No. 100064, 2014-Ohio-1620**
- ***Fowler v. Indian River Juvenile Cor. Facility*, 5th Dist. Stark No. 2021CA00021, 2021-Ohio-4422**

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Substantial Silliness of Synonyms

- Often times we see reports with synonyms for substantial.
- As a result, defense argue that the provider's failure to properly use the magic word "substantial" is fatal to the requested condition.
- In *Rowland v. Buehrer, 2017-Ohio-7096,* the court held:
  - "We initially note that while "injury" is defined as set forth above, there is not a "statutory definition" of "substantial aggravation." As did the First District in Pflanz, ¶ 17, (and the Eighth District in Gardi v. Bd. of Educ. of the Lakewood School District, 8th Dist. Cuyahoga No. 99414, 2013-Ohio-3436, ¶ 12), we find the language of R.C. 4123.01(C)(4) to be unambiguous and clear. As this Court noted in Woods, pursuant to Pflanz, " 'to be compensable, the aggravation of a preexisting condition must be substantial both in the sense of being considerable and in the sense of being firmly established through the presentation of objective evidence.' " Woods, ¶ 17.
- Basically stating that you don't need magic words to justify a finding of substantial aggravation.
- That being said, if I was defense counsel, I would still argue it.

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Substantial Aggravation - Abatement

- For claims with injuries occurring before August 25, 2006, there is no provision for abatement of a condition allowed by aggravation. However, for injuries that occur on or after August 25, 2006, R.C. 4123.54(G) states:
  - "If a condition that pre-existed an injury is substantially aggravated by the injury, and that substantial aggravation is documented by objective diagnostic findings, objective clinical findings, or objective test results, no compensation or benefits are payable because of the pre-existing condition once that condition has returned to a level that would have existed without the injury."
- R.C. 4123.01(C)(4) and R.C. 4123.54(G) changed the legal landscape considerably with respect to aggravation injuries.

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Substantial Aggravation – Abatement Continued

- From Memo B2:
- A finding that a substantially aggravated condition has abated, or returned to baseline, has no impact on the allowed conditions in the claim. The claim remains allowed for the substantially aggravated condition. A decision that the substantial aggravation of a preexisting condition has abated involves the extent of an injured worker's disability, in that it is a decision to not compensate or authorize treatment for that condition at that time. Hearing officers are to handle requests for additional compensation or treatment after an abatement finding as they do requests for a new period of temporary total disability compensation after a finding of maximum medical improvement.
  - Editorial: This is dumb. MMI should suffice, but such is life from the Claimant's side.
  - Note: BWC is now filing these. Success TBD.

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Substantial Aggravation – Abatement Appeals

- Situation:
  - EOR is successful in its Motion for Abatement. The SHO grants Abatement of the SAPE, and Refusal Order is released…
  - Where and how do you appeal?

- Answer:
  - Courts have held that this is considered an “extent of disability issue”, as a result, it can only be challenged in mandamus.
  - See: *Clendenin v. Girl Scouts of W. Ohio*, 150 Ohio St.3d 300, 2017-Ohio-2830.

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Substantial Aggravation in Practice

- For Claimants
  - Utilize case law to reinforce that objective diagnostic evidence of a pre-existing condition is not actually necessary.
  - EOR cannot argue abatement, unless it is adjudicated administratively (or waived, but I don't know why you would).

- For Defense
  - Argue that you need some objective evidence – otherwise no proof it pre-existed. I don't think case law agrees with you, but the Hearing Officers seem to.
  - There is much discussion regarding doctors using synonyms for substantial (i.e. – Significant, Considerable, Major). Depending upon whether the adjudicator is a textualist, you may focus in on the language used throughout the report as a secondary defense.

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- Questions?
- Comments?
- Experiences?

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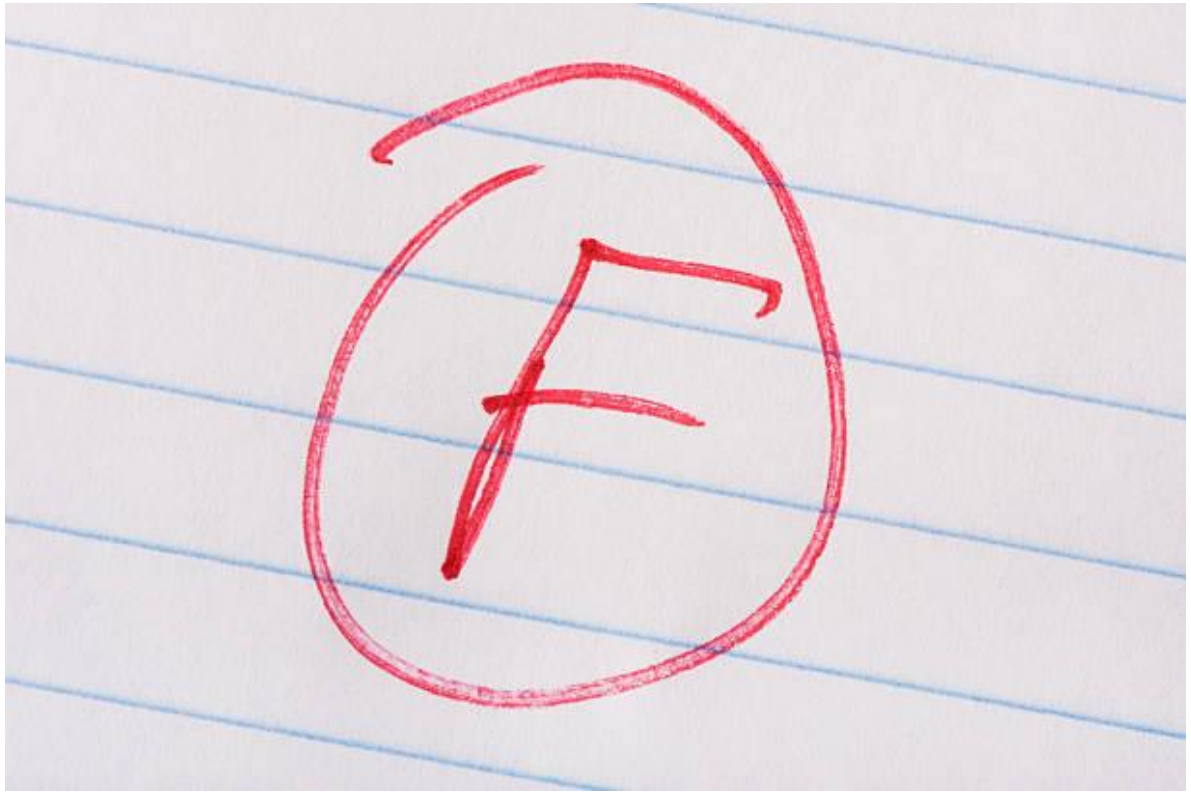
(F) Issues



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(F) Issues

- **Two issues have been dominating the Listservs over the past few years.**

- **OAC 4123-6-31(F)**
  - Payment for x-ray examinations (including CT, MRI, and discogram) **shall** be made when medical evidence shows that the examination is medically necessary either for the treatment of an allowed injury or occupational disease, or for diagnostic purposes to pursue more specific diagnoses in an allowed claim. Providers shall follow all prior authorization requirements in effect at the time when requesting authorization and payment for such studies.

- **ORC 4123.56(F)**
  - If an employee is unable to work or suffers a wage loss as the direct result of an impairment arising from an injury or occupational disease, the employee is entitled to receive compensation under this section, provided the employee is otherwise qualified. If an employee is not working or has suffered a wage loss as the direct result of reasons unrelated to the allowed injury or occupational disease, the employee is not eligible to receive compensation under this section. It is the intent of the general assembly to supersede any previous judicial decision that applied the doctrine of voluntary abandonment to a claim brought under this section.

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OAC 4123-6-31(F)

- OAC 4123-6-31(F) – Medical Imaging
  - Payment for x-ray examinations (including CT, MRI, and discogram) **shall** be made when medical evidence shows that the examination is medically necessary either for the treatment of an allowed injury or occupational disease, **or** for diagnostic purposes to pursue more specific diagnoses in an allowed claim. Providers shall follow all prior authorization requirements in effect at the time when requesting authorization and payment for such studies.

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OAC 4123-6-31(F) - Continued

- The way Claimant's counsel views this, as any diagnostic test SHALL be approved when the exam is *medically necessary* **or** *for diagnostic purposes*.
- I hate to say it, but I think Claimant's counsel is right on this one.
- Regardless, it is not always interpreted this way.
- We have seen more and more hearing officers deciding that these requests be denied, because they are for older soft-tissue injuries.

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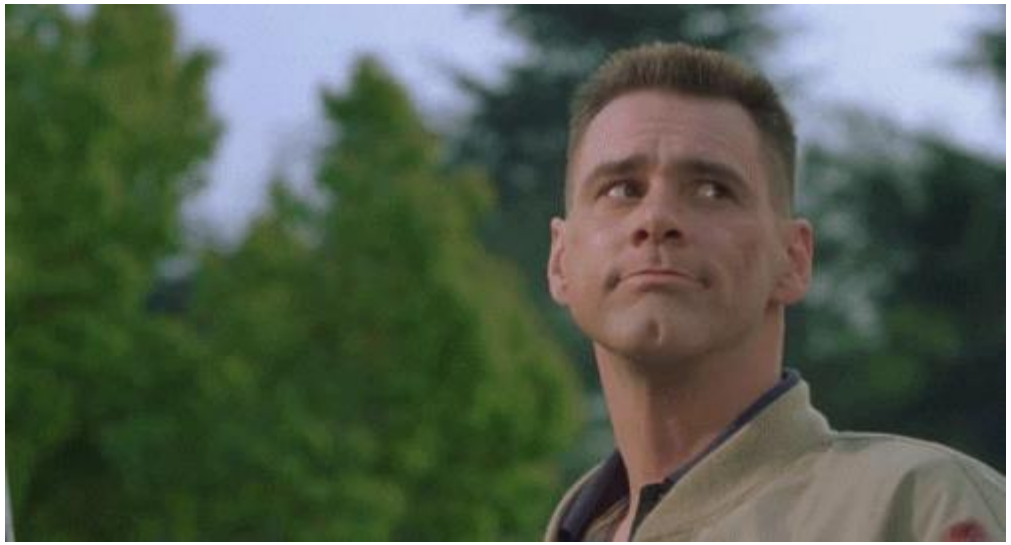

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ORC 4123.56(F) - Compensation in case of temporary disability.

- On June 16, 2021, Governor Mike DeWine signed Ohio House Bill 81.
- HB 81 codifies eligibility for temporary total disability benefits (TTD).
- Under Ohio Revised Code §4123.56(F), the legislature intended to leave behind decades of case law concerning the doctrine of voluntary abandonment.
  - Note: RIP – Louisiana-Pacific
- The new provision was meant to simplify a defense to a request for TTD by saying an employee not working or suffering a wage loss as a direct result of reasons unrelated to the claim is not eligible to receive compensation.
- Simple enough, right?

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ORC 4123.56(F) – Here is what it says…

- ORC 4123.56(F)
  - If an employee is unable to work or suffers a wage loss as the direct result of an impairment arising from an injury or occupational disease, the employee is entitled to receive compensation under this section, **provided the employee is otherwise qualified.** If an employee is not working or has suffered a wage loss as the direct result of reasons unrelated to the allowed injury or occupational disease, the employee is not eligible to receive compensation under this section. It is the intent of the general assembly to supersede any previous judicial decision that applied the doctrine of voluntary abandonment to a claim brought under this section.

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.56(F) – So where does the confusion come from?

- The problem is that the statute does not specifically address what happens when a claimant is disabled due to the injury **and** not working for reasons unrelated to the claim.
- Claimants attorneys argue that a claimant is entitled to temporary total disability compensation assuming the claimant's wage loss is a direct result of their impairment arising from the injury.
- Employers' attorneys have argued that the claimant must first show that they are "otherwise qualified" to receive the compensation. If the claimant is not working or has suffered a wage loss as a direct result of reasons unrelated to the allowed injury, the claimant is not entitled to TTD.

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Well clearly the we will all get some direction, right?

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.56(F) – Guidance…

- Typically, the BWC's legal division helps to provide guidance to the Industrial Commission and its hearing officers as to how to interpret the new law.
- However, they did not in this case.
- In fact, the BWC has taken a backseat and said they are going to wait for judicial direction.
- Unfortunately, that has not come yet.

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.56(F) Cases

- To date, no case has made its way to the Supreme Court.
- Huntington v. Taku was pending…
  - In this case, the Claimant suffered a knee injury and then returned to work.
  - He was let go due to a reduction in the workforce and accepted a severance.
  - Claimant tried to find work, but ultimately required a knee surgery, which caused him to miss out on a job opportunity.
  - DHO → No TTD.
  - SHO → TTD.
  - Employer appeals to 10th District, but the employer dismissed its appeal on July 19th, 2022, prior to any decision being issues.

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.56(F) – Where do we stand?

- Honestly, at this point, everything is up in the air.
- Half the bar sees it one way, half the bar sees it the other way.
- Claimants have had some strong recent Commission decisions, but they have not made their way much farther…
- Until that guidance comes, if I was defense counsel, I would argue that early and often. From my perspective .56(F) has seemingly been used to defend TTD at all turns – and in many cases – successfully.
- Any examples from the crowd?

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Let's Play .56(F) Law School

- Hypo:
  - IW suffers a knee injury at work, that ultimately requires surgery.
  - IW is off of work waiting for his surgery.
  - During this time he doesn't feel well and follows up with his physician, who through testing determines he has cancer, and must receive immediate chemotherapy to treat.
  - This delays his surgery a year while he goes through treatment.
  - Is he entitled to TTD?

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.56(F) Law School Part II

- Hypo:
  - IW suffers a hip injury at work. Initially diagnosed as a sprain.
  - The pain is significant, and she is placed off of work by her doctor.
  - After a few weeks the pain isn't getting better and an MRI is requested and properly approved, as we all know OAC 4123-6-31(F) states the diagnostic test SHALL be approved.
  - Between the approval and the date of the MRI, the IW finds out she is pregnant.
  - The doctor advises her she cannot have an MRI of her hip until the baby is born…
  - Is she entitled to TTD?

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.56(F) Law School Part III

- Hypo:
  - IW is involved in a physical altercation at work where he was NOT the aggressor.
  - IW is pushed and injures his arm.
  - This takes place on a Friday, and that evening he goes to an urgent care facility, who places him off work due to the arm injury for a week.
  - On Monday the employer calls and terminates the IW for breaking company policy and getting into a physical altercation at work.
  - Is he entitled to TTD?

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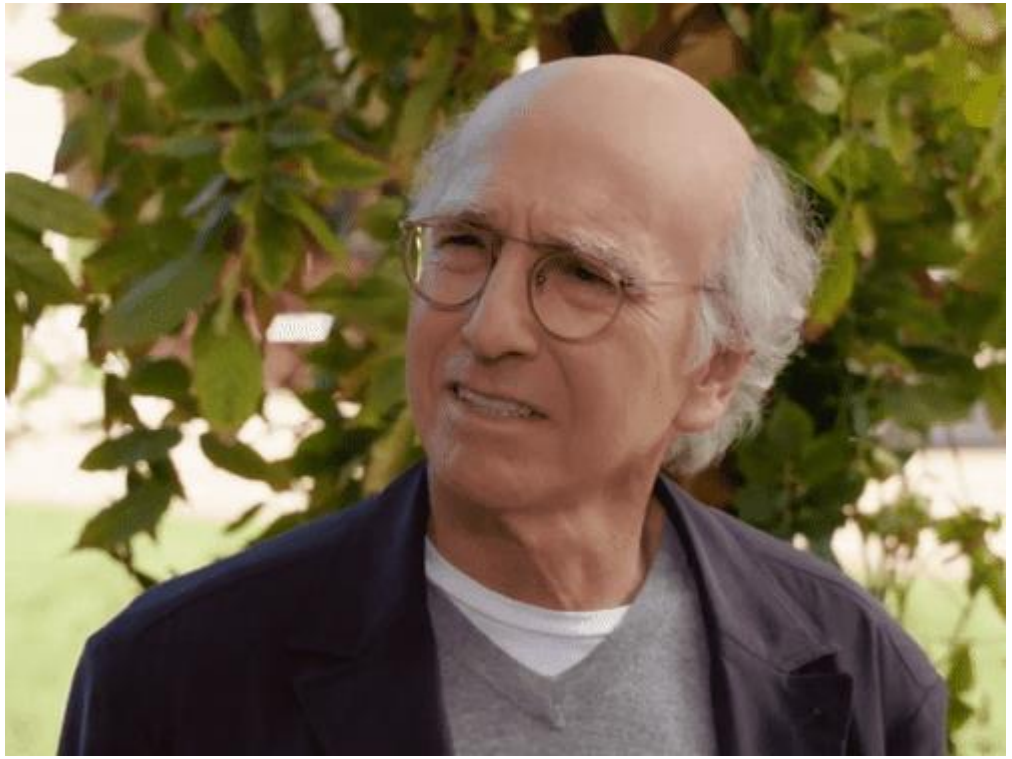
How I feel anytime .56(F) is brought up…



MOVING ON…

Grab Bag Topics (Time Permitting)

- Update to Medco14s…
  - BWC will be rolling out a new MedCo-14 in September.
  - Below video on how it should be completed that is about 49 mins long… I don't recommend all 49 minutes, but some information is helpful.
  - https://www.youtube.com/watch?v=a9dwJW7oRaI
- Update to IC Website…
  - To access the IC Hearing Officers Manual: ICON → For Representatives → IC Resource Library.
- Pending issues before the BWC board regarding presumptive treatment…

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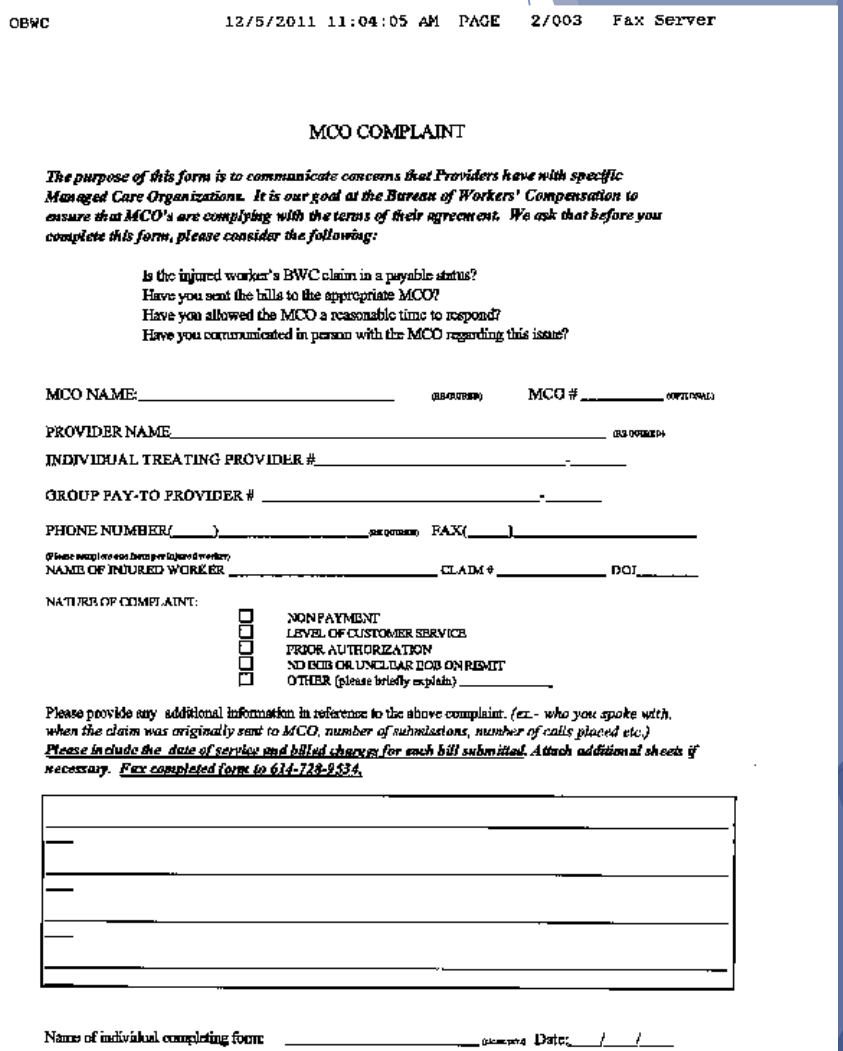
Grab Bag Topics: MCO Complaints

- What to do with a slow MCO?
  - Contact case manager.
  - Ask for different case worker.
- File the MCO Complaint form.
  - Note: This will take longer
- Contact the Ombuds Office
  - **Phone:** 1-800-335-0996
    Fax: 877-321-9481
    Email: ombudsperson@bwc.state.oh.us



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MCO COMPLAINT

The purpose of this form is to communicate concerns that Providers have with specific Managed Care Organizations. It is our goal at the Bureau of Workers' Compensation to ensure that MCO's are complying with the terms of their agreement. We ask that before you complete this form, please consider the following:

Is the injured worker's BWC claim in a payable status?
Have you sent the bills to the appropriate MCO?
Have you allowed the MCO a reasonable time to respond?
Have you communicated in person with the MCO regarding this issue?

MCO NAME:_____ (REQUIRED) MCO # _____ (OPTIONAL)

PROVIDER NAME_____ (REQUIRED)

INDIVIDUAL TREATING PROVIDER #_____-_____

GROUP PAY-TO PROVIDER # _____-_____

PHONE NUMBER(____)_____(REQUIRED) FAX(____)_____

(Please complete one form per injured worker)
NAME OF INJURED WORKER _____ CLAIM # _____ DOI____/____/____

NATURE OF COMPLAINT:

- ☐ NON PAYMENT
- ☐ LEVEL OF CUSTOMER SERVICE
- ☐ PRIOR AUTHORIZATION
- ☐ NO EOB OR UNCLEAR EOB ON REMIT
- ☐ OTHER (please briefly explain) _____

Please provide any additional information in reference to the above complaint. *(ex.- who you spoke with, when the claim was originally sent to MCO, number of submissions, number of calls placed etc.)* ***Please include the date of service and billed charges for each bill submitted. Attach additional sheets if necessary. Fax completed form to 614-728-9534.***

Name of individual completing form _____ (REQUIRED) Date:____/____/____

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Grab Bag Topics: Loss of Use Awards

- Because of unique Orders, we have seen some difficulty in getting these appropriately paid out after a DHO Order granting the Amputation or LOU.
- Situation: DHO Order grants amputation. Order does not state that the EOR must pay the award. Is the EOR required to pay?
- Answer: If the claim is not in court for any relevant AA's or the allowance, then I think the employer will be required to pay (see R.C. 4123.511(H)(4)).
- However… We have seen that EORs are refusing to make payment on the Order unless it specifically says they must.
- Practice Tip: EOR has to pay. It's codified. File a C-86 and DHO will have to grant even if the original amputation allowance was appealed.

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Questions?

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Contact Information:

Sam Marcellino
smarcellino@nrsinjurylaw.com
614-783-5891

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