

NATIONAL COUNCIL OF INSURANCE LEGISLATORS  
WORKERS' COMPENSATION INSURANCE COMMITTEE  
OKLAHOMA CITY, OKLAHOMA  
DECEMBER 8, 2018  
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) Workers' Compensation Insurance Committee met at The Renaissance Oklahoma City Convention Center Hotel in Oklahoma City, Oklahoma on Saturday, December 8, 2018 at 10:15 a.m.

Senator Jerry Klein of North Dakota, Acting Chair of the Committee, presided.

Other members of the Committees present were:

Sen. Jason Rapert (AR)	Asw. Pamela Hunter (NY)
Asm. Ken Cooley (CA)	Rep. Lewis Moore (OK)
Rep. Matt Lehman (IN)	Rep. Tom Oliverson, M.D. (TX)
Rep. Steve Riggs (KY)	

Other legislators present were:

Rep. Sam Kito (AK)	Sen. Gary Dahms (MN)
Rep. Deborah Ferguson (AR)	Sen. Paul Utke (MN)
Sen. Travis Holdman (IN)	Asm. Kevin Cahill (NY)
Sen. Dan "Blade" Morrish (LA)	Sen. Paul Wieland (MO)

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

**DISCUSSION/CONSIDERATION OF PROPOSED AMENDMENTS TO NCOIL MODEL ACT ON WORKERS' COMPENSATION REPACKAGED PHARMACEUTICAL REIMBURSEMENT RATES**

Karl Aumann, Chair of the Maryland Workers' Compensation Commission (MWCC), stated that he is in his 14th year as Chair of the MWCC and an interesting aspect of workers' compensation systems across the country is that it is very difficult to come up with a single way to approach a problem. It is nevertheless critical that problems be identified, as well as solutions for them. He continued that NCOIL is one such organization that aims to find such solutions and others include the International Association of Industrial Accident Boards and Commissions (IAIBC), the Southern Association of Workers' Compensation Administrators (SAWCA), and the National Association of Workers' Compensation Judiciary (NAWCJ) that do their best to try and fix these common problems as they arise.

Mr. Aumann stated further that in an effort to analyze prescriptions and the costs and issues associated with physician dispensing and compounds, one organization undertook to conduct a study. In Maryland in 2010, the MWCC was presented with the results of that study, which indicated that close to 40% of all of the prescriptions that

were being used in workers comp were being dispensed by the doctors directly, not by pharmacies or pharmacy benefit managers (PBMs). Mr. Aumann stated that he sat at that meeting and was astonished because he thought with that kind of a percentage, why had the MWCC not been apprised of this before; why had the insurers not come in and said this is a terrible situation that needs to be fixed?

The MWCC then endeavored to take some steps to fix the problem by introducing regulations that would cap prices, but that was met with serious resistance by the state medical society and by many in the legislature. Therefore, the MWCC's proposed legislation was defeated, which was very unusual in the context of that process. That caused the MWCC to turn around and determine how to figure out solving this problem in another way.

Mr. Aumann stated that the MWCC then came to an interesting understanding that the problem was not as big as they were first led to believe. After digging down deeper into the facts of the initial report, which had stated that 40% of all of the prescriptions that were being used in workers comp were being dispensed by the doctors directly, not by pharmacies or PBMs, MWCC started talking with insurers and with people in the community who were incredulous in saying that they were not having that experience and they were not seeing that high of a number.

The MWCC therefore endeavored to conduct its own study, in part because the original study presented to the MWCC only included a certain subset of the data available. The MWCC determined that it needed to get all of the data from the self-insureds, from the people who had workers' compensation insurance policies available from the market, and from the captive state agency which at that point in time issued about 30 to 35% of the workers' compensation policies in Maryland.

Mr. Aumann stated that after gleaning through all of that data through the course of a year, MWCC determined that the real percentage of prescriptions being dispensed by doctors directly was about 18%. MWCC has followed that percentage subsequently and it is now down to about 15%, which is a small increment of reduction, but nonetheless, a reduction in the percentage of prescriptions that are being dispensed by the doctors.

With regard to the lessons that the MWCC took from the process, Mr. Aumann stated that it is first and foremost important to identify the problem and then identify the problem as it pertains to a particular state. The comparisons to neighboring states or similarly situated states with respect to this problem don't have the same weight. MWCC also learned that getting all of the relevant data about physician dispensing and the costs associated with it in your own jurisdiction is extremely important.

Mr. Aumann reiterated that every state has its own rules with respect to workers' compensation and that makes each situation unique. It is important to make sure that those particular facts are taken into account when trying to solve a problem. For example, North Dakota and Ohio are two of about a handful of states at most that are monopolistic states because they require employers to purchase workers' compensation coverage from a government-operated insurance fund. Every state has its own approach to solving certain problems and you have to tailor the solution to a problem to the facts that you have in your own particular state.

Mr. Aumann stated that Maryland is what is referred to as claimant-choice state. The claimants get to pick their own doctors and there is no review board on selection of who it is that can treat, and it is a very different system than many other states that have boards or provide for employers getting to select who the treating physicians are. That has a big impact on how you can go about implementing some controls on costs and on physician dispensing generally.

Mr. Aumann continued by noting that one thing that Maryland has experienced that he believes has been enormously helpful is that the state legislature instituted a prescription drug monitoring program (PDMP) about 3 years ago and the implementation of that process has really helped across the board because it was not limited to just workers' compensation prescriptions; it was across the board that everybody who was prescribing and dispensing needed to report to a database. That has been really helpful. Additionally, one of the biggest components that was learned in Maryland throughout the process of examining these issues was that physicians were dispensing opioids at an alarming rate, in large measure because the marketing that went into the descriptions of those opioids was that they were a fail-safe problem and that they were not going to be addictive. Therefore, there needed to be a re-education process and an awareness on the part of all physicians and the healthcare providers in Maryland that these issues need to be paid attention to.

Mr. Aumann stated that another component that has been very helpful in Maryland when dealing with these issues is to get the buy-in from the carriers and from the folks who are handling the claims, the adjusters. They see what is happening on the front-end and what is being prescribed. The MWCC made it clear to them that if there was a problem in that they viewed an abuse of some type prescription practice, they should bring news of the problem to the MWCC. The MWCC can then listen to the problem, have all of the facts laid out, and determine if it is or is not an appropriate use of that particular prescription.

Mr. Aumann stated that the situation as a whole is still not fixed, obviously, as there are still people dying from opioids after being prescribed them for totally legitimate reasons. However, the community and stakeholders have come together to try and fix the problem and everyone is hopeful that strides that can continue to be made not only in reducing the financial cost, but the human cost that results from when prescriptions are overprescribed.

Mr. Aumann stated that he is very active with SAWCA and the IAIBC and noted that workers' compensation administrators are dealing with this across the country. One solution Mr. Aumann stated that he had heard about was finding the average wholesale price (AWP) of a drug and then applying it so that you could not charge more than a certain amount which is something that is referenced in the proposed amendments to the existing NCOIL Model before the Committee today. Mr. Aumann stated that one of the things that struck a chord with him at a hearing he attended was that some drug manufacturers were being purchased and therefore the AWP became fictitious because the new owners of the drug manufacturers could create their own AWP because they were the manufacturer of the drug. Accordingly, methods are always being crafted to try and maneuver around legitimate ways to fix the problem and Mr. Aumann stated that the issue must be looked at carefully to make sure that the states have the ability to make what works in their own jurisdictions available to them. Mr. Aumann stated that there is

not a single piece of legislation that will work in all of the states. A solution has to be finely tuned to what's happening in particular jurisdictions.

Rep. Tom Oliverson, M.D. (TX) asked Mr. Aumann to comment on his experience in Maryland with drug compounding in workers' compensation as Rep. Oliverson has been hearing some things in Texas relating to how a pharmacist, physician or facility is basically combining any drugs they want to and sometimes it can result in a lethal dose of something that is put into something harmless such as Bengay.

Mr. Aumann stated that drug compounding is a problem in Maryland and is an offshoot of a way to get around certain rules because sometimes if you use prescriptions that are compounded then they fall outside of a classical AWP prescription and then they can charge whatever price they want to. Mr. Aumann stated that in Maryland, they found that coordinating with the adjusters and insurers closely to make them aware of the situation really helps. In Maryland there was a situation when conducting an annual study where a very large county was noticed to have what MWCC viewed as a big jump in the payment of prescriptions that were compounded. Mr. Aumann stated that he called the County Executive and asked him if he was aware of the big jump in the county's costs and notified him that it was a big problem.

Mr. Aumann further stated that the MWCC does not hesitate to contact insurers when monitoring these issues to discuss a big jump in drug compounding or opioid prescriptions. Mr. Aumann noted that he believes that physician dispensing of opioids is not as big of a problem as it used to be because there are so many rules associated with keeping it safe and many physicians don't want the hassle of keeping it in their offices because of all of the rules associated with securing those drugs. However, the compounding issue is something that Mr. Aumann believes is growing and it is important to go after the source, the adjusters, who are on the front lines, and notify them of what may be an inappropriate drug used in certain instances and contest its use in whatever form that the states have available.

Mr. Aumann noted that he has a special docket that is set up just on prescriptions and medical treatment so if the carriers and adjusters know that if they have a problem, that within 30 days they can get on the docket and have that problem fixed or at least addressed.

Sen. Klein asked Mr. Aumann if Maryland has adopted anything similar to what is in the proposed NCOIL amendments to address physician dispensing and drug compounding. Mr. Aumann replied no and stated that the original regulations that the MWCC sought to institute in 2010 would have expanded the existing medical fee guide to include prescriptions. That proposal was rejected but what is in the current Maryland statute is a requirement that the cost for prescriptions has to be in the usual and customary range and that becomes the lynchpin for reviewing whether the costs are appropriate or not and then testimony is taken if necessary that states what pharmacies and PBMs charge, and if the cost is beyond that then there will be an order issued saying that only a certain amount of money will be paid to the prescriber regardless of whether the prescriptions have already been dispensed or not.

Sen. Klein then noted that the proposed amendments to the Model have been on the agenda for several meetings but that the sponsor of the amendments - Rep. Marguerite Quinn (PA) - was not able to attend this meeting. Accordingly, Sen. Klein, as Acting

Chair of the Committee, asked the Committee for guidance as to whether the Committee should move forward with a Motion to adopt the amendments. If the Committee declined to vote on the amendments, the proposed amendments would be kept on the agenda again until the Spring Meeting in Nashville. Sen. Klein again asked for guidance from the Committee as to how it would like to proceed.

Rep. Oliverson then made a Motion to adopt the proposed amendments which was seconded by Asm. Ken Cooley (CA) – NCOIL Secretary. Sen. Klein noted that, pursuant to NCOIL's bylaws, the quorum needed to be waived in order to vote on matters before the committee. A motion was made by Rep. Oliverson to waive the quorum requirement which was seconded by Rep. Sam Kito (AK). The Motion carried without objection by way of a voice vote. Sen. Klein then returned to Rep. Oliverson's Motion to adopt the proposed amendments which also carried without objection by way of a voice vote.

#### MINUTES

Upon a Motion made by Asm. Cooley and seconded by Asw. Pam Hunter (NY), the committee approved the minutes from its July 13, 2018 meeting in Salt Lake City.

#### ADJOURNMENT

There being no further business, the Committee adjourned at 11:00 a.m.