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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF KIGIN,

Appellant,

-against-

No. 181

NEW YORK STATE WORKERS' COMPENSATION
BOARD,

Respondent.

20 Eagle Street
Albany, New York 12207
October 14, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE ABDUS-SALAAM

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1 CHIEF JUDGE LIPPMAN: 181, Matter of Kigin
2 - - - Kigin.

3 Counselor, would you like any rebuttal
4 time?

5 MR. GREY: One minute, please, Your Honor.

6 CHIEF JUDGE LIPPMAN: One minute. Sure, go
7 ahead.

8 MR. GREY: May it please the court, my name
9 is Robert Grey. I'm appearing on behalf of Appellant
10 Maureen Kigin in this matter. The issue before the
11 court fundamentally is whether the state workers'
12 compensation board has issued a regulatory scheme
13 that is in conflict with the statute that the board
14 is charged with the obligation to administer.

15 CHIEF JUDGE LIPPMAN: Why - - - why would
16 it be conflict? Give us your basic kernel of your
17 argument.

18 MR. GREY: The basic kernel of the
19 argument, Your Honor, is that, as it's presently
20 written, the statute provides that the employer or
21 carrier can deny treatment, before the treatment is
22 rendered, provided that they meet two conditions.
23 One is that the treatment has to cost in excess of
24 1,000 dollars. And the other is that they must have
25 a doctor saying that the treatment is not necessary.

1 JUDGE SMITH: Actually, what it says is a
2 second conflicting opinion from a physician.

3 MR. GREY: From a physician authorized by
4 the board.

5 JUDGE SMITH: But doesn't that - - -
6 doesn't that sort of assume there's got to be a first
7 opinion before there's a second opinion?

8 MR. GREY: It assumes that there's a
9 request from a treating doctor for treatment that
10 costs in excess of 1,000 dollars, thus implicating
11 13-a(5).

12 JUDGE SMITH: I mean, implicit in it is the
13 physician's opinion that that's appropriate and
14 necessary treatment?

15 MR. GREY: Yes, sir.

16 JUDGE SMITH: And why can't the workers'
17 compensation boards for - - - for - - - and you - - -
18 you agree that the - - - that's subject to dispute,
19 obviously, and the board can say it's not appropriate
20 and necessary?

21 MR. GREY: Well, un - - - under - - -

22 JUDGE SMITH: You - - - you say they have
23 to have a conflicting opinion from a doctor. And
24 maybe you're - - - of course, in this case you do.

25 MR. GREY: Well, under the - - - well, with

1 regard to the conflicting opinion from a doctor in
2 this case, the matter below is not decided based on
3 the opinion of that doctor. The matter below, in
4 this case, was decided based on the board's
5 guidelines. And the medical opinion that was
6 proffered was also based on the guidelines. So the
7 fundamental question here - - -

8 JUDGE SMITH: Well - - - well - - - well,
9 why - - - why - - - why isn't - - - why can't the
10 guidelines be read to say, in effect, we're
11 regulating the first opinion, the first opinion in
12 which the second one is conflicting? And we're
13 saying you've either got to be within the guidelines
14 or show us a good reason - - - a good enough reason
15 for a variance? Why is that inappropriate?

16 MR. GREY: Because it's contrary to what
17 the statute says, Your Honor.

18 JUDGE SMITH: What does the statute say
19 about what the first opinion has to say?

20 MR. GREY: Well, you - - - you'd have to
21 read, I believe, together Sections 13-a, 13-a(5), and
22 21(5). 13-a establishes the broad obligation of the
23 employer and carrier to provide medical treatment.

24 13 - - -

25 JUDGE SMITH: But - - - but my - - - my

1 question is what does the opinion, the - - - what
2 does the - - - there's obv - - - there's clearly some
3 implicit burden on the - - - on the recipient, on the
4 - - - the claimant to do something. You can't do - -
5 - you - - - you don't just get money by saying send
6 me a check. You have to have a doctor saying this is
7 - - - this is appropriate treatment. We agree so
8 far?

9 MR. GREY: Yes.

10 JUDGE SMITH: Why can't the workers'
11 compensation board, by regulation, define the extent
12 of that burden, say we're going to consider an
13 application adequate when it's either within these
14 guidelines or shows us a good reason for being
15 outside the guidelines?

16 MR. GREY: Because, Your Honor, the
17 legislature's already defined that burden. The
18 legislature has already written a statute, 13-a(5).
19 And what that statute says is that treatment in
20 excess of 1,000 dollars can be pre-authorized or pre-
21 denied based on a conflicting medical opinion. The
22 necessary interpretation - - -

23 JUDGE SMITH: Okay, but - - - but I - - - I
24 - - - I keep coming back to it. Suppose 500 dollars,
25 and the statute doesn't apply at all. You can't say

1 I would like 500 dollars for a rain dance. You have
2 to have a doctor who says I want to get - - - this -
3 - - this - - - this guy has a 500-dollar treatment
4 that will work.

5 MR. GREY: The - - - there is a bifurcation
6 of issues here, Judge, between treatment and payment.
7 The way the statute is written, the injured worker is
8 entitled to receive the treatment and the physician
9 submits the bill. The carrier still reserves the
10 right to dispute the bill. And then whether the bill
11 is payable is a matter to be adjusted between the
12 provider and the car - - - and the insurer. But in
13 the interim, the injured worker has been treated.
14 The problem with the regulatory scheme that you have
15 here - - -

16 JUDGE SMITH: How can - - - how can - - -

17 MR. GREY: - - - is that the injured worker
18 now - - -

19 JUDGE SMITH: How can - - - how can a
20 worker be - - -

21 MR. GREY: - - - cannot get - - -

22 JUDGE SMITH: Wait a minute, how can a
23 worker be entit - - - entitled to treatment that no
24 one's going to pay for? What good does that do?

25 MR. GREY: That - - - that's the nature of

1 the system, Your Honor. It's been that way for a
2 hundred years.

3 JUDGE PIGOTT: But it's better now.

4 JUDGE GRAFFEO: I thought the - - - I
5 thought the - - -

6 JUDGE PIGOTT: Isn't it?

7 JUDGE GRAFFEO: - - - benefit of these new
8 regs is that the injured worker doesn't have to get
9 pre-approval. The injured worker can get ten
10 treatments. And then if they want additional medical
11 treatment of this nature, say acupuncture, then
12 they've got to request the variance. So for the vast
13 majority of injured workers, it's eliminated that
14 first step that they've got to wait to get a medical
15 opinion. They can get ten treatments. Am I - - - am
16 I wrong?

17 MR. GREY: There - - - there are two
18 problems with it, Your Honor.

19 JUDGE GRAFFEO: Am - - - am - - - but is
20 that how it works? Am I right or wrong about that?

21 MR. GREY: Under the guidelines?

22 JUDGE GRAFFEO: Yes, under the guidelines.

23 MR. GREY: Under the guidelines the injured
24 worker gets the treatment that the guidelines
25 prescribe.

1 JUDGE GRAFFEO: So you get ten treatments,
2 and then you decide whether you want to request a
3 variance?

4 MR. GREY: Correct.

5 JUDGE GRAFFEO: Correct?

6 MR. GREY: That's the guideline process.

7 JUDGE GRAFFEO: So doesn't that benefit the
8 vast majority of people? It eliminates having to go
9 in and get pre-approval.

10 MR. GREY: The - - - the short answer to
11 your question, Your Honor, is no because with the - -
12 - with the increase in the pre-authorization
13 threshold from 500 dollars to a 1,000 dollars, that
14 sweeps in all of this treatment anyway. So when the
15 - - - when the pre-authorization limit was 500
16 dollars, yes, there were people that had - - -

17 JUDGE SMITH: But you're - - - you're - - -

18 MR. GREY: - - - this sort - - -

19 JUDGE SMITH: - - - talking specifically
20 about this acupuncture?

21 MR. GREY: I'm talking about this
22 acupuncture or physical therapy or chiropractic.

23 JUDGE SMITH: But in - - - in - - - in - -
24 - in general, presumably, there's some benefit to
25 having a long list of procedures that the - - - the

1 claimant doesn't have to go to the trouble of asking
2 pre-authorization for?

3 MR. GREY: Indisputably so, Your Honor.
4 And we have no objection to the medical treatment
5 guidelines to the extent that they pre-authorize
6 treatment. You know, the - - - the legislature
7 clearly directed the board - - -

8 CHIEF JUDGE LIPPMAN: Under that scheme - -
9 -

10 MR. GREY: - - - to pre-authorize.

11 CHIEF JUDGE LIPPMAN: Under that scheme,
12 though, doesn't it set up a situation where you're
13 saying the next step makes them out of step with the
14 - - - with - - - out - - - out of compliance with the
15 statutory purpose?

16 MR. GREY: That's exactly so, Your Honor.
17 The - - - the portion of the guidelines to which we
18 object is not the portion of the guidelines that pre-
19 approves - - -

20 CHIEF JUDGE LIPPMAN: That says you can get
21 ten treatments?

22 MR. GREY: - - - treatment. It's that once
23 the - - - the injured worker has gotten the pre-
24 approved treatment, the guidelines now automatically
25 pre-deny the treatment - - -

1 CHIEF JUDGE LIPPMAN: What would be an
2 appropriate scheme after you get past the ten
3 treatments?

4 MR. GREY: After you get back - - - after
5 you get past the treatment that's authorized by the
6 medical treatment guidelines, whatever that is - - -

7 CHIEF JUDGE LIPPMAN: Yes.

8 MR. GREY: - - - the appropriate scheme
9 would be to follow the existing statutory procedures.

10 JUDGE READ: Well, doesn't the existing
11 statutory procedure always make it an obligation to
12 show that the treatment's medically necessary? So I
13 - - - I don't understand what you mean by pre-deny?

14 MR. GREY: The - - - the - - - the existing
15 statutory procedure, Your Honor, has a presumption in
16 favor of the request of the treating physician. And
17 it imposes an obligation - - -

18 JUDGE READ: But what would - - - what
19 would that be? That would be - - -

20 MR. GREY: That's the Section 21(5)
21 presumption. And - - -

22 JUDGE RIVERA: But isn't 21(5) just a
23 presumption that the facts, as set out in the medical
24 records, are assumed to be prima facie?

25 MR. GREY: But tho - - - those - - -

1 JUDGE READ: You don't have to bring your
2 doctor in - - -

3 MR. GREY: Those - - - those facts would be
4 the diagnosis - - -

5 JUDGE RIVERA: Um-hum.

6 MR. GREY: - - - the level of disability
7 and the treatment request. That's the purpose of
8 having - - -

9 JUDGE SMITH: Treating - - - is the
10 treatment request a fact?

11 MR. GREY: - - - treating doctor's reports.

12 JUDGE RIVERA: That's not a fact.

13 MR. GREY: Pardon?

14 JUDGE RIVERA: Of what - - - okay, okay.

15 JUDGE SMITH: Is - - - is the treatment
16 request a fact?

17 MR. GREY: That the treatment is being
18 requested is a fact, yes, sir.

19 JUDGE SMITH: Yeah, okay - - - well, no, I
20 have no doubt whatever that the treatment's being
21 requested.

22 MR. GREY: Okay.

23 JUDGE SMITH: But - - - but - - - but - - -
24 but the question isn't - - - isn't whether it's
25 requested. It's whether it's reasonable and

1 appropriate. Is that a fact that's - - - that - - -
2 that - - - that - - - that's subject to the Section
3 21 presumption?

4 MR. GREY: Well, if - - - again, if you go
5 back to the 13-a(5), under 1,000 dollars there's no
6 mechanism for the carrier to deny the treatment
7 before it's rendered.

8 JUDGE SMITH: Okay, so Section 21 has
9 nothing to do with it?

10 MR. GREY: Well, we - - - we believe that
11 Section 21 and - - - and the purpose of the law,
12 which this court has outlined in many, many
13 decisions, is to create a presumption in favor of the
14 injured worker and in favor of the injured worker's
15 doctor's report.

16 JUDGE SMITH: Judge - - - Judge Cardozo
17 says that it's bas - - - that the purpose of the
18 presumption is to - - - just to get rid of the stuff
19 that's not controverted and not put any burden on the
20 claimant to have to prove stuff that's not going to
21 be fought about anyway. Is - - - is - - - isn't that
22 right?

23 MR. GREY: Correct, and the statute, as it
24 exists, provides that the treatment requests gets
25 granted unless the carrier comes forward with a

1 contrary medical opinion. The issue with the
2 guidelines is that the board has substituted the
3 statutory requirement that the carrier produce a
4 contrary medical opinion with a relief for the
5 carrier from its obligation to do that and
6 arbitrarily deciding - - -

7 CHIEF JUDGE LIPPMAN: So after the ten
8 treatment - - - after the ten treatments, what should
9 happen? You come in. You say I request whatever.
10 And basically, unl - - - unless they come back and
11 say a good reason why it's - - - it's - - - it's - -
12 - you shouldn't have it, you get it? The presumption
13 is with the claimant.

14 MR. GREY: The presumption and the - - -
15 and the - - - and the text of Section 13-a(5), Your
16 Honor, both - - -

17 JUDGE PIGOTT: But isn't it still with you?
18 In other words, you get - - - you - - - your doctor
19 knows you're getting up to the - - - to the ceiling -
20 - -

21 MR. GREY: Um-hum.

22 JUDGE PIGOTT: - - - and she writes in and
23 say, you know, the - - - I - - - I'm - - - it's an
24 ongoing treatment and she's - - - the claimant's
25 going to need another twenty-five treatments. I - -

1 - unless somebody's got a good reason to - - - to
2 deny that, it's not automatically denied, is it?

3 MR. GREY: No, Your Honor. What happens is
4 if it's under 1,000 dollars - - -

5 JUDGE PIGOTT: I'm - - - I'm over that.
6 I'm - - -

7 MR. GREY: I - - - but if it's under 1,000,
8 the injured worker gets it. If the carrier then has
9 an objection to the bill - - - to the bill when they
10 receive it, it goes to an arbitration panel which is
11 the way it's been forever. If it's over 1,000
12 dollars, the burden shifts to the carrier.

13 JUDGE PIGOTT: You say burden, but what I'm
14 suggesting to you is if the doctor even picked up the
15 phone and said, you know, he did lose a leg and it's
16 going to take more than this. And so I'm - - - it's
17 an ongoing treatment. No one's going to deny it. It
18 - - - I'm - - - I'm searching for the - - - I mean -
19 - -

20 MR. GREY: Your - - - Your - - - Your
21 Honor, having practiced in this area for twenty-seven
22 years, I have to respectfully disagree with you on
23 that point.

24 JUDGE READ: Well, are you arguing that the
25 pre - - - that there's a presumption that what the

1 has gotten the treatment that the guidelines
2 prescribed, if the treating doctor sends in a
3 request, the carrier need do nothing, because the
4 guidelines have been established by the board as the
5 quote/unquote "standard of care." If the - - -

6 CHIEF JUDGE LIPPMAN: You're saying that's
7 where the presumption has - - - has flipped or the
8 burden has flipped and that's the problem.

9 MR. GREY: And the regulation expressly
10 flips the presumption and says that the burden of
11 proof is on the provider.

12 JUDGE SMITH: Now the - - -

13 JUDGE GRAFFEO: Is that - - - is that why
14 it didn't happen here? Because I thought - - - maybe
15 I'm reading your client's doctor's submission or
16 deposition differently, but I thought she didn't find
17 necessarily functional improvement. It was more pain
18 management.

19 MR. GREY: That - - - that's an issue with
20 the guidelines, Your Honor. The - - - the guidelines
21 focus on functional improvement as opposed to
22 palliative care. The board issued - - -

23 JUDGE GRAFFEO: That - - - that could last
24 forever. So is the system required to pay forever?
25 Is that a concept of workers' comp?

1 MR. GREY: Yes, Your Honor.

2 JUDGE SMITH: But - - -

3 MR. GREY: The claimant - - - the injured
4 worker's right to medical care is not time limited
5 and continues - - -

6 JUDGE SMITH: But let - - - let me - - -

7 MR. GREY: - - - as long as causally
8 related treatment's required.

9 JUDGE SMITH: Let me ask if I could, you -
10 - - you - - - you told us how it's supposed to work.
11 Let's take an extr - - - an extreme case. A rid - -
12 - a ridiculous case but it's to make a point. A - -
13 - I have a - - - I have - - - my doctor's a witch.
14 And - - - and he or she thinks he can cure my
15 ailments by burning bats' toes in a cauldron and he's
16 going to charge me 5,000 dollars. And I ask for - -
17 - for pre-approval. You're saying I - - - you're
18 saying that the carrier has to - - - has to either
19 fork out the 5,000 or get a contrary medical opinion
20 from a physician?

21 MR. GREY: That's what the law says, Your
22 Honor. The - - - the other point I would make to
23 you, though, is that these guidelines are not the
24 board's sole means of reigning in what it believes is
25 inappropriate treatment. A physician can only treat

1 an injured worker if that physician is coded by the
2 compensation board. The board has power over coding,
3 and the board has power over billing disputes. So
4 this regulatory scheme is taking a - - - a
5 blunderbuss to a problem - - -

6 CHIEF JUDGE LIPPMAN: You're probably not
7 going to have - - -

8 MR. GREY: - - - that requires a small
9 pistol.

10 CHIEF JUDGE LIPPMAN: - - - the doctors
11 that Judge Smith is talking about be on the coded
12 list?

13 MR. GREY: Yes, the problem is that - - -

14 JUDGE SMITH: But - - - but it is - - - it
15 is - - -

16 MR. GREY: - - - if you have a doctor like
17 that they shouldn't be coded, yes.

18 JUDGE GRAFFEO: If - - - if the - - -

19 JUDGE SMITH: But there are doctors who are
20 a little bit aggressive sometimes in what they're
21 willing to charge for. Has such things happened?

22 MR. GREY: Absolutely, Your Honor. And
23 that's why the carrier has recourse to - - - to
24 disputing the bills and going to arbitration.

25 JUDGE RIVERA: And - - - and if the carrier

1 - - - I'm sorry.

2 JUDGE GRAFFEO: So if the legislature
3 adopted this as opposed to this being a regulation
4 guideline?

5 MR. GREY: The legislature, Your Honor,
6 certainly could have amended 13-a(5) to direct the
7 board to pre-determine treatment requests. The
8 legislature did not do that. The legislature
9 directed the board to pre - - - to issue a list of
10 pre-authorized procedures - - -

11 JUDGE GRAFFEO: It's part of a - - -

12 MR. GREY: - - - with which we agree.

13 JUDGE GRAFFEO: It's part of a reform
14 package to try to keep the costs down of workers'
15 compensation.

16 MR. GREY: Well, if - - - if you - - - if
17 you - - -

18 JUDGE GRAFFEO: So I guess we'd be telling
19 them they have to be more specific.

20 MR. GREY: I - - - I believe, Your Honor,
21 their list of - - - of desired outcomes was to remove
22 impediments to diagnosis and treatment, to create a
23 list of pre-authorized procedures to reflect best
24 medical practices, to reduce litigation costs, and to
25 increase benefits, so to the extent that the

1 guidelines pre-authorize diagnostic tests and
2 fundamentally necessary surgeries and - - - and basic
3 courses of physical therapy, they achieve all of
4 that.

5 The problem is that the second you go
6 beyond the guidelines, you now have a stoppage of
7 treatment until the variance is approved - - -

8 JUDGE PIGOTT: Not necessarily.

9 MR. GREY: - - - if it's approved.

10 JUDGE PIGOTT: Not necessarily, right? You
11 - - - I mean you - - -

12 MR. GREY: Yes, Your Honor.

13 JUDGE PIGOTT: - - - you can anticipate
14 that you're getting to the end of whatever the
15 guideline is and you can go in and get an approval
16 before treatment stops.

17 MR. GREY: Only if the variance application
18 is granted. The problem - - -

19 JUDGE PIGOTT: Of course, of course.

20 MR. GREY: - - - Your Honor, what the - - -
21 what the regulations provide and what the board has
22 done is if the person reaches the end of their
23 therapy and the doctor puts in for a variance, and
24 while the variance is pending, the doctor does the
25 right thing and continues to treat the patient and

1 then the variance gets granted six weeks later, the
2 board will not approve payment to the doctor for the
3 six weeks of treatment that it agrees were necessary,
4 because it was performed without a variance. That's
5 the problem.

6 JUDGE PIGOTT: Well, that's a different
7 fight.

8 CHIEF JUDGE LIPPMAN: Yeah.

9 JUDGE ABDUS-SALAAM: What happens - - -
10 what happens when - - -

11 CHIEF JUDGE LIPPMAN: Judge Abdus-Salaam.

12 JUDGE ABDUS-SALAAM: - - - currently,
13 because the guidelines were changed recently, I think
14 last year, for this kind of treatment. Is your
15 client still getting ten additional - - - or was she
16 able to get ten additional treatments?

17 MR. GREY: The - - - the - - - the board
18 issued chronic care guidelines. It still has not
19 issued palliative care guidelines, which the board
20 views as a - - - as a distinct issue because you go
21 back to the guidelines' focus on function. So you've
22 got chronic-care guidelines that focus on function
23 but we still have no - - -

24 JUDGE ABDUS-SALAAM: So in other words the
25 - - - the answer is no.

1 MR. GREY: - - - pain relief guidelines.

2 JUDGE ABDUS-SALAAM: She's not getting - -
3 - she didn't get additional treatment?

4 MR. GREY: No, Your Honor. You have a lady
5 here who's a court reporter who works and tries to
6 work and she needs something to manage her pain so
7 she can show up to work for the board by whom she's
8 employed.

9 CHIEF JUDGE LIPPMAN: Okay, counselor.
10 Thank you, counselor.

11 MR. GREY: Thank you, Your Honor.

12 CHIEF JUDGE LIPPMAN: You'll have your
13 rebuttal.

14 Counselor? What's wrong, counselor, with
15 the scheme that your adversary lays out that he says
16 is - - - is consistent with the statute itself?

17 MR. GROENWEGEN: Well, I think there's a
18 couple things I'd like to make clear. One is - - -

19 CHIEF JUDGE LIPPMAN: I know, but what's -
20 - - what's wrong with it?

21 MR. GROENWEGEN: Well, I think - - - I
22 think the fundamental error is I - - - I don't think
23 the statute creates this burden, this - - - this
24 presumption that medical care - - - that the - - -
25 the claimant is entitled to any medical care desired.

1 CHIEF JUDGE LIPPMAN: So he's wrong as to
2 who has the burden?

3 MR. GROENWEGEN: Correct, correct.

4 CHIEF JUDGE LIPPMAN: Under the statute - -
5 -

6 MR. GROENWEGEN: Correct.

7 CHIEF JUDGE LIPPMAN: - - - as it exists,
8 irregardless of the guidelines?

9 MR. GROENWEGEN: That's right. We don't
10 think that the workers' compensation law reflects a
11 general presumption that - - - that all - - - that -
12 - -

13 CHIEF JUDGE LIPPMAN: Isn't the presumption
14 you get treated while you need treatment? Isn't that
15 the basic thrust of the statute? As long as you
16 require treatment you get compensation?

17 MR. GROENWEGEN: If it's medically
18 necessary. But there's always been this basic issue
19 that you're only entitled to care - - -

20 CHIEF JUDGE LIPPMAN: So it all comes down
21 to who has the burden?

22 MR. GROENWEGEN: Correct. Correct, but
23 what - - -

24 CHIEF JUDGE LIPPMAN: Because the
25 assumption is you get treatment if it's medically

1 necessary. Who shows that it's medically necessary?

2 MR. GROENWEGEN: Yeah, I mean, it - - -
3 clearly, no one denies it.

4 CHIEF JUDGE LIPPMAN: Or unnecessary.

5 JUDGE PIGOTT: Is there a - - - is there a
6 difference, though, I mean has something changed? Or
7 ar - - - is your argument that this argument is
8 totally specious, that nothing changed under the new
9 reform act?

10 MR. GROENWEGEN: Nothing has changed, in
11 our view, with respect to the burden of proof, which
12 is really their - - - their - - - their main
13 objection here which is the only thing that's really
14 changed. The board has provided a very detailed set
15 of guidelines for what is considered medically
16 appropriate care.

17 JUDGE SMITH: But what - - - what was the
18 claimant's burden? You - - - you say it's always
19 been the same. So what is it? What - - - what was
20 it and still - - - what is it that it was and still
21 is?

22 MR. GROENWEGEN: Well, the - - - the - - -
23 the claimant would have had the burden in any
24 situation where there was a dispute as to whether or
25 not the care was medically necessary to meet that

1 burden and to show that the care was - - -

2 JUDGE SMITH: Well - - -

3 MR. GROENWEGEN: - - - medically necessary.

4 JUDGE SMITH: Well, I guess, you don't - -
5 - you don't get a dispute until the claimant asks for
6 something, right?

7 MR. GROENWEGEN: That's correct.

8 JUDGE SMITH: And - - - and - - - and he -
9 - - and - - - and the claimant ha - - - he or she has
10 to - - - presumably has to have a doctor saying this
11 is appropriate? Or - - - or, yeah, he - - - he can't
12 just say gee, I'd like to go spend a few hundred
13 thousand on - - - on whatever I feel like.

14 MR. GROENWEGEN: You know, that - - - that
15 - - - that - - - that's correct. I mean, presumably,
16 the - - - the - - - the claimant would have a care
17 provider that would say I think you should have more
18 acupuncture.

19 JUDGE GRAFFEO: But what sounds different -
20 - -

21 JUDGE PIGOTT: Is there - - - is there any
22 difference then between the two? I - - - I get the
23 impression from you opponent that - - - that let's
24 assume there's ten under the guidelines - - -

25 MR. GROENWEGEN: Um-hum.

1 JUDGE PIGOTT: - - - and this person needs
2 twenty.

3 MR. GROENWEGEN: Um-hum.

4 JUDGE PIGOTT: And he's saying if we don't
5 ask for it they're going to cut us off at ten. We're
6 done. And unless we get a letter in or something, we
7 either can treat for free, if the doctor's willing to
8 do it, because you're never going to pay them,
9 because there's no letter there on that date, or stop
10 treatment. Is that true?

11 MR. GROENWEGEN: That's right. I mean,
12 they can't - - - they - - - I mean - - -

13 JUDGE PIGOTT: Was that true before?

14 MR. GROENWEGEN: Well, the - - - the - - -
15 the care provider - - - one - - - one thing I'd like
16 to make clear is - - -

17 CHIEF JUDGE LIPPMAN: Answer the judge's
18 question.

19 MR. GROENWEGEN: Okay, that - - - that may
20 have been true before because, well, the care
21 provider would have been at risk of not being paid if
22 they proceeded with treatment that - - - that was not
23 medically necessary. There was a possibility the
24 carrier or the employer would come back and say that
25 care was - - - went beyond what was medically

1 necessary in this case.

2 JUDGE GRAFFEO: But that was a risk. That
3 was a risk assumed by the medical care provider.

4 MR. GROENWEGEN: Correct.

5 JUDGE GRAFFEO: I think what your adversary
6 is saying is the injured worker got the treatment
7 that they needed depending on whether the provider
8 was willing to take the risk of getting payment or
9 not getting payment or partial payment. Whereas it
10 sounds like in this - - - under these guidelines
11 there can be a break in treatment while the worker
12 awaits approval of the variance if and when that may
13 ever come.

14 MR. GROENWEGEN: That's right. If - - -
15 that's correct. I mean if they're - - -

16 JUDGE GRAFFEO: So that - - - I mean,
17 that's a substantial change.

18 MR. GROENWEGEN: Well, it - - - it - - -

19 JUDGE GRAFFEO: Should that be something
20 that the legislature approved as opposed to a
21 regulatory act?

22 MR. GROENWEGEN: Yeah, because the - - -
23 the board has always had the authority to regulate
24 not only the system generally, but to reg - - - adju
25 - - - adjudicate disputes as to the - - - as to

1 whether or not care was medically necessary. So - -
2 -

3 CHIEF JUDGE LIPPMAN: Is it a good thing
4 from a - - - a policy perspective that there be that
5 kind of break when someone really needs the
6 treatment?

7 MR. GROENWEGEN: Well, I think it's a good
8 - - -

9 CHIEF JUDGE LIPPMAN: And - - - and as
10 Judge Graffeo said, if it's not a good thing,
11 wouldn't you think the legislature should be the one
12 that's going to say that?

13 MR. GROENWEGEN: Well, the - - - the - - -
14 I think it's important to remember that the
15 guidelines provide a - - - a - - - to the extent they
16 apply, provide a comprehensive summary of what's
17 considered und - - - under current medical thinking
18 what is appropriate care for particular types of
19 injuries. So - - - so by - - -

20 CHIEF JUDGE LIPPMAN: Inappropriate that
21 you might need another ten treatments?

22 MR. GROENWEGEN: Well, the - - - the - - -

23 CHIEF JUDGE LIPPMAN: I mean in the
24 broadest context?

25 MR. GROENWEGEN: In the broadest context?

1 Not necessarily but - - - but it's true that the - -
2 - the - - -
3 the employee or their - - - if they felt that this
4 was an unusual situation to - - -

5 CHIEF JUDGE LIPPMAN: Yeah, but I - - - but
6 I think what your adversary is saying is that to do
7 it the way you contend the new schematic works - - -

8 MR. GROENWEGEN: Um-hum.

9 CHIEF JUDGE LIPPMAN: - - - is contrary to
10 the whole purposes of the statute. Why is that not a
11 reasonable approach to this? It would seem that - -
12 - that all of a sudden you could need treatment,
13 which is the whole idea of the statute, and now you
14 can't get it under this new scheme. That was not - -
15 - it's not the legislative scheme. The legislative
16 direction was you can - - - you can say a certain
17 number of treatments that are just done. But beyond
18 that the rest of this is not what they're - - - what
19 they've laid out, is it? Or is it?

20 MR. GROENWEGEN: Well, remember that - - -
21 that - - - that for - - - for the - - - the - - - the
22 - - - the great majority of - - - of cases, the - - -
23 the employee's going to have an - - - an
24 incontrovertible entitlement to the care that's in
25 the - - -

1 CHIEF JUDGE LIPPMAN: Isn't it a typ - - -

2 MR. GROENWEGEN: - - - guideline. So - - -

3 CHIEF JUDGE LIPPMAN: Isn't it a typical -

4 - -

5 MR. GROENWEGEN: - - - this is the - - -

6 the extreme - - -

7 CHIEF JUDGE LIPPMAN: Counselor, isn't it a
8 typical circumstance, let's say with acupuncture or
9 so many other things, that you'd have the - - - the -
10 - - the ten treatments and you're going to need more?
11 This is not an unusual circumstance, or is it?

12 MR. GROENWEGEN: Well, it - - - it - - - it
13 - - - it - - - the point is that they - - - they - -
14 - they - - - they're not precluded from obtaining it.
15 They just have to show - - - they have to go in and
16 say - - -

17 CHIEF JUDGE LIPPMAN: I know, but you're
18 just going to have a real break in your treatment.

19 MR. GROENWEGEN: You could. It's - - -

20 CHIEF JUDGE LIPPMAN: Until - - - until - -
21 - under - - - again, under his theory, your
22 adversary's theory, that - - - that the legislature
23 didn't say that. And now you're radically changing
24 the way it works. And if you're going to radically
25 change the way it works, maybe the - - - the

1 legislature should do that and not do it by kind of
2 this flipping of the burden that really is not a
3 necessary consequence of these pre-approved ten, you
4 know, treatments. That - - - isn't that his
5 argument?

6 MR. GROENWEGEN: I - - - I - - - I think
7 that is essentially, you know, his argument. And I -
8 - - I - - - I can only say that I think the break in
9 treatment probably would have occurred under the pre-
10 existing scheme because a care provider would have
11 been reluctant to - - - to say, in many cases, I'm
12 not sure that - - - that the comp system will pay for
13 this treatment.

14 JUDGE PIGOTT: That's the - - - that's - -
15 - that's the - - -

16 JUDGE SMITH: Well, you - - - you need - -
17 -

18 JUDGE PIGOTT: I was go - - - that's the -
19 - - when you - - - you two are arguing about burden
20 shifting. You say there is no burden shifting. He
21 says there is. It really comes down to that day,
22 right, the - - - the day that the comp board says no
23 more treatment. And that's now regulatory. You're
24 saying no more treatments after X, right? They're
25 saying before when that day came, we continued to get

1 treatment unless and until the board had a hearing or
2 made a determination that it's no longer necessary.
3 And in - - - and before, that treatment continued and
4 sometimes we'd win, sometimes we'd lose. But at
5 least the - - - the treatment continued. That's - -
6 - that's, it seems to me, is the burden issue that
7 we're talking about, isn't it?

8 MR. GROENWEGEN: Yeah, I mean, I don't
9 think there - - - there - - - there - - - there - - -
10 there was ever an assurance that - - -

11 JUDGE SMITH: Well - - - well, does it
12 depend on whether it's more - - -

13 MR. GROENWEGEN: - - - the - - - that
14 treatment would continue.

15 JUDGE SMITH: - - - or less than 1,000
16 dollars? I mean in the old days it was more than
17 1,000 dollars and you wanted your eleventh
18 acupuncture treatment you had to get pre-approval.

19 MR. GROENWEGEN: Yeah, I mean, one - - -
20 one thing I think - - -

21 JUDGE SMITH: The carrier - - - and if the
22 carrier said no then you - - - then - - - then there
23 was a proceeding at which different conflicting - - -
24 they had to get a conflicting medical opinion, but
25 the - - - but the - - - but there could be a gap at

1 that point, I would think, even in the old days
2 before the guidelines.

3 MR. GROENWEGEN: That's right. Right,
4 first - - - for - - - for - - -

5 JUDGE SMITH: But on the other hand, if
6 it's less than 1,000 - - -

7 MR. GROENWEGEN: Um-hum.

8 JUDGE SMITH: - - - what would happen is
9 the provider would make the decision am I going to
10 take my chances on giving the eleventh acupuncture
11 treatment and see if I'm going to get paid or not?

12 MR. GROENWEGEN: Correct.

13 JUDGE SMITH: And now - - - and now the - -
14 - rather than the provider taking - - - taking
15 chances, the provider does an application for a
16 variance and finds out beforehand.

17 MR. GROENWEGEN: Correct.

18 JUDGE SMITH: And does that signif - - -
19 does that make a - - - does that make for a more
20 drawn out process in which the treatment is more
21 likely to be interrupted than it used to be?

22 MR. GROENWEGEN: Well, the - - - the - - -
23 the regulations have an expedited procedure for
24 resolution of these things. And one of the
25 advantages of the - - - of - - - of the guidelines

1 and the regulations, adopting them, was intended to
2 be resolving a lot of these disputes in advance by
3 having, you know, carefully thought out guidelines by
4 - - - by experts as to what is and is not appropriate
5 as opposed to the - - - the prior system where an
6 administrative law judge at the board would be
7 resolving these disputes based on conflicting
8 opinions of - - - of physicians, which led to
9 potentially inconsistent or unpredictable results.
10 Now there's a - - -

11 CHIEF JUDGE LIPPMAN: Okay, counselor.

12 MR. GROENWEGEN: - - - lot more clarity.

13 CHIEF JUDGE LIPPMAN: Thanks, counselor.

14 MR. GROENWEGEN: But - - -

15 CHIEF JUDGE LIPPMAN: Appreciate it.

16 MR. GROENWEGEN: Thank you.

17 MS. SINGER: Good afternoon. I'm Jill
18 Singer for the Special Funds. The board has always
19 determined the med - - - medical necessity of
20 treatment as a trier of fact. The burden of proof
21 has always been on the claimant to show that
22 treatment was medically necessary in the face of a
23 challenge. And now, with the medical treatment
24 guidelines that challenge has been pre-determined.
25 And the variance process places the - - -

1 JUDGE SMITH: He says you're not allowed to
2 pre-determine it under the statute unless you have an
3 - - - an opinion of a physician?

4 MS. SINGER: Care - - - care is always
5 needed to be medically necessarily, though, or - - -
6 or else it's on a - - -

7 JUDGE SMITH: Well, in the old days - - -

8 MS. SINGER: - - - case-by-case basis.

9 JUDGE SMITH: - - - if you had a treatment
10 that was more than 1,000 bucks, you had to ask the
11 carrier is this okay. And the carrier was not
12 allowed to say no unless - - - well, assuming you
13 start out with a physician's opinion saying it was
14 all right, the carrier had to have a second opinion,
15 a conflicting opinion, from a physician. And that's
16 in the statute, right?

17 MS. SINGER: Right, and that - - - but
18 that's already been - - -

19 JUDGE SMITH: What happened to that second
20 conflicting opinion? Does the carrier not have to
21 get it anymore?

22 MS. SINGER: The carrier can get it. The -
23 - - the car - - - or the carrier can challenge on the
24 basis that the - - - the treatment is not appropriate
25 and medically necessary.

1 CHIEF JUDGE LIPPMAN: Yeah, but the carrier
2 can deny it without having a second medical opinion,
3 that's the question.

4 MS. SINGER: If it - - - they don't meet -
5 - -

6 CHIEF JUDGE LIPPMAN: Under the new - - -
7 under the new scheme.

8 MS. SINGER: - - - the burden of proof, if
9 they don't meet the burden of proof. But it's just
10 been pre-determined. It's the same - - -

11 CHIEF JUDGE LIPPMAN: Yeah, but - - -

12 JUDGE SMITH: Is - - - isn't that contrary
13 to the statute?

14 MS. SINGER: But - - -

15 JUDGE SMITH: Doesn't the statute say he's
16 got to have a doctor's opinion before he denies it?

17 MS. SINGER: But that doctor's opinion
18 would be challenging what the guidelines have just
19 pre-determined. In other words, it's just shifted
20 the timing. It - - - the burdens haven't changed.

21 JUDGE PIGOTT: Well, if that - - - if there
22 was - - - if there were five treatments the carrier
23 could say we're not paying anymore; we think five's
24 enough. And - - - and you would be saying under the
25 new guidelines, no. Up until ten we're not going to

1 - - - we're not going to let you controvert?

2 MS. SINGER: Right, it's pre-determined to
3 be, in this case, ten. In the old days the carrier
4 would have had to get a medical opinion but now they
5 don't have to because it's been pre-determined by the
6 guidelines. It just makes the system more efficient
7 because - - -

8 CHIEF JUDGE LIPPMAN: Yeah, but the
9 guidelines - - -

10 MS. SINGER: - - - because it's been
11 predetermined.

12 CHIEF JUDGE LIPPMAN: - - - in essence, say
13 if it's more than ten then you presumptively don't
14 get it.

15 MS. SINGER: Then you - - -

16 CHIEF JUDGE LIPPMAN: Isn't that what it
17 means or - - -

18 MS. SINGER: - - - need to show - - -

19 CHIEF JUDGE LIPPMAN: Or I think that's
20 what it means, yeah.

21 MS. SINGER: Right, I think they're saying
22 that's what they can con - - - the guidelines
23 consider that to be medically necessary and if you
24 want more then you have to - - -

25 JUDGE SMITH: I - - - I understand the new

1 system might be more efficient. But isn't the old -
2 - - I mean that you can't - - - the guidelines can't
3 amend the statute. The statute says that you can't
4 deny pre-approval without a second conflicting
5 opinion from a physician. What happened to that
6 statute?

7 MS. SINGER: The guidelines just determine
8 on - - - initially what is medically necessary
9 treatment.

10 JUDGE PIGOTT: You had that group that - -
11 - that studied - - -

12 MS. SINGER: And that was - - -

13 JUDGE PIGOTT: - - - it and - - - and put
14 all these things in place and that is the pre-
15 determined - - - that it's not medically necessary
16 after ten in certain situations?

17 MS. SINGER: They're - - - basically
18 there's - - - they're - - - they're laying out what
19 is and isn't medically necessary - - -

20 CHIEF JUDGE LIPPMAN: So the question is -
21 - -

22 MS. SINGER: - - - treatment.

23 CHIEF JUDGE LIPPMAN: - - - can you do that
24 or is that contrary to the statute?

25 MS. SINGER: You can - - -

1 CHIEF JUDGE LIPPMAN: Can you say that,
2 presumptively, since we've studied it, here's the
3 ten. This is what you get. Anything more than that,
4 presumptively, you don't need it and we don't have to
5 put any medical evidence to - - - to say that you
6 don't need it?

7 MS. SINGER: That's - - - that's part of
8 the board's - - -

9 CHIEF JUDGE LIPPMAN: The answer to that is
10 yes, right? That's what - - -

11 MS. SINGER: The - - - it's under the
12 board's - - -

13 CHIEF JUDGE LIPPMAN: - - - the new
14 schematic does, right?

15 MS. SINGER: Because the board's always
16 been the trier of fact as to what is and isn't
17 medically necessary treatment. They're just doing it
18 ahead of time to make - - -

19 CHIEF JUDGE LIPPMAN: So in answer to Judge
20 Pigott's question - - -

21 MS. SINGER: - - - it efficient more.

22 CHIEF JUDGE LIPPMAN: - - - once you do the
23 ten, you've studied it, right? That's it. You have
24 a right, in your view - - - your position is you have
25 a right to say anything else is no good, and I don't

1 have to give you any kind of medical contrary
2 evidence. You - - - you can't get it presumptively?

3 MS. SINGER: Right, because it's already
4 been pre - - -

5 CHIEF JUDGE LIPPMAN: Right.

6 MS. SINGER: - - - determined.

7 CHIEF JUDGE LIPPMAN: Right, that's - - -
8 okay, thanks.

9 Counselor, rebuttal?

10 MR. GREY: Your - - - Your Honor, what that
11 argument boils down to, which I think Judge Smith put
12 his finger on, is the respondent's contention is,
13 essentially, that the board believes the guidelines
14 are a good thing. That is, as Judge Smith pointed
15 out, not the office of the board. The question for
16 the court is whether the guidelines are lawful.
17 Otherwise, we run into - - -

18 CHIEF JUDGE LIPPMAN: Yes.

19 MR. GREY: - - - U.S. v. Two Hundred
20 Barrels of Whiskey. With regard to your question,
21 Your Honor, about whether submitting variances is an
22 unusual circumstance - - -

23 CHIEF JUDGE LIPPMAN: Yes.

24 MR. GREY: - - - since their inception, the
25 record at the Appellate Division will show the board

1 has been getting 20,000 variance applications per
2 month. So you're dealing with a quarter million
3 applications a year from doctors who do not believe
4 that the guidelines are adequate to treat their
5 patients.

6 JUDGE PIGOTT: The alternative then would
7 be what?

8 MR. GREY: The alternative would be the
9 system would be to uphold the guidelines, to the
10 extent - - -

11 JUDGE PIGOTT: Well, the alternative would
12 be that you'd have 20,000 physicians treating without
13 authorization from the WCB, waiting for the WCB to
14 pay them because of oversights or whatever and - - -
15 and/or someone to challenge them as opposed to
16 drawing a line in the sand and - - - as I think
17 they're trying to do, save money and get things
18 moving on the low - - - on the low end, right?

19 MR. GREY: Well, I - - - there - - - there
20 are a few problems with that, Judge Pigott. One is
21 that it's not the board's job to draw - - - to draw
22 the line in the sand.

23 JUDGE PIGOTT: No, but if you look - - -

24 MR. GREY: It's the carrier's job.

25 JUDGE PIGOTT: - - - at it another way, I

1 think of ALJs who don't believe in acupuncture at
2 all.

3 MR. GREY: Um-hum.

4 JUDGE PIGOTT: They think that's a joke.
5 They think that's an excuse. They - - - and they
6 will not grant it. So now you're stuck with an ALJ
7 somewhere who says I'm not - - - I'm not authorizing
8 this at all, and you're out. Now that's not going to
9 happen anymore because there's a guideline that says
10 it is a - - - it is a good procedure and you've got
11 to give it. So there are benefits to this that, on
12 the whole, considering the number - - - I - - - you
13 say 20,000 variances, I don't know how many cases
14 there are a month in the workers' compensation board,
15 but there's more than 20,000. And - - - and
16 somebody's got to - - - to decide these things,
17 right? You got to - - -

18 MR. GREY: Right, and that implicates the
19 due process issue, which is that if one individual
20 worker runs into one individual ALJ who doesn't
21 believe in a form of treatment or doesn't believe in
22 a particular doctor, the ALJ - - - the - - - the
23 worker gets to have their day in court on their
24 treatment - - -

25 CHIEF JUDGE LIPPMAN: So what's - - -

1 MR. GREY: - - - for the courts to make a
2 determination.

3 CHIEF JUDGE LIPPMAN: How is it going to
4 work now under your interpretation of this - - - the
5 - - - the guidelines and the presumption that it
6 makes after the guid - - - guidelines as being
7 contrary to the statute, how is it going to work now
8 - - -

9 MR. GREY: It - - - it would - - -

10 CHIEF JUDGE LIPPMAN: - - - in those 20,000
11 cases?

12 MR. GREY: It would work the way the
13 legislature directed. The board can use its existing
14 medical treatment guidelines as a list of pre-
15 authorized procedures. And for any treatment in
16 excess of the guidelines, up to 1,000 dollars,
17 there's no pre-authorization. The carrier can always
18 object to the bill. Not the board, the carrier.

19 CHIEF JUDGE LIPPMAN: Right.

20 MR. GREY: Over 1,000 dollars, if there's a
21 request, the carrier can deny the request based on
22 what the statute says to cover any medical payments.

23 JUDGE PIGOTT: Before you go - - -

24 JUDGE GRAFFEO: So we don't have to
25 invalidate the entire guidelines if we agree with

1 you?

2 MR. GREY: Yes, Your Honor, only the pre-
3 denial portion of it.

4 JUDGE PIGOTT: Before you go on that,
5 though, because you say you - - - you - - - you spend
6 a lot of time in workers' compensation boards, how
7 long does some of these hearings last when you've got
8 a - - - you know, an initial appearance and/or a
9 continuation? Sometimes ten seconds, sometimes
10 thirty?

11 MR. GREY: If counsel is well prepared, we
12 can handle a hearing in about two minutes, Your
13 Honor.

14 JUDGE PIGOTT: Right, and - - - and - - -
15 and that's the way comp generally works?

16 MR. GREY: Yes, Your Honor.

17 JUDGE PIGOTT: So it's only - - - it's only
18 when you - - - when you run into a - - - a situation
19 that there's any type of a real hearing like you've
20 had here?

21 MR. GREY: Right, and then what happens in
22 this case is, from the day the variance request was
23 submitted until the day - - - day of the judge's
24 decision, was three months in which the lady got no
25 treatment. And then you had an appeal which took

1 eight months, which is fast for the board -- they're
2 now running about a year -- during which she got no
3 treatment.

4 JUDGE SMITH: When - - - what would have
5 happened in the old days if it's more than 1,000
6 dollars? You - - - you - - - you would have
7 submitted your request to the carrier and the - - -
8 the carrier what - - - had a - - - had a - - -

9 MR. GREY: Thirty days.

10 JUDGE SMITH: - - - a limited - - - had
11 thirty days to get back. And if he got back with a
12 medical opinion you might wait forever?

13 MR. GREY: If they did nothing, then at the
14 end of the thirty days it was authorized as a matter
15 of law. If they got an IME who said it was - - - it
16 was adeq - - - fine, then it was approved. If they
17 had a doctor who said it wasn't necessary then we
18 litigated.

19 JUDGE SMITH: Okay, so - - - so you - - -

20 MR. GREY: But then - - -

21 JUDGE SMITH: So the - - -

22 MR. GREY: But we litigate now.

23 JUDGE SMITH: So the occasion - - - the
24 occasion for litigation used to be the carrier saying
25 no with an IME to support them. Now the occasion is

1 it's a - - - if it's outside the guidelines?

2 MR. GREY: That's exactly correct, Your
3 Honor.

4 CHIEF JUDGE LIPPMAN: Okay.

5 MR. GREY: Thank you.

6 CHIEF JUDGE LIPPMAN: Thanks, counselor.
7 Thank you all. Appreciate it.

8 (Court is adjourned)

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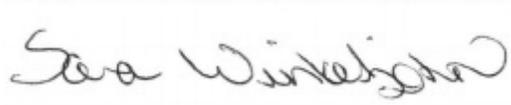
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Kigin v. New York State Workers' Compensation Board, No. 181 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: October 19, 2014