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WHATEVER HAPPENED TO HOUSE CALLS?

PITFALLS OF TELEMEDICINE

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How did we get from this:

To this:

IN THE BEGINNING……

- (Aka, March 16 2020) the WCB amended the law to include Section 325-1.8 “Emergency Medical Aid and telemedicine.”

It was passed through “emergency rule making” and was set to expire June 13, 2020.

- It actually expired in July 2023, however, the WCB liked it so much…

12 NYCRR 325-1.26

- Telehealth:
  - Defined as treatment by authorized providers “using two way audio and visual electronic communication, or audio only.”
    - Can only be performed by authorized provider who *is available* for an in-person encounter (within a reasonable distance from claimant’s residence).
    - Must abide by the Guidelines (we’ll come back to that).
    - The visit must be “medically appropriate for telehealth (that too).

Restrictions: 325-1.26(b)(1)

- (i) Can only be used *following* an in-person encounter, and every third visit must be in person.
- (ii) Must be an in person visit every three months (until MMI).
- (iii) Must be an in person visit at least annually (after MMI).

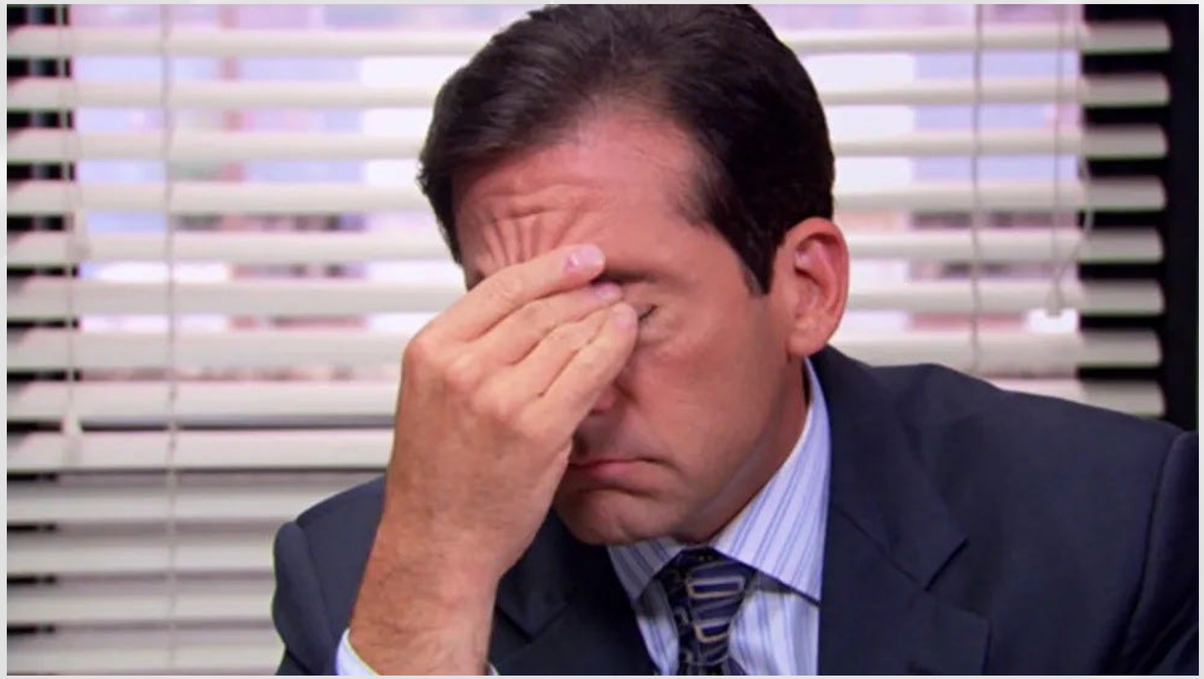
Restrictions: 325-1.26(b)(2)

Special rules for mental health treatment:

- There must be “no benefit” to in person visits, or evidence that in person visit poses an “undue risk or hardship.”
- The provider has to document the reason for use of telehealth at each visit.

Bear with me:

- “Medically Appropriate” for telehealth means that an in-person physical examination of the claimant is not needed in order to assess the claimant’s clinical status, need for further diagnostic testing, appropriate treatment, or the determination of causal relationship or level of disability. 12 NYCRR 325-1.26(c).



Exam apparently not needed: 325-1.26(c)(1)(i-viii)

(i) Managing chronic conditions.
(ii) Discussing test results.
(iii)Counseling about diagnostic and therapeutic options.
(iv)Dermatology (no palpation or biopsy needed).
(v) Prescriptions.*
(vi)Nutrition counseling.
(vii)Mental health counseling (when non verbal cues aren’t needed).
(viii)Other clinical scenarios.

Exam apparently needed: 325-1.26(c)(2)(i-ix)

i. Health concerns that require a procedure.

ii. Abdominal pain, chest pain, mental changes, severe headache, signs or symptoms of a stroke, posing a danger, or other situations “generally accepted” as requiring in-person treatment.

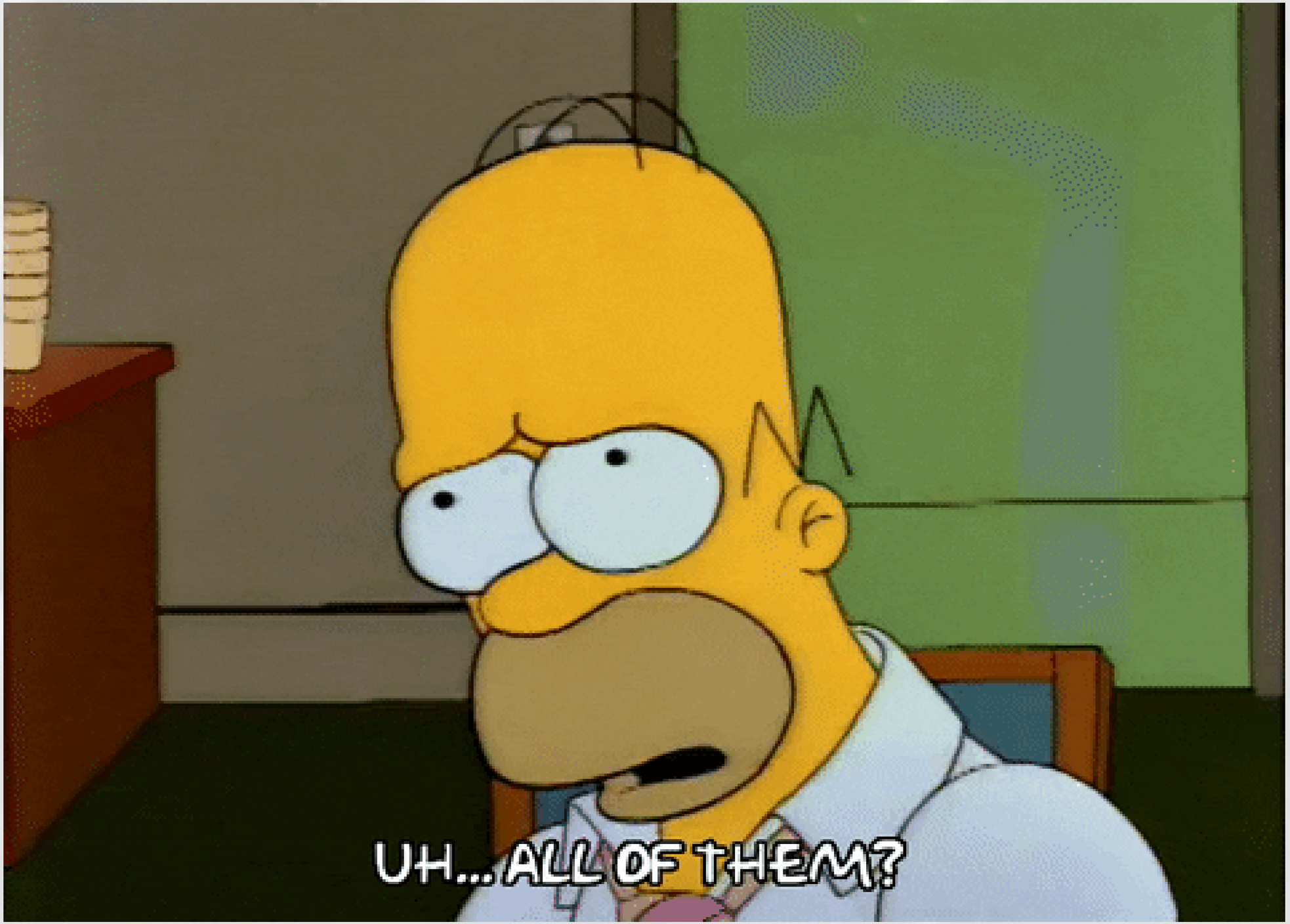
iii. Eye or vision complaints.

iv. Highly nuanced or multiple complex health concerns involving comorbidity/medication interactions.

v. Any situation in which an in-person exam might reasonably impact the accuracy, quality or certainty of the provider’s assessment, treatment or recommendations.

Exam apparently needed: 325-1.26(c)(2)(i-ix)

vi. Any situation where a physical exam is needed to assess disability or range of motion, including, but not limited to, strength testing, formal range of motion testing, assessment of joint stability, nuanced orthopedic and/or neurologic testing spirometry or pulmonary function testing, or exercise testing.
vii. PT/OT/Chiropractic.
viii. “Other clinical scenarios.”
ix. Assessment of causal relationship, or not, it’s really up to you.


UH... ALL OF THEM?

When they HAVE to be in person. 325-1.26(c)(3)(i-viii)

i. Drug testing.
ii. Initial prescription of, or follow up monitoring of meds (without periodic in-person evaluation).
iii. Where the “nature” of the treatment in the MTGs necessitates an in-person exam.
iv. Assessment of PPD.
v. Other clinical scenarios.
vi. Claimant doesn’t have the tech.
vii. Existence of physical or cognitive barriers.
viii. Claimant prefers in person.

Pitfalls!

IMEs

IMEs can be done via telehealth visits. 325-1.26(d)

- Everyone has to consent.
- Typically not recommended.

- It all turns on .....

Credibility

When evaluating the medical evidence presented, the Board is not bound to accept the testimony or reports of any one expert, either in whole or in part, but is free to choose those it credits and reject those it does not. Matter of Morrell v. Onondaga County, 238 A.D.2d 805 (3d Dept. 1997) *leave to appeal den'd*, 90 N.Y.2.d 808 (1997).

Board Decisions

The Board has historically not ignored opinions on causal relationship, permanency, SLU, degree of disability, or a determination of PFME on the basis that the exam/opinion was through telehealth, but they will discount credibility.

1. WDF Inc. WCB Case No. G1110618 (disallowing claim for CRPS because the treating provider could not assess temperature or skin changes through telemedicine).
2. Department of Education, WCB Case No. G2663175 (crediting IME over treating physician who filed a C-4.3 based on a telemedicine appointment).

Board Decisions

However:

1. Crosby Street Hotel, WCB Case No. G2292960 (Improper of WCLJ to discount telehealth opinion outright).
2. The Landa Group WCB Case No. G0936768 (Telehealth visits for over a year were sufficient to sustain an opinion of a 100% disability without any physical exams).
3. Sovereign Industries Group, Inc., WCB Case No. G2473615 (PFME for CRPS based on a telehealth visit affirmed).
4. Manhattan Beer Distributors LLC, WCB Case No. 2024656759 (Affirmed amendment of claim to include major depressive disorder based on opinion of provider who treated the claimant exclusively with telemedicine).

So what now?

The above cases were based on events *before* the new regulation …

- 12 NYCRR 325-1.8

12 NYCRR 325-1.26

Compliance and Credibility

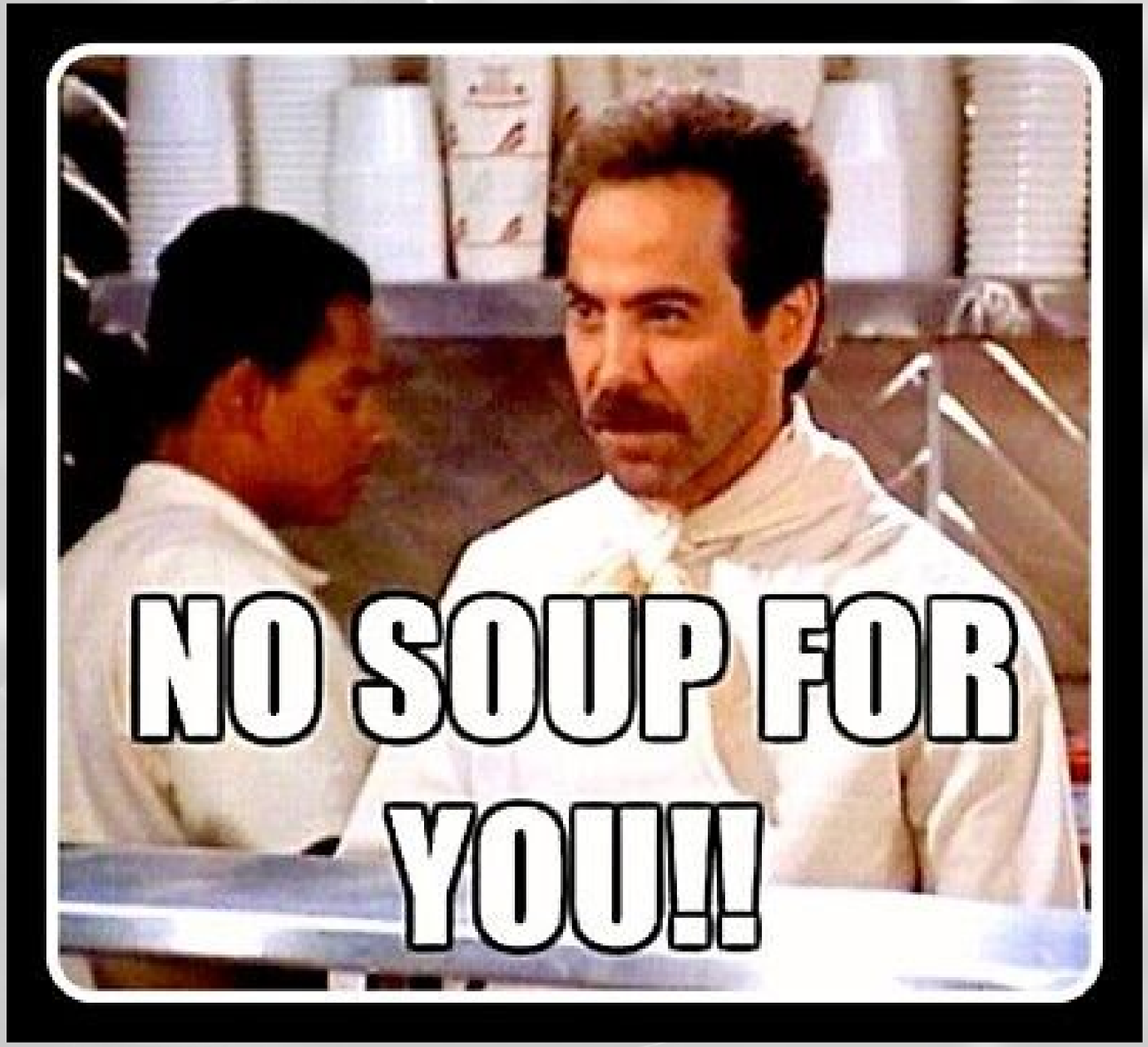
Compliance – carefully review bills for telehealth visits for compliance with the rules in 325-1.26

1) Was there an initial in-person evaluation? When was the last in-person evaluation?

2) Is it a visit that *may* require an in-person examination under 325-1.26(c)1?

3) Is it a visit that *requires* an in-person examination under 325-1.26(c)(2)?

If so …..


NO SOUP FOR YOU!!

Compliance

File a C-8.1, noting the provider has failed to abide by the regulations for telehealth.

1) Use box 12, “other.”

2) Cite the specific section of the regulation with which the provider was allegedly not in compliance.

3) If there are separate objections based on causal relationship, the MTGs, etc., be sure to include those as well.

Credibility

Credibility

That it was telehealth is not enough:

- Undermining the credibility of a telehealth opinion requires highlighting what is *missing*, not just that it was telehealth.
- In cases where the claimant is relying on a telehealth opinion for any issue, the case should be referred to counsel for depositions.
- If the visit was one where telehealth was not permitted, selective consideration can be given to a legal argument alone.

Credibility cont.

While the regulations have changed, we know the Board has not automatically discounted telehealth visits when weighed against in-person IMEs, so we can't be dismissive of an opinion on that basis alone.

Questions?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