

# CSI - Ohio

The Common Sense Initiative

## Business Impact Analysis

Agency Name: Bureau of Workers' Compensation

Regulation/Package Title: HPP Operational Rules

Rule Number(s): OAC 4123-6-01 to OAC 4123-6-20.1

Date: \_\_\_\_\_

**Rule Type:**

☐ New

☒ Amended

☒ 5-Year Review

☒ Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

### **Regulatory Intent**

**1. Please briefly describe the draft regulation in plain language.**

**Please include the key provisions of the regulation as well as any proposed amendments.**

Chapter 4123-6 of the Administrative Code contains BWC rules implementing the Health Partnership Program (HPP) for state fund employers, including rules governing payment to providers. BWC enacted the bulk of the Chapter 4123-6 HPP provider payment rules in January and February 1997.

The rule review date for these rules are November 1, 2014 and February 1, 2015. BWC performed a five-year rule review of the rules in 2009, at which time BWC made numerous changes, mostly rescinding unnecessary and/or duplicative rules, or combining some rules into existing rules. As part of the current five-year rule review process, the Chapter 4123-6 HPP rules governing BWC enrollment and certification of providers, the operation of

BWC's managed care organizations (MCOs), and provider payment have been thoroughly reviewed and appropriate changes have been proposed. BWC is proposing the following:

Rescind:

4123-6-13 Payment to MCOs.

Rescind and Replace:

4123-6-01 Definitions.

Amend rules:

4123-6-01.1 Applicability of medical rules.

4123-6-02 Provider access to the HPP - generally.

4123-6-02.2 Provider access to the HPP - provider ~~credentialing~~ certification criteria.

4123-6-02.21 Provider access to the HPP - non-certified provider enrollment.

4123-6-02.3 Provider access to the HPP - provider application and ~~credentialing~~ certification criteria.

4123-6-02.4 Provider access to the HPP - provider ~~recredentialing~~ and recertification.

4123-6-02.5 Provider access to the HPP - provider not certified.

4123-6-02.51 Provider access to the HPP - Denial of provider, entity or MCO enrollment/certification based on criminal conviction or civil action.

4123-6-02.6 Provider access to the HPP - selection by an MCO.

4123-6-02.7 Provider access to the HPP - provider decertification procedures.

4123-6-02.8 Provider requirement to notify of injury.

4123-6-03.2 MCO participation in the HPP - MCO application for certification or recertification.

4123-6-03.7 MCO participation in the HPP - bureau's authority to decertify, to refuse to certify or recertify an MCO.

4123-6-03.9 MCO participation in the HPP - MCO disclosure of relationship.

4123-6-04.3 MCO scope of services - MCO medical management and claims management assistance.

4123-6-04.5 MCO scope of services - bureau claims management.

4123-6-04.6 ~~Thirty-day return~~ Return to work assessment.

4123-6-05.4 Employer access to the HPP; payment for referrals prohibited.

4123-6-06.1 Employee access to medical services - ~~employee~~ education by MCO and employer.

4123-6-06.2 Employee access to the HPP - employee choice of provider.

4123-6-07 Services and supplies never covered.

4123-6-10 Payment to providers.

4123-6-14 MCO bill submission to bureau.

4123-6-15 Confidentiality of records.

4123-6-16 Alternative dispute resolution for HPP medical issues.

4123-6-16.2 Medical treatment reimbursement requests.

4123-6-16.3 Reimbursement of retroactive medical treatment reimbursement requests.  
 4123-6-17 Bureau refusal to certify or recertify, action to decertify a provider or MCO - standards and procedures for adjudication hearings.  
 4123-6-18 Data gathering and reporting.  
 4123-6-19 Remain at work ~~program~~ services.  
 4123-6-20 Obligation ~~for submitting~~ to submit medical documentation and reports.  
 4123-6-20.1 Charges for copies of medical reports.

No Change rules:

4123-6-02.9 Provider access to the HPP - provider marketing.  
 4123-6-03 MCO participation in the HPP - generally.  
 4123-6-03.4 MCO participation in the HPP - MCO certification.  
 4123-6-03.10 Conflict of interest.  
 4123-6-04.4 MCO scope of services - fee bill review and audit process.  
 4123-6-05.2 Employer access to the HPP - employer enrollment and selection of MCO.  
 4123-6-05.3 Employer access to the HPP; certain solicitation practices by MCOs prohibited.  
 4123-6-14.1 Records to be retained by MCO.  
 4123-6-16.1 HPP medical treatment guidelines.

The major substantive changes proposed for the HPP provider payment rules pursuant to the five-year rule review are as follows:

- Reorganize definitions rule OAC 4123-6-01 into alphabetical order and make minor clarifications.
- State that BWC is authorized to re-credential and recertify providers at least every three years, but not more often than annually, and may do so on a staggered basis on such criteria as BWC determines appropriate. OAC 4123-6-02
- Require for BWC certification that providers not be currently excluded from participation in Medicare or Medicaid. OAC 4123-6-02.2
- Add certified shoe retailer as a BWC certified provider type. OAC 4123-6-02.2
- State that the certification of a provider shall lapse and the provider shall only be enrolled with BWC if the provider has no billing activity with BWC for a period of 18 months or longer. OAC 4123-6-02.21
- State that the enrollment of a provider with BWC shall expire if the provider has no billing activity with BWC for a period of 18 months or longer. OAC 4123-6-02.21
- Allow BWC to immediately decertify a provider other than a hospital if:
  - the provider's professional license to practice has been revoked or suspended for an indefinite period of time or for a period of more than 30 days subsequent to the provider's certification to participate in the HPP;
  - the provider has been convicted of or has pleaded guilty to workers' compensation fraud, corrupt activity, or criminal offenses related to the delivery of or billing for health care services; or

- BWC determines by clear and convincing evidence that the continued participation by the provider in the HPP presents a danger of immediate and serious harm to claimants. OAC 4123-6-02.5 (per Am.Sub.H.B. 493)
- Clarify that BWC may decertify and terminate the enrollment of a person, provider, MCO, or owner for services rendered if:
  - The person, provider, MCO, or its owner, or an officer, authorized agent, associate, manager, or employee of a person, provider, or organization is convicted of or pleads guilty to workers' compensation fraud, corrupt activity, or criminal offenses related to the delivery of or billing for health care benefits.
  - There exists an entry of judgment against the person, provider, MCO, or its owner, or an officer, authorized agent, associate, manager, or employee of a person, provider, or organization and proof of the specific intent of the person, provider, MCO, or owner to defraud, in a civil action brought pursuant to R.C. 4121.444.
  - There exists an entry of judgment against the person, provider, MCO, or its owner, or an officer, authorized agent, associate, manager, or employee of a person, provider, or organization in a civil action brought pursuant to the Ohio corrupt activity statutes. OAC 4123-6-02.51
- Clarify procedural requirements in the provider progressive compliance rule, including sending of notices by certified mail, directing application of the progressive compliance process to violations of workers' compensation statutes and rules by non-facility providers, and exempting acts of intentional misrepresentation and reasons for immediate decertification from the progressive compliance process. OAC 4123-6-02.7
- Clarify that an MCO may subcontract onsite or out-of-state medical case management services with the prior approval of the bureau, provided such services are conducted under the supervision of the MCO. OAC 4123-6-03.2
- Remove language providing for the immediate decertification of an MCO, to clarify that all MCO decertification actions shall be conducted pursuant to the process set forth in OAC 4123-6-17. OAC 4123-6-03.7
- Clarify that the MCO conflict of interest "firewall" includes, but is not limited to, TPAs, medical and vocational rehabilitation providers, PEOs, and TW developers affiliated with an MCO, and that the MCO must:
  - Provide to BWC a description of the resolution of any opportunity for or the appearance of any conflict of interest or preferential treatment between the affiliated entities and the MCO, satisfactory to BWC; and
  - Have complete separation of functions, offices, systems, and staff from the affiliated entities, including but not limited to medical and vocational rehabilitation case management staff and marketing staff. OAC 4123-6-03.9
- Provide that if an injured worker refuses to attend an IME to assist in the ADR process, the MCO shall refer the issue to BWC, and the injured worker's right to benefits may be suspended during the period of refusal. OAC 4123-6-04.3
- Require MCOs to assist BWC in educating employers and to educate providers, whether in-state or out-of-state, as to BWC initiatives as set forth in the MCO contract. OAC 4123-6-06.1

- Require injured workers to notify a provider of the injured workers' MCO and/or employer. OAC 4123-6-06.2
- Clarify that prescription smoking deterrent drugs outside an approved smoking cessation program are only reimbursed by BWC when dispensed while the injured worker is admitted to a hospital during an approved inpatient admission or during the course of an outpatient visit in a hospital. OAC 4123-6-07
- Require that if a provider customarily charges for missed appointments or procedures, the provider shall inform the employee upon the initial or emergency treatment that the provider charges for missed appointments or procedures and that such charges are the responsibility of the employee. OAC 4123-6-10
- Rescind MCO payment rule OAC 4123-6-13 and the reference to the rule in OAC 4123-6-04.6, as MCO reimbursement, including incentive and penalty payments, is governed by the MCO contract. (see Am.Sub.H.B. 59)
- Clarify that the provisions of the HPP confidentiality rule apply to information exchanged among BWC, the MCO, the employer and its representative, the employee and his or her representative, the provider, and the provider's employees and agents, and that all such parties shall ensure transmission of confidential information via secured methods approved by BWC, including but not limited to encryption, password protection, facsimile, and other secure methods. OAC 4123-6-15
- Provide that if the MCO receives an ADR dispute involving a medical treatment reimbursement request relating to a non-allowed condition, and the allowance of the additional condition is pending before BWC or the IC, the MCO may pend the dispute until the earlier of the final administrative or judicial decision or the staff hearing officer decision on the allowance of the additional condition, at which time the MCO shall resume the ADR process. OAC 4123-6-16
- Clarify procedural requirements in the HPP provider/MCO decertification rule. OAC 4123-6-17
- Require that physicians treating injured workers complete, sign, and submit to the MCO a physician's report of work ability on form MEDCO-14 or equivalent upon every claimant encounter, containing certain minimum elements. OAC 4123-6-20
- Clarify that vocational rehabilitation providers must provide requested documentation to BWC, the IW, employer (and their representatives), MCO, QHP, or self-insuring employer within 5 business days, just as other providers. OAC 4123-6-20
- State that providers may charge parties for additional copies of medical records that have been provided to BWC and are available on BWC's website, such charges not to exceed the amounts allowed under Ohio law. OAC 4123-6-20.1

**2. Please list the Ohio statute authorizing the Agency to adopt this regulation.**

R.C. 4121.44, R.C. 4121.441, R.C. 4123.66.

**3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?**

**If yes, please briefly explain the source and substance of the federal requirement.**

No

- 4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.**

Not applicable.

- 5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?**

The public purpose is to provide appropriate and clear direction of program parameters and service actions which all parties engaging in the administration, use or provision of HPP related services to Ohio injured workers pursuant to addressing an allowed medical condition resulting from a workplace injury must adhere. These proposed rules will support the charge as set forth in R.C. 4121.44(B)(1), (2) and (4) which provide that, to implement the HPP, the Administrator shall “certify one or more external vendors, which shall be known as ‘managed care organizations,’ to provide medical management and cost containment services” in the HPP for a period of two years beginning on the date of certification; the Administrator may recertify the MCOs for additional two year periods; and the Administrator may “enter into a contract with any managed care organization that is certified by the bureau . . . to provide medical management and cost containment services” in the HPP.

Further, the proposed rules support the charge pursuant to R.C. 4121.441(A) which provides that the Administrator, with the advice and consent of the BWC Board of Directors, shall adopt rules for implementation of the HPP “to provide medical, surgical, nursing, drug, hospital, and rehabilitation services and supplies to an employee for an injury or occupational disease . . . and to regulate contracts with managed care organizations pursuant to this chapter.”

Finally, the proposed rules also supportis the charge pursuant to R.C. 4123.66(A) which provides that the BWC Administrator “shall disburse and pay from the state insurance fund the amounts for medical, nurse, and hospital services and medicine as the administrator deems proper,” and that the Administrator “may adopt rules, with the advice and consent of the [BWC] board of directors, with respect to furnishing medical, nurse, and hospital service and medicine to injured or disabled employees entitled thereto, and for the payment therefore.”

- 6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?**

Success will be measure by the providers' and employers' compliance with the modifications to the rules. Further, MCO compliance will be measured in accordance with the terms of the MCO's 2014 -2015 contract and administrative payments made to the MCOs based on their HPP operational performance. Additionally, success will be measured by the timely provision of services to injured workers, and the maintenance of costs within the annual fee schedule projections for the relevant services impacted by the recommended changes.

### **Development of the Regulation**

**7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.**

**If applicable, please include the date and medium by which the stakeholders were initially contacted.**

The rules covered within this document were distributed via e-mail to the following lists of stakeholders for review:

- BWC's Managed Care Organizations (MCOs), the MCOs' Medical Directors
- BWC's internal medical provider stakeholder list -- 67 persons representing 52 medical provider associations/groups
- BWC's internal provider list serve (over 700 interested parties)
- BWC's Healthcare Quality Assurance Advisory Committee
- Ohio Attorney General's Office, Workers Compensation Section
- Ohio Association for Justice
  - Employer Organizations o Council of Smaller Enterprises (COSE)
  - o Ohio Manufacturer's Association (OMA)
  - o National Federation of Independent Business (NFIB)
  - o Ohio Chamber of Commerce
- BWC's Self-Insured Division's employer distribution list
- BWC's Employer Services Division's Third Party Administrator (TPA) distribution list

**8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?**

BWC did receive input and responded as indicated below. Because of the number of comments we have included a stakeholder feedback grid attachment which reflects comments received and BWC's response to the same. See **Attachment A**.

**9. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?**

None

**10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?**

None. No regulatory alternatives which could be considered have been identified.

**11. Did the Agency specifically consider a performance-based regulation? Please explain. *Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.***

No. The regulations pursuant to the requirements of the O.R.C. 44121.44(B)(1), (2) and (4), 4121.441(A) and 4123.66(A) are designed to provide appropriate and clear direction of program parameters and service actions which all parties engaging in the administration, use or provision of HPP related services to Ohio injured workers pursuant to addressing an allowed medical condition resulting from a workplace injury must adhere.

**What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?**

BWC is the only state agency responsible for regulating HPP related medical services for Ohio's workers' compensation programs.

**12. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.**

Once the rules are approved and through the JCARR process, the BWC staff impacted by the rules will be informed of the effective date. The various units of the Medical Services Division of BWC will coordinate communication and training to internal BWC staff and the MCOs. BWC's Medical Services Division will also ensure that relevant sections of the MCO Policy Guide and the Provider Billing and Reimbursement manuals are updated to reflect appropriate rule modifications.

### **Adverse Impact to Business**

**13. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:**

**a. Identify the scope of the impacted business community;**

All HPP services providers, self-insured employers, and MCOs.

**b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance);**



Impact is in the nature of HPP services providers', self-insured employers', and MCOs' time for reviewing or receiving education on the changes, as well as applying any modifications to relevant systems.

**c. Quantify the expected adverse impact from the regulation.**

**The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a “representative business.” Please include the source for your information/estimated impact.**

Estimated time which HPP services providers, employers, and MCOs may need to adjust to the changes is at less than 15 hours.

**14. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?**

BWC is attempting to meet the legislative intent by setting forth appropriate and clear direction of program parameters and service actions which all parties engaging in the administration, use or provision of HPP services to Ohio injured workers pursuant to addressing an allowed medical condition resulting from a workplace injury must adhere. The rules have been reviewed and appropriately modified to add additional clarity of program parameters and service actions which all parties engaging in the administration, use or provision of HPP services need to take to ensure service access, quality and cost efficiencies.

**Regulatory Flexibility**

**15. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.**

No. The rules are to provide guidance and clarity of program parameters and actions which all parties engaging in the administration, use or provision of HPP services must take to ensure service access, quality and cost efficiencies, and timely provider reimbursements, which leads to quality medical care, as well as a successful and safe return to work for injured workers.

**16. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?**

Not applicable.

**17. What resources are available to assist small businesses with compliance of the regulation?**

The MCOs have a responsibility in the contract they sign with BWC to provide training and support to all providers they utilize in managing the medical care of their injured workers. Additionally, by contract the MCOs are responsible for providing education and support to injured workers and employers on all workers' compensation services and programs including medical services. The various units of the Medical Services Division and the Chief Medical Officer Division of BWC will also provide support and direction to impacted businesses regardless of size with respect to meeting Bureau regulations.