

Proposed Revisions to the NCOIL Model Workers' Compensation Drug Formulary Act

Several states have implemented workers' compensation pharmacy formularies on the basis that an evidence-based formulary serves as an effective tool to manage costs, ensure appropriate prescribing and address the overprescribing of opioids. As an independent dispute resolution organization, MAXIMUS adjudicates pharmacy disputes on behalf of multiple states with workers' compensation formularies including California, Texas and Arizona. Based on our experience, we believe the National Council of Insurance Legislators' (NCOIL) "Model Workers' Compensation Drug Formulary Act" should include the following provisions in order to ensure patients have an avenue to obtain timely access to medications and to make certain the dispute is resolved in a fair and unbiased manner.

- The Division of Workers' Compensation (the Division) shall develop and implement an evidence-based pharmacy formulary.

Discussion: It is essential that the pharmacy formulary a state chooses to adopt is based on evidence-based guidelines. Commercially available formularies include ODG and ACOEM. The Centers for Medicare and Medicaid (CMS) has also established a formulary for Medicare Part D Prescription Drug Benefits. While these products can be useful, they may not accommodate the unique needs of an individual state. For example, some states may prefer a fairly broad formulary while others may be seeking a more restrictive model. As such, we believe the model act should not mandate the use of a particular formulary but instead allow each state discretion in establishing a formulary that meets its needs.

- If an employer denies a request for a drug that is not authorized by the pharmacy formulary or on the basis that a pharmacy formulary drug is not medically necessary for treatment of the injured worker's condition, the injured worker shall have the right to seek an independent medical review of the employer's denial.

Discussion: The draft model act provides that if the employer does not approve the prescribing physician's request for an "N" drug, the employer shall send the request to a third party that is certified by the Utilization Review Accreditation Commission (URAC) to make a determination concerning the request. We believe this second level review is unnecessary and will delay the injured worker's access to care. In our experience, the vast majority of second level reviews facilitated by employers uphold the employer's initial denial. A more streamlined, independent appeals process is needed to prevent delays and ensure the injured worker receives a fair and unbiased review of their request.

- The Division shall contract with an independent review organization (IRO) to make a determination regarding injured workers' formulary exception requests and requests for formulary medications that have been denied based on lack of medical necessity.

Discussion: In lieu of a second level appeal conducted by the employer, the employer's initial denial should result in an automatic appeal to an IRO to determine if the requested drug is medically necessary. Having the dispute resolved by an IRO will ensure the request will be reviewed by an independent physician with clinical expertise in the injured worker's medical condition and extensive experience resolving pharmacy disputes.

- The independent review organization, any experts it designates to conduct a review, or any officer, director, or employee of the independent review organization shall not have any material professional, familial, or financial affiliation, as determined by the administrative director, with any of the following: (A) The employer, insurer or claims administrator, or utilization review organization. (B) Any officer, director, employee of the employer, or insurer or claims administrator. (C) A physician, the physician's medical group, the physician's independent practice association, or other provider involved in the medical treatment in dispute. (D) The facility or institution at which either the proposed health care service, or the alternative service, if any, recommended by the employer, would be provided. (E) The development or manufacture of the principal drug, device, procedure, or other therapy proposed by the employee whose treatment is under review, or the alternative therapy, if any, recommended by the employer. (F) The employee or the employee's immediate family, or the employee's attorney.

Discussion: In fairness to all parties and to protect the integrity of the independent medical review dispute resolution process, the IRO selected by the Division must be free of all material conflict of interests.

- The IRO shall make a determination concerning the requested medication within three (3) business days of receipt of a non-expedited request and within twenty-four (24) hours of an expedited request.

Discussion: This provision will ensure the injured worker's pharmacy dispute is resolved timely and that access to care is not delayed.

- The determination of the IRO shall be deemed to be the determination of the Division of Workers' Compensation and shall be binding on all parties.

Discussion: In the interest of finality, the right to appeal the IRO's determination should be limited to a narrow set of circumstances (e.g., where there is evidence the IRO reviewer had a material conflict of interest, the determination was procured by fraud or the determination was the result of a plainly erroneous finding of fact).

- The IRO should develop and maintain a secure automated system to allow for electronic processing of all pharmacy disputes submitted to the IRO.

Discussion: The implementation of an electronic processing system will allow for quicker resolution of disputes and provide transparency as to the status of a dispute.