NATIONAL COUNCIL OF INSURANCE LEGISLATORS
WORKERS' COMPENSATION INSURANCE COMMITTEE
INTERIM COMMITTEE CONFERENCE CALL
OCTOBER 10, 2019
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) Workers' Compensation Insurance Committee held an interim meeting via conference call on Thursday, October 10, 2019 at 1:30 p.m.

Assemblywoman Maggie Carlton of Nevada, Chair of the Committee, presided.

Other members of the Committees present were:

Rep. Matt Lehman (IN)
Rep. Peggy Mayfield (IN)
Rep. Ryan Mackenzie (PA)
Rep. Wendi Thomas (PA)

Also in attendance were:

Commissioner Tom Considine, NCOL CEO
Paul Penna, Executive Director, NCOIL Support Services, LLC
Will Melofchik, NCOIL General Counsel

QUORUM

Upon a motion made by Rep. Matt Lehman (IN), NCOIL Vice President, and seconded by Rep. Wendi Thomas (PA) the Committee waived the quorum requirement without objection.

CONTINUED DISCUSSION ON DEVELOPMENT OF NCOIL WORKERS' COMPENSATION DRUG FORMULARY MODEL ACT

Rep. Lehman began by stating that the Model started out as essentially the bill that he sponsored in Indiana as something to work off of. The Committee has had two extensive hearings on this topic at the recent NCOIL Spring and Summer Meetings and changes have been made to the Model to address certain concerns. Rep. Lehman then reviewed the latest version of the Model and noted some of the changes made from the prior version. First, in Section 3, language was included to provide states the option of developing their own formulary. Accordingly, states can either choose to adopt and implement one of the nationally recognized, evidence-based formularies, or develop their own to meet the unique needs of that state. Next, in Section 3, language was added to add evidence-based guidelines among the factors that a state must consider when developing or selecting a formulary.

Rep. Lehman then noted that a comment letter on the Model was submitted by MedChi – the Maryland State Medical Society – and PRI – the Physicians Research Institute. In their letter they noted that the Model requires states to choose a "nationally recognized, evidence-based drug formulary", and only two formularies would qualify under that definition. However, Rep. Lehman noted that since the new version of the Model contains language that provides states the option of developing their own formulary, the issue raised in the comment letter is addressed.

Next, throughout Section 4 of the Model, the wording of "included but not recommended in the formulary" was changed to "listed but not approved in the formulary" in an effort to better describe the categories of drugs on the formulary. Next, in Section 4, the timeframe within which to notify the prescribing physician and the injured employee of the third party's determination of a request to use a drug that is listed but not approved in the formulary was shortened from five business days to three business days. Next, a new Section – now Section 5 – was added titled "Third Party Conflict of Interest" in order to ensure that the third parties resolving formulary disputes are conflict-free.

Rep. Lehman stated that he believes the current version of the Model is a strong work product for states to consider adopting and noted that his philosophy when developing model laws at NCOIL has always acknowledged that it is impossible to develop a perfect Model since states are almost always going to change certain provisions as they deem appropriate. Accordingly, Rep. Lehman stated that he hopes that by the end of this interim conference call meeting the Committee can agree upon the version of the Model that will be voted on at the NCOIL Annual Meeting in December. Rep. Lehman stated that he is not opposed to making certain changes to the Model between now and then that do not represent a major shift in policy, and hoped that the Committee can adopt the Model in December to send out to states for adoption.

Rep. Lehman stated that one of the issues to keep in mind is the calendar the Committee is working off of in that the timing of the Annual Meeting may conflict with state bill-filing deadlines. Therefore, Rep. Lehman stressed the importance of at least having the Committee, by the end of this interim conference call meeting, agree to the direction in which the Model is headed so a solid framework could be filed in states.

Asw. Carlton thanked Rep. Lehman for his comments and noted that conflict of interest provisions seem to be appearing in a lot of legislation across the country. Asw. Carlton then opened up the discussion to legislators present on the call.

Rep. Thomas asked who the new Section 5 – Third Party Conflict of Interest – is meant to apply to. Rep. Lehman stated that said Section is meant to apply to essentially everyone involved in a formulary dispute, such as the employer, insurer, claims administrator, and third party organization that handle the drug request. Rep. Lehman stated that he believes this Section is important as there appear to be more and more intersections of ownership when analyzing these types of dealings.

Rep. Thomas asked if that means that the parties mentioned in Section 5 cannot be involved in the development of the formulary. Commissioner Tom Considine, NCOIL CEO, stated that Section 5 is meant to deal with the appeals process. As an example, if insurance company "x" owns TPA "y", then TPA "y" cannot be used as the third party reviewer on any appeals that insurance company "x" is the insurer for.

Rep. Ryan Mackenzie (PA) stated that he thinks what Cmsr. Considine said makes a lot of sense but that is not necessarily what Section 5 is saying as said Section seems to only apply to third parties certified by the Utilization Review Accreditation Commission (URAC). Rep. Mackenzie said he agrees with the intent of Section 5 but noted that he believes the language might not incorporate everything that was stated by Rep. Lehman and Cmsr. Considine. Rep. Lehman stated that he reads the Section to apply to everyone involved in the appeal process but noted that if something needs to be changed in the Section, he is open to discussing that. Rep. Mackenzie stated that he

agrees with Rep. Lehman's interpretation of the Section but noted that if the intent is to expand the Section to exclude conflicts of interest between somebody actually involved with the formulary, such as a formulary board member, then language would need to be added to the Section.

Cmsr. Considine stated that the concern that was raised, and which Rep. Lehman directed NCOIL staff to address, related solely to conflicts of interest within the appeal process. Rep. Lehman stated that this is an issue that reflects why drafting Model laws as a framework for states to work with is the best approach as, in his experience, it is easier to expand a Model and retract one. It is important the conflict of interest provisions be in the Model and then states can expand it as they deem appropriate.

Rep. Mackenzie stated that he is not opposed to the new language that provides states the option of developing their own formulary, but noted that Pennsylvania avoided such language in its legislation because they heard from other states that developing the formulary became a very long and arduous process and implementation of the formulary was ultimately delayed in many instances. Accordingly, Pennsylvania opted to start with a nationally-recognized formulary and then make changes to it if necessary. Rep. Mackenzie then stated that the new language that provides a process to obtain a drug that is omitted from the formulary seems to be cumbersome and a challenge for the injured worker.

Rep. Lehman stated that in Indiana they decided to adopt the ODG Workers' Compensation Formulary, but for purposes of a Model law, it is important to provide states options so that they can determine what is best for their state. Regarding Rep. Mackenzie's second point, Rep. Lehman stated that he believes that comes down to how each state's workers' compensation system is set up as Indiana is an employer-driven system. Rep. Lehman further stated that it is important to remember that an emergency situation, as noted in Section 4(F) of the Model, trumps all of the other provisions of the Model related to appeals. Rep. Lehman noted that the American Medical Association (AMA) submitted comments that seek to fundamentally change the Model such that the employer should not come between the patient and physician relationship. Rep. Lehman noted that he does not want to alter the Model in that fashion as he believes the current version of the Model still affords the injured worker an opportunity to obtain the drug prescribed by the physician.

Rep. Mackenzie stated that the approach tried in Pennsylvania was that if the drug was on the formulary it was essentially deemed approved and it the drug was not on the formulary then a medical provider could provide justification for going outside of the formulary and then if that was challenged by the employer it would then go to the URAC review process. Rep. Mackenzie closed by thanking Rep. Lehman for the work thus far on the Model.

Asw. Carlton then opened the discussion up to any interested parties on the call who wished to comment on the Model.

Daniel Blaney-Koen, Senior Legislative Attorney at the AMA, stated that the AMA appreciates the increased emphasis on ensuring the absence of conflicts of interest but concerns do remain: for example, the interpretation of Section 5 and whether it would exclude certain people from the review process such as medical professionals who might have, for example, privileges at hospitals or who are contracted by a payor where

there is not necessarily direct financial conflict but there may be an affiliation that is mercurial. Accordingly, while the conflict of interest section represents a step in the right direction for the Model some of the language needs to be worked on in order to avoid unintended consequences. Mr. Blaney-Koen further stated that not all conflicts may require someone to be excluded from the review process and perhaps could be cured by disclosure combined with some sort of process to determine whether the conflict would require recusal.

Mr. Blaney-Koen further stated that the Model would benefit from provisions regarding increased transparency in the formulary. Mr. Blaney-Koen stated that he appreciates the effort in the Model to make sure that the medications are listed, but for the physicians involved, knowing what those medications are is certainly one aspect of providing optimal care in addition to knowing what the utilization management requirements may be is important as well. Further, Mr. Blaney-Koen noted that while the original version of the Model may have worked for Indiana as an employer-driven workers' compensation state, at its core, the medical necessity review is a medical process that should be made by medical professionals. That does not in all cases necessarily require a physician but the AMA advocates for that.

The AMA also encourages additional work on the Model to be done in order to reduce the burden on the injured worker. The AMA supports the emergency provision in the Model, Section 4(F), but notes that the three (3) business day timeframe (Section 4(C)(2)) within which to notify the prescribing physician and the injured employee of the third party's determination of a request to use a drug that is listed but not approved in the formulary can be burdensome. In some instances that timeframe can increase to 96 hours if a weekend is involved and for purposes of continuity of care, some injured workers may not be able to wait that long even in non-emergency situations. That is why the AMA supports streamlining the medical review process instead of putting an employer or third party administrator in the middle of the patient-physician relationship.

With regard to the review process, Mr. Blaney-Koen stated that he is not sure if the current Model has sufficient detail in terms of the timeliness and notification of all parties, particularly the treating physician and the patient. Mr. Blaney-Koen stated that while states certainly could add more to the Model as was alluded to earlier, the Model is still too sparse to move forward knowing that if an NCOIL-endorsed Model was introduced in a state, it would be a very difficult process for all states to determine what might need to be added. Accordingly, Mr. Blaney-Koen requested that the Committee conduct more work on the Model and noted that it would be great to have the Model get to the point where the AMA could support it.

Rep. Lehman stated that most workers' compensation systems already have in-place utilization review and other processes, as does health insurance, and therefore questioned whether the review system in the Model needed to be reformed to be conducted by medical professionals. With regard to conflicts of interest, Rep. Lehman stated that the main issue is direction of care and noted that he agreed with Mr. Blaney-Koen that there could be some unintended consequences resulting from that Section of the Model as currently drafted. Rep. Lehman stated that he is open to discussing how to amend that Section to address that issue but noted that he is comfortable with said Section as currently drafted.

Frank O'Brien, VP of State Gov't Relations at the American Property Casualty Insurance Association (APCIA), stated that APCIA is mindful of Rep. Lehman's approach that from a model law drafting point of view, oftentimes less is more and lawmakers should be afforded the opportunity to change a Model as appropriate to meet the needs of their state. APCIA provided comments regarding the Model's review process based upon APCIA's experience in Texas and California and noted that those comments would cause significant concern from the AMA. Mr. O'Brien stated that APCIA believes the Model is a very good piece of legislation and is supportive of it moving forward. There may be some issues that require some technical amendments and APCIA would be happy to work with Rep. Lehman and the Committee on that.

On behalf of the American Association of Payors, Administrators and Networks (AAPAN), Robert Holden stated that AAPAN supports the Model but noted the three (3) business day timeframe (Section 4(C)(2)) within which to notify the prescribing physician and the injured employee of the third party's determination of a request to use a drug that is listed but not approved in the formulary. Mr. Holden stated that in polling AAPAN's members there can be some logistical issues in terms of notifying employees as such notification frequently must be done by mail. Mr. Holden stated that he is not objecting to the language but just wanted to ask if consideration had been applied to notifying the injured employee and where the change from five to three business days originated from.

Rep. Lehman stated that Mr. Holden made a valid point regarding notification by mail but noted that in Indiana, several of its notification laws have been changed to where electronic delivery is acceptable. Rep. Lehman stated that he believes everyone can agree that five business days for notification was too long and noted that – as the AMA pointed out – three business days in certain circumstances perhaps could be too long as well. Rep. Lehman further stated that he believes the change from five to three business days makes sense and noted that he would be interested in learning how many states require notification by mail. Mr. Holden stated that he would be glad to get that information to Rep. Lehman.

Nate Myszka, Senior Manager of State Government Affairs at Medtronic, stated that Medtronic is typically not involved with drug formularies but one of Medtronic's therapies is increasingly being used as an alternative to oral opioids and there has been some confusion in some state formulary laws as to whether they apply to medications delivered by the aforementioned therapy which is called a intrathecal pain pump that is implanted into the body and has a catheter that goes right into the spinal fluid where it is able to deliver mediation in very small, fractional doses compared to an oral medication. Accordingly, Medtronic submitted a proposed amendment to Section 3 of the Model which would exempt such intrathecal pumps from the formulary.

Rep. Lehman asked why the delivery method of the medication would matter with regard to whether or not the delivery process would be exempted from the formulary. Mr. Myszka stated that the issue is not so much whether the formulary would allow for the medication but rather the time limits that are set forth. You may have a seven day limit for an oral dose of medication but because of the very small, fractional dose that you have in a pain pump a physician might be able to go several months before refilling the pump and there are some physicians that Medtronic is hearing from who are able to wean patients off of oral opioids and get patients on a much more extended refill schedule.

Rep. Lehman stated that he understands the differences between the intrathecal pump and oral medications but is concerned about simply exempting said pump from the formulary as requested by Medtronic. Rep. Lehman also noted that he believes employers would not deny such a medication delivery method and therefore the timing requirements of the formulary referenced by Mr. Myszka would not apply. Also, exempting certain medications or delivery processes from the formulary leads to a slippery slope of others then asking: "why am I not exempted?" Mr. Myszka stated that he understood Rep. Lehman's point and will try to put some thought as to how Medtronic's goal can be realized without simply asking for an outright exemption from the formulary.

Len Welsh of Baker & Welsh, LLC thanked the Committee for the new language in Section 3 that added evidence-based guidelines among the factors that a state must consider when developing or selecting a formulary. However, Mr. Welsh noted that it might be beneficial to be more explanatory as to what it means regarding the connection between the formulary and treatment guidelines. A good example would be phase-of-care with opioid prescriptions. No one really argues with opioid prescriptions for pain management in response to a traumatic injury such as a broken bone or some other direct injury to the body that causes immediate pain to the body and immediate need for surgery or some sort of medical intervention. The problem arises in most cases with opioids in the chronic pain management phase that comes after the traumatic phase as most abuse occurs there – the prescriptions continue and people become addicted and that is why we have the problem we have.

Accordingly, if may be beneficial to provide an example in that Section of the Model that references evidence-based guidelines relating prescriptions to phase of care with opioids which are usually deemed appropriate for the traumatic injury phase and deemed inappropriate for the chronic pain management phase. Mr. Welsh stated that he would be happy to submit proposed language to include in the Model. Rep. Lehman stated that he understands the point made by Mr. Welsh but noted that in the lawmaking process, examples are not typically given in code. Mr. Welsh acknowledged that his proposal is outside-the-box of legislative drafting but noted that the situation itself is somewhat outside-the-box and stated that in his experience in California, examples in legislation and regulation do often help figure out what intent is. Mr. Welsh stated that he will send Rep. Lehman some proposed language for consideration.

Asw. Carlton then asked Rep. Lehman how he wanted to proceed with the Model, noting that in response to Rep. Lehman's earlier remarks about having the Model ready for states to consider in advance of bill-filing deadlines, changes to a bill can always be made after it is filed. Rep. Lehman stated that he is not seeking a vote on the Model from the Committee today but rather a consensus that the version of the Model discussed today will be the version presented to the Committee at the Annual Meeting in December subject to any changes made between now and then. Rep. Lehman further stated that he does not believe he has heard anything on the call today that would cause him to make any major policy changes to the Model and hoped that the Committee would conduct a formal vote on the Model in December.

Asw. Carlton asked Rep. Lehman if his intended path forward for the Model means that he is open to any technical changes that may come before him between now and December and that any substantive changes would need to be discussed by the Committee in December. Rep. Lehman replied yes and noted that he is open to

changes but noted that his goal is for the Committee to vote on the version of the Model discussed today. Asw. Carlton stated that she is comfortable with that since nothing is set in stone in any legislative process and asked for any thoughts from the legislators present on Rep. Lehman's statements.

Hearing no objection, Asw. Carlton thanked Rep. Lehman for his work thus far on the Model and noted that she has utilized several NCOIL Models in Nevada but changed them as necessary to meet Nevada's needs. A Model law is a nice template to work from knowing that it must adapt to state's needs.

ADJOURNMENT

There being no further business, the Committee adjourned at 2:30 p.m.