

By Mark Noonan

Prescription drug cost share of total medical costs has increased to 19 percent. Combined with the fact that pharmacy cost growth continues to escalate at a rate higher than overall medical expense, there is an urgent need for expense management. With the continued increase in medical costs, prescription costs, and utilization, states are implementing fee schedule changes and drug utilization mandates.

Rising Prescription Drug Costs

As prescription drug costs for injured workers continue to rise, states are searching for ways to control them. According to a 2010 Issues Report by the National Council on Compensation Insurance (NCCI) and their 2011 Update on Prescription Drug Study, the volume of prescription drugs dispensed by physicians to injured employees on workers' compensation has risen sharply in recent years, and puts an upward pressure on workers' compensation costs.

- Prescription drug cost share of total medical costs is 19 percent.
- Workers' compensation medical costs per claim average more than \$6,000 and drastically rise to almost \$25,000 for lost-time claims.
- Three quarters of repackaged drug costs originate from physicians. Physician dispensing continues to increase in almost every state.
- Overall cost increases driven more by utilization than price increases.
- The top prescribed workers' compensation drug is OxyContin®. A successful patent defense, which removed the extended release of the generic version from the market, is likely the major contributing factor.

According to NCCI, workers' compensation medical providers are increasingly dispensing prescription drugs out of their offices, a major cost driver in the workers' compensation system since 2008. NCCI reports a sharp increase in these costs in almost every state. Physicians may dispense drugs out of their offices for many reasons -- to allow the patient to start taking the drug immediately, to determine appropriate medication and dosage, to assist a patient that can't easily get to a pharmacy, or to increase their revenue.

Typically, the cost of a physician-dispensed medication is more than it would be from a pharmacy or pharmacy benefit provider. NCCI found that the percentage of workers' compensation drug dollars due to physician dispensing rose from 15 percent in 2007 to more than 20 percent in 2008, and the trend can be seen in nearly all states.

The Workers Compensation Research Institute (WCRI) researched prescription narcotics use patterns in workers' compensation. Addiction, increased disability, overdoses, and death are a growing concern for workers' compensation payers when

it comes to narcotics prescriptions. The study found that many physicians who prescribed narcotics to injured workers were not using the recommended tools to monitor use, abuse, and diversion despite medical guideline recommendations.

Out of the 17 states studied, WCRI found that prescription costs were 40 percent lower in the state of Washington due to implemented policies that kept their costs down. This included a formulary of approved drugs and therapeutic interchange, lower-than-typical pharmacy fee schedule, mandatory generic substitution, and infrequent physician dispensing. The study may be useful for employers when dealing with issues such as pharmacy fee schedules, physician prescribing patterns, medical cost drivers, and laws that mandate the use of generics.

Other states, such as Massachusetts, have begun to explore protocols for physicians to use to monitor usage among patients. Employers and their claim vendors should explore what their PPO/MPN rules are for in network physicians to both control usage and monitor compliance with physician instructions. Employers should also want their network physicians to have a plan for reducing reliance on these medications to reduce dependency and the health issues associated with long term narcotic usage.

For a copy of the reports mentioned, visit www.NCCI.com and www.wcrintet.org.

Drug Testing and the ADA

Outside of increasing workers' compensation prescription drug costs, pain medication creates an additional headache for employers. What happens when an employee fails a mandatory drug test due to prescription medicine? How far can employers go before they step into Americans with Disabilities Act (ADA) issues?

For example, an employee in Tennessee was fired from her job of over 20 years after she tested positive for a legally prescribed drug. Her employer had changed its policy to test for certain prescription drugs as well as illegal ones. The medication that the employee was taking for back pain (hydrocodone, a prescribed narcotic) was among many drugs that the employer now deemed unsafe.

Two decades after the Supreme Court first upheld the right to test for drugs in the workplace, the issue of whether or not certain prescribed drugs pose a safety hazard is of rising concern. The growing reliance of injured workers on powerful prescription drugs suggests that many are going to work with potent drugs in their systems. Although done in an effort to maintain a safe work environment, employers are receiving complaints and lawsuits from employees who cite privacy concerns over drug testing and argue that they should not be fired for taking legal prescriptions.

Employers must address the issue. They are liable for workplace accidents, product defects, and industrial injuries involving prescription drug abuse. Setting rules about prescription drug use in the workplace is not easy; it is difficult to prove impairment. It is complicated with the fear of violating ADA, which prohibits asking employees about prescription drugs unless workers are seen acting in a way that compromises safety or suggests they cannot perform their job. According to Christopher Kuczynski, assistant legal counsel in the Equal Employment Opportunity

Commission's policy division for the Americans with Disabilities Act, an employer must have reasonable belief the person is unable to do the job or poses a threat based on a medical condition.¹

Many states have a drug-free workplace program, a concept that developed after Congress passed the 1988 law requiring companies with federal contracts to adopt drug policies. But the programs have barely changed in the 20+ years since they were conceived and focus heavily on illegal drugs. Meanwhile, the laws on drug testing are complex and vary from state to state. Several prohibit or restrict random drug testing, while others provide incentives for employers to test employees such as discounts on workers' compensation premiums.

Employers can ask workers in safety-sensitive jobs to self-report any potentially dangerous prescription medications, but they cannot ensure they will do so. Companies can train supervisors on how to recognize signs of drug abuse, but an incorrect assessment can land an employer in court.

What is the answer for employers? Know your state's laws and find a balance. The smartest thing for employers to do is to develop a thorough and consistent drug testing policy that spells out which drugs workers might be tested for and under what circumstances.

Telecommuting: Changing WC Terrain

Telecommuting is giving employers and employees new options—opening up office space and providing cost savings to employers, while eliminating travel and easing the burden of childcare for employees. While it seems advantageous for both parties, it does pose challenges for a company's workers' compensation program. Employees working from home create exposures that do not occur in the office setting.

Although little workers' compensation case law exists on the matter of telecommuting, there are two cases that show the exposure employers face when not setting specific guidelines for their telecommuting employees.

In June 2011, the Court of Appeals of Oregon ruled in favor of an employee who was injured when she tripped over her dog while working at home (*Mary S. Sandberg vs. J. C. Penney Co. Inc.* No. 0702441, A140276). The Court disagreed with the Oregon Workers' Compensation Board, which determined the injury did not arise from her employment. The Appellate Court said the employee worked from home as a condition of her employment, which benefited her employer, and workers' compensation benefits were to be paid.

In another telecommuting case this June, a husband of an obese woman who died of a blood clot after working long hours in her home-based office was awarded her

¹ See <http://www.eeoc.gov/eeoc/meetings/6-8-11/kuczynski.cfm>

workers' compensation benefits (*James P. Renner vs. AT&T, No.A-2393-10T3*). Whether or not poor health contributed to her death, the Superior Court of New Jersey Appellate Division ruled that although she led a "sedentary life in and out of work," she was less active when behind her desk working. Doctors said the blood clot likely formed when she was working overnight to complete a project. The decision in this case was very specific and fact-based and the impact of this case on future cases is unknown.

State workers' compensation laws covering employees who telecommute remain underdeveloped. This new territory should be a concern for every employer who has employees who telecommute and work from their home. Companies that permit employees to work from a home office should take various precautionary steps in order to lessen the likelihood of workers' compensation claims:

- Establish a telecommuting policy
- Require a separate office area
- Set fixed work hours and insist on periodic breaks
- Implement ergonomic procedures
- Perform work site checks

Employers must design their telecommuting program carefully in order to minimize workers' compensation issues. Telecommuters face the same risk factors as employees at the main office – work-related injuries and illnesses, fire and electrical safety, and ergonomics. No matter what state they are located in, employers are responsible for providing the same safe and healthy work environment for those telecommuting as for employees who work on company grounds.

NCCI State of the Line Report

According to NCCI, the workers' compensation industry continues to struggle as it faces a growing list of challenges. Those challenges include an uptick in claim frequency, declining premiums, poor underwriting results, a slow economic recovery, and the uncertainty of the healthcare reform.

Workers' compensation experienced its first claim frequency increase in 13 years. Although it is offset by a year of no severity increase, any upward movement in lost-time claim frequency should be of concern to employers. It is unclear to NCCI if this frequency increase is a "new normal" or an effect of the recession.

Within their State of the Line Report, presented at the 2011 Annual Issues Symposium, NCCI points out the good news that offsets the frequency increase—medical and indemnity claim cost changes. The decrease in the average cost in 2010

appears to be due to an influx of small lost-time claims that were likely medical-only claims in previous years. The average medical cost per lost-time claim increased two percent in 2010, the smallest increase in medical cost since 1993.

The economy continues to walk a line between renewed economic downturn and lower growth estimates. It is unclear at this time whether the worst of the economic situation is past or just pending a re-visit. Either way, NCCI's outlook for workers' compensation is one of continuing deterioration.

Next Step for Employers

For lines of insurance, workers' compensation is among the most sensitive to changes in the economy. The economy influences key financial components of workers' compensation: exposure, frequency and severity, and investment income. According to NCCI's latest "Gauging the Economy" report, the slow employment growth America is experiencing will put an upward pressure on claim frequency and exposure. The weakness in the economy produces slower growth in payroll, which is the key driver of workers' compensation. The weak economic recovery also suggests a limited indemnity severity (cost-per-claim) growth since indemnity severity benefits are linked to wages.

Since workers' compensation costs are primarily driven by the cost of claims, understanding your workers' compensation program is critical, especially during the current economy. Combined with the fact that pharmacy cost growth continues to escalate at a rate higher than overall medical expense, there is an urgent need for expense management.

For More Information

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