

BWC Board of Directors
Medical Services and Safety Committee

Thursday, March 25, 2010
Level 2, Room 3 (Mezzanine)
30 West Spring St.
Columbus, OH 43215

Members Present: James Harris, Chair
James Hummel
Thomas Pitts

Members Absent: None

Other Directors Present: Charles Bryan, David Caldwell, Alison Falls, Kenneth Haffey,
William Lhota, James Matesich, Larry Price, and Robert Smith

CALL TO ORDER

Mr. Harris called the meeting to order at 12:37 PM, and the roll call was taken. All members were present.

MINUTES OF FEBRUARY 25, 2010

Mr. Harris asked for any changes to the minutes of February 25, 2010. With no changes, Mr. Hummel moved to have the minutes of February 25, 2010 be approved, and Mr. Pitts seconded the motion. The motion passed with a 3-0 unanimous roll call vote.

REVIEW AND APPROVAL OF AGENDA

Mr. Harris asked for any changes to the agenda. With no changes, Mr. Pitts moved to have the agenda approved, and the motion was seconded by Mr. Hummel. The motion passed with a 3-0 unanimous roll call vote.

NEW BUSINESS/ACTION ITEMS

1. Motions for Board Consideration

B. For Second Reading

1. Drug Free Safety Program (DFSP) Rule 4123-17-58

Mr. Abe Al-Tarawneh, Superintendent of the Division of Safety and Hygiene, Ms. Tina Kilmeyer, Chief of Customer Services, Mr. John Pedrick, Chief Actuarial Officer, and Mr. Rick Brown, Management Analyst Supervisor in Employer Consulting appeared before the Medical Services and Safety Committee for the second reading of the Drug Free Safety Program(DFSP), Rule 4123-17-58.

Ms. Kielmeyer noted DFSP replaces two rules concerning Drug Free Work Place and Drug Free Work Place EZ, (DFWP and DWFP-EZ respectively). Ms. Kielmeyer said DFSP is easier for employers to join, will provide measurable results and flexibility for employers to customize the program to their business. Ms. Kielmeyer noted pricing and discount information concerning DFSP was presented by Deloitte to the Actuarial Committee at their February meeting, and would be considered again this month.

Ms. Kielmeyer responded to an issue posed at last month's meeting concerning an employer terminating an employee for a first positive drug test. Ms. Kielmeyer presented the current handbook of the DFWP and DFWP-EZ programs that provide guidance for employers. Mr. Matesich asked for clarification as the post accident testing refers to a guidebook, not a rulebook. Mr. Brown replied the Bureau's role is to provide guidance to employers. The Bureau provides the rules of the program and how it operates, but the employer has to self implement the program. The Bureau will answer questions about: timing; how to put a drug free workplace policy together; and putting the program together. The employer has to make choices. Mr. Brown did note some items, such as applying the program to a part of the employer's work force, is clearly prohibited. However, employers have legal counsel and they may be subject to collective bargaining agreements. Mr. Brown said the Bureau defines what is an accident, what to do when an accident occurs, and when to post accident drug test. Mr. Brown indicated there have only been a handful of questions on these topics, and the Bureau believes there is a comfortable level of understanding, with flexibility, to employers.

Mr. Matesich gave a hypothetical of an employee sorting bottles, sustaining a minor cut, and needed stitches offsite. Mr. Matesich did not believe a drug test would be warranted, but under the wording of DFSP, he could not participate in the program unless he tested. Mr. Brown responded a post accident investigation is required, and the accident is examined by who caused or contributed to it; if no one, then no testing would be required. Mr. Brown noted there are four additional criteria on whether to post accident drug test: reasonable suspicion; work rule violations; injury was common to job function; and extent of the injury. Under the hypothetical, Mr. Brown noted none of the factors would warrant a post accident drug test. Mr. Brown reiterated the Bureau works with employers to develop the policies needed to be in the program.

Mr. Matesich wanted to know how the Bureau will monitor employers in advanced DFSP, so that they would not terminate on a first positive drug test. Mr. Brown noted advanced DFSP's intelligent design is essentially the same as the DFWP and DFWP-EZ advanced programs. The DWFP-EZ has the possibility a first time positive drug test may lead to employee termination, but the practice is discouraged. Instances where a first time positive would lead to termination may involve an employer in multistate jurisdictions. Mr. Brown noted the Bureau reviews each instance on a case by case basis. The Bureau cannot tell an employer not to terminate someone; that is the employer's right within their employment policies, and employers have legal counsel. Mr. Brown noted the program does give some flexibility of an employer to terminate on a first positive, such as a blatant violation of a written work rule, but the employers who participate must give second chances and define how they do so.

Mr. Price asked if an employer can terminate for a first positive drug test in advanced DFSP. Mr. Brown indicated employers can, but the Bureau evaluates each situation. Mr.

Brown noted many employers asked if they are compliant with the program over the past thirteen years without any significant issues raised. Mr. Brown reiterated advanced DFSP establishes the employer's intent not to terminate for a first positive drug test. Mr. Price inquired if the Bureau could overturn an employer's decision to terminate. Mr. Brown noted the Bureau could only ensure an employer is substantially complying with the program; if the employer is not compliant, the discount can be taken back. Mr. Price asked if an employer has to commit to a second chance for employees who have a first positive drug test, and Mr. Brown replied in the affirmative.

Mr. Hummel noted last month's discussion of why group rated employers are not entitled to the basic discount because the groups mimic what is in basic DFSP. Mr. Pedrick noted the issue was difficult because it involved comparing the programs for group rating and basic DFSP along with a pricing component. Both group rating and basic DFSP have safety elements. However, there are safety needs and requirements in group rating not unique to basic DFSP. Both group programs and basic DFSP require supervisory training, and accident investigation reporting. DFSP overall meshes with the group employer guidelines, and the level of intersection between the two did not warrant offering a basic level discount to group rated employers.

Mr. Hummel asked what elements in basic DFSP are not elements of a group. Mr. Al-Tarawneh noted expectations from a group will be verified by the group sponsor, and the group safety program is predicated on 9 strategies in the Bureau's 10 step business plan. A group employer will have a robust accident investigation and reporting. Administrator Ryan replied group employers are already doing many elements of basic DFSP in their program, and those requirements are factored into the discount. Mr. Pedrick added Deloitte had priced the basic DFSP for non-group rated employers at a range of 3-5% discount, and the Bureau is proposing a 4% discount. Analyzing the programs from loss experience, some of the elements are common between the programs, and some are unique to DFSP, such as drug testing. The pricing involved in group rating overrode the loss exposure an employer participating in basic DFSP would justify. Hence, Mr. Pedrick said there should be no discount for group rated employers in basic DFSP.

Mr. Matesich inquired how the Bureau ensures group employers are meeting safety guidelines, and who monitors the group sponsor for compliance. Ms. Kielmeyer reported the Bureau recently met with group sponsors; in the meeting, the Bureau's expectations for safety were discussed. One issue was although a group sponsor had to provide an annual safety training program for its employers, there was no requirement for the employers to attend. Ms. Kielmeyer noted the group sponsors must provide the Bureau the safety plan developed for the upcoming year. The Bureau reviews the plan and gives suggestions to make the plan more robust, and the group sponsor must report when the safety training occurs. The Bureau desires more from group sponsors, and Ms. Kielmeyer noted the Bureau is in the early stages of pulling sponsors together with safety professionals to determine the best safety initiatives. Ms. Kielmeyer noted many of the issues here will be addressed in the group sponsor rule. Ms. Kielmeyer admitted the Bureau requires a group sponsor to provide a safety plan and provide 8 hours of training with certain initiatives; however the group programs could be more robust and effective. Mr. Hummel replied the problem is that employers do not have to participate in group sponsor's safety programs.

Mr. Price inquired about the stakeholders contacted as neither a list or number of stakeholders was provided to the Board. Ms. Kielmeyer noted 156 stakeholders were contacted for feedback, which included interested parties, stakeholders, customers and drug treatment professionals. Mr. Price indicated he would prefer the list be part of the Board's record.

Mr. Price inquired how the Bureau knows an employer has a system in place to lodge a complaint. Mr. Brown answered an employer must give a written policy to its employees, and the employer must name an administrator for their program, or the person an employee can go to with questions. The employer policy requires full and fair disclosure to its employees. An annual progress report is required, and failure of an employer to submit a report will remove them from the program. Mr. Brown added, in his experience, it was extremely rare for an employee complaint about this issue. Mr. Price asked what steps were involved in the process if an employee has concerns. Ms. Kielmeyer referenced a sample policy in the DWFP and DWFP-EZ handbook. One of the requirements was employee education; employees must be given written policies and attend a training session. Ms. Kielmeyer noted many employer policies are modeled after this policy, but the employees must attend a training session. Mr. Harris asked if the contact person name must be listed in the policy, and Ms. Kielmeyer responded in the affirmative.

Ms. Falls inquired about the number of participants in the programs. She noted a downward trend in participating employers, from approximately 5,000 in 2009 to 4,000 now. The inevitable result is the Bureau was sending a message to encourage a drug free work environment but fewer employers participating. Mr. Hummel said last year that group employers could not stack discounts. Ms. Kielmeyer replied there were employers still participating in DFWP and DFWP-EZ but are not eligible for discounts. Ms. Kielmeyer added a selling point of DFSP is some employers have been maxed out by the 5 year limitation of DWFP and DFWP-EZ. Under DFSP, these employers are allowed to participate again. Mr. Harris inquired if these employers are aware of the new rules involved in DFSP. Ms. Kielmeyer responded in the affirmative, that many of the employers participated in interested party meetings; furthermore, the Bureau will do a mailing and e-newsletter informing employers of the changes and encouraging them to join DFSP. Mr. Hummel asked if 1,918 employers in the table provided are participating but not receiving a discount, and Ms. Kielmeyer responded in the affirmative.

Mr. Pitts noted that level 2 and 3 employers in DFWP and DFWP-EZ could terminate for first positive drug tests in certain situations. Employers in advanced DFSP also could terminate for first positive drug tests in certain circumstances.

Ms. Kielmeyer reviewed changes since the first reading. There were 156 interested parties contacted on DFSP, and two regional meetings were held. Since the first reading, three additional comments were received. In Paragraph (B), Ms. Kielmeyer noted new employers with new coverage will not have to wait a year before joining DFSP. This change allowed the workload to be spread over the course of the year. Second, the deadline for the first year of DFSP has been extended from the May 28th deadline to June 30th to give employers another month to enroll. Third, under random drug testing in advanced DFSP, one comment asked for reconsideration of the 25% random drug testing level. There was a cost to participating employers, and the cost of the random drug

testing may be cost prohibitive. Consequently, the Bureau reduced the level to 15%. Mr. Harris asked if this testing level was on a case by case basis, and Ms. Kielmeyer responded it was an across the board reduction. Employers can still choose to do 25% random drug testing in advanced DFSP, but the Bureau will only require 15%.

Ms. Kielmeyer noted two additional comments concerned the cost of the assessment and sharing cost of assessment through a collective bargaining agreement. Ms. Kielmeyer emphasized the Bureau would honor an employer's collective bargaining agreement and not prevent them from participating in DFSP. Ms. Kielmeyer stated the Bureau would publish a DFSP manual to provide more detail than is included in the rule.

Mr. Matesich appreciated the work on DFSP, and he believed a drug free program with a safety component was a great step forward. However, the rule indicated an employer must pay for the assessment. Fundamentally, Mr. Matesich had issues with telling an employer what they have to pay. If negotiated in collective bargaining under good faith, the Bureau cannot tell an employer they have to pay for the assessment. Hence, under (E)(5) of the rule, the rule should have an exception listed. Mr. Pitts noted there are circumstances where employers have to pay for safety equipment; the provision in this rule was to make sure employees do not pay for the assessment. Mr. Pitts has seen employees pay for these assessments; if the employers want to be part of DFSP, the rule should indicate they have to pay. Mr. Harris agreed with Mr. Pitts, noting if collective bargaining addressed the issue, the Bureau should not interfere. However, if an employer demands an employee pay for an assessment, and the employer is participating in DFSP, that situation is inherently unfair. Mr. Matesich noted his concern was an employer may do cost benefit analysis rather than a goal of having a safer workplace and reducing insurance costs. Mr. Matesich agreed employers should pay for safety guards on equipment, but he did have a problem telling an employer to pay for an assessment for a small discount. Ms. Kielmeyer replied most employers pay for the assessments unless collective bargaining is in place.

Mr. Lhota had concerns here, which did not have an exception for collective bargaining. He believed the rule should state: "unless other arrangements by employer and employee." Mr. Pitts, Mr. Harris, Mr. Price and Mr. Caldwell disagreed. Mr. Pitts believed it opened the door to employers to have a short education session and have an employee sign afterwards a statement that if the employee is drug tested, the employee must pay for it. If a collective bargaining agreement is in place, then the parties agree who is to pay. Mr. Price said the suggestion was too broad. Mr. Caldwell believed the exception could create a situation allowing an employer to shift the burden onto the employee, and unscrupulous employers would take advantage. Administrator Ryan posed a hypothetical of a temporary service employer telling employees they must pay for a \$200 drug test if in an accident. That cost may reflect the entire paycheck and deter the employee from filing an accident report. Administrator Ryan's concern was the atmosphere by the agency with mandatory drug testing. Mr. Lhota noted he could modify his suggestion to collective bargaining agreements. Mr. Pitts said the rule was in its second reading, and there are four levels of law: the United States and Ohio Constitutions; the Ohio Revised Code; the Ohio Administrative Code; and policies. While these laws may not be word for word consistent, and he did not see a conflict, Mr. Pitts believed Mr. Lhota was looking at the rule literally. Mr. Pitts believed the rule was working together with other agreements. Ms. Kielmeyer, noted employers were

concerned with federal labor laws that take precedence. Mr. Hummel complemented the staff; he believed the rule proposal was a great move forward.

Mr. Hummel moved that the Medical Services and Safety Committee recommend that the Board of Directors approve the Administrator's recommendation to adopt new rule 4123-17-58 of the Administrative Code, "Drug-Free Safety Program Rule," and to rescind existing rules 4123-17-58 and 4123-17-58.1. Mr. Hummel further moved that the Medical Services and Safety Committee refer the rule to the Actuarial Committee for its review and consideration of the discounts provided for in the appendix to the rule. This motion consenting to the Administrator adopting and rescinding the rules as presented at the meeting was subject to the Actuarial Committee's approval of the discounts in the appendix to the rule. The motion was seconded by Mr. Pitts, and the motion passed with a 3-0 unanimous roll call vote.

Mr. Price and Mr. Harris thanked the Administrator and staff for the excellent work on DFSP. Mr. Harris believed the discussion was robust, beneficial and educated all Board members.

Mr. Matesich commented regarding a news article published claiming the Board of Directors was nothing more than a rubber stamp of the Bureau. Mr. Matesich noted there were concessions in discussions with DFSP, and all of the Board members were fulfilling their responsibilities as well as challenging the Administrator and her teams. He noted this proposal was a challenge and dealing with the Board members was also a challenge. Mr. Matesich said he is not a rubber stamp for anyone. Administrator Ryan clarified the issue as a comment was raised by Representative Hottinger who asked Mr. Lhota to respond. Administrator Ryan believed the reporter did not hear the entire answer. Mr. Lhota said the press pulls clips out of a statement. However, Mr. Lhota noted there is a philosophical diversity in the Board leading to spirited debates and discussion. All Board members have a fiduciary responsibility to fulfill, and the Board of Directors was not a rubber stamp of the Bureau. Mr. Price said he wished the meeting was videotaped. In the history of the Bureau, a lot of measures were rubberstamped. However, Mr. Price was happy the Board of Directors was using the power given to them.

2. Claim Procedures subsequent to allowance Rule 4123-3-15

Ms. Kim Robinson, Director of Policy, presented the second reading of the Claim Procedures Subsequent to Allowance Rule, Rule 4123-3-15, also known as the "claim reactivation rule."

Ms. Robinson noted the rule serves as a checkpoint in the life of a claim. Currently the rule requires reactivation of a claim if there has been no compensation or medical treatment in the past 13 months. Prior to 1997, the rule had reactivation at 24 months, but because of MIRA I reserving, it was changed to the current 13 months. Now, with MIRA II no longer requiring the 13 month period, the Bureau is proposing the reactivation checkpoint expand out to 24 months. Ms. Robinson believed the change would improve Bureau efficiencies, decrease costs, and remove an unnecessary burden to the treatment of injured workers.

Ms. Robinson noted 97% of all treatment requests near the 13 month mark were granted. The Bureau noted this created an unnecessary administrative burden on the Bureau and MCOs, especially in instances when the requests were for routine follow up care. Ms. Robinson noted Senate Bill 7 changed the statute of limitations on claims to 5 years from date of last medical or compensation paid on claims with a date of injury of August 25, 2006 or later; the 24 month reactivation would roughly serve as a half-way point in claim's life. Ms. Robinson noted the requests for reactivation would be reduced to less than 1,000 per year.

Ms. Robinson noted the rule had received stakeholder feedback, and there was one minor change from the first reading under paragraph (B). Wording was included that, if an employer was out of business, copies would not be mailed to them. 70 to 80 stakeholders were asked to comment on the rule, which included: all service provider organizations; the OSBA Workers' Compensation Committee; OAJ; OMA; the Ohio Chambers of Commerce; and MCOs. Several of the stakeholders met with the Bureau. Ms. Robinson reported there were 7 comments received. 5 of the 7 comments misunderstood the concept between statute of limitations and reactivation, and Ms. Robinson reiterated claims were open for 5 years from the date of last medical or compensation paid whereas reactivation served as a checkpoint in the lifetime of the claim.

Mr. Haffey inquired regarding the amount of work involved in processing a reactivation. Ms. Robinson replied: a provider would have to file a treatment request; the MCO would then contact the Bureau; the Bureau would obtain a physician review and determine the facts facilitating treatment and issue an order. Ms. Robinson noted the proposal not only reduces mailing costs, but will actually speed up the amount of time when an injured worker can seek follow up care.

Mr. Price noted the issue he brought up in DFSP regarding having a list or quantity of stakeholders contacted on the proposal to have in the Board's record. Administrator Ryan replied the stakeholders contacted was a matter of public record. She also noted many doctors schedule follow up visits from 6 months to a year out, so the rule currently does not make sense practically.

Mr. Pitts commented on stakeholder feedback of two unidentified MCOs and from Sheakley, which may be a third party representative or a MCO. Mr. Pitts believed unquestionably these stakeholders' intention was to deny care to injured workers. Mr. Pitts stated these comments are exactly why there are MCO forums ongoing. Mr. Pitts noted MCOs should be treating an injured worker as an individual, and he was very concerned about the three comments from these stakeholders indicating it was their job to deny medical care. Mr. Pitts believed this mindset was deeply troubling, and he was glad there would be another forum next month. Ms. Falls took Mr. Pitts' comments to heart, but she noted the MCO League was on the record as supporting the proposal. Mr. Pitts replied his concern was the three representative's comments, and not the MCO League itself. Mr. Caldwell concurred with Mr. Pitts, and he hoped the three representatives were the exception, and not the rule, to the MCO League's position. He hoped there were no MCOs with the viewpoint conveyed by these three representatives.

Mr. Pitts moved that the Medical Services and Safety Committee recommend that the Bureau of Workers' Compensation Board of Directors approve the Administrator's recommendation to amend rule 4123-3-15 of the Administrative Code, "Claim Procedures Subsequent to Allowance," to change the time a claim is inactive from thirteen months to twenty-four months. The motion also consented to the Administrator amending rule 4123-3-15 as presented at the meeting. The motion was seconded by Mr. Hummel, and the motion passed with a 3-0 unanimous roll call vote.

DISCUSSION ITEMS

1. Committee Calendar

Mr. Harris confirmed with Mr. Donald Berno, Liaison for the Board of Directors, next month's agenda had pharmacy overview, MCO-Voc Rehab Referral Report, and change in OPSS effective date.

Mr. Freddie Johnson, Director of Managed Care Services, reported he and Ann Casto would propose delaying the effective date of the OPSS to January 1, 2011. Mr. Johnson noted the remaining fee schedules for the calendar year included: Medical and Service Provider Fee Schedule (May/June, 2010); Outpatient Hospital Fee Schedule (October/November, 2010); Ambulatory Surgical Center Fee Schedule (November/December, 2010); Inpatient Hospitalization Fee Schedule (September/October, 2010); and Vocational Rehabilitation Service Provider Fee Schedule (September/October, 2010).

Mr. Johnson noted Medicare issues new rates near October each year. Information the Bureau relies on for rates usually runs a quarter behind. At the meeting of December 15, 2010, there will be an agenda topic to update the Medical Service and Provider Fee Schedule to conform to Medicare's new rates. The Bureau uses Medicare CPT codes and tries as fast as possible to adapt to Medicare. Mr. Johnson indicated the fast time frame is why that meeting is necessary. He added Medicaid actually has an emergency rule to perform the same task. The December, 2010 meeting allows Medicare time to announce their report and provides time for the Bureau to make necessary modifications.

ADJOURNMENT

Mr. Pitts moved to adjourn the meeting at 2:10 PM, seconded by Mr. Hummel. The meeting adjourned with a 3-0 unanimous roll call vote.

Prepared by Michael J. Sourek, Staff Counsel
March 29, 2010