



March 5, 2021

Via email: troy.haley@tn.gov

The Honorable Abbie Hudgens, Administrator
The Honorable Troy Haley
Tennessee Department of Labor and Workforce Development
Bureau of Workers' Compensation
220 French Landing Dr. 1-B
Nashville, TN 37243

Re: Comments on December 21, 2020, Proposed Amendment to Chapter 0800-02-26
Electronic Medical Billing for Workers' Compensation

Dear Administrator Hudgens and Mr. Haley:

On behalf of the Association of Claims Professionals (ACP), we are writing to comment upon the recently proposed rulemaking to amend Chapter 0800-02-26 and revise the payment regulations related to medical billing for workers' compensation claims. The Proposed Rule (TN 12650 2020 | Department of Labor and Workforce | TAC 0800-2-26-.3, .5, .6) was issued on December 21, 2020. ACP opposes amendment of the Rule and urges the Department to retain the existing regulation, if not modify the proposal to allow for a 30 day repayment period, consistent with many other states.

If, however, the Department rejects these comments and intends to finalize the proposed regulation, at a minimum the regulatory text must be amended to explicitly define the “reasonable costs and attorney fees incurred in such collection actions” to no more than 25% of the amount collected. Without such a limitation, there will be rampant abuse of the provision, as has happened in other states, with attorneys clogging the courts with \$5 and \$10 penalty cases that have an accompanying \$25,000 attorney fee award as well. Thus, we specifically propose that **if the Department proceeds with finalizing the proposed regulation, the last sentence be amended to state that “providers, if they prevail, shall also be entitled to receive reasonable costs and attorney fees incurred in such collection actions to be paid by the employer, in a combined amount not to exceed 25% of the payment recovered in the dispute, to be paid by the employer.” (new proposed text underlined).**

About ACP: ACP was formed in 2002 as the only national association representing the interests of independent claims professionals. ACP members employ thousands of claims specialists and other professionals across the country and in Tennessee and handle millions of property and casualty, workers’ compensation, disability, and other liability claims annually. Membership is comprised of independent claims adjusters and third-party administrator organizations, many of



whom handle claims administration responsibilities for Tennessee insureds and their carriers. ACP member companies employ thousands of adjusters in the state.

The Proposed Regulation: ACP is particularly concerned about the proposed amendment to Section 0800-02-26-.09 (Compliance and Penalty), which currently states as follows:

0800-02-26-.09 COMPLIANCE AND PENALTY.

(1) Any electronically submitted bill determined to be complete but not paid within 15 calendar days or objected to within 15 business days will be subject to penalties of not less than \$50.00 nor more than \$5,000.00. Disputes on medical bill payments between providers and payers may be submitted to the Medical Payment Committee pursuant to T.C.A. § 50-6-125.

(2) The Tennessee Bureau of Workers' Compensation may impose a civil monetary penalty if it determines that a payer has failed to comply with the electronic claims acceptance and response process by the effective date adopted in 0800-02-26-.10. The amount of a civil monetary penalty will be up to \$500.00 for each violation, but shall not exceed \$5,000.00 for identical violations during a calendar year.

The proposed amendment would delete the last sentence of paragraph (1) and replace it with the following sentence:

Any provider not receiving timely payment of the undisputed portion of the provider's bill may institute a collection action in a state court having proper jurisdiction over such matters to obtain payment of the bill. Such providers, if they prevail, shall also be entitled to receive reasonable costs and attorney fees incurred in such collection actions to be paid by the employer.

The Proposed Rule Should be Withdrawn: ACP and its members strongly opposes the amendment, as we are not aware of any problems with the structure of the current regulation, or its implementation. The regulatory penalties provide the needed incentives to ensure prompt payment of claims, and appropriate compensation of providers to the extent that a claim payment is late, are working, and there is no need to modify the regulation as it is currently in force. Perhaps most significant, there is no legal authority to create such a cause of action. Any cause of action to be brought in court must be created by the legislature, and not the Department. Thus, the proposed regulation is *ultra vires* and without statutory basis. This is particularly true of the fee shifting provisions, addressed below.

In contrast, eliminating the sliding scale penalty approach in favor of collection litigation is bad policy for all involved (except plaintiffs' lawyers who will reap fees from such cases). Forcing parties into litigation will guarantee delays in resolving late payment disputes and resolution of the appropriate amounts for any late payments. Moreover, given that the "damages" associated

with late payments will likely be a few days of interest, many claims that would be eligible for an appropriate regulatory penalty will never be made given that the amounts at issue will be sufficiently small as to only merit determination in an already clogged small claims court. Conversely, to the extent claims are brought, they will likely be meritless lawsuits alleging inflated late payment claims. Either way, both providers and insurers will be worse off. Further, increased transaction costs will be passed onto consumers, further damaging the program.

Another significant unintended consequence of the proposal is that it runs the risk of further impacting the declining number of providers participating in the workers compensation system. In February 2020, the Department issued a study entitled “Access to Medical Care in Tennessee Workers’ Compensation: Assessing the Availability and Timeliness of Medical Care Provided to Injured Workers”¹ which documented provider, consumer and patient concerns about the Tennessee workers’ compensation system. Among other concerns raised, the report highlighted that providers in particular wanted less, rather than more, contact with the judicial system. More specifically, the report noted: “[t]he complexity of the payment systems, correspondence load, exposure to attorneys, extended utilization review and delays in treatment approvals are all cited by practitioners as reasons for not participating.” Report at 12. Changing the regulation to drive more providers into the courts would further harm their interest in participating in the workers compensation program, defeating a core priority of the Department and insurers alike.

The Department’s Report documents provider frustrations with the extensive paperwork and other frictions involved in the workers compensation system. Requiring providers to file lawsuits, rather than proceeding through the ease of the existing penalty assessment system, seems to be a step in the wrong direction. For these reasons, we urge the Department to withdraw the proposed regulatory change.

The Fee Shifting Provision Must be Eliminated, or In the Alternative, Amended: Similar to the comments above, the last sentence of the proposed regulation, which would require employers to pay attorney’s fees and costs of the provider, is without statutory authority or basis under law and must be eliminated. The Tennessee legislature has not created any law or other authority that allows such fee shifting to occur,² and even so such statutes must be narrowly drawn and crafted.³ As such, the Department has no authority by regulation to shift fees. To do so would violate the Tennessee Constitution’s Separation of Powers, among other laws. Thus, the proposed regulation’s last sentence must be deleted.

¹ Tennessee Bureau of Workers Compensation, Report -- Access to Medical Care in Tennessee Workers’ Compensation (February 2020).

² Compare Tennessee Code Annotated Section 20–12–119 (fee shifting statute in Civil Code); Tennessee Code Annotated Section 36–3–617(a)(1) (domestic abuse cases).

³ See, e.g. *Tran v. Bui*, No. E2016-00544-COA-R3-CV, 2016 WL 6804445 (Tenn. Ct. App. Nov. 17, 2016)



If, notwithstanding the comments above, the Department intends to continue with its change, at a minimum the proposed amendment must be changed to ensure that the “transaction costs” of the collection efforts do not exceed the amount collected. Stated differently, the Department should define what “reasonable costs and attorney fees incurred in such collection actions” actually means. For example, “reasonable attorneys fees” could be measured against the work done by the plaintiff’s lawyer to bring and conclude a case, but if the case involves a \$10 collection action it would be patently unreasonable for the action to have been pursued in the first place. This is not a speculative issue, as similar vague regulations in other states have led to a proliferation of very low dollar collection suits being filed with the courts (clogging court dockets) and burdening employers simply for the collection of the attorney’s fees. We urge the Department to clarify that such cases will not be deemed reasonable in Tennessee.

To address this issue, the Department should clarify that “reasonable” attorney fees and costs incurred in such collection actions should be no greater than 25% of the actual late payments awarded in the action. By doing so, the Department can avoid frivolous collection actions being filed, and to be paid by the employer. To do so, we propose that the proposed last sentence be amended to state that “providers, if they prevail, shall also be entitled to receive reasonable costs and attorney fees incurred in such collection actions in an combined amount not to exceed 25% of the payment recovered in the collection action, to be paid by the employer.” (new proposed text underlined).

The Regulation Should Also Be Amended to Provide 30 Days for Bill Repayment: Tennessee is in the minority of states that have a 15 calendar day bill payment requirement; the majority of states permit payment within 30 or more days.⁴ In fact, recognizing this, the Department had in the past created for companies a waiver of the 15-day limit and extended it to 30 days through July 2021. If the bill payment regulations are to be changed, we urge the Department to consider alignment with other states, and an extension of the 15 day period to 30 days.

Summary: We appreciate that the current regulation places the Department in the role of enforcer and penalty-collector. While the ACP and its members certainly do not condone late payment of claims, and hope to minimize any penalty assessments, we suggest that the Department, as the regulator, has a role to play in the timely payment of claims, and that the regulation strikes the correct balance in defining that role. Turning late payment penalties over to the courts will not save the Department time, and will certainly harm providers, insurers, and ultimately consumers. The regulation has worked, and there is no reason to modify it. For that

⁴ An estimated 30 states have a 30-day turn-around time period for payment of claims,. In addition, California and Nevada provide 45 days, and Connecticut, Hawaii, New York, North Carolina, Texas and Washington allow for 60 days.



reason, the ACP urges the Department to withdraw the proposal and to leave the regulation intact without modification.

Please let us know if you have any further questions or comments about the above. Please also feel free to contact me at susan@murdockinc.com if you have any questions about our comments.

Sincerely,

A handwritten signature in black ink that reads 'Susan R. Murdock'. The signature is written in a cursive style with a loop at the end of the last name.

Susan R. Murdock Executive Director
Association of Claims Professionals
1700 Pennsylvania Avenue, Suite 200
Washington, DC 20006
Phone: 202.626.2941
www.claimsprofession.org