Workers' Comp

# StateWatch Summer 2017

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### National

The Department of Labor suspended an **Occupational Safety and Health Administration** (OSHA) rule that would've required certain businesses to electronically submit their worker injury data by July 1. The rule would've made the injury information available to the public, in a move OSHA has said would "nudge" employers to focus on safety. An OSHA spokeswoman quoted in a *Washington Post* article the delay was implemented to address employers' "concerns about meeting their reporting obligations" in time. The new electronic reporting compliance date is Dec. 1.

Surgery may not always be the best option according to a report that questions the value of arthroscopy and knee replacement for some common conditions. Published in the *BMJ* (formerly the *British Medical Journal*), **Washington State Department of Labor and Industries (L&I)** authored-piece advises against knee arthroscopy in nearly all patients with arthritic knees, even if accompanied by a meniscus tear, or symptoms such as joint locking, pain or swelling. Knees are among the most common body part injured in workplace accidents, behind backs and shoulders, said Gary Franklin, MD, MPH, medical director for the Washington DOL. The department updated its medical treatment guideline last year to no longer cover arthroscopic debridement and lavage of an arthritic knee. The issue of arthroscopic knee surgery may be gaining importance as the workforce is aging, potentially bringing a greater severity of arthritis. Older workers tend to have more rotator cuff and knee injuries, according to a report on the aging workforce from the National Council on Compensation Insurance.

The increased use of network physicians to treat injured workers is a leading factor for why workers' compensation medical costs throughout the country have moderated in recent years, according to a recent

**National Council on Compensation Insurance** report.

The **FDA** has approved a generic version of Roxicodone tablets. Oxycodone hydrochloride is an immediate-release opioid analgesic indicated to manage pain severe enough to require an opioid analgesic and for which alternative treatment options are inadequate. This generic oxycodone hydrochloride product will be available in 5 mg, 10 mg, 15, mg, 20 mg, and 30 mg tablets and manufactured by Pharma Major Lupin Limited (Lupin).

The FDA also released a request of Endo Pharmaceuticals to voluntarily remove its reformulated Opana ER (oxymorphone hydrochloride extended-release tablets) from the market. The request follows an FDA advisory committee review of all available post-marketing data determining the routes of abuse of Opana ER have dramatically changed; shifting from nasal to injection. Such abuse has been associated with an increase in cases of HIV and hepatitis C, as well as a serious blood disorder, thrombotic microangiopathy, in certain populations. In response, Endo officials said they are "reviewing the request and evaluating the full range of potential options," but maintains the product is safe and effective when taken as prescribed.

## Statewide

# ALABAMA

On May 8, an **Alabama Circuit Court** judge declared the state's entire workers' comp system unconstitutional. Judge Pat Ballard of the 10th Judicial Circuit in Jefferson County took issue with two statutory provisions that cap attorney fees and permanent partial disability benefits – but because the Alabama Workers' Compensation Act contains a non-severability clause, he tossed the entire act. Ballard stayed enforcement of his order for 120 days to give lawmakers a chance to cure the deficiencies he identified in Alabama Code Sections 25-5-68 and 25-5-90.

### ALASKA

On June 15, Gov. Walker signed into law **HB 132** declaring drivers for transportation network companies (TNC) such as Uber and Lyft are independent contractors and not entitled to workers' compensation benefits. This bill also establishes the state as the only political entity allowed to regulate the transportation network industry.

### ARIZONA

Gov. Ducey recently signed **HB 2410,** adding heart disorders and 12 cancers to the list of firefighter ailments presumed to be work-related. The law is designed to make it easier for firefighters who sustain an injury to their heart, lungs or blood vessels to collect workers' compensation benefits. Claimants will no longer have to prove their "heart-related, perivascular or pulmonary injury or illness" was caused by their employment. instead, they will be deemed automatically eligible for those benefits, providing they meet certain criteria and their employer does not successfully challenge the ailment's connection to work. Additionally, **HB 2161**, also signed by the governor, adds buccal cavity and pharynx cancer, esophagus cancer, kidney cancer, large intestine cancer, lung cancer, malignant myeloma and several other cancers to the list.

Also, a measure to incorporate the term "full and final settlement" into Arizona's workers' compensation law has been approved. **SB 1332**, which Gov. Ducey signed May 8, defines the term as a written agreement between the employer/carrier and employee that involves the employer/carrier making a lump sum payment in exchange for the worker signing away his right to reopen the medical portion of the claim. Under current law, Arizona workers have a lifetime right to reopen a workers' comp claim, even after signing a settlement, if they need additional treatment. As of Oct. 31, workers will have the option of waiving the right to future medical care

when settling a claim. The full and final settlement would require workers represented by attorneys to indicate they understand the consequences of entering such a settlement and that "monies received for future medical treatment associated with the industrial injury should be set aside to ensure that the costs of such treatment will be paid." If a worker is not represented by counsel, an administrative law judge would determine whether the full and final settlement is fair to the worker. All full and final settlements must be approved by the Industrial Commission, which must consider the permanency of the worker's injury and whether it has stabilized, before signing off on the settlement.

Gov. Ducey also signed **SB 1331,** which allows the state to adopt a tiered rating system for workers' compensation insurers. The new system gives carriers more flexibility when setting workers' compensation insurance rates. Under the new system, carriers can apply for six deviations. If NCCI and the Department of Insurance approve of the deviations, the carrier can sell plans at any one of six rates.

**ARKANSAS**

*WATCHLIST:* The state's **Workers' Compensation Commission** held a public hearing in May for new rules for a drug formulary, new dispute resolution for providers and pharmacists and rules for reviewing and prescribing opioids. The commission accepted comments on the proposed rule change through June 14. The rule is tentatively scheduled to become effective for new claims filed after Sept. 1.

**CALIFORNIA**

At the request of stakeholders, the **California Division of Workers' Compensation** (DWC) has agreed to delay its new drug formulary to Jan. 1, 2018. According to *WorkCompCentral*, several stakeholders who commented to regulators on California's proposed drug formulary said they need more time to adopt the new rules.

The **California Department of Industrial Relations** (DIR) has adopted new process standards for refineries aimed at preventing major accidents. The department called the new rule a "landmark regulation" that will strengthen workplace safety and health at oil refineries across the state. The DIR said it submitted the rules to the California Office of Administrative Law, which until Aug. 3 to review and approve it.

*WATCHLIST:* A bill that would create a single-payer health care system in California — potentially including coverage of workers' comp medical expenses — would result in costs of about $400 billion a year, according to a recently released fiscal analysis. **SB 562** proposes a universal health care system in which Californians would be covered for all medical care without co-pays or deductibles. Patients would not be restricted to networks in choosing a doctor, and wouldn't need a referral to see a provider. Covered treatment would include inpatient, outpatient, emergency care, dental, vision, mental health and nursing home care. Under the bill, physicians and registered nurses would be free to override clinical practice guidelines "if, in their professional judgment, it is in the best interest of the patient and consistent with the patient's wishes," according to the bill's language. The so-called "Healthy California" program would be governed by a nine-member, unpaid board appointed by the governor and legislature, and a public advisory committee of doctors, nurses, other health care providers and consumers.

**COLORADO**

On June 5, Gov. Hickenlooper signed into law bills that will create an Uninsured Employers Fund, and allow workers to be compensated for post-traumatic stress disorder and other mental impairments. **HB 1119** will use penalties charged to companies illegally operating without workers' compensation coverage to create a fund to provide benefits for workers whose employers were uninsured. The bill also revamps the process for the Division of Workers' Compensation to penalize uninsured employers and requires the division to assess a

minimum penalty of $250 per day when an employer faces a second charge of operating without insurance. But it also allows the division to accept a penalty of less than $250 after negotiating with the employer. The new rule also prohibits the division from charging penalties for violations that occurred more than three years before notifying an employer it did not have mandated coverage. Another signed bill, **HB 1229,** eliminates a statute limiting compensability for post-traumatic stress disorder (PTSD) claims to events not related to a worker's typical job responsibilities. Supporters said the law will make it easier for police and other first responders to be compensated for PTSD.

**FLORIDA**

Gov. Scott signed **HB 1007**, which requires all Florida insurers to maintain anti-fraud units (or contract for such services) and submit anti-fraud plans to state regulators by Dec. 31. It requires each insurer to designate one employee to implement HB 1007's requirements. The bill also tasks the Division of Investigative and Forensic Services with creating a report on the best practices for fighting insurance fraud by Dec. 31, 2018. The new law takes effect Sept. 1.

**IDAHO**

The **Idaho Industrial Commission** adopted emergency rules that delay until November an electronic data interchange update that was slated for July 1. The emergency rules push back until Nov. 4 the date by which carriers, third-party administrators and self-insured employers must start submitting claims data using EDI Claims Release 3.0.The commission decided on the delay after system users requested more time for testing and implementation.

**LOUISIANA**

On June 12, Gov. Edwards signed three pieces of legislation aimed at curbing Louisiana's opioid epidemic. **HB 192,** which takes effect Aug. 1, will limit to a seven-day supply first-time opioid prescriptions to outpatients treating for acute pain. Exceptions would be allowed when determined to be medically necessary. The law will require doctors to explain to patients the risks associated with opioids and give them the option to be prescribed a smaller quantity. **HB 490** will require the **Drug Policy Board** to establish an advisory council on heroin and opioid prevention and education. Under **SB 55**, adds continuing education requirements for physicians involved in controlled substance prescribing and addiction treatment. It will also require prescribers to check the prescription drug monitoring program before initially prescribing any opioid, or if the patient's course of treatment continues for more than 90 days.

*WATCHLIST:* **HB 592**, which would have established a workers' comp drug formulary based on the Official Disability Guidelines, failed to attract the support of the Louisiana Senate committee before adjournment and wasn't passed.

**MARYLAND**

The **Maryland Workers' Compensation Commission** announced that injured workers can now submit a first report of injury form online. The online application allows workers the option to save their work and return later and sign the form with their mouse, if using a computer, or finger, if using a touch-screen device. Attorneys can access the form by logging in using their web-enacted file management system (WFMS) credentials.

In other news, Gov. Hogan signed **SB 72** which creates a tiered rating system for workers' compensation carriers.

**MASSACHUSETTS**

On June 12, the **Department of Industrial Accidents** announced the launch of its two-year pilot program to address the opioid crisis by giving stakeholders quicker access to medical professionals to make treatment decisions. The Opioid Alternative Treatment Pathway (OATP) is voluntary and will be available only when the injured worker has executed an approved lump-sum settlement but continues using opioids. Either the insurer or injured worker or his or her legal representative can trigger a request to participate in the program, which can be accessed through new online forms 110A and 108A. If both parties agree to participate, the insurer incurs the cost of the program, including alternative medical treatments for the injured worker as well as all referral fees.

**MISSISSIPPI**

The **Mississippi Workers' Compensation Commission** has adopted an amendment to its 2017 fee schedule. The 15-page "Guidelines for the Prescription of Opiates" states there is insufficient data to show that the long-term use of opioids is an effective treatment for chronic nonmalignant pain and that such use presents serious risks.

**NEVADA**

**Assembly Bill 12**, which requires independent adjusters and those working for third-party administrators be licensed from the Division of Insurance before handling claims, was approved by Gov. Sandoval. The only exception is for salaried employees of an insurance company. These "company adjusters," would be allowed to obtain a license but would not be required to do so. To obtain a license, adjusters must pass a background test as well as a licensing exam. Adjusters would need to accumulate 24 hours of continuing education credits every three years to be eligible for renewal.

**NEW YORK**

*WATCHLIST:* A bill introduced May 18 would allow employers to refuse to pay for compounded drugs that have not been approved by the FDA. **SB 6436** would also allow claimants to fill workers' compensation prescriptions at any licensed in-state pharmacy. Per the bill, employers must pay for those prescriptions as long as; 1) the worker fills them at a licensed in-state pharmacy and; 2) the prescription is not for a compounded drug that does not have FDA approval. If the worker fills the prescription at an out-of-state pharmacy, or if the prescription is for an unapproved compounded drug, "the employer or carrier shall have the right to deny any charges," the bill states. Under current law, employers can compel workers to fill prescriptions at a specific pharmacy. Under SB 6436, employers could merely "encourage" a worker to fill his prescription at a specific pharmacy.

**NORTH DAKOTA**

**Workforce Safety & Insurance** (WSI) has revised five utilization review forms and is requiring providers to begin using them immediately. The revisions include general formatting and language changes, and a conversion to a user-friendly PDF version. The forms include Independent Exercise Form (C59a); Work Hardening/Conditioning Form (C59b); Utilization Review Request Form (UR-C), which includes revisions to Section 7, Injection Request, and Section 8, Therapy Request; Utilization Review Chiropractor Request Form (UT-Chiro), which includes changes to Section 3, Acute and Sub-acute Care, and Section 4, Palliative Care; and Medical Service Dispute Resolution Request Form (M2). WSI will return any forms not completed in their entirety, the agency said. For more information, call 888-777-5871.

Regulators have posted amended rules of procedure for the **North Dakota Workers' Compensation Act** relating to power mobility devices, physical therapy assistants, certified occupational therapy assistants and certified athletic trainers. The new rules, which took effect July 1, also amend attorney requirements, mileage and per diem for travel, rehabilitation services, definitions, medical necessity justifications, motor vehicle purchases, home modifications, who may be reimbursed, treatment requiring authorization, and costs of record copying.

**OHIO**

*WATCHLIST:* The **Bureau of Workers' Compensation** (BWC) is proposing several changes to its outpatient drug formulary, Rule 4123-6-21.3. Among the medications proposed for deletion from the formulary on Oct. 1 are all forms of alprazolam, fluoxetine tablets, Opana ER, Pexeva (paroxetine mesylate) and menthol 5% pads, and methyl salicylate liquid. Proposed formulary additions are Onfi (clobazam), all anti-diabetic medications, oral inhalation respiratory medications, Entresto, Xiidra and several over-the-counter topical analgesics. Medications with proposed changes in coverage include Marinol (dronabinol), which is used for nausea and vomiting, and would require preauthorization documenting a previous trial and therapeutic failure with either promethazine, ondansetron or meclizine; Lyrica; erectile dysfunction medications such as Viagra and Cialis, which would be limited to one product per month; and tiered coverage of medication used for the treatment of opioid-induced constipation. BWC also proposes the implementation of tiered coverage of topical medications containing lidocaine.

**OKLAHOMA**

The **Workers' Compensation Commission** posted a notice in the *Oklahoma Register* announcing all claim information must be submitted via electronic data interchange, effective Jan.1, 2018.

**OREGON**

Gov. Brown recently signed into law a bill that would allow the **Department of Consumer and Business Services** to certify self-insurance programs created by intergovernmental agreements. HB 2816 addresses an issue dating back to 1985, when the Special Districts Association of Oregon created the Special Districts Insurance Service Trust through an intergovernmental agreement among its members.

**PENNSYLVANIA**

On June 20, the **Pennsylvania Supreme Court** struck down the state's impairment rating evaluation (IRE) process as unconstitutional. IREs had been governed by Section 306(a.2) of the Workers' Compensation Act, however, the justices, affirming an earlier decision by the Commonwealth Court, found the statute contained an impermissible delegation of legislative authority to the American Medical Association (AMA). According to both the High and Appeals courts, the problematic provision is the requirement that doctors use the "most recent" version of the *AMA Guides* for evaluating permanent impairment in worker disability ratings. As a result, the PA worker's comp board has suspended all independent rating evaluations in reaction to the Supreme Court decision. The bureau sent a notice to stakeholders through its electronic claims filing system indicating that the agency will no longer designate physicians to perform IREs.

**SOUTH CAROLINA**

Gov. McMaster signed **H3441** which allows payment of workers' compensation benefits by check or an electronic payment system.

**TEXAS**

**Texas A&M University**, College Station, is conducting two surveys of Texas injured employees on behalf of the Department of Insurance's Workers' Compensation Research and Evaluation Group, and in support of the Biennial House Bill 7 Report and the Annual Network Report Card. The first survey will measure the impact of HB 7 on the Texas workers' comp system, and the second will fulfill a major component of the Workers' Compensation Health Care Network Report Card. The results of the survey will be reported in the Report Card, due Sept. 30. Approximately 4,000 injured employees will participate, but their names and answers will be kept confidential. They will be asked about access to medical care, satisfaction with medical care, and return-to-work and health outcomes.

While total pharmacy spend has dropped significantly, the cost of compounded drugs nearly doubled in Texas from 2010 to 2016, according to a new report by the **Department of Insurance's Workers' Compensation Research and Evaluation Group.** Pharmacy spending plummeted from $160 million in 2010 to $98 million last year, but compounded drug costs skyrocketed from $6 million to $11 million, with the average cost per prescription jumping 133 percent from $356 to $829, the report states. The authors of "Baseline Evaluation of the Utilization and Cost Patterns of Compounded Drugs" also determined the top five dispensing pharmacies based on number of prescriptions accounted for 86 percent of all compounded drugs dispensed last year — a 73 percent increase from 2010. Houston-area pharmacies alone accounted for two-thirds of all compounded drugs dispensed across the state, researchers said.

Recently signed **SB 1494** is designed to rein in the overuse of work hardening and work conditioning by giving DWC discretion to require preapproval and concurrent review. The DWC has included these physical therapy services in a list of four research projects slated for fiscal 2017. The Workers' Compensation Research and Evaluation Group will update its own 2003 study on the impact of accredited and non-accredited work-hardening and work-conditioning programs. Non-accredited facilities are required to be preauthorized as part of a "mandatory list" of treatment and services targeted by the Legislature in 2001 as part of a comprehensive reform package in House Bill 2600.

Another signed bill, **HB 2060,** removes the requirement that ombudsmen, who assist injured workers in navigating the claims system and answering non-legal questions, have "at least one year of demonstrated experience in the field of workers' compensation." The Office of Injured Employee Counsel sought the bill because it has had difficulty filling its ombudsman positions. Earlier this year, the OIEC had 17 ombudsman vacancies out of 95 positions.

Gov. Abbott also signed into law several workers' compensation measures focusing on benefits for the state's first responders.

- **HB 1794** requires the Health and Human Services Commission by no later than Dec. 1 to create the Work Group on Mental Health Access for First Responders. The group will then be expected to deliver a report to the executive and legislative branches by no later than Jan. 1, 2019, and then to disband on June 1, 2019.

- **HB 1983** makes compensable post-traumatic stress disorders incurred as a result of a work injury and can be proven by the "preponderance" of evidence. It takes effect Sept. 1.

- **HB 2119** extends a law passed in 2015 to ensure that death benefits for a surviving spouse of a first responder killed on duty continue if he or she chooses to remarry



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