

SPECIAL PENNSYLVANIA WORKERS' COMPENSATION ALERT

By Francis X. Wickersham, Esquire
610.354.8263 | FAX 610.354.8299
fxwickersham@mdwcg.com

G. Jay Habas, Esquire
814.461.7802 | FAX 814.461.7818
gjhabas@mdwcg.com

The Commonwealth Court holds that a claimant's use of Fentanyl lozenges for treatment of chronic pain was not reasonable and necessary due to the highly addictive nature of the medication and because it had not been approved for use in connection with the claimant's condition.

Bedford Somerset MHMR v. WCAB (Turner); No. 1997 C.D. 2011; filed September 5, 2012; Opinion by Judge Simpson

The claimant injured her back in 1987 and thereafter underwent two surgical procedures which failed, leaving her with chronic pain syndrome, neuropathy, osteomyelitis and spinal stenosis. Over a course of 20 years, the claimant tried at least 12 different pain medications, which she either could not tolerate or did not control the pain. Among the pain medications she tried included non-steroidals, which caused severe burning in her stomach; Oxycontin, Oxycodone and MS Contin, all of which gave her severe headaches, vomiting and gastrointestinal problems; and Morphine, to which she was allergic. Her physician of 15 years finally developed a medication regimen that did alleviate the crushing and burning pain, which she described as a "lifesaver." This pain management included a 125 mg Fentanyl patch (later increased to 200 mg), which is a long-acting opioid-type medicine, and 600

mg Fentanyl lozenges four times a day for breakthrough pain.

The employer requested Utilization Review of the claimant's Fentanyl use and the ongoing office visits. The UR physician determined that the office visits and Fentanyl patch were reasonable and necessary medical treatment but that the Fentanyl lozenge was not because that medication was only approved for pain associated with cancer due to its highly addictive nature. On review of the UR Determination, the Workers' Compensation Judge found in favor of the employer. The judge based this decision on evidence that the reason the lozenges were only approved for cancer treatment was because of their addictive nature, as shown by what the judge found to be the claimant's significantly increased use. The judge also relied on the admission by the claimant's physician that, if it was found that the Fentanyl lozenges were not reasonable and necessary, an alternative medication/treatment plan could be developed with help from a pain specialist.

The Workers' Compensation Appeal Board reversed the judge, concluding that the employer had not met their burden since the claimant credibly testified that in 20 some years, the Fentanyl program was the

only thing that she could tolerate that would provide her with the pain relief she needed.

The employer appealed the Board's decision to the Commonwealth Court, arguing that the evidence accepted by the judge showed that the Fentanyl lozenges were not reasonable and necessary treatment for the claimant's pain because of their confirmed addictive nature and that an alternative treatment plan could be devised for the claimant. The claimant argued that the judge's decision defied the long-established principle that medical treatment that is palliative in nature and manages a claimant's pain is reasonable and necessary.

In rejecting this argument and reversing the Board, the Commonwealth Court noted that the judge did not deem the claimant's use of the Fentanyl lozenges to be unreasonable and unnecessary merely because they were palliative. Rather, the Court concluded that the judge relied upon the evidence of the highly addictive nature of the lozenges, as demonstrated by the claimant's increased usage of them.

Practice Pointer: This decision has received considerable attention because of the finding that use of the Fentanyl lozenges was not reasonable and necessary medical treatment, despite the claimant's credible testimony that it was virtually the only form of medication that provided her with relief from 20 years of excruciating pain where other drugs had failed. The ruling also is significant as it rejected the long-advocated argument from claimants that medical treatment that is merely palliative is still reasonable and necessary. However, the decision may be limited by the fact that both the judge and the Commonwealth Court were persuaded by evidence that the risk of addiction from the Fentanyl lozenges far outweighed the benefits. Nevertheless, the defense community should be encouraged by the case since it can be used to support the position that ongoing treatment with extremely addictive drugs is not reasonable or necessary where safer, alternative pain management treatment plans are available.

What's Hot in Workers' Comp is published by Marshall Dennehey Warner Coleman & Goggin to provide information on recent legal developments of interest to our readers. This publication is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. We would be pleased to provide such legal assistance as you require on these and other subjects when called upon. Our firm, founded in 1962, is exclusively a defense litigation law firm with over 450 attorneys working out of 18 offices in the states of Pennsylvania, New Jersey, Delaware, Ohio, Florida and New York.

Copyright©2012 Marshall Dennehey Warner Coleman & Goggin, all rights reserved. No part of this publication may be reprinted without the express written permission of our firm. For reprints or inquiries, contact marketinghelp@mdwcg.com. If you wish to be removed from this mailing list, contact tamontemuro@mdwcg.com.