

NEW YORK WORKERS' COMPENSATION ALLIANCE

Board of Directors

Robert Grey, Chair
Joseph Sensale, Treasurer
Neil Abramson
Ronald Balter
James Buckley
Greg Connors
William Crossett
Louis Dauerer
Erin McCabe
Brian Mittman
Victor Pasternack
Alex Rosado
Donald Shouldice
William Turley
Michael Whitcher

Mailing Address

c/o Grey & Grey, LLP
360 Main Street
Farmingdale, New York
11735

Inquiry Contact:

Robert Grey
Grey & Grey, LLP
(212) 964-1342

November 14, 2016
Re: Formulary and PBM Discussion Documents

Hon. Kenneth Munnely
Workers' Compensation Board
328 State Street
Schenectady, New York 12305-2318

Dear Chair Munnely:

I am writing to you on behalf of the tens of thousands of injured workers that are represented by members of the Workers' Compensation Alliance. We have reviewed the Board's recent proposals to create a formulary for prescription medications and to require insurers to contract with pharmacy benefit management companies. We are concerned about the impact this will have on the availability of appropriate treatment for injured workers in a timely manner, as well as with the potential for increased system costs as yet another insurer-side "cottage industry" is developed to divert employer premium dollars from injured workers.

Initially, we are unable to locate any statutory authority for the creation of a formulary. Workers' Compensation Law § 13(i) provides an injured worker the right to receive causally related medications, and Workers' Compensation Law § 13-o only gives the Board the authority to promulgate a Pharmaceutical Fee Schedule. There is no language contained in these provisions that authorizes the Board's promulgation of a drug formulary. We believe that in order for the Board to create formulary or a pharmacy benefit plan, it would require additional authority from the Legislature.

In addition, we are concerned that the proposed “formulary” may be inadequate to provide the full range of prescription medications that may be beneficial in the treatment of occupational injuries and illnesses. To the extent that the proposal to create a formulary moves forward, we hope that the Board will seek the broad participation of a wide range of health care providers and pharmacists in creating any formulary to help ensure that there are no gaps in coverage.

As noted above, we are unable to locate any statutory authority that would support a mandate for insurers to contract with Pharmacy Benefit Managers. The law currently permits the carrier to select a pharmacy network for the injured worker to use, but does not provide the Board with authority to direct the carrier which network to use or how to manage its choice of network.

We do not agree that Workers’ Compensation Law § 13-a(5) provides the Board the authority to control prescription medications. Although the statute provided the authority for the medical treatment guidelines, its plain language states that the Board, “...shall issue and maintain a list of pre-authorized procedures under this section.” This cannot apply to medications, because no reasonable or rational interpretation of this language could apply to a doctor’s writing a prescription. Prescribing a medicine is not a “procedure”.

The discussion document notes under recommendations:

“E. Require compliance with MTGs on drug recommendations for all prescriptions, both inside and outside of NYS.”

We do not believe that the Board has the authority to compel out of state providers to comply with the medical treatment guidelines. It would be inappropriate for a pharmacy run by or contracted to a carrier to determine whether or not the prescriptions are consistent with the guidelines, as doing so would deny due process to injured workers and would run afoul of the variance process. Also, as noted above, we contend that the Legislature has not given the Board the authority to include medications within the guidelines.

We are also concerned about the necessity for pharmacy benefit managers, and the potential cost of their participation in the system. If a formulary is created, then the Board will have already restricted the type of medications available to injured workers. The prescription of medication is a matter that should be left to the discretion of the treating physician. The use of pharmacy benefit managers would compound the restrictions created by the use of a formulary by further restricting whether even the medications on the formulary would be available to an individual injured worker. Moreover, this decision would be made not by a treating physician or even an independent medical examiner, but rather by unidentified staff at the PBM with unclear qualifications.

In addition, the introduction of pharmacy benefit managers to the workers' compensation system would create yet another for-profit vendor on the insurer side. The existing plethora of such vendors absorbs a significant part of employer premiums, increasing system costs and diverting funds that should provide benefits to injured workers.

We appreciate the opportunity to express our concerns and to bring these issues to your attention in connection with the formulary and pharmacy benefit plan proposals.

On behalf of the WCA Board,

Robert E. Grey