OKLAHOMA STATE SENATE
CONFERENCE
COMMITTEE REPORT

May 17, 2012

Mr. President:

Mr. Speaker:

The Conference Committee, to which was referred

SB 1520

By: Bingman of the Senate and Jordan of the House

Title: Workers' compensation benefits; reimbursement rates; tort claims. Effective date.

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together with Engrossed House Amendments thereto, beg leave to report that we have had the same under consideration and herewith return the same with the following recommendations:

1. That the House recede from all Amendments.

2. That the attached Conference Committee Substitute be adopted.

Respectfully submitted,

SENATE CONFEREES

Bingman

Nichols

Sykes

Burrage

Johnson (Bob)

Sparks

HOUSE CONFEREES
Conference Committee on Public Safety, Judiciary and Military Affairs

Senate Action ADOPTED & PASSED Date MAY 23 2012 Action _____ Date _____

epc

HOUSE CONFEREES

Jordan _____

Martin (Steve) _____

McCullough _____

Moore _____

Morrissette _____

Roan _____

Roberts (Dustin) _____

Schwartz _____

Sherrer _____

Wesselhoft _____

Williams _____

STATE OF OKLAHOMA

2nd Session of the 53rd Legislature (2012)

CONFERENCE COMMITTEE SUBSTITUTE
FOR ENGROSSED
SENATE BILL NO. 1520 By: Bingman of the Senate

and

Jordan of the House

CONFERENCE COMMITTEE SUBSTITUTE

An Act relating to workers' compensation benefits; amending 85 O.S. 2011, Sections 327, 333, 341 and 342, which relate to medical fee schedule, permanent impairment or disability, discharge or termination of group insurance and change of condition; modifying requirements for certain reimbursement; updating statutory references; requiring certain annual affidavit; requiring promulgation of certain form; providing for suspension of certain benefits for failure to file certain affidavit; creating rebuttable presumption; requiring written findings under certain circumstances; limiting certain liability; authorizing amendment of certain orders under specified circumstances; requiring inclusion of certain statement on certain forms; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 85 O.S. 2011, Section 327, is amended to read as follows:

Section 327. A. For the express purpose of reducing the overall cost of medical care for injured workers in the workers'

compensation system by five percent (5%), the Administrator of the Workers' Compensation Court is hereby directed to develop a new "Oklahoma Workers' Compensation Medical Fee Schedule" to be implemented by January 1, 2012. Thereafter, the Administrator shall conduct a review of the Fee Schedule every two (2) years. The Fee Schedule shall establish the maximum rates that medical providers shall be reimbursed for medical care provided to injured workers, including, but not limited to, charges by physicians, dentists, counselors, hospitals, ambulatory and outpatient facilities, clinical laboratory services, diagnostic testing services, and ambulance services, and charges for durable medical equipment, prosthetics, orthotics, and supplies.

B. Reimbursement for medical care shall be prescribed and limited by the Fee Schedule as adopted by the Administrator, after notice and public hearing. The director of the Oklahoma State Employees Group Insurance Board shall provide the Administrator such information as may be relevant in the development of the Fee Schedule. The Administrator shall develop the Fee Schedule in a manner in which quality of medical care is assured and maintained for injured workers. The Administrator shall give due consideration to additional requirements for physicians treating an injured worker under ~~this act~~ the Workers' Compensation Code, including, but not limited to, communication with claims representatives, case managers, attorneys, and representatives of employers, and the

additional time required to complete forms for the Court, insurance carriers, and employers.

C. In making adjustments to the Fee Schedule, the Administrator shall use, as a benchmark, the reimbursement rate for each Current Procedural Terminology (CPT) code provided for in the fee schedule published by the Centers for Medicare and Medicaid Services of the U.S. Department of Health and Human Services for use in Oklahoma (Medicare Fee Schedule) on ~~the effective date of this act~~ August 26, 2011. For services not valued by CMS, the Administrator shall establish values based on the usual, customary and reasonable medical payments to health care providers in the same trade area for comparable treatment of a person with similar injuries.

1. No reimbursement shall be allowed for any magnetic resonance imaging (MRI) unless the MRI unit produces a field strength that is equal to or greater than 1.0 Tesla is provided by an entity that meets Medicare requirements for the payment of MRI services or is accredited by the American College of Radiology or is accredited by the Intersocietal Accreditation Commission or is accredited by the Joint Commission on Accreditation of Healthcare Organizations. For all other radiology procedures, the reimbursement rate shall be the lesser of the reimbursement rate allowed by the 2010 Oklahoma Fee Schedule or two hundred seven percent (207%) of the Medicare Fee Schedule.

2. For reimbursement of medical services for Evaluation and Management of injured employees as defined in the fee schedule adopted by the Administrator, the reimbursement rate shall not be less than one hundred fifty percent (150%) of the Medicare Fee Schedule.

3. Any entity providing durable medical equipment, prosthetics, orthotics or supplies must be accredited by a CMS-approved accreditation organization. In the event a physician provides durable medical equipment, prosthetics, orthotics, prescription drugs, or supplies to a patient ancillary to the patient visit, reimbursement will be no more than ten percent (10%) above cost.

4. The Administrator shall develop a reasonable stop loss provision of the Fee Schedule to provide for adequate reimbursement for treatment for major burns, severe head and neurological injuries, multiple system injuries, and other catastrophic injuries requiring extended periods of intensive care.

D. The right to recover charges for every type of medical care for injuries arising out of and in the course of covered employment as defined in ~~this act~~ the Workers' Compensation Code shall lie solely with the Workers' Compensation Court and its administration. When a medical care provider has brought a claim in the Court to obtain payment for services, a party who prevails in full on the claim shall be entitled to a reasonable attorney fee.

E. Nothing in this section shall prevent an employer, insurance carrier, group self-insurance association, or certified workplace medical plan from contracting with a provider of medical care for a reimbursement rate that is greater than or less than limits established by the Fee Schedule.

F. A treating physician may not charge more than Four Hundred Dollars ($400.00) per hour for preparation for or testimony at a deposition or court appearance in connection with a claim covered by the Workers' Compensation Code.

G. The Administrator's review of medical and treatment charges pursuant to this section shall be conducted pursuant to the Fee Schedule in existence at the time the medical care or treatment was provided. The order approving the medical and treatment charges pursuant to this section shall be enforceable by the Court in the same manner as provided in the Workers' Compensation Code for the enforcement of other compensation payments. Any party feeling aggrieved by the order, decision or award of the Administrator shall, within ten (10) days, have the right to request a hearing on such medical and treatment charges by a judge of the Court. The judge of the Court may affirm the decision of the Administrator, or reverse or modify the decision only if it is found to be contrary to the Fee Schedule existing at the time the medical care or treatment was provided. The order of the judge shall be subject to the same appellate procedure set forth for all other orders of the Court.

H. Charges for prescription drugs dispensed by a pharmacy shall be limited to ninety percent (90%) of the average wholesale price of the prescription, plus a dispensing fee of Five Dollars ($5.00) per prescription. "Average wholesale price" means the amount determined from the latest publication designated by the Administrator. Physicians shall prescribe and pharmacies shall dispense generic equivalent drugs when available. If the NDC for the drug product dispensed is for a repackaged drug, then the maximum reimbursement shall be the lesser of the original labeler's NDC or the lowest cost therapeutic equivalent drug product. Compounded medications shall be billed by the compounding pharmacy at the ingredient level, with each ingredient identified using the applicable NDC of the drug product, and the corresponding quantity. Ingredients with no NDC area are not separately reimbursable. Payment shall be based upon a sum of the allowable fee for each ingredient plus a dispensing fee of ~~five dollars~~ Five Dollars ($5.00) per prescription.

I. When medical care includes prescription drugs dispensed by a physician or other medical care provider, the employer or insurance carrier shall be required to pay the lesser of the reimbursement amount specified under the schedule of fees adopted by the Administrator, the reimbursement amount for prescription drugs obtained by mail order, when mail order is available, or the reimbursement amount for prescription drugs obtained at a retail pharmacy. If the National Drug Code (NDC) for the drug product

dispensed is for a repackaged drug, then the maximum reimbursement shall be the lesser of the original labeler's NDC or the lowest cost therapeutic equivalent drug product. Compounded medications shall be billed by the compounding pharmacy.

J. Implantables are paid in addition to procedural reimbursement paid for medical or surgical services. A manufacturer's invoice for the actual cost to a physician, hospital or other entity of an implantable device shall be adjusted by the physician, hospital or other entity to reflect, at the time implanted, all applicable discounts, rebates, considerations and product replacement programs and must be provided to the payer by the physician or hospital as a condition of payment for the implantable device. In the event the physician, or an entity that the physician has a financial interest in, other than an ownership interest of less than five percent (5%) in a publicly traded company provides implantable devices, this relationship must be disclosed to patient, employer, insurance company, third party administrator, certified workplace medical plan, case managers, and attorneys representing claimant and defendant. In the event the physician, or an entity that the physician has a financial interest in, other than an ownership interest of less than five percent (5%) in a publicly traded company, buys and resells implantable devices to the hospital or another physician, that markup shall be limited to ten percent (10%) above cost.

K. Payment for medical care as required by ~~this act~~ the Workers' Compensation Code shall be due within forty-five (45) days of the receipt by the employer or insurance carrier of a complete and accurate invoice, unless the employer or insurance carrier has a good faith reason to request additional information about such invoice. Thereafter, a judge of the Court may assess a penalty up to twenty-five percent (25%) for any amount due under the Fee Schedule that remains unpaid upon the finding by the Court that no good faith reason existed for the delay in payment. In the event the Court finds a pattern of an employer or insurance carrier willfully and knowingly delaying payments for medical care, the Court may assess a civil penalty of not more than Five Thousand Dollars ($5,000.00) per occurrence.

L. In the event an employee fails to appear for a scheduled appointment with a physician, the employer or insurance company shall pay to the physician a reasonable charge, to be determined by the Administrator, for the missed appointment. In the absence of a good faith reason for missing the appointment, the Court shall order the employee to reimburse the employer or insurance company for such charge.

M. Physicians providing treatment under ~~this act~~ the Workers' Compensation Code shall disclose under penalty of perjury to the Administrator of the Workers' Compensation Court, on a form prescribed by the Administrator, any ownership or interest in any

health care facility, business, or diagnostic center that is not the physician's primary place of business. Such disclosure shall include any employee leasing arrangement between the physician and any health care facility that is not the physician's primary place of business. A physician's failure to disclose as required by this section shall be grounds for the Administrator to disqualify the physician from providing treatment under ~~this act~~ the Workers' Compensation Code.

SECTION 2. AMENDATORY 85 O.S. 2011, Section 333, is amended to read as follows:

Section 333. A. The determination of permanent impairment or disability shall be the responsibility of the Workers' Compensation Court. Any claim by an employee for compensation for permanent partial impairment must be supported by competent medical testimony of the treating physician who is a medical doctor or a doctor of osteopathy or a qualified independent medical examiner which shall be supported by objective medical findings, as defined in ~~this act~~ the Workers' Compensation Code, and which shall include an evaluation by a physician stating his or her opinion of the employee's percentage of permanent partial impairment and whether or not the impairment is job-related and caused by the accidental injury or occupational disease. A physician's opinion of the nature and extent of permanent partial impairment to parts of the body other than scheduled members must be based solely on criteria

established by the American Medical Association's "Guides to the Evaluation of Permanent Impairment", Fifth Edition, or any subsequent edition approved by the Administrator after public hearing and review by the Physician Advisory Committee, hereinafter referred to as "Guides". A copy of any written evaluation shall be sent to both parties within seven (7) days of issuance. Medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty. For purposes of this section, "physician" has the same meaning as defined in Section ~~26~~ 326 of this ~~act~~ title and includes a person licensed by another state who would be qualified to be a licensed physician under the laws of this state. Any party may submit the report of an evaluating physician.

B. Permanent partial impairment shall not be allowed to a part of the body for which no medical treatment has been received. A determination of permanent impairment or disability made by the Court which is not supported by objective medical findings provided by a treating physician who is a medical doctor or doctor of osteopathy or a qualified independent medical examiner shall be considered an abuse of discretion.

C. The Physician Advisory Committee may recommend the adoption of a method or system to evaluate permanent impairment that shall deviate from, be used in place of, or in combination with the Guides. Such recommendation shall be made to the Administrator of

the Workers' Compensation Court who may adopt the recommendation in part or in whole. The adopted method or system shall be submitted by the Administrator to the Governor, the Speaker of the House of Representatives and the President Pro Tempore of the Senate within the first ten (10) legislative days of a regular session of the Legislature. Such method or system so submitted shall be subject to disapproval by joint or concurrent resolution of the Legislature during the legislative session in which submitted. If disapproved, the existing method of determining permanent partial impairment shall continue in effect. If the Legislature takes no action on the method or system submitted by the Administrator, the method or system shall become operative ten (10) days following the adjournment of the Legislature.

D. The examining physician shall not deviate from the Guides or any alternative thereto except as may be specifically provided for in the Guides or modifications to the Guides adopted pursuant to subsection C of this section.

E. In cases of permanent partial impairment, the compensation shall be seventy percent (70%) of the employee's average weekly wages, and shall be paid to the employee for the period prescribed by the following schedule:

Thumb: For the loss of thumb, sixty-six (66) weeks.

First Finger: For the loss of the first finger, commonly called the index finger, thirty-nine (39) weeks.

Second Finger: For the loss of a second finger, thirty-three (33) weeks.

Third Finger: For the loss of a third finger, twenty-two (22) weeks.

Fourth Finger: For the loss of a fourth finger, commonly called the little finger, seventeen (17) weeks.

Phalange of Thumb or Finger: The loss of the first phalange of the thumb or finger shall be considered equal to the loss of one-half (1/2) of such thumb or finger, and compensation shall be one-half (1/2) of the amount above specified; the loss of more than one phalange shall be considered as the loss of the entire thumb or finger; provided, however, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

Great Toe: For the loss of a great toe, thirty-three (33) weeks.

Other Toes: For the loss of one of the toes other than the great toe, eleven (11) weeks.

Phalange of Toe: The loss of the first phalange of any toe shall be considered to be equal to the loss of one-half (1/2) of such toe, and compensation shall be one-half (1/2) of the amount specified. The loss of more than one phalange shall be considered as the loss of the entire toe.

Hand: For the loss of a hand, two hundred twenty (220) weeks.

Arm: For the loss of an arm, two hundred seventy-five (275) weeks. Provided, that for the purposes of the arm as a scheduled member, the arm shall mean that part of the body that extends from the surgical neck of the humerus and includes the elbow joint.

Foot: For the loss of a foot, two hundred twenty (220) weeks.

Leg: For the loss of a leg, two hundred seventy-five (275) weeks. Provided, that for the purposes of the leg as a scheduled member, the leg shall mean that part of the body that extends from the surgical neck of the femur and includes the knee joint.

Eye: For the loss of an eye, two hundred seventy-five (275) weeks.

Deafness: Deafness from industrial cause, including occupations which are hazardous to hearing, accident or sudden trauma, three hundred thirty (330) weeks, and total deafness of one ear from industrial cause, including occupations which are hazardous to hearing, accident or sudden trauma, one hundred ten (110) weeks. Any examining physician shall only evaluate deafness or hearing impairment in accordance with the latest publication of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" in effect at the time of the injury or alternative method provided for under provisions of ~~this act~~ the Workers' Compensation Code.

Loss of Use: Permanent loss of use of a thumb, finger, toe, arm, hand, foot, leg or eye shall be considered as the equivalent of the loss of such thumb, finger, toe, hand, arm, foot, leg or eye.

For the permanent partial loss of use of a member, loss of hearing or sight of an eye, seventy percent (70%) of the employee's average weekly wage during that portion of the number of weeks in the foregoing schedule provided for the loss of such member or sight of an eye which the partial loss of use thereof bears to the total loss of use of such member, loss of hearing or sight of an eye.

Amputations: Amputation between the elbow and the wrist shall be considered as the equivalent of the loss of a hand. Amputation between the knee and the ankle shall be considered as the loss of a foot. Amputation at or above the elbow shall be considered as the loss of an arm. Amputation at or above the knee shall be considered as the loss of a leg.

Hernia: In case of an injury resulting in the first or second hernia in the same area of the body, there shall be no award of permanent partial impairment. Payment of benefits in such cases shall be limited to temporary total disability compensation for six (6) weeks, and all necessary medical costs including, but not limited to, the cost of surgery. A claimant who has had surgery for a hernia may petition the Workers' Compensation Court for one extension of temporary total disability compensation and the Court may order such an extension, not to exceed six (6) additional weeks,

if the treating physician indicates such an extension is appropriate, or as agreed to by all parties. An award for temporary total disability or permanent partial impairment may be entered by the Court if an injury results in a third hernia, or more, in the same area of the body.

Other cases: In cases in which the Court finds an injury to a part of the body not specifically covered by the foregoing provisions of this section, the employee may be entitled to compensation for permanent partial impairment. The compensation ordered paid shall be seventy percent (70%) of the employee's average weekly wage for the number of weeks which the partial disability of the employee bears to five hundred (500) weeks. No permanent disability shall be awarded unless there is objective medical evidence of a permanent anatomical abnormality. In determining the existence of such an abnormality, the Court may consider if there is credible medical evidence that the ability of the employee to earn wages at the same level as before the injury has been permanently impaired.

F. The compensation payments under the provisions of the Workers' Compensation Code for permanent partial impairment shall not:

1. Exceed the sum of Three Hundred Twenty-three Dollars ($323.00) per week for injuries occurring on or after August 27,

2010, through August 26, 2015, or fifty percent (50%) of the state's average weekly wage beginning August 27, 2015;

2. At any time be less than One Hundred Fifty Dollars ($150.00) per week for injuries occurring on or after August 27, 2010.

G. Previous Disability: The fact that an employee has suffered previous disability or impairment or received compensation therefor shall not preclude the employee from compensation for a later accidental personal injury or occupational disease. In the event there exists a previous impairment, including a previous non-work-related injury or condition which produced permanent disability and the same is aggravated or accelerated by an accidental personal injury or occupational disease, compensation for permanent disability shall be only for such amount as was caused by such accidental personal injury or occupational disease and no additional compensation shall be allowed for the preexisting disability or impairment. The sum of all permanent partial impairment awards, excluding awards against the Multiple Injury Trust Fund, shall not exceed five hundred twenty (520) weeks, except for awards for amputations and disability to the parts of the body for which surgery was received in the latest injury.

H. No payments on any permanent partial impairment order shall begin until payments on any preexisting permanent partial impairment orders have been completed.

I. Any person receiving permanent total disability benefit payments or temporary total disability benefit payments from an employer or the employer's insurance carrier, the latter of which have continued for the previous twelve (12) consecutive months, regardless of whether proceedings have been initiated by the filing of a Form 3, shall file with the Workers' Compensation Court, twelve (12) months after receipt of the first benefit and every year thereafter for payments of temporary total disability benefits which have continued for a period of twelve (12) months immediately preceding, an affidavit under penalty of perjury stating that he or she has not been gainfully employed and is not capable of gainful employment. Such affidavit shall be on a form promulgated by the Workers' Compensation Court. Failure to file the affidavit shall result in the suspension of benefits and shall create a rebuttable presumption for the termination of benefits until the person shows by a preponderance of the evidence that he or she is not employed or capable of employment. Failure to file an affidavit as required by this subsection shall be recorded on the permanent record of the person's case for suspension of benefits, and the Workers' Compensation Court shall make written findings of fact as to the evidence considered in rebutting the presumption against the suspension or termination of benefits.

SECTION 3. AMENDATORY 85 O.S. 2011, Section 341, is amended to read as follows:

Section 341. A. No employer may discharge or, except for nonpayment of premium, terminate any group health insurance of any employee because the employee has in good faith:

1. Filed a claim;

2. Retained a lawyer for representation regarding a claim;

3. Instituted or caused to be instituted any proceeding under the provisions of ~~this act~~ the Workers' Compensation Code;

4. Testified or is about to testify in any proceeding under the provisions of ~~this act~~ the Workers' Compensation Code; or

5. Elected to participate or not to participate in a certified workplace medical plan as provided in ~~this act~~ the Workers' Compensation Code.

B. No employer may discharge any employee during a period of temporary total disability solely on the basis of absence from work.

C. After an employee's period of temporary total disability has ended, no employer shall be required to rehire or retain any employee who is determined to be physically unable to perform assigned duties. The failure of an employer to rehire or retain any such employee shall not be deemed a violation of this section.

D. No employer may discharge an employee for the purpose of avoiding payment of temporary total disability benefits to the injured employee.

E. An employer which violates any provision of this section shall be liable in a district court action for reasonable damages,

actual and punitive if applicable, suffered by an employee as a result of the violation. An employee discharged in violation of the Workers' Compensation Code shall be entitled to be reinstated to his or her former position. Exemplary or punitive damage awards made pursuant to this section shall not exceed One Hundred Thousand Dollars ($100,000.00). The employee shall have the burden of proof by a preponderance of the evidence. The liability of the state or any political subdivision, as defined in paragraph 11 of Section 152 of Title 51 of the Oklahoma Statutes, found in violation of this section shall be limited to the amounts set forth under The Governmental Tort Claims Act.

SECTION 4. AMENDATORY 85 O.S. 2011, Section 342, is amended to read as follows:

Section 342. Within the time prescribed by Section ~~18~~ 318 of this ~~act~~ title, the Workers' Compensation Court may find that the injured employee has suffered a change of condition for the worse or better and amend any prior order involving temporary total disability, additional permanent partial impairment, permanent total disability, and medical benefits. Provided, that any change of condition shall only be found to those body parts adjudicated by the previous award or as a result of a consequential injury and must be proved by objective medical evidence of a change of condition. Additional permanent partial impairment awarded after a change of condition and the permanent partial impairment from the previous

award shall not exceed five hundred twenty (520) weeks, except for additional permanent partial impairment resulting from amputation or surgery as a result of the change of condition. The Workers' Compensation Court shall include a statement on all forms for notices and instructions to employers and employees informing employees that they shall promptly comply with the requirements of this section.

SECTION 5. This act shall become effective November 1, 2012.

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