

Workers' Compensation Advisory Council
Comments & Recommendations re: Proposed Amendments to SB1297/HB857 & SB1680/HB1192
June 4, 2009

AMENDED **SB 1297 by Crowe / *HB 857 by Mumpower**
AMENDED **SB 1680 by Ketron / *HB 1192 by Mumpower**

THE ORIGINAL BILLS ARE ALMOST IDENTICAL; THE AMENDMENTS ARE IDENTICAL.
THEREFORE, THE ANALYSIS APPLIES TO BOTH AMENDMENTS.

NOTE: Representative Judd Matheny, Chair of the House Consumer and Employee Affairs Committee requested the Advisory Council meet to review the proposed amendments and to submit comments and recommendations regarding the amendments. The Advisory Council met on Thursday, June 4, 2009 and the following persons were present in person or by telephone (a quorum of voting members was present in person; therefore, an electronic meeting was not necessary):

- Treasurer David Lillard, Jr., Chair
- Jack Gatlin (Voting Member, Employee Representative)
- Tony Farmer (Voting Member, Employee Representative)
- Jerry Lee (Voting Member, Employee Representative)
- Stewart Meadows (Voting Member, Employer Representative)
- Bob Pitts (Voting Member, Employer Representative)
- Gary Selvy (Voting Member, Employer Representative)
- Kitty Boyte (Nonvoting Member, Attorney Representative)
- Bruce Fox (Nonvoting Member, Attorney Representative)
- Steve Johnson (Nonvoting Member, Healthcare Provider Representative)
- Sam Murrell, M.D. (Nonvoting Member, Healthcare Provider Representative)
- Gregg Ramos (Nonvoting Member, Attorney Representative)
- Sue Ann Head (Ex Officio Member - Designee for Commissioner of Labor and Workforce Development)
- Mike Shinnick (Ex Officio Member - Designee for Commissioner of Commerce and Insurance)

**The following format compares present law and the proposed amendments. The practical effect of the amendments follows this table.

| Present Law (as of January 1, 2008) | Proposed Amendments | Comments |
|--|---------------------|----------|
| (4)(A) the medical fee schedule (MFS) is not intended to prohibit an employer, trust or pool, or insurer from negotiating in its own medical fee agreements fees lower than those established by the MFS | No change | |

Workers' Compensation Advisory Council
Comments & Recommendations re: Proposed Amendments to SB1297/HB857 & SB1680/HB1192
June 4, 2009

| | | |
|--|---|---|
| <p>(B) defines contracting agent as one in direct privity of contract with a medical provider to reimburse the provider for services rendered at rates different from the MFS</p> | <p>(B) defines “contracting agent” as a person or party that has a direct signed contract with a medical provider</p> <p>*adds a definition of “third party” - an organization that enters into a contract with a contracting agent or another third party to gain access to a provider network contract</p> <p>*requires the “third party” to exercise the rights and responsibilities under the contract as if the “third party” were the contracting entity</p> | <p>>the definition of “third party” is not clear as the definition itself refers to “third party”.</p> <p>>an entity probably cannot be required to exercise “rights” - it can be granted the same rights as the “contracting agent”</p> <p>>“contracting entity” is not defined</p> |
| <p>(B) makes it clear negotiated rates cannot exceed the MFS</p> | <p>No change</p> | |
| <p>(C) requires any new contract or renewal of a contract with a medical care provider to:</p> <p>(C)(i) disclose whether the list of contracted providers may be sold, leased, transferred or conveyed to other payors or agents [including insurers and self-insureds] in a section of the contract titled “assignment”, “assignability or similar title</p> | <p>As of January 1, 2010</p> <p>*applies to new contracts or renewals [same as current law]</p> <p>(C) requires every contracting agent that wishes to sell[s], lease[s], assign[s], transfer[s], or convey[s] its list of contracted health care providers and their contracted reimbursement rates to:</p> <p>(C)(i) disclose to the provider whether the list of contracted providers may be sold, leased, transferred, or conveyed to other third parties, including workers' compensation insurers, self insured companies, third party administrators, or workers' compensation preferred provider organization (PPO) networks.</p> <p>requires the disclosure of the ability to sell, lease, transfer or convey the list of network providers to be in a section of a contract titled "assignment" or "assignability" or similar title;</p> | <p>the word “other” should probably be deleted as the contracting agent is not a third party</p> |

Workers' Compensation Advisory Council
Comments & Recommendations re: Proposed Amendments to SB1297/HB857 & SB1680/HB1192
June 4, 2009

| | | |
|---|---|---|
| <p>(C)(ii) disclose whether the payor to which the contract is sold may be permitted to pay the contracted rate (if less than the medical fee schedule) - in same section titled "assignment"</p> | <p>(C)(ii) disclose whether third parties to which the list of contracted providers may be sold, leased, transferred, or conveyed may be permitted to pay a provider's contracted rate if less than the workers' compensation fee schedule.</p> <p>The disclosure of the ability to pay a provider's contracted rate, if less than the workers' compensation fee schedule, shall be in the same section titled "assignment" or "assignability" or similar title of the same contract.</p> | |
| <p>(C)(iii) permits providers - upon the initial signing or renewal of a provider contract - to decline participation in workers' compensation networks that are sold or leased</p> | <p>The provision permitting a provider to decline participation is now in (C)(v).</p> | |
| | <p>(C)(iii) Notify the third parties to which they sell, lease, assign, transfer, or convey all applicable terms, limitations, fee schedules for both board certified/eligible and general surgery rates, provider credentialing information and other conditions of the original health care provider contract.</p> | <p>This sentence is awkwardly constructed.</p> |
| | <p>(C)(iii) No language contained in any contract between the contracting agent and its affiliates or assignees will alter the terms, fees, discounts, or conditions of the contract and the provider list which they are accessing.</p> <p>When the contract is terminated the contracting agent will notify the entity they directly sold, leased or transferred the contract of the termination.</p> | <p>This appears to prohibit the second tier "third party" [silent ppo] from paying a lesser amount than the rate of the original contract.</p> <p>This sentence is not clear.</p> |

*Workers' Compensation Advisory Council
Comments & Recommendations re: Proposed Amendments to SB1297/HB857 & SB1680/HB1192
June 4, 2009*

| | | |
|---|---|---|
| <p>(C)(iv) requires the contracting agent to maintain a web page listing all the customers to whom the network is sold that is accessible to all contracted providers and must be updated at least twice a year</p> | <p>(C)(iv) Maintain a web page for healthcare providers that contains a complete listing of third parties to whom the network is , or has been sold, leased, transferred or conveyed either by the contracting agent or by another third party, along with the effective date, that is accessible to all contracted providers and updated every ninety (90) days thereafter</p> | <p>This would not be required for contracts that are currently in effect.</p> |
| <p>(C)(iv) requires the contracting agent to maintain a toll-free telephone number accessible to all contracted providers where they may access payor summary information and a list of lessees of the network</p> | <p>(C)(iv) Same as current law except the toll free number is not used to access list of lessees</p> | |
| | <p>(C)(v) Notify the healthcare provider at least thirty (30) days in advance in writing to the contracting address provided, of the contracting agent's intention to assign the contract to a new third party, and allow the provider to decline to participate in the new assignment by indicating so in writing within thirty (30) days. >Allow the healthcare provider to terminate contracts with specific third parties, by providing ninety (90) days written notice to the contracting agent.</p> | <p>The first sentence of this paragraph is awkwardly worded and may create confusion. It may not be possible for a person or entity to cancel a contract when they are not a party to the contract.</p> |
| | <p>(C)(vi) May not require a health care provider as a condition of participation or continuation of participation in a commercial health plan to also participate in a workers' compensation program.</p> | |

*Workers' Compensation Advisory Council
Comments & Recommendations re: Proposed Amendments to SB1297/HB857 & SB1680/HB1192
June 4, 2009*

| | | |
|--|---|--|
| | (C)(vii) Disclose or designate an individual or department position responsible for responding to inquiries regarding the timely remediation of any deficiencies identified in connection to the contract. | |
| (D)(i) requires the payor's explanation of benefits (or explanation of review) to identify the name of the network that has the written contract with the provider showing the payor can pay preferred rate for services | (D)(i) requires the payor's "explanation of payment" or "explanation of review" to: (1) specifically, accurately, and clearly identify the name of the contracting agent" that has a written agreement signed by the provider whereby the workers' compensation payor is entitled to access the network (2) include the name of the insurer, the name of the entity performing bill review, the injured workers' name, the total allowed rate due under terms of the contract, and the amount of any reduction or denial of payment along with the explanation of the same. | |
| (D)(ii)requires the provider to submit a written request questioning a payment received from the payor **the written request must include a statement explaining why the payment is not at the contracted rate for the services provided ***failure of the provider to include the statement relieves the payor from demonstrating it was entitled to pay the disputed contracted rate | This language is deleted by the amendment | |
| > requires the payor - within 30 days of the written request - to demonstrate the payor's right to pay the contracted rate | This language is deleted by the amendment | |

*Workers' Compensation Advisory Council
 Comments & Recommendations re: Proposed Amendments to SB1297/HB857 & SB1680/HB1192
 June 4, 2009*

| | | |
|--|---|--|
| <p>>the workers' compensation payor is deemed to have demonstrated that it is entitled to pay a contracted rate if it identifies the contracting agent who has contracted with the medical provider to pay the reimbursement at the contracted rate</p> | <p>This language is deleted by the amendment</p> | |
| | <p>(D)(ii) After at least one (1) request from the provider for a review of payment made in violation of the contract terms, payments revert to one hundred percent (100%) of the appropriate Tennessee Fee Schedule and will be paid in thirty-one (31) days. If the payor fails to make payment within thirty-one days they will be assessed a civil penalty of 2.08% monthly (25% annual percentage rate) which is paid to the provider.</p> | <p>It is not clear from what date the 31 days is to be computed. Also, there appears no way to determine the number of requests from a provider concerning payment review and there is no indication as to who is to assess the penalty. In addition, the amendment does not clearly indicate if the civil penalty is to be applied only after a request for review or to late payments, without any review request.</p> |

*Workers' Compensation Advisory Council
 Comments & Recommendations re: Proposed Amendments to SB1297/HB857 & SB1680/HB1192
 June 4, 2009*

| | | |
|--|--|---|
| | <p>(E) The commissioner of labor and workforce development shall investigate any allegations that contracting agents or others are not abiding by, or have not abided by, the provisions of Section 50-6-204(i)(4). Such investigations shall provide the contracting entity or other subject of the investigation the opportunity to demonstrate (1) that the apparent violation occurred as a result of an administrative error or other unintended event and (2) the steps taken to remedy and avoid recurrence of the error. If the commissioner finds that such allegations are valid, the commissioner is authorized to assess civil penalties pursuant to 50-6-233.</p> | <p>It does not appear §50-6-233 authorizes the commissioner to assess such penalties. §50-6-233(8) authorizes the commissioner to establish a civil penalty BUT it is against a <u>provider</u> who has, after proper notification and appropriate time to respond, refused to make repayment to a payor for a payment that exceeds the medical fee schedule after exhausting all appeals. Under no circumstances shall a provider be assessed a civil penalty solely for receiving payment from a payor that exceeds the medical fee schedule.</p> |
|--|--|---|

Practical Effect of Amendment(s)

The amendment to SB 1297 / HB 857 and SB1680 / HB1192 will NOT apply to current contracts between providers and any payor/third party - the enacting clause specifically states it is applicable to only new or renewed contracts after January 1, 2010. The amendment deletes the current provisions of §50-6-204(i)(4); therefore, the provisions in current law that require the payor to maintain a website, a toll free number, and to provide certain information on an explanation of benefits will cease to exist when the amendment goes into effect on January 1, 2010.

In general, it appears the intent of the amendment is:

- to require any second tier or subsequent tier payor to abide by the original contract between the provider and the “contracting agent”;
- to require the “contracting agent” to notify the “third parties” concerning the fee schedule rates for board certified/eligible surgeons vs. the general surgery rates
- to require advance written notice from the “contracting agent” to the provider of the intent to assign the contract to a new third party and to permit the provider to “opt out” of the assignment
- to permit providers to terminate contracts with third parties upon 90 days written notice

- to prohibit tying a provider's participation in a commercial health plan to participation in a workers' compensation program
- to designate a specific person or department for the provider to contact when the provider has a question about a payment
- to require the explanation of payment to include more specific information to assure the provider can determine the contract under which the payment is being submitted
- to establish a method by which a provider can be reimbursed at 100% of the medical fee schedule rate if the payor fails to respond to a request by the provider for review of payment
- to require the commissioner to investigate allegations of violations of 50-6-204(i)(4) AND
- to authorize the commissioner to assess civil penalties for violations of 50-6-204(i)(4).

Informational Note

If the sponsors and interested parties intend portions of the amendment to apply to current contracts, the amendment must be changed to designate which portions shall be applicable to current, new and renewal contracts.

Comments of Advisory Council Members

Mr. Tony Farmer (Employee Representative) made the following comments:

He stated he recognized the medical community is frustrated over the entire issue and that he is sure they would rather practice medicine than deal with the business of contracts, medical fee schedules and silent PPOs. It is a matter of contract, though, and the doctors do have the right not to enter into these contracts and the right to cancel these contracts, especially ones that permit discounted rates to be sold to other entities. Mr. Farmer said he thinks the doctors should be able to object to this, back out of this and have the right to refuse to do this.

Mr. Farmer observed the proposed amendments involve many interested parties, including the Department of Labor and potentially the Department of Commerce and Insurance. He said it doesn't appear that those parties - who will have to live with the law and potentially enforce it - have been consulted as to its impact on the Tennessee workers' compensation system and how it is to be implemented and integrated into the current statute. He observed the amendment places a responsibility on the Department of Labor to investigate and assess penalties for violations of the new provisions and stated he did not see how the Department can do that when they do not know what the specific contracts permit and what entities are involved in this process in the State of Tennessee. He suggested the issue may need additional regulation of the entities that are currently not known to the department if these entities want to handle Tennessee claims and if they purport to be entitled to use contracts for discounted payments to the doctors. Mr. Farmer stated that we do not need a system that is so complex in nature that it will interfere with treatment of injured workers. He said this is his genuine fear.

Mr. Farmer noted we currently regulate how insurance companies are required to handle claims; how utilization review is to be performed; and many other aspects of the handling of workers'

compensation claims. He said if this issue is studied further by the departments of labor and commerce and insurance and the other interested parties, it may be determined that this is an area that needs regulation either by licensure or, at least, registration with the departments so that one department or the other can better understand the impacts of this issue on the Medical Fee Schedule, the workers' compensation system and on the delivery of quality medical care to injured workers.

He stated the amendments as drafted, in his opinion, create more problems than they solve. He said he does not think that at this late date in the legislative session these problems can be resolved in a thoughtful, reasoned manner to create an amendment that does what the sponsors intend. He suggested the sponsors request the Department of Labor meet with all the interested parties over the summer and facilitate a discussion and, hopefully, a solution that can be enacted next session with the support and input of all interested parties.

Dr. Sam Murrell (Health Care Representative) made the following comments:

Dr. Murrell stated, as a physician, the subject of the amendment is a genuine issue. He stated the issue has already impacted the quality of care and the delivery of care. He agreed there is real awkwardness in the drafting of the proposed amendments. He noted while the amendment gives the physician 30 days notice of the opportunity to opt out of the sale or transfer of the contract, or in some instances 90 days, ethically, the doctor cannot elect to opt out in the middle of treating the patient and simply tell the patient that you are no longer participating with a carrier. Dr. Murrell stated the amendment does not provide for those individual cases, such as is the case with commercial insurance, to continue treatment at current rates on a case by case basis. The intent of the amendment is good, but it needs to be flushed out more. Dr. Murrell also noted some of the frustration of the medical community is because there is no where to turn to address recourse for proper payment.

Mr. Bob Pitts (Employer Representative)

Mr. Pitts stated this issue has been around for some time and many thought it was addressed in 2007 although the issue was raised again in each of the last two years. He observed that at the current time, the major players want to resolve the issue once and for all but at this late date it cannot be adequately and completely accomplished prior to the end of this legislative session.

Mr. Pitts noted some of the problems are communications problems - not knowing where to get concerns addressed and while there may be ways in current law to address the issue, that has not been communicated to the participants. He acknowledged this is an issue about which many people and the sponsors feel very strongly but he agreed it cannot be effectively dealt with this year before the end of this legislative session.

Mr. Pitts agreed, since Tennessee has a department that regulates insurance companies and a department whose principal concern in this instance is an effective, meaningful workers' compensation program that adequately protects all the interests that it is time for one or both

of the departments to take charge of the issue and provide some leadership as a focal point for all the parties to come together and discuss the issue and be sure that all the parties who wish to participate really understand current law and what avenues are open to them to resolve problems. He said the Advisory Council could either suggest the departments' participation or request that the legislature direct the departments to participate in trying to reach a resolution among the parties. He stated the departments must play a role because there are a lot of players involved, including providers, insurance companies, workers, businesses/employers, and it is important for providers to be appropriately paid and that contracts be honored.

Mr. Pitts observed while the interested parties have legitimate reasons for their respective positions, everyone is posturing and it is time for all the parties to get together and determine whether there is a need for legislation and what it should be. He concluded his remarks by expressing a concern that if the issue continues to fester and is not satisfactorily resolved, it will cause problems for the workers' compensation program that nobody wants to see.

MOTION re: Amendments by Sponsors

Mr. Tony Farmer made a motion, based on his comments and the comments made by Dr. Murrell and Mr. Pitts, that the Advisory Council recommend against passage of these amendments as currently presented and that the Department of Commerce and Insurance and the Department of Labor and Workforce Development meet with appropriate parties over the summer to facilitate the meeting of all interested parties to undertake a meaningful dialogue about these issues and hopefully come up with a solution that addresses the interest of all the parties.

Mr. Stewart Meadows (Employer Representative) seconded Mr. Farmer's motion. No member objected to the motion and the Chair declared the motion adopted without objection.

RECOMMENDATION re: Amendments by Sponsors

The voting members of the Advisory Council **UNANIMOUSLY RECOMMEND AGAINST PASSAGE** of the amendments and **unanimously recommend** the departments facilitate a meeting of all interested parties over the summer to undertake a meaningful dialogue of the issue.