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DWCNewsline

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Internet Web Page: <http://www.dir.ca.gov>

Newsline No. 02-10

January 5, 2010

Division of Workers' Compensation administrative director issues clarification of utilization review audit measures due to Cervantes decision

The Division of Workers' Compensation (DWC) acting administrative director (AD) has received questions from claims administrators about how to comply with utilization review (UR) and the spinal surgery second opinion process statutes and regulations, in light of the *en banc* decision by the Workers' Compensation Appeals Board (WCAB) in Jesus Cervantes v El Aguila Food Products, Inc. et al (Cervantes), and offers the following guidance to claims administrators.

The *Cervantes* decision became final on Dec. 14, 2009, and is now binding on all DWC administrative law judges. Based on *Cervantes*, a claims administrator that receives a valid request for authorization (RFA) for spinal surgery, has only 10 calendar days to complete the utilization review process and, if the spinal surgery is not authorized as requested, to file the DWC form 233 (Objection to Treating Physician's Recommendation for Spinal Surgery) in the proper manner. The WCAB opinion clearly states that in the case of recommended spinal surgery, UR must be completed on the request before the issue may be addressed by a second opinion evaluator. It noted the Legislature created a special fast track decision-making and dispute resolution process in Labor Code section 4062(b) that is different from all other requested treatment disputes in a workers' compensation case. The procedures included within the definition of spinal surgery are identified in regulation section 9788.01(l) of Title 8 of the California Code of Regulations (8 Cal. Code Regs.) which is available on-line at: <http://www.dir.ca.gov/dwc/dwcpropregs/SpinalEmerReg.htm>. To be a valid RFA, the requesting report must be a doctor's first report of occupational injury or illness (form 5021), a PR-2 or a narrative that complies with 8 Cal. Code Regs. § 9792.6(o), and states 'request for authorization' at the top.

The 10 calendar day time limit begins to run upon receipt of a valid RFA, whether it is first received by at the claims office or the utilization review organization. A claims administrator may authorize the requested spinal surgery at any time. However, a claims administrator that fails to complete UR within the 10 calendar day time limit will be required to authorize the requested spinal surgery, per *Cervantes*.

When additional reasonable information is needed to make a medical necessity determination because it was not provided with the RFA, the claims administrator or its URO must:

- 1) request the necessary information by fax or mail;
- 2) document the request for information in the file; and
- 3) make a utilization review decision before the 10 calendar day period expires.

The decision must be communicated to the requesting physician within 24 hours of the decision by phone or fax, and by written decision to the requesting physician and the parties and their attorneys within either 24 hours (for concurrent UR) or two business days (for prospective UR). Reasonable information needed to make the decision may be requested by a non-physician but only a reviewing physician may deny the requested surgery due to the lack of receiving the requested information. A request for such information in spinal surgery cases only **does not delay** the deadline for decision to 14 calendar days, and the UR decision date **cannot be extended** beyond the 10th calendar day (as allowed under 8 Cal. Code Regs. § 9792.9(g)(1) for other types of treatment recommendations). An ‘appeal’ or ‘request for reconsideration’ by a treating physician under the claims administrator’s voluntary internal appeal procedure, if any, **does not extend** the 10 calendar day time limit for serving the DWC form 233 to obtain a second opinion evaluation report.

The WCAB commented that any UR decision other than a timely, full approval of the requested spinal surgery will be deemed a UR denial. ***Before the 10 calendar day period expires***, if the requested spinal surgery is not authorized in full ***and even if the UR reviewing physician denies authorization***, the claims administrator must properly complete and serve the DWC form 233 with the requesting physician’s report attached, as described in 8 Cal. Code Regs. § 9788.1, in order to obtain a comprehensive medical/legal evaluation on the disputed spinal surgery request.

In the case of disputed spinal surgeries only, the parties ***may not use*** the regular agreed medical evaluator/qualified medical evaluator AME/QME process under Labor Code section 4062(a) to resolve the dispute. A defendant that fails to timely initiate the spinal surgery second opinion process by properly filing the DWC form 233 will not be allowed to obtain a comprehensive medical/legal report through the regular AME/QME panel process per *Cervantes*.

For the purpose of utilization review investigations of claims locations and utilization review organizations, the AD will audit for compliance with the 10 calendar day time limit announced in the *Cervantes* opinion for all valid requests for authorization for spinal surgery received by a claims administrator on or after Dec. 14, 2009.

DWC 233 forms served by the applicant or the defendant before Dec. 14, 2009, will be processed as explained in Labor Code section 4062(b) and the regulations at 8 Cal. Code Regs. §§ 9788.1 – 9788.91 under the pre-*Cervantes* rules. Defendant objections using DWC form 233, served from Dec. 14 through Dec. 24, 2009, with defects (including defective UR, incomplete forms or without the full treating physician’s report) will be reviewed on a case-by-case basis.

Effective Dec. 25, 2009, the DWC Medical Unit will reject requests for spinal surgery second opinion evaluations that are incomplete; or, that fail to provide evidence of the completion of UR within 10 calendar days of receipt of a valid RFA recommending spinal surgery; or, that fail to provide a full copy of the requesting treating physician’s report with the DWC form 233.

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