Misunderstanding Occupational Medicine Services 'Protocols'

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Urgent message: Urgent care owners should be aware of the misuse of the term "protocol" and the scope of employers' directions concerning the processing of employees in their centers. In addition, urgent care owners need to be diligent when they believe that one of their clients is attempting to override the course of medical treatment for an employee.

The discipline of occupational medicine (or occupational health) is focused on the treatment of work-related injuries and illnesses. The term generally refers to workers compensation injury care, preventive and compliance services, and health and wellness in which the client is an employer.

As a part of this, it's common parlance for urgent care providers to call the instructions from employers in administering occupational medicine services "protocols." For example, a quick review of several urgent care facility websites shows these statements:

- "We'll work with you to develop a custom plan that meets your *business's unique needs, protocols* & preferences."
- "We develop *individualized protocols* for each company and design our services to meet your needs."
- "Our knowledgeable staff understands the nuances of workers' compensation and how to follow *employer-specific protocols."*
- "Utilizing the most up to date *occupational medicine protocols,* our providers will have your employees ready to work quickly and safely...."

Only one of these five healthcare providers is using the term *protocol* correctly. Do you know which one?

Occupational medicine physicians frequently work directly with employers in an effort to support the operation of the company and to keep workers safe and healthy on the job.[1] Often, urgent care centers will offer these services.

However, urgent care providers should eschew the use of the term *protocol*. As this article will detail, there are numerous occupational medicine and urgent care providers who continue to use this *inaccurate, illegal,* and *antiquated term* to describe the instructions for servicing an account—rather than for the medical treatment of patients. As such, the incorrect use of protocols has caused at least one healthcare provider to pay a significant price in the form a multimillion-dollar class action settlement.

Urgent Care Centers That Provide Occupational Medicine Services Beware

An occupational medicine service provider typically works closely with a corporate client to provide of a host of services that may include drug screening (for safety or regulatory compliance), routine physicals (fitness for duty or regulated positions such as police, fire, haz-mat, and transportation), and treatment of workers compensation injuries. All of these services and others can be performed in the urgent care setting.[2]

When an urgent care company signs an agreement with a new employer account, it will receive instructions from the employer on how to handle that company's employees who visit the urgent care center seeking services. In many instances, these instructions are called a "protocol."

These instructions can include the specific components required of a physical, the number and types of panels to be tested on a drug screen, and if and what type of modified duty (light duty) is acceptable. In addition, as a part of their so-called protocol, an employer will dictate the authorization required for a referral, the number of pre-authorized visits, and the recipients of notification, such as an HR generalist, a third-party program administrator, or a nurse case manager for test results and determinations of return-to-work status.

When an injured employee visits the urgent care center with

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an employer authorization for services, the urgent care staff will consult the protocol to verify which services are allowed and should be provided.

The Definition of the Term *Protocol*

According to the dictionary, *protocol* is defined as "a detailed plan of a scientific or medical experiment, treatment, or procedure" or "a detailed written set of instructions to guide the care of a patient or to assist the practitioner in the performance of a procedure."[3]

However, the term does not carry the same meaning within occupational medicine. The term is being used in occupational medicine as instructions to the healthcare provider for *processing* the employer's account.

Although this appears to be a "company town" system (meaning a community where all stores and housing are owned by the one company which is also the main employer),[4] it's really the occupational medicine physician—not the written instructions, the protocol, or the employer—who has ultimate professional discretion and liability over the outcomes of the patient's treatment. Only a physician can determine whether an employee is capable of working due to physical condition or injury. And only a physician can determine the causation of an injury within the scope of employment.

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In an ideal environment, the protocol should drive the patient's

flow through the center. Some occupational medicine providers structure their protocols as flow sheets and refrain from using the term *protocol* when referring to the process. It's this flow sheet, or service package, that's designed by the employer for the employee's care. Again, a protocol, in contrast, is a medical treatment plan that's the responsibility of the physician.

Why Is This Important?

Urgent care owners should heed the results of a 2009 class action suit representing 7,000 Walmart employees against Concentra in Colorado. Judge Robert Blackburn in the U.S. District Court for Colorado ruled that the presence of "protocols" in Concentra's service model amounted to employer direction of a physician's care—which is illegal, as it violates laws that require a medical professional to treat workers compensation injuries without interference from the employer.[5]

The lawsuit alleged that Walmart engaged a subsidiary to control the treatment for employees with workplace injuries. The retailer sent the injured workers to clinics run by Concentra. The class action lawsuit, which covered current and former Walmart employees in Colorado, alleged that Walmart, Concentra, and insurer American Home Assurance Company (an AIG company) conspired to "violate a Colorado workers compensation law that bars companies from dictating medical care for workers hurt on the job."

Court documents revealed that Walmart provided Concentra with "protocol notes" before appointments with employees.[5] For example, the protocol notes required the physician to obtain preauthorization from the Walmart subsidiary for referrals to other treatment providers (eg, specialists) in direct violation of Colorado law. These protocol notes also dictated, restricted, and/or withheld treatment by:

- Dictating how often a physician could treat injured Walmart workers
- Requiring the authorized treating physician (ATP) to notify Walmart if the ATP determined that it was necessary for the injured employee to miss work
- Prohibiting the ATP from prescribing any chiropractic treatment
- Prohibiting the ATP from prescribing limited work schedules (eg, light duty)
- Requiring the ATP to obtain approval from Walmart's adjusters before prescribing more than five visits to a physical therapist or an occupational therapist
- Prohibiting the ATP from prescribing health club memberships
- Directing the ATPs to only write prescriptions to Walmart pharmacies

In addition, the employees showed that despite the fact that two administrative law judges and the Industrial Claims Appeals Office determined that Walmart's protocol notes unlawfully dictated treatment in violation of state law, Walmart continued to treat its injured employees subject to the protocol notes.[5]

The class action settlement was approved by the judge, and Wal-Mart Stores and Claims Management Inc. (its adjuster) paid $4 million. Plus, Concentra Health Services in Colorado, through its insurer, paid an additional $4 million. As part of the settlement, healthcare provider Concentra was required to provide training to its marketing and sales force on state laws that prohibit outside interference in how care is provided.

"The health, safety, and wellbeing of our associates are important to Walmart," said spokesman Randy Hargrove after the settlement was announced in 2012. "It is up to the doctors to determine the best course of treatment for each person."[6]

Concentra, one of the nation's largest providers of occupational medical services, no longer refers to the processing instructions as "protocols," but instead calls them "service packages."[7]

Interestingly, this issue has arisen several times in Alabama, where courts have held that the employer may not limit the scope of the employee's treatment by refusing to pay for reasonably necessary medical treatment recommended by the physician or agreeing to pay only for certain procedures.[8-10]

Conclusion

Urgent care owners should be aware of the misuse of the term *protocol* and the scope of employers' directions concerning the processing of employees in their centers. In addition, urgent care owners need to be diligent when they believe one of their clients is attempting to override the course of medical treatment for an employee.

Urgent care owners, other healthcare providers, and employers could face similar legal action in other states that, like Colorado, prohibit companies from dictating injured workers' care. ■

References

1. Concentra. What is occupational medicine? Available at: https://www.concentra.com/occupational-health/occupational-medicine/. Accessed February 2, 2018.
2. Ayers A. Understanding the landscape of occupational medicine. *JUCM*. January 2013. Available at: https://www.jucm.com/understanding-the-landscape-of-occupational-medicine/. Accessed February 2, 2018.
3. Protocol. *The Free Medical Dictionary*. Available at: https://medical-dictionary.thefreedictionary.com/protocol. Accessed February 2, 2018.
4. Wikipedia. Company town. Available at: https://en.wikipedia.org/wiki/Company_town. Accessed February 2, 2018.
5. Gianzero v Walmart. 1:09-cv-00656-REB, (D.Col. March 24, 2009). Available at: http://www.lexisnexis.com/documents/pdf/20090728102108_large.pdf. Accessed February 2, 2018.
6. Svaldi A. Injured Walmart workers win $8 million settlement. *Denver Post*. November 13, 2012. Available at: http://www.denverpost.com/2012/11/13/injured-walmart-workers-win-8-million-settlement/. Accessed February 2, 2018.
7. Concentra Employer Portal. Online Account Management. Employer Portal FAQ. Available at: https://www.concentra.com/employer-portal/#FAQ. Accessed February 2, 2018.
8. Ex parte City of Prattville, 56 So. 3d 684 (Ala. Civ. App. 2010).
9. Ex parte El Reposo Nursing Home Group, Inc., 81 So. 3d 370, 374 (Ala. Civ. App. 2011).
10. City of Auburn v Brown, 638 So. 2d 1339 (Ala. Civ. App. 1993).