

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Bureau of Workers' Compensation

Regulation/Package Title: Miscellaneous Rules

Rule Number(s): OAC 4123-5-18 & 4123-6-02.5 Medical proof required for payment of compensation and Provider access to the HPP – provider not certified.

Date: November 18, 2016

Rule Type:

☐ New ☐ 5-Year Review

☒ Amended ☐ Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. Please briefly describe the draft regulation in plain language.

Please include the key provisions of the regulation as well as any proposed amendments.

OAC 4123-5-18 This rule set forth the definition and criteria with respect to the medical proof BWC will consider in determining the appropriateness of payment of compensation to an injured worker having an Ohio workers' compensation claim. BWC is proposing changes to OAC 4123-5-18 that would allow medical information submitted by a certified nurse

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practitioner, clinical nurse specialist, or physician assistant (which I will refer to from here forward in this presentation as Physician Extenders) who has examined an injured worker to be considered as sufficient medical proof to support payment or non-payment of the first six (6) weeks of temporary total disability benefits.

Relevant recommended changes to the rule are:

First in paragraph (A) new language is added to this paragraph to point to new paragraph (E) added to the rule.

Language in Paragraph (B) is being modified to improve the rule's readability, as well as provide the necessary flexibility in how medical proof is to be evaluated in determining its sufficiency. Specifically, in paragraphs (B)(4) and (B)(5), the key changes remove the specific requirements that the medical proof has to be discovered and/or stated by a physician.

The modification to language in Paragraph (C) further facilitates the intent of the recommended changes to paragraph E by eliminating language that directs only medical information from a physician be considered.

New paragraph (E) is being recommended which sets forth the specific requirement governing the narrow exception to when medical proof not provided by a licensed physician may be considered as sufficient to support payment or non-payment of disability. Paragraph (E)(1) states that during the first six weeks after the date of injury, medical reports on form MEDCO-14 or equivalent completed and signed by a physician, certified nurse practitioner, clinical nurse specialist, or physician assistant who has examined the claimant may be considered sufficient medical proof to support payment or non-payment of disability for no more than six weeks of disability.

Paragraph (E)(2) sets forth what medical proof will be considered sufficient for any subsequent periods of temporary disability beyond the initial 6 weeks. Paragraph (E)(2) states that for subsequent periods of temporary disability, to be considered sufficient medical proof to support payment or non-payment of disability, medical reports on form MEDCO-14 or equivalent must be:

- (a) Completed and signed by a physician who has examined the claimant, or
- (b) Completed by a certified nurse practitioner, clinical nurse specialist, or physician assistant who has examined the claimant and co-signed by a physician who has reviewed medical documentation of the examination of the claimant by the certified nurse practitioner, clinical nurse specialist, or physician assistant.

OAC 4123-6-02.5 This rule sets forth the terms, conditions and actions to which BWC must adhere in the certifying, recertifying, or decertifying a provider's participation in the Health Partnership Program. The rule also allows BWC to immediately revoke or suspend the certification of a provider other than a hospital, for reasons set forth in Ohio Revised Code

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4121.443. The proposed change will clarify and address the point that just as BWC can immediately revoke or suspend the certification of a provider for the reason set forth in Ohio Revised Code 4121.443, BWC can also immediately revoke or suspend the enrollment status of the provider in the system.

Relevant recommended changes to the rule are:

The only change to this rule is found in Paragraph (C) in which the phrase “and terminate the enrollment” is inserted.

2. Please list the Ohio statute authorizing the Agency to adopt this regulation.

R.C. 4121.441, 4121.443, 4123.05

3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program? If yes, please briefly explain the source and substance of the federal requirement.

No.

4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.

n/a

5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?

The purpose of the regulations is BWC’s responsibility for implementing rules to effectively execute the Agency’s charge pursuant to the fiduciary responsibility embedded in the statutes governing The Health Partnership Program. Relevant statutory languages are:

R.C. 4123.05 provides that BWC shall adopt rules “. . . to regulate and provide for the kind and character of notices, and the services thereof, in cases of injury, occupational disease, or death resulting from either, to employees, the nature and extent of the proofs and evidence, and the method of taking and furnishing the same, and to establish the right to benefits or compensation from the state insurance fund, the forms of application of those claiming to be entitled to benefits or compensation, and the method of making investigations, physical examinations, and inspections. . . .”

Ohio Revised Code 4121.441(A)(1)(k) and (A)(1)(i) provide that the Administrator, with the advice and consent of the BWC Board of Directors, shall adopt rules for implementation of the HPP “to provide medical, surgical, nursing, drug, hospital, and rehabilitation services and supplies to an employee for an injury or occupational disease” which shall include, but are not limited to:

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- (k) Standards and criteria for the bureau to utilize in certifying or recertifying a health care provider . . . for participation in the health partnership program;
- (i) Standards for the bureau to utilize in penalizing or decertifying a health care provider from participation in the health partnership program.

Ohio Revised Code 4121.443 provides that BWC may summarily suspend the certification of a provider other than a hospital without a prior hearing if BWC determines:

- The provider's professional license, certification, or registration has been revoked or suspended for an indefinite period of time or for a period of more than thirty days;
- The provider has been convicted of or has pleaded guilty to a violation of workers' compensation fraud or engaging in a pattern of corrupt activity, or has been convicted of or pleaded guilty to any other criminal offense related to the delivery of or billing for health care services.
- BWC determines, by clear and convincing evidence, that the continued participation by the provider in the HPP presents a danger of immediate and serious harm to claimants.

6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?

The success of these regulations will be measured in the administrative efficiency and effectiveness of the Agency in carrying out its statutory charge to:

- a. Properly and timely provide appropriate indemnity benefits to injured workers having an allowed Ohio workers' compensation claims;
- b. Properly and timely suspend as appropriate a provider's enrollment for violations pertaining to ORC 4121.443.

Development of the Regulation

7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.

If applicable, please include the date and medium by which the stakeholders were initially contacted.

The Bureau has distributed these rules for comments to:

- BWC's Managed Care Organizations
- BWC's internal medical provider stakeholder list - 68 persons representing 56 medical provider associations/groups
- BWC's Healthcare Quality Assurance Advisory Committee
- Ohio Association for Justice
- Employer Organizations
- Council of Smaller Enterprises (COSE)

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- Ohio Manufacturer's Association (OMA)
- National Federation of Independent Business (NFIB)
- Ohio Chamber of Commerce
- BWC's Self-Insured Division's employer distribution list
- BWC's Employer Services Division's Third Party Administrator (TPA) distribution list
- The Bureau's rules distribution list, and
- The general public via the E-Notification System

8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

The first comments from the National Federation of Independent Business (NFIB) Ohio, the Ohio Chamber of Commerce and the Ohio Manufacturers' Association expressed similar concerns that the original recommended language in rule 4123-5-18 of Paragraph (E)(1) did not clearly enough define the "initial period of disability" during which medical information solely from a physician extender would be considered sufficient. To provide further clarity the various associations recommended that the initial period should begin on the date of the injury and continue up to but not exceeding six weeks. After reviewing the recommended language changes against the goal BWC was working to achieve, which is mitigating the impact of an injured worker not being able to immediately see a physician after an injury, BWC determined that the recommendation could be accommodated and thus modified the initially recommended language to now read as found at the beginning of the sentence of paragraph (E)(1): "During the first six weeks after the date of injury...." This change limits the time when medical information solely from a physician extender will be considered sufficient for temporary total compensation purposes to only the first six weeks after the date of injury

With that clarification, it was additionally felt that there needed to be clarity regarding how long temporary total disability payments can be supported with only medical information from a physician extender. To ensure consistency in the application of the medical information to the establishment of how long temporary total benefit can be granted using medical information from a physician extender language was added to limit the time to no more than 6 weeks of disability; specifically the last portion of paragraph (E)(1) states "for no more than six weeks of disability."

NFIB, the Ohio Chamber of Commerce and the Ohio Manufacturers' Association also expressed some concern regarding Paragraph (E)(2). In particular the association wondered if it was BWC's intent that a physician actually "sees" the patient to make a determination with respect to the individual's extent of disability. If that was the case the suggestion was that the rule be revised to reflect this intention. BWC responded to the comment indicating

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the proposed language in Paragraph (E)(2) is a reflection of current practice. Currently, the law has been interpreted that so long as a physician reviews the results of a medical examination, and attest to the agreement of the examination finding by affixing their signature to the medical report used for temporary total benefit purposes, such medical report is considered sufficient. Thus, no modification was necessary to the language as reflected in Paragraph (E)(2).

The Ohio Chamber of Commerce also requested clarification on the necessity of the rule. They wanted to understand the necessity and intent of rule as they have no knowledge of injured workers having difficult time receiving access to physicians. BWC responded that the recommended changes to the rule were developed after the BWC field operations staff expressed concerns due to their having to reject MEDCO-14 forms as inappropriate due to the need for a physician signature. This has in a number of instances led to delays in, and injured workers' frustration with, the administration of otherwise legitimate claims for temporary total benefits. Additionally, there have been instances where the Industrial Commission has issued orders addressing only a portion of the time Temporary Total benefits are to be paid to an injured worker, due to the timing in which the injured worker could initially see a physician. Where the injured worker had received an evaluation and treatment from a physician extender, the associated medical information could not be considered in the IC's determination of when Temporary total benefits were to be granted.

Finally, there was a comment submitted by plaintiff counsel Mr. Philip Fulton in support of the changes for rule 4123-5-18.

9. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?

n/a

10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?

There were no alternative regulations considered. The modifications made were to currently existing rules which facilitates BWC's responsibilities to effectively execute the Agency's charge pursuant to the fiduciary responsibility embedded in the statutes governing The Health Partnership Program as set forth in the answer to question 5 above .

11. Did the Agency specifically consider a performance-based regulation? Please explain. *Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.*

No. The changes to OAC 4123-5-18 actually conform the rule to reflect the understanding of how physicians currently utilize certified nurse practitioners, clinical nurse specialists, or physician assistants in their practice. OAC 4123-6-02.5 changes create conformity with current statutory expectations relating to addressing summary suspension of providers. Thus, performance based regulations are not appropriate for the content of these rules.

12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?

The Bureau is the only state agency regulating workers' compensation claims, and the certification and enrollment of providers in the Health Partnership Program, and thus there is not another agency promulgating rules on these subjects.

13. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.

The Bureau will post the rules on its website, www.ohio.bwc.gov, and will distribute the rules to affected parties. Internal training will occur with Field Operations and provider relations staff regarding the administration of the modified rule language. Injured workers and/or providers will be able to receive personal assistance from the BWC Claims Customer Service staff, the Provider Relations or Medical Policy staff members in interpreting or addressing unintended impacts of the rules' modifications.

Adverse Impact to Business

14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

a. Identify the scope of the impacted business community;

The impacted community includes Ohio's injured workers, employers, and providers.

b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and

OAC 4123-5-18

- i. Injured Workers can have their indemnity benefits terminated if supporting medical proof is not submitted by or co-signed by a physician; therefore the injured worker may need to invest time to ensure their medical provider complies with the requirements of the rule when temporary total benefits are being extended beyond an initial 6 weeks of time.

- ii. Physicians must ensure availability of time to examine the injured worker, or review the injured worker's medical information resulting from an examination conducted by a certified nurse practitioner, clinical nurse specialist, or physician assistant.

OAC 4123-6-02.5

Providers may have their BWC certification and enrollment revoked for violations pertaining to ORC 4121.443.

c. Quantify the expected adverse impact from the regulation.

The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a “representative business.” Please include the source for your information/estimated impact.

OAC 4123-5-18

The time commitment for either injured workers or physicians should be less than 1 hour. Submission of appropriate medical information by physicians on behalf of injured worker to be considered for temporary total benefits is currently required. Thus, injured worker follow-up with the physician practice, and the physician incorporating an appropriate review protocol of an injured worker's medical record when the physician did not conduct the examination should require minimum effort.

15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

The changes to OAC 4123-5-18 actually conforms the rule to reflect the understanding of how physicians currently utilize certified nurse practitioners, clinical nurse specialists, or physician assistants in their practice. The changes will reduced the potential of injured workers having their temporary total benefits initially delayed due to timing of seeing a physician. However, the goal of the changes was not to eliminate the requirement of a physician's appropriate involvement in ongoing management of an injured worker's claim. The overall benefit of the change, very much so outweigh the identified adverse impacts. Moreover, the regulatory intent of these rules is justified by the need for the Bureau to comply with statutory mandates.

Regulatory Flexibility

16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

No.

17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

Not applicable. None of these rules have provisions that would result in fines or penalties to employers.

18. What resources are available to assist small businesses with compliance of the regulation?

Bureau rules and policies are available on www.ohio.bwc.gov. Also, BWC personnel, specifically the Claims Customer Care Team, Provider Relations business area, and the Managed Care Organization staff are available to assist injured workers, providers, and employers in addressing relevant compliance issues.