NATIONAL COUNCIL OF INSURANCE LEGISLATORS
WORKERS' COMPENSATION INSURANCE COMMITTEE
NCOIL SPRING MEETING – ATLANTA, GA
FRIDAY, MARCH 2, 2018
3:15 P.M. – 4:15 P.M.

The National Council of Insurance Legislators (NCOIL) Workers' Compensation Insurance Committee met at the Whitley Hotel in Atlanta, GA on Friday, March 7, 2018 and was called to order by Senator Jerry Klein at approximately 3:15 PM.

Senator Jerry Klein of North Dakota presided

Other Members of the Committee present were:

Sen. Jason Rapert, AR
Asm. Ken Cooley, CA
Rep. Matt Lehman, IN
Rep. Steve Riggs, KY
Rep. Bart Rowland, KY
Rep. George Keiser, ND
Sen. James Seward, NY
Rep. Michael Henne, OH
Rep. Tom Oliverson, TX

Other legislators present were:

Rep. Sam Kito, AK
Rep. Deborah Ferguson, AR
Rep. Paul Mosley, AZ
Rep. Bryon Short, DE
Rep. Joe Hoppe, MN
Sen. Ed Buttrey, MT
Sen. Bob Hackett, OH

Also in attendance were:

Commissioner Tom Considine, NCOIL CEO
Paul Penna, Executive Director, NCOIL Support Services, LLC
Will Melofchik, Legislative Director, NCOIL Support Services, LLC

MINUTES

Upon a motion made and seconded, the Committee unanimously approved the minutes of its November 17, 2017 meeting in Phoenix, AZ.

CONTINUED DISCUSSION ON PHYSICIAN DISPENSING AND DRUG COMPOUNDING

Kevin Tribout of OptumRX stated that physician dispensing of repackaged drugs has reached a tipping point and 42 states have taken some type of action to combat against it, but loopholes still remain. Florida, Pennsylvania and Wyoming are the latest states to pass such legislation. Some states have day-supply limits, some have caps on reimbursements, and some have visit requirements. Mr. Tribout stated that despite some loopholes, where these reforms have taken place, the results have been effective.

A 2017 report from the Florida Division of Workers' Compensation (FDWC) stated that the total spending on physician dispensed repackaged medications was down from $50

million in 2012, to roughly $9.4 million in 2016. The report also shows that the FDWC's compounding spending amounts have dropped from $8.8 million in 2012 to about $4.2 million in 2016. Mr. Tribout further stated that in 2012, the FDWC had about 320,000 prescriptions of repackaged drugs that were dispensed by a physician, and that was down to about 52,000 in 2016. However, the FDWC report shows that the actual cost has remained relatively stable so the access issue that you sometimes hear about is a misnomer.

Mr. Tribout stated that loopholes continue to exist in state legislation and regulations. Varied doses of medications are becoming more prevalent. Rather than 5mg or 10mg, we are now seeing 6mg or 7.5mg that has a unique NDC that is being repackaged. As states have targeted repackaged physician dispensed drugs, compounded drugs have become widespread. About half the states have addressed the issues surrounding compounded drugs. Mr. Tribout stated that policy on these issues going forward should be what is contained in the proposed amendments to the NCOIL Model Act on Workers' Compensation Repackaged Pharmaceutical Reimbursement Rates (Model). That is, there should be restrictions on the number of days' supply of the medication. There are instances where an injured worker needs to initiate treatment right away, so the physician obviously should be able to dispense directly, but unless it's some type of infusion or specialty medication that you can't get at a pharmacy, 30 days later that treatment is just the same as if you are taking your blood pressure or cholesterol medication from a pharmacy.

Mr. Tribout stated that some states such as CA and NY, which did require legislation to give them the authority to create a formulary, are addressing physician dispensing and compounding in their formularies by requiring prior authorization. Mr. Tribout complemented the proposed amendments to the Model that deal with prior authorization. Requiring the physician to specifically indicate what the medical necessity is for dispensing specific medications, including compounded drugs, is an important reform and encouraged the Model to contain such reforms. In Texas, such a requirement was not implemented for compounded drugs and over 6 years, their compounds increased 106% in costs. However, in July, that will be changed to require prior authorization for all compounds.

Erin Collins of the National Association of Mutual Insurance Companies (NAMIC) expressed NAMIC's support of the proposed amendments to the Model. The language represents strong steps that address the cost drivers in the system and concerns about the utilization of these medications in general. Formularies and treatment guidelines are something that they are also interested in. NAMIC's comments on the Model focus on expanding it to include reforms on physician dispensing and compounded drugs. NAMIC consistently hears from its members that because there are loopholes, the most appropriate solution may be for a directed network of preferred providers and that might help close some of the loopholes in an organic way.

Matthew Smith of the Coalition Against Insurance Fraud stated that the Coalition supports the proposed amendments to the Model as an important step in fighting fraud. The Coalition has worked with Rep. Marguerite Quinn (PA), Chair of the NCOIL Workers' Compensation Insurance Committee, on this issue: House Bill 18 and Senate Bill 936. These issues have gotten so bad in Pennsylvania that until recently, one of the largest compounding pharmacies in PA was owned by one of PA's largest workers' compensation law firms. Mr. Smith noted that with compounded drugs, especially

compounded creams, it as no longer a matter of medical care or medical necessity but rather greed and financial gain. Recently, there have been two deaths identified with compound creams that were improperly formulated. Compound creams also result in billions of dollars in financial fraud that harms consumers. Tricare, which provides healthcare services to active and retired military members, found that in 2010, $23 million was paid out for compound pharmaceuticals; in 2014 it rose to $513 million. In the first 9 months of 2015 they had been billed $1.7 billion. In 2006, the CA workers' compensation department reported $10 million dollars paid out for compound pharmaceuticals and in 2013 it had risen to $145 million.

Mr. Smith stated that studies show that many compounds are nothing more than over the counter pharmaceuticals mixed in with something else which is sometimes not identified or fully disclosed. Studies show that the actual value in many of these compounded creams is between $60 - $70 on average but are billed out anywhere from $2,000 to $5,000 per tube. There are reported instances of per-tube prescriptions going as high as $30,000 to $40,000. The proposed amendments to NCOIL's Model will help with many of these issues. In Florida, a $175 million compounding fraud-ring was broken up that involved 3 physicians, 2 prior convicted felons and kickbacks. Similar operations have taken place in Texas and Nevada. In California, there was recently a $125 million fraud-ring involving compounded drugs broken up. In Georgia, a $10 million financial recovery was recently made involving compounded drugs and fraudulent billing practices. This is a workers' compensation issue but it also crosses over into bodily injuries, auto injuries, slip and fall injuries, and any type of injury where potential medical fraud is involved.

Rep. Tom Oliverson (TX) stated that it was time to start cracking down on some compounded drugs as they present a lot of danger to the public.

Sen. Jason Rapert (AR), NCOIL President, asked if there is a place at all for compounded drugs. Mr. Smith stated that the Coalition only focuses on the fraudulent abuses of compounded drugs.

Mr. Tribout added that if you look at compounds from a clinical perspective, most studies indicate that it is about 3-5% of group health which utilizes compounds. There is a need for compounded drugs in some cases, such as ophthalmological needs and for burns. Mr. Tribout stated that it is important to look at the U.S. Postal Services OIG report from 2016 where it found that the cost was going to go to $1.9 billion in compounds and after an investigation, pharmacists and doctors were prosecuted for fraud. Some pharmacies provide great services and they are not all bad actors. However, loopholes have been found, they have been frequently exploited, which is why prior authorization showing medical necessity for compounds should be required.

Rep. George Keiser (ND) stated that this has been a recurring issue with the workers' compensation industry and asked if it was an issue with Medicare, Medicaid and with the general health insurance market. And if not, what are the drivers in workers comp. Mr. Tribout stated that he did not think it was an issue with Medicare or Medicaid because there is usually have some sort of prior authorization or there is a formulary in place that the doctors have to prescribe to and most of those plans and even group health plans have a "flag" as to why that compound is being prescribed. There are no flags at the State workers comp level because it is just not being flagged and there is nothing to stop those pharmacies from processing the claims.

Ms. Collins added that in terms of some of the reforms in the proposed amendments to the Model that are viewed as critical, requiring critical evaluation, physician documented medical necessity, or utilization review, of compounded pharmaceutical products prescribed for patients is essential. That will enable recognition of pharmacies that are operating correctly and directing business to them.

Sen. Jerry Klein (ND) closed by stating that this discussion will continue at the NCOIL Summer Meeting in July.

DISCUSSION ON PRESUMPTIVE PTSD LEGISLATION

John Hanson, Senior Consultant at Willis Towers Watson, stated that GA and NY created cancer benefits programs for firefighters as opposed to having those claims flow through the comp pools. The programs are fully insured with a carrier that manages those benefits. Firefighters had lobbied heavily in those states to create a cancer presumption for them. There is a trend in of taking an issue and driving it into the workers' comp pool via occupational presumption. He stated that there are 38 states that have cancer presumptions for firefighters and virtually every state has certain presumptions for policeman and firefighters. PTSD legislation currently exists in 3 states. 5 years ago, it was in 1 state. Last year ME and VT created presumption legislation for PTSD for first responders. It is important to note that first responders is a group of more than just firefighters – EMT's, police, firefighters, volunteer firefighters, and in some instances correctional officers. Accordingly, some are not even employees of a city or county.

Mr. Hanson stated that it is important to consider the parties involved in presumption legislation: cities; counties; states; first responder associations and unions; politicians; workers' comp pool managers; lobbyists; and lawyers. PTSD presumption legislation has a very similar cast to all the other presumptions that precede it. There is a desire to provide first responders with what some believe is a right to have some type of easier evidentiary access to workers' comp benefits. In 2017, the following states passed specific PTSD legislation for first responders: Colorado; South Carolina; Texas; New York; Vermont; and Maine. Vermont and Maine created a true occupational presumption for PTSD. Florida, Connecticut, Minnesota, New Mexico, and Ohio considered PTSD first responder legislation, but nothing passed. Arizona and New Hampshire are also considering such legislation in 2018. He stated that there were identifiable trends in PTSD presumption legislation and that the structure of this type of legislation is becoming very similar. Most of the legislation has similar legislative intent; defines "traumatic event" and "mental health professional"; provides a basis to rebut the presumption; and provides for a fiscal impact. Mr. Hanson noted that Arizona is considering not only PTSD presumption legislation but also a therapy program that would last up to 48 sessions. The estimated cost of the program has been reported to be anywhere from $8 million to $90 million.

Mr. Hanson continued by saying as PTSD presumption legislation moves through the system, it is starting to establish a framework with similar language and that certain evidentiary requirements are appearing. New Hampshire's bill is almost identical to Vermont's. Mr. Hanson also noted that in the past few years, it was understood that only a psychiatrist or psychologist utilizing the DSM could diagnose PTSD to create a presumption. However, new legislation is starting to extend that diagnosing ability to

social workers and drug counselors. In Arizona's bill, anyone who is a licensed therapist can diagnose PTSD, and the entity that is required to provide 48 separate therapy sessions cannot hire or employ an independent medical examiner to rebut the diagnosis until it gets to workers' comp. There is a trend of making it easier to get a diagnosis of PTSD and making it very difficult to counter said diagnosis. Mr. Hanson stated that he expects several states to introduce PTSD presumptive legislation this year.

Rep. Steve Riggs (KY), NCOIL Immediate Past President, stated that he spoke with a large disability carrier in Kentucky who said that their disability policy covers this sort of issue and he was not sure why workers' comp was being pushed into this field to create overlap. Mr. Hanson stated that there is overlap and that it is different among cities, counties and states. Most disability policies have a two-year mental nervous rider, and PTSD would be picked up under that. Mr. Hanson stated, with the rise of PTSD presumption legislation, it may be a central misconception on the part of first responder service that presumption is actually the best way to do this because first responders have a significant amount of benefits available to them, including disability, line of service, lump sum cancer, pension, and retirement. When you look at cancer, and PTSD, the illnesses have a broader field and there is an immediate want for coverage but if you ask a first responder if they have any kind of coverage, their understanding of it is very thin.

NY feels that presumption through the workers' comp program seems to be what most of the first responders feel is the best means to acquire that disability and medical benefit. The reality is that every bit gets litigated. Accordingly, part of the discussions with first responders may be to say that workers' compensation may not be the best avenue for what they are looking for. Most first responders are looking for early access to a benefit, within a week or 2 of diagnosis, and then some sort of benefit that would supplement the other benefits they have which includes everything from county/city/state benefits and voluntary benefits that are sold to police/fire departments. Mr. Hanson stated that the challenge is coordination and communications of the benefits available to them. Further, Mr. Hanson stated that volunteer fire departments might not be able to afford a lot of the benefits and they could start to fold. 70% of firefighters are volunteers.

Sen. Bob Hackett (OH) stated that this type of legislation was blocked in Ohio. In Ohio, with post-traumatic stress syndrome you have to be injured to collect the benefits. He further stated that entire bill was for first responder observers who viewed an accident to qualify for benefits and the workers' comp system in Ohio stated that it would cost $180 million. Sen. Hackett then asked about equal protection under the law – what if a bank teller saw their best friend get shot. How do you carve out first responders? Mr. Hanson responded stating that the issue of equal protection was central to all the presumption issues. There is some sense of anxiety that there will be some other group that will ask for the same benefits as first responders such as sanitation workers. He continued by saying that taxpayers could not continue to be forced to cover these expenses. He added that a lot of first responders do have medical plans so the idea going forward with PTSD is that rather than presumption, there is an opportunity to create a suite of products that do not exist today. Eventually, every state will have to grapple with this issue.

In response to Rep. Riggs' question, Rep. Keiser stated that that most workers' comp programs have an exclusive remedy clause so that that is the reason why additional

coverage may need to be added or not added in the workers' comp industry when discussion PTSD presumption legislation.

Mr. Hanson added that it may, in fact, be an exclusive remedy but it is also being highly litigated. Mr. Hanson closed by stating that he believes first responders will continue to lobby to improve/broaden existing workers' compensation laws, with a specific broadening of volunteer first responder coverage. Public entities and insurance markets will also develop alternative approaches to fit legislative requires.

ADJOURNMENT

There being no further business, the Committee adjourned at 4:15 p.m.