# ODG GUIDELINES

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## ODG - WHAT IS IT?

The Official Disability Guidelines (ODG) are products sold by MCG Health, a subsidiary of Hearst, a global communications company that owns over 360 businesses, including ESPN and a number of large newspapers and magazines. The original publisher of ODG was Work Loss Data Institute (WLDI), which was acquired by Hearst in 2017. On its website, www.mcg.com, MCG describes itself as a "leading provider of care management guidelines and software for health insurers and providers."[1]

ODG is made up of three components: 1) treatment guidelines; 2) return-to-work guidelines; and 3) a drug formulary. The stated goal of these guidelines is to "help healthcare organizations implement informed care strategies that proactively and efficiently move patients toward health."

MCG asserts that it takes data from "peer reviewed papers and research studies" to create *evidence-based* products. But what is evidence-based medicine? Evidence-based medicine is a doctor's use of general information, such as statistics and case study information, as an aid in treating a specific patient. The general data is used with actual clinical data to reach the best result. This model of treatment is not new to medicine and it is logical for practitioners to use general guides in treating individual patients.

ODG is organized by condition (ICD coding). For each condition, there is citation to medical literature and case studies which are ranked by quality. In many cases, there are high quality studies that reach different conclusions regarding disability or treatment. Thus, there is often no clear consensus and it is inaccurate to cite ODG as supporting only one position.

Moreover, the value of guidelines is greatly dependent on the quality of information considered in determining what is average or normal. If the numbers do not account for differences in age, job duties, mechanism of injury, co-morbidities, and recurrence/exacerbation, then the average is not accurate and outliers might not be outliers.

[1] All of the quotes and information regarding MCG/Hearst/WLDI can be found at www.mcg.com.

Assuming the information is similar enough that a valid generalization can be formulated, the question becomes how to deal with cases that do not follow expectation. These outliers are where evidence-based medicine meets cost containment in workers' compensation. As MCG explains about ODG, "[t]hese guidelines are meant to be used to identify cases that are out of the norm, where questions may be asked, such as what makes them different."

It is undeniable that evidence-based medicine is a good way to try to control medical costs. In general, the outliers are among the most expensive claims. Identifying outliers is helpful, but if just being different means automatically being denied, then ODG is not being followed. Indeed, ODG itself states that "[t]he final opinion regarding any medical condition and the ability of a patient to return to work should rest with the physician treating that patient".

As a guideline, ODG is very helpful. It is available to customers in an online format which allows for quick access and reference. There is nothing wrong with the product itself. The question is whether the product is used properly, cited accurately, and considered in context. Like any company, MCG is ultimately profit-driven.

## ODG AND OHIO LAW

Before examining ODG's legal status, it is helpful to look first at the overall legal framework that governs treatment issues under Ohio law. Starting with §35, Art. II of the Ohio Constitution, it is interesting to note that the constitution refers only to "compensation" and does not mention medical treatment. However, since its creation, BWC has been given statutory power over medical treatment issues.

Initially enacted as GC § 1465-89, and currently set forth in R.C. 4123.66(A), the law states that BWC "shall disburse and pay from the state insurance fund the amounts for medical, nurse, and hospital services and medicine as the administrator deems proper". In order to discharge this significant duty, the Legislature gave BWC power to promulgate rules regarding procedure and decision-making. See R.C. 4121.30 and 4121.31. These statutes specify that such rules must be created pursuant to R.C. Chapter 119 - that is, subject to the full rule-making process necessary to give a rule the force and effect of law.

In addition to its rule-making powers, BWC was also given power to "establish, adopt, and implement policy guidelines and bases for decisions involving reimbursement issues". R.C. 4121.32(D). However, the Legislature clearly noted that "[n]either the policy guidelines nor the bases set forth in the reimbursement manual or provider bulletins referred to in this division is a rule as defined in section 119.01 of the Revised Code." Id. Thus, guidelines such as ODG are not rules and therefore lack the force and effect of law. See *State ex rel. Saunders v. Indus. Comm.*, 101 Ohio St.3d 125, 2004-Ohio-339.

In 1997, with the creation of the HPP system and MCOs, BWC used its rule-making authority to create a dispute resolution process under Chapter 4123-6 of the Ohio Administrative Code. Two rules in particular apply to guidelines like ODG.

First, Ohio Adm.Code 4123-6-16.2 provides that "[m]edical treatment reimbursement requests shall be evaluated by the MCO using the following three-part test (all three parts must be met to authorize treatment reimbursement)":

1) the requested services are reasonably related to the allowed conditions;

2) the requested services are reasonably necessary for the allowed conditions; and

3) the costs are of the services are medically reasonable.

Obviously, this three-part test is taken from *State ex rel. Miller v. Indus. Comm.*, 71 Ohio St.3d 229 (1994). Ohio Adm.Code 4123-6-16.2, therefore, codifies the judicially-created legal standard for adjudicating treatment disputes.

Second, Ohio Adm.Code 4123-6-16.1 provides that

> the MCO and the bureau shall refer to treatment guidelines adopted by the bureau. In the event of a conflict between these guidelines and any provision of this chapter of the Administrative Code, the provisions contained in the Administrative Code shall control.

The treatment guidelines referred to in this rule include ODG. The rule is just as important for what it says as for what it does not say:

· the rule says that MCOs and the BWC shall "refer" to guidelines like ODG; the rule does not say that the guidelines "must be followed" or that the MCOs and BWC must chain themselves inexorably to ODG;

· the rule applies only to MCOs and the BWC; the rule does not apply to the Industrial Commission or its hearing officers;

· the rule does not refer directly to ODG or any specific guideline;[2]

· the rule clearly states that provisions of the Administrative Code should prevail over guidelines like ODG. As cited above, Ohio Adm.Code 4123-6-16.2 says that the *Miller* test controls treatment disputes. Thus, if treatment satisfies the *Miller* test, but ODG recommends denial, the law, not guidelines, must prevail.

[2] The original version of Ohio Adm. 4123-6-16.1 referred specifically to Milliman & Roberston Guidelines and five other specific guidelines. The rule was amended in September 2004 to include specific reference to *ODG Treatment*. Effective February 1, 2010, the rule was changed to its current form which does not refer to any particular guideline at all.

Using this logic, if a hearing officer is presented with a situation where medical evidence supports the reasonableness, necessity, and cost-effectiveness of treatment but that treatment is not supported by ODG, the hearing officer should follow the Ohio Adm.Code 4123-6-16.1 and approve the treatment since the requirements of the rule prevail over guidelines like ODG.

The courts have also addressed the issue of whether guidelines should prevail over the *Miller* test when there is a conflict. In *State ex rel. Sugardale Foods v. Indus. Comm.*, 90 Ohio St.3d 383 (2000), the issue was whether a particular type of lumbar fusion product known as Steffee plating should be approved. Steffee plating was not approved by the FDA or BWC policy (it was said to be "too experimental"). The self-insured employer claimed that since BWC did not approve the product, it could not be forced to approve it through the hearing process. The Industrial Commission disagreed and authorized the surgery because the evidence satisfied the *Miller* test. The Supreme Court upheld the authorization, finding that the Industrial Commission has jurisdiction to consider and a duty to adjudicate treatment disputes. With respect to the use of guidelines, the Supreme Court noted that they are not rules and therefore not legally binding.

In *State ex rel. Bax Global, Inc., v. Indus. Comm.*, 10th Dist. Franklin No. 06AP-135, 2007-Ohio-695, the issue was whether an artificial disc for the lumbar spine could be authorized when the disc replacement product had not been approved by the FDA or BWC medical policy. The evidence in that case satisfied the *Miller* criteria and the Industrial Commission properly approved the treatment. The employer sought a writ of mandamus in the Tenth District Court of Appeals and argued that if the BWC and/or FDA do not approve a particular medical treatment, the Industrial Commission abuses its discretion by approving such treatment. The employer further argued that any "off label" or "experimental" treatment should not be approved in a workers' compensation claim. The Court of Appeals denied the requested writ, citing the fact that the evidence in question met the *Miller* criteria. Also, the court cited *Sugardale Foods* and stated that "FDA and BWC approval are merely guidelines and it is up to the Commission to decide the issue".

Thus, the case law is in harmony with the Administrative Code sections discussed above: guidelines such as ODG must give way when the *Miller* criteria are met. From a legal perspective, guidelines are exactly what they should be - guidelines. They are not law and they do not bind anyone at any stage of the treatment dispute process.

## ODG AS USED IN OHIO

There are several problems with the use of ODG in Ohio's workers' compensation system. Foremost is the inability of many parties to access ODG. The law says that MCOs and BWC shall refer to such guidelines, but they do not require that it be ODG or any

particular guideline. BWC has decided to pick ODG but ODG is not free and not provided to anyone other than the MCOs and BWC.

Hearing officers routinely rely on medical reports which cite ODG as the basis for the particular recommendation. Unfortunately, the physicians cite ODG generically with no reference to page numbers, sections, or other notations. Indeed, physicians do not even specify which product is being used - *ODG Guidelines* or *ODG Treatment*. By analogy, the generic reference to ODG is equivalent to a lawyer citing a legal principle and listing "the law" as precedent; or a theologian expounding on a tenant of faith, and citing "God's word" as the source.

It is this ability to provide vague references to ODG that cannot be verified by hearing officers that is the problem. It is no mystery that the MCOs, BWC, and employers use physicians who know that saying no will result in more business. Like any guideline, ODG can be manipulated and misquoted. For obvious reasons, it would be beneficial for hearing officers to be able to verify that ODG actually says what a doctor says it says. By not providing ODG, the Industrial Commission is requiring its hearing officers to rely on evidence that they cannot check for accuracy. This problem must be remedied.

Perhaps hearing officers have not been provided ODG based on the concern that such access would result in hearing officers "practicing medicine". But hearing officers routinely weigh medical evidence and explanations from physicians and that role is not considered the practice of medicine. Simply referring to a guideline, which is not legally binding, to check on the accuracy of a medical report which the hearing officer has the power to find persuasive, cannot be considered the practice of medicine. There is no physician-patient relationship, only the discharge of adjudicatory duties.

Another problem with the use of ODG is when it is blindly followed with respect to diagnostic testing. Ohio Adm.Code 4123-6-31(F) states that x-rays, MRIs, CT scans, and discograms should be approved for allowed conditions **or** "for diagnostic purposes to pursue more specific diagnoses in an allowed claim." In other words, the physician does not have to be treating the allowed conditions to obtain authorization for diagnostic testing. Because the *Miller* criteria and/or ODG always require treatment to be for allowed conditions, they conflict with Ohio Adm.Code 4123-6-31(F). Pursuant to the plain language of Ohio Adm.Code 4123-6-16.1, Ohio Adm.Code 4123-6-31(F) should control. Unfortunately, MCOs, the BWC, and examining/reviewing physicians slavishly cling to the allowed conditions in the name of cost containment and violate the law in the process. By doing so, they delay testing which can prolong recovery, generate a massive number of unnecessary hearings, and violate the law.

Further, some examining/reviewing physicians state that ODG never supports authorization of discograms (not a completely accurate statement in the first place). However, administrative rules prevail over guidelines if they conflict - that is the law. See R.C. 1.51. As cited above, Ohio Adm.Code 4123-6-31(F) explicitly mentions discograms in the diagnostic testing rule. If discograms can never be allowed according to ODG, then there is a conflict - why would the rule refer to a test if it could never be authorized?

Because there is a conflict, the rule must prevail pursuant to Ohio Adm.Code 4123-6-16.1 and the discogram should be authorized.

In order to deal with these problems, every effort should be made to inform hearing officers that they should not rely on evidence citing ODG when the *Miller* test is met and/or diagnostic testing should be approved under Ohio Adm.Code 4123-6-31(F). The rules and case law cited above provide a firm basis for this argument. In addition, advocates should consider purchasing ODG. By far the most effective argument against a report that misquotes or mischaracterizes ODG is to provide the actual ODG text to the hearing officer.

## CONCLUSION

In the final analysis, the goal of the system should be to provide injured workers access to medical care that restores function and reduces/eliminates pain in a cost-effective manner. There is nothing wrong with ODG or evidence-based medicine in theory, but when statistics are used to override the warnings of ODG itself regarding deference to the treating physician, and the law itself which requires approval of treatment that meets the *Miller* criteria and/or the diagnostic testing rule, then the use of guidelines is improper. At a minimum, hearing officers should be permitted access to the ODG guidelines and MCO/BWC reviewers should identify the portions of ODG that support their conclusions. These changes would improve the reliability of medical evidence and provide a disincentive for physicians to misuse ODG.