California Workers' Compensation Institute
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October 31, 2017

VIA E-MAIL – DWCForums@dir.ca.gov

Maureen Gray, Regulations Coordinator
Division of Workers' Compensation, Legal Unit
P.O. Box 420603
San Francisco, CA 94142

Re: Forum Comment: Proposed Amendment to Benefit Payment and Notice Regulations (CCR Section 9812(i))

Dear Ms. Gray:

On behalf of its members, California Workers' Compensation Institute offers these Forum comments on the proposed amendment to the Notice Denying Liability for All Compensation Benefits, CCR section 9812(i). The Institute members include insurers writing 83% of California's workers' compensation premium, and self-insured employers with $65B of annual payroll (30% of the state's total annual self-insured payroll).

Insurer members of the Institute include AIG, Alaska National Insurance Company, Allianz Global Corporate and Specialty, AmTrust North America, Berkshire Hathaway, CHUBB, CNA, CompWest Insurance Company, Crum & Forster, EMPLOYERS, Everest National Insurance Company, The Hartford, ICW Group, Liberty Mutual Insurance, Pacific Compensation Insurance Company, Preferred Employers Insurance, Republic Indemnity Company of America, Sentry Insurance, State Compensation Insurance Fund, State Farm Insurance Companies, Travelers, XL America, Zenith Insurance Company, and Zurich North America.

Self-insured employer members include Adventist Health, BETA Healthcare Group, California Joint Powers Insurance Authority, California State University Risk Management Authority, Chevron Corporation, City and County of San Francisco, City of Torrance, Contra Costa County Schools Insurance Group, Costco Wholesale, County of Alameda, County of Los Angeles, County of San Bernardino Risk Management, County of Santa Clara Risk Management, Dignity Health, Foster Farms, Grimmway Farms, Kaiser Permanente, Marriott International, Inc., Pacific Gas & Electric Company, Safeway, Inc., Schools Insurance Authority, Sempra Energy, Shasta County Risk Management, Shasta-Trinity Schools Insurance Group, Southern California Edison, Special District Risk Management Authority, Sutter Health, University of California, and The Walt Disney Company.

Recommended revisions to the proposed regulation are indicated by underscore and ~~strikeout~~. Comments and discussion by the Institute are identified by *italicized text.*

Forum Comment:

Labor Code section 138.4(f), as amended by Senate Bill 1160, states:

> On or before January 1, 2018, the administrative director shall adopt regulations to provide employees with notice that they may access medical treatment outside of the workers' compensation system following the denial of their claim.

The Division has chosen to fulfill this mandate by simply modifying the DWC Denial notice, and the Institute wholeheartedly supports this approach. This is the most cost-effective solution -- with the least administrative burden -- to effectuate the requirement of Labor Code section 138.4(f) as enacted by Senate Bill 1160. However, the Institute is concerned that the amended language as currently drafted will be misinterpreted by employees and providers in such a way as to cause increased administrative burden in the form of unnecessary and untenable liens.

Recommendation:

Modify CCR section 9812(i) text & notice language as follows**:**

> The notice shall contain the following statement:
>
> Although your claim has been denied, if you believe that you still need medical treatment for your injury or illness, you ~~have the right to obtain~~ may access medical treatment outside of the workers' compensation system.
>
> If you have your own health insurance, or are eligible to be treated ~~by~~ under someone else's health insurance, you can use that insurance to get medical care. ~~You should advise your physician that you believe that your injury or illness is work related, so the health insurer can seek reimbursement from the claims administrator.~~
>
> If you do not have health insurance available, there ~~are~~ may be doctors, clinics, or hospitals that will treat you without immediate payment. ~~You should advise any doctor, clinic, or hospital that agrees to treat you that you believe that your injury or illness is work related so they can seek payment from the claims administrator through the workers' compensation system.~~

Discussion:

The Institute's recommended changes are designed to more precisely mirror the statutory language. Labor Code section 138.4(f) as amended by Senate Bill 1160 has not altered anything concerning either medical access or potential rights to reimbursement in denied claims. The legislative intent (as evidenced in the legislative digest of SB 1160) and the plain language of Labor Code section 138.4(f) require only that employees be given ***notice that they may access medical treatment outside the workers' compensation system.*** *Adding additional language is unnecessary, and likely to cause confusion by incorrectly implying that the law concerning medical treatment in the case of a denied claim has changed.*

Abbreviating the regulatory language and limiting it to the specific mandate of Labor Code section 138.4(f) avoids confusion and maximizes clarity. The phrases "right to obtain," "so the health insurer can seek reimbursement," and "so they can seek payment from the claims administrator through the workers' compensation system" could be construed as conferring new benefits or implying that employees' medical treatment outside the workers' compensation system will (or should) be reimbursed through the workers' compensation system. In fact, in the case of a denied claim, a claimant or lien claimant must prove injury AOE/COE as a prerequisite to entitlement to compensation or reimbursement.

Furthermore, the drafted language does not differentiate between those employees who dispute the denial of their claim and those who do not. Employees often agree with the denial and do not wish to pursue their claims further when, for example, there is a refusal to cooperate in an investigation, a wrong insurer, or a lack of coverage. But the proposed language could be construed as directive, requiring employees to generate medical liens when pursuing treatment outside the workers' compensation system, even if they are not disputing the claim denial -- and even if any such treatment liens are untenable.

The Institute recommends "under" for purposes of accuracy, as a patient is not treated "by" health insurance.

The Institute recommends "may be" for specificity. The phrase "may be" more accurately communicates to the employee that this is a possible option.

In summary, the notice to employees should be precise and focused. Additional language addressing reimbursement and payment is unnecessary, confusing, and should be eliminated to ensure clarity and avoid increased delays and administrative burdens.

Recommendation:

Replace the DWC Denial Notice in the Benefit Notice Instruction Manual with the amended denial notice as recommended above.

Discussion:

In order to avoid confusion and regulatory inconsistency, the Institute also recommends that the Division replace the current DWC Denial notice contained in the Benefit Notice Instruction Manual with the amended denial notice that is to be adopted.

Thank you for the opportunity to comment, and please contact us if additional information would be helpful.

Sincerely,

Denise Niber
Claims and Medical Director

DN/pm

cc: Christine Baker, DIR Director
George Parisotto, DWC Administrative Director
Jackie Schauer, DIR Counsel
CWCI Claims Committee
CWCI Medical Care Committee
CWCI Legal Committee
CWCI Regular Members
CWCI Associate Members