

# NEW YORK WORKERS' COMPENSATION ALLIANCE

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## Mailing Address

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April 12, 2011

Re: Medical Treatment Guidelines

Chairman Robert Beloten  
Workers' Compensation Board  
111 Livingston Street – 22<sup>nd</sup> Floor  
Brooklyn, New York 11201

Honorable Chairman Beloten:

We previously wrote to you on December 1, 2010 regarding the Medical Treatment Guidelines.

In our prior letter, we objected to the Board's application of the MTG to all cases past, present, and future, despite the opinion of claimants, attorneys, and health care providers that this would be unworkable. We expressed concern that the MTG would deny or significantly limit medical treatment and medication for thousands of injured workers who had received such treatment for many years.

It regrettably appears that our concerns were justified. Carriers have denied treatment and medication in numerous cases, which has resulted in a flood of variance requests.

We recognize that sound Medical Treatment Guidelines and an effective process would benefit employers, carriers, and injured workers. However, we believe that the MTG as adopted are illegal and violate Workers' Compensation Law Sections 21 and 13(a), among other provisions. Under the MTG process the MTG are the presumptive standard of care improperly elevating the regulation above the statute and denying injured workers adequate care and treatment "for such period as the nature of the injury or the process of recovery may require."

In addition, the MTG permits authorization for services (including surgery) to be denied based on the opinions of nurse case managers and peer reviews. This process, which improperly elevates the opinions of non-doctors and non-examining doctors above those of treating physicians and surgeons, is illegal and in violation of Workers' Compensation Law Section 13-a(5).

Assuming *arguendo* that the MTG are legal, however, they have still been misapplied by the Board. First, the MTG should not have been applied retroactively. The unnecessary and unwise retroactive application of the MTG has deprived injured workers of medical treatment to which they had a set of established rights and expectations. Second, the Board should not be applying the MTG to palliative care or chronic pain treatment. By their terms the MTG do not apply to chronic treatment, but rather apply to acute-phase medical treatment. The misapplication of the MTG on a

retroactive basis and to non-acute treatment is responsible for a substantial portion of the variance applications that are being filed.

Even assuming that the MTG are legal and that they have been correctly applied by the Board, our experience in the past four months has proved that the MTG process is irredeemably fraught with problems and should be abandoned.

In the pre-MTG system, doctors and carriers understood that medical care below a threshold amount (\$500 and later \$1,000) did not require advance authorization, whereas treatment beyond the threshold amount required a written request for authorization, followed by a response from the liable employer or carrier. The Board had established a series of processes to address non-response (MD-1, and later C-4AUTH) so that written authorization was provided by the Board upon the carrier's default. In either eventuality, health care providers had a high degree of certainty about whether a particular treatment was authorized and would be paid for.

The MTG process has replaced this situation of relative certainty with one of near total uncertainty. Virtually every carrier has opted out of the Optional Prior Approval Process, which was apparently intended to replace the former pre-authorization system on an interim basis. This has left a situation in which health care providers are required to read the MTG and then arrive at their best educated guess as to whether the particular treatment option is or should be authorized. The health care provider is given no certainty as to whether the carrier agrees with that assessment, or whether the treatment will in fact be paid for. Under the MTG regime many carriers, including the City of New York, have taken the position that they never need to issue authorization, that the health

care provider must proceed on his or her reading of the MTG and essentially assume the risk of being incorrect.

In terms of delivering medical treatment to injured workers in a timely fashion, the process is an utter failure. Rather than expediting treatment, it has served to delay medical treatment while health care providers attempt to decipher a complex set of regulations and engage in back-and-forth communication with carriers in the absence of any formal process. In essence, the MTG has destroyed the former authorization process and replaced it with a void within which most health care providers and carriers are unable to function.

Most health care providers have attempted to address this issue by filing the only forms that are available to them C-4AUTH and MG-2 forms. These forms are routinely rejected by the Board on the grounds that they are improper forms. Health care providers are thus left without any recourse to obtain written authorization. Where surgical procedures are involved, even where the health care provider is willing to assume the risk that his or her interpretation of the MTG is correct and will be upheld by the Board (and that the provider may have to wait months before that determination is made and payment is received), most hospitals will not provide operating facilities absent written authorization.

In cases where filing a variance application is the proper option for the health care provider, it is clear that the MTG process imposes an unreasonable burden on the physician. The Board has regularly and routinely rejected MG-2 variance applications as inadequate because the doctor did not provide a detailed explanation, including citations to medical literature, as to why the variance should be granted. It is entirely unreasonable

to require health care providers to submit what are essentially legal briefs in support of a simple treatment request. This is especially true in view of the fact that the Board's medical fee schedule is inadequate to properly compensate providers for the completion of multi-page medical reports, let alone preparing narrative requests with attachments in support of variance requests simply so that they can provide care and treatment to their patients.

The variance process also fails to address a number of pertinent legal issues. In many instances, carriers responding to MG-2 requests do not provide copies of their denials to the claimant's attorney. Health care providers and claimants have little or no understanding that the variance process requires them to "reconsider" the treatment request upon the carrier's denial of the request. The MG-2 form contains a space only for the claimant's signature, not for the attorney or the health care provider.

On the strength of regulatory presumption in favor of the MTG, some carriers have taken the position that they are not obligated to subpoena the treating physician for cross-examination or to pay any fees associated with the physician's deposition or testimony. This position has been supported by the Board, contrary to the statute and the Board's own regulations. Workers' Compensation Law Sections 13 and 19 make it clear that it is the carrier's responsibility to bear the costs of any litigation, including paying a fee to the treating doctor should his appearance and testimony be required. See also 12 NYCRR §§ 300.2(d), 300.2(f), 300.3, 301.1. The statutory scheme envisioned by the Legislature and incorporated in part in W.C.L. § 21(5) is further enhanced by the Board Rules, which clearly place the obligation to produce the treating doctor upon the compensation carrier. See, e.g., 12 NYCRR 300.10(c).

The variance process requires the physician to be available to testify at the variance hearing if no earlier deposition was taken. As depositions cannot be taken without the cooperation of the carrier, the result is that the provider is obligated to become available to testify on an arbitrary date on which he or she may be unavailable – and the lack of availability results in denial of the variance and denial of treatment for the injured worker.

The Board's administration of the variance process has also created substantial delays and duplication of effort. It appears that WCL Judges assigned to variance parts will not consider any non-variance issues, whereas judges not assigned to variance parts will not consider any variance issues. There are numerous cases in which a record has been developed on treatment issues as a corollary issue to another subject in dispute, yet WCL Judges have refused to render decisions on the fully-developed issue, instead requiring the filing of an MG-2 and re-litigation of the very same issue through the variance process.

In addition to failing to adequately compensate health care providers for the enormous increase in paperwork and testimony that has resulted from the MTG, the Board has also failed to issue clear guidance regarding payment to claimant attorneys for the time and effort associated with reviewing variance requests, advising clients and health care providers, executing hearing requests, taking medical testimony, and appearing at hearings. The Board has, however, succeeded in creating a new cottage industry of nurse case managers and peer review companies who can now substitute their opinions for treating doctors in the interest of creating further litigation.

We would respectfully submit that the MTG are illegal, have been substantially misapplied by the Board, and that the associated process has imposed new and substantial burdens on injured workers, health care providers, employers, carriers, and the Board's own staff. We are frankly unable to envision any modification of the process that would salvage any benefit from this ill-conceived system. We therefore request that all MTG regulations, paperwork, and process be withdrawn by the Board.

Thank you for your careful consideration of these issues.

Very truly yours,

Robert E. Grey  
Chair  
Workers' Compensation Alliance