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Montana Legislative Services Division

Office of Research and Policy Analysis

Memo

To: **Economic Affairs Committee Members**
From: **Pat Murdo, Legislative Researcher**
Re: **Medical Review Panels, Defensive Medicine, and Malpractice**
November 4, 2009

With medical costs comprising more than half of workers' compensation payments in recent years, the Economic Affairs Committee has expressed interest in trying to determine ways to improve several facets of the injured workers' experience and the costs of treating the injured worker. Among the issues frequently cited in relation to medical costs are:

- payments to providers. Under legislation in 2007 the Department of Labor and Industry has sought to standardize payment rates in workers' compensation medical care about 65% of above Medicare rates. (Originally, there was an effort to pay approximately 10% above the rates paid by Montana's major health insurers to retain a revenue-neutral situation, but this has proved difficult partly because of proprietary information being involved for the health insurers.)
- a wide range of treatment options and treatment providers[1]. The effort to adopt utilization and treatment guidelines is one way that the Department of Labor and Industry is trying to streamline the decision process to recognize standard practices that do not need insurer approval before implementation, which would speed treatment for an injured worker and provide some assurance to the insurer that standard practices are being followed.
- use of defensive medicine by health care providers, which implies more testing (potentially increasing costs because of providers' fears of malpractice lawsuits) and, in some cases, more hesitance in estimating when an injured worker has reached maximum medical improvement.
- difficulty in evaluating maximum medical improvement and rating an injured workers' ability to return to light work or medium-duty work because of concern by employers that an injured worker may be reinjured or aggravate the existing injury.
- the long tails of workers' compensation medical cases in Montana, in which medical claims stay alive unless not used for 60 consecutive months, with an exception for repair or replacement of a prosthesis furnished as a result of a job-related injury. (See 38-71-704(1)(f)). As a result, there are injured workers being treated for medical problems stemming from the original injury but not occurring until many years afterward.

Addressing Costs and Treatment

The Department of Labor and Industry is addressing the first two issues with medical fee schedules and efforts to adopt utilization and treatment guidelines. For information on the medical fee schedules, see the report provided by Jerry Keck of the Department of Labor and

[1] "Treating physicians" under workers' compensation include all of the following: a physician licensed in Montana with admitting privileges in the area where the physician is located, a chiropractor, a physician assistant in areas where there is no physician, an osteopath, a dentist, an advanced practice registered nurse and, upon approval of an insurer, any of the above licensed in another state.

Industry at the September 9, 2009, Economic Affairs Committee meeting.[2]

Some confusion has arisen over whether utilization and treatment guidelines must be adopted or whether that is optional. The statute allowing the department to proceed contains the following (emphasis added):

> 39-71-401, MCA (3) (a): The department **may establish by rule** evidence-based utilization and treatment guidelines for primary and secondary medical services. There is a rebuttable presumption that the utilization and treatment guidelines established by the department are correct medical treatment for the injured worker.
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> (b) An insurer is not responsible for treatment or services that do not fall within the utilization and treatment guidelines adopted by the department unless the provider obtains prior authorization from the insurer. If prior authorization is not requested or obtained from the insurer, an injured worker is not responsible for payment of the medical treatment or services.
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> (c) The department may establish by rule an independent medical review process for treatment or services denied by an insurer pursuant to this subsection (3) prior to mediation under 39-71-2401.

The department convened a panel of medical providers in August to review two standard types of utilization and treatment guidelines, which the panel did in September and October. A third set of guidelines, those adopted by Washington State, are up for review in November. The department is asking the panel to recommend a guideline and any variations, with the hope of a final recommendation in January, and possible implementation by mid-year.

A search by Legislative Services library staff of court cases associated with utilization and treatment guidelines found one Colorado case in which the Court of Appeals upheld the medical utilization review panel's use of medical treatment guidelines. These had been challenged by a provider whose medical care was determined as "not reasonably appropriate". The provider further contended that the guidelines "impacted ... his ability to pursue his chosen profession." But the court disagreed.[3]

Former Workers' Compensation Panels

As indicated in a memo prepared by Ann Clayton and Diana Ferriter for the department in September 2009, Montana's workers' compensation system previously used an Occupational Disease Medical Panel from 1977 to 1997. The process involved the department directing a disputed claim to an evaluator. If a dispute about the evaluator's opinion arose, the department had a second evaluator render an opinion. A continued dispute went to a third evaluator who weighed in on the previous two opinions. The department issued an order based on the third evaluator's opinion. Any dispute over that went to a contested case hearing, then to the Workers' Compensation Court and, if necessary, the Montana Supreme Court. Delays in

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[2] See link at: http://leg.mt.gov/content/Committees/Interim/2009_2010/Economic_Affairs/Meeting_Documents/09-9medicalschedules.pdf

[3] Timothy Hall v. Industrial Claim Appeals Office of the State of Colorado, American Manufacturers Mutual Insurance Co., and Nancy Glass, 74 P.3d 459, 2003 Colo. App. LEXIS 524, decided in April 2003.

decisions and the costs of evaluations plus the difficulty of finding doctors to serve on the medical panels were reasons given for the termination of this and a subsequent process.[4]

Existing Medical Legal Panels

Panels that have met with success and that are similar to panels recommended for national attempts to decrease medical malpractice costs are the Montana Medical Legal Panel for physicians, dentists, and podiatrists and a Montana Chiropractic Legal Panel, both intended to provide a forum to review malpractice accusations and assess facts prior to the filing of lawsuits. The Montana Medical Legal Panel has been in existence since 1977, while the Montana Chiropractic Legal Panel has existed since 1989. Table 1 shows the results from claims filed in 2008 against all Montana medical providers, with selected breakdowns for Montana physicians and Montana hospitals. The number of claims filed that year against all Montana medical providers, 194, were the lowest since 1998, when 256 claims were filed. The highest number of claims against all providers, 288, came in 2005. Brian Zins of the Montana Medical Association, who serves as executive director of the Montana Medical Legal Panel, noted that the process has diminished the number of cases taken to trial and "totally cuts down on court" by allowing parties to examine an issue before third party experts prior to filing a lawsuit.[5]

Unlike the projected use of a medical panel to determine treatment options or maximum medical improvement for an injured worker, these legal panels do not delay treatment but instead focus on determining whether actions already taken met a standard of practice. They review "all malpractice claims or potential claims" against specified health care providers except for certain claims subject to arbitration agreements and claims brought by an inmate in a correctional facility for treatment within the facility. As stated in section, 27-6-102, MCA, of the Montana Medical Malpractice Panel Act:

> The purpose of this chapter is to prevent where possible the filing in court of actions against health care providers and their employees for professional liability in situations where the facts do not permit at least a reasonable inference of malpractice and to make possible the fair and equitable disposition of such claims against health care providers as are or reasonably may be well founded.

Panels consist of three attorneys and three health care providers (or one physician and two hospital administrators in the case of claims against a facility). Funding (in the form of proportionate assessments against providers), confidentiality issues, and administrative responsibilities are spelled out in the statutes. The Montana Medical Association says that medical legal panels meet on average twice a week throughout the year. Statutorily, the panel is required to act within 120 days of the executive director sending notice of the filing but in reality the panel tends to act on cases within 80 days, Mr. Zins said. The biggest difficulty in finding panel members is for experts in anaesthesiology or radiology, partly because these specialists do not have the same sort of office hours and presence as other medical specialists do. The Medical Legal Panel' 2008 budget was $835,000, including staff and travel costs.

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[4]See link at: http://leg.mt.gov/content/Committees/Interim/2009_2010/Economic_Affairs/Meeting_Documents/09-9ClaytonMemo-Medicalpanels.pdf

[5]Telephone call Nov. 4, 2009, with Brian Zins of the Montana Medical Association.

These medical legal panels[6] indirectly address concerns about defensive medicine, seen as the type of medicine involving testing or any type of treatment that a health care provider does not specifically consider necessary but that a patient insists upon. They more directly deal with malpractice allegations. Data available from the last 11 years indicates that of 22 cases taken to trial and resulting in jury verdicts, 17 verdicts were in favor of the health care provider and 5 in favor of the claimant. These 22 cases resulting in verdicts contrast with 2,802 claims filed in those 11 years. Further examination of what those 22 cases have meant monetarily in addition to all malpractice claims settled out of court or without trial is available in Table 2.

Table 2 contains information from the top 12 insurers that write medical malpractice insurance policies in Montana. They report annually to the State Auditor's Office under 33-23-310, MCA, which was enacted in 2005. The Table lists the insurers by market share, with one firm enjoying roughly one-third of the malpractice insurance market and writing coverage for both physicians and health care facilities. The Utah Medical Insurance Association is followed in market share by Mountain States Healthcare Reciprocal Risk Retention Group with 17.86% and Doctors Co., a Utah-Based interinsurance exchange with 16.92%. The Doctors Co. writes malpractice insurance only for doctors and not health care facilities while the top two insurers write coverage for both.

Highlights of Table 2 include:

- An indication of very high payouts in some years contrasting with relatively low payouts in other years. (See Utah Medical, for example.)
- An indication of healthy companies with pure direct loss ratios under 100 but some companies that are over 100 -- meaning they pay out more than they are taking in. (See Preferred Professional Insurance Co.)
- An indication that physicians and nurses have generally more claims made against them than health care facilities.

MMI and the AMA 6th Edition, Return-to-Work Medical Issues, and Long Claim "Tails"
Other concerns about the high medical costs in workers' compensation include trying to determine maximum medical healing or improvement (MMI), which involves use of the American Medical Association Guides to the Evaluation of Permanent Impairment, resolving the concerns of employers (and employees) on return-to-work when a treating physician authorizes light or medium duty, and the long "tails" of claims that start out as one medical problem but morph over time into other problems.

The Economic Affairs Committee already has received some information previously presented to the Labor-Management Advisory Council involving review of other states' use of guidelines and the pros and cons of the 6th editions.[7] Under 39-71-703, MCA, Montana's work comp system uses the "latest edition", currently, the AMA's 6th edition. Critics contend the 6th edition results in decreased benefits because of decreased percentages for impairment ratings. They also question whether use of "current edition" in statute is appropriate because there is no legislative review of the implications of that current edition.

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[6] The Montana Medical Legal Panel is authorized under Title 27, chapter 6. The Montana Chiropractic Panel is authorized under Title 27, chapter 12.

[7] See link at: http://erd.dli.mt.gov/wcstudyproject/sixth_ed_ama_guides_permanent.pdf.

The Economic Affairs Committee may want to examine whether the utilization and treatment guidelines and AMA 6th edition, along with the existing mediation and Workers' Compensation Court, are sufficient to determine MMI from the perspectives of employers, injured workers, and health care providers, particularly in cases of dispute or fear that an injured worker will face further complications.

The medical issues related to Return-to-Work may be discussed at the November 17 meeting. The long claims tail will be discussed in March.

Summary

This memo and the related two Tables have looked at various medical issues that involve medical legal panels, defensive medicine, and malpractice. The memo also has reviewed activities already undertaken by the Department of Labor and Industry that involve efforts to address Montana's workers' compensation medical costs, including utilization and treatment guidelines and discussions about the use of AMA guidelines for determining impairment status and maximum medical improvement.

The workers' compensation system in the past has used medical legal panels primarily prior to treatment. Conversely, the medical community has handled malpractice claims in an after-treatment situation with relative success from the view of meeting the purpose of the panel -- to reduce unnecessary medical malpractice lawsuits. That does not necessarily mean that health care providers had more success than patients, because out-of-court settlements often resulted without lawsuits being filed. The use of medical panels after the fact appears much more successful in Montana than prior review panels. Still remaining for discussion are such medical costs issues as delays in return-to-work and the long tails of medical claims.