

## **When Doves Cry: New Rule Regarding Opioid Medication in MN Workers' Compensation Cases**



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Minnesota's own Prince Rogers Nelson died on April 21, 2016. In the days and weeks that followed his death, it was revealed that he had battled with addiction to pain medication. Ultimately it was determined that his death was caused by an accidental overdose of Fentanyl. His death put a very public spotlight on the dangers of addiction and long term opioid medication. This certainly is not a new problem, but the death of Prince revived a very public discussion about opioid medication.

Many in the Minnesota workers' compensation field became concerned about long-term opioid medication use well before the death of Prince. In handling workers' compensation claims, many of you have witnessed first-hand the effects of long-term opioid medication. While some injured workers' may have benefited from it, many have become dependent to the point of their own detriment and at a significant cost to the workers' compensation insurer. Prior to the new rule, the cases were difficult to defend because if the employee presented in any credible manner, he or she simply had to assert that the opioid medication helped them function and/or control pain. In addition, the treating doctors (i.e. the ones prescribing the medication) were usually supportive in writing narrative reports justifying the use of the medication. There were no specific rules regarding long-term opioid medication. The employee simply had to prove that the medication was reasonably required to cure and relieve the effects of the work injury.

In 2013, the legislature amended MN Stat. § 176.83 to include language whereby rules could be passed to determine the "criteria for the long-term use of opioids or other scheduled medications to alleviate intractable pain and improve function, including the use of written contract between the injured worker and the health care provider who prescribed the medication."

The amendment of this statute eventually led to [Minnesota Rule 5221.6110](#) that was adopted in July 2015. The full text of the rule is in the link above. In essence, this

rule acts as a treatment parameter for long-term opioid medication. You can see that the rule is very detailed and specific and includes several requirements before prescribing long-term opioid medication and additional rules that must be followed once the medication has been prescribed. I will now highlight some important sections of the rule:

Subp. 3: This part requires specific assessment tools that the health care provider must use when initiating a long-term treatment plan with opioid medication. The health care provider must use scientific literature in the assessment of both pain and function.

Subp. 4: This requires that the health care provider must make sure that the employee meets six criteria: (1) that the employee cannot maintain function at work or in daily living without long-term use of opioid medication, (2) the employee must not have somatic symptom disorder, (3) all other reasonable medical treatment options have been exhausted, (4) the employee does not have a history of failing to comply with treatment or take medication as prescribed, (5) the employee does not have substance use disorder, (6) and that a qualitative urine drug test confirms that the employee is not using any illegal substances.

Subp. 5: This part of the rule lists several potential contraindications including medical conditions such as respiratory depression, pregnancy, substance use disorder, mental disorders, suicide risks, impulse control, and unsafe behavior.

Subp. 6: This part of the rule requires the health care provider to include the employee in an integrated program of treatment that includes risk assessments and referrals to second opinion if the employee shows a high risk of dependence or abuse.

Subp. 7: In the past, a written contract was optional. Now, the rules states that "A patient receiving long-term treatment with opioid analgesic medication must enter into a written treatment contract with the prescribing health care provider as part of the integrated program of treatment" and the contract "must" be part of the patient's medical record. The rule goes on to state what must be included in the contract.

Subp. 8: Describes the criteria for monitoring the long-term use of opioid medication.

At this point you may be asking, "Okay, so what can I do on my files where long-term opioid medication has been prescribed?" That leads us to Subparts 9 and 10. Based on the language of the following two subparts, it appears that Subpart 9 would be used in claims where long-term opioid medication was prescribed after the rule was adopted in July 2015, and Subpart 10 is used in claims where long-term opioid medication was already in place at the time the rule was adopted in July 2015.

Subp. 9: When long-term opioid medication has been prescribed after July 2015, and the provider is not complying with the rule, this part of the rule gives you a roadmap to make the provider comply and/or deny payment of the medication. The rule states that the provider's failure to comply with any requirement of the rule is not a basis to deny payment for treatment with opioid analgesics "unless the insurer has previously sent the provider and the patient a copy of this part and has given the provider at least 30 days to initiate a plan to come into compliance. The insurer is required to send the provider and patient notice and provide 30 days to initiate a plan for compliance only once."

Therefore, if you feel that the provider has not complied with the rule, send them a letter with a complete paper copy of the entire Minnesota Rule 5221.6110 and indicate that they are not in compliance with the rule and that they have 30 days to initiate a plan to come into compliance or payment for additional treatment and medications may be denied. Please make sure that you carbon copy the employee directly and if they have an attorney, carbon copy the attorney as well and send them both a paper copy of the rule.

Subp. 10: Many of your claims may include employees that were already on long-term opioid medication at the time this rule was enacted in July 2015. If that is the case, then you can send the provider and the employee a copy of this rule and within three months, the health care provider must: assess the current level of pain and function as noted in the rule, meet all requirements of the risk assessment standards noted in Subp. 6, complete a written contract that complies with Subp. 7, and establish monitoring of the treatment that complies with Subp. 8.

In summary, the attached rule will provide you with an avenue to control long-term opioid use of injured workers. In many cases, you will no longer need an independent medical examination in order to address the reasonableness and necessity of the medication use. Rather, you can simply use the rule to make sure that the provider is complying. An independent medical examination may still be helpful and recommended in some cases, but using this rule to your benefit is likely the first step. You can also use the rule to your benefit to deny treatment in the near future while you wait to schedule and receive an independent medical examination that may provide you with additional defenses. You will also want to provide your independent medical examiner with a copy of the rule and ask his or her opinion on whether the treating doctor is complying with the rule.

Please feel free to contact myself or any of the attorneys at Brown & Carlson to review your claims that involve long-term opioid medication use and what you may be able to do in order to control and manage some of these difficult cases.

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