

- SUBJECT:** Continuing the Division of Workers' Compensation at TDI
- COMMITTEE:** State Affairs — committee substitute recommended
- VOTE:** 9 ayes — Cook, Menendez, Craddick, Frullo, Geren, Harless, Huberty, Oliveira, Solomons
- 0 nays
- 4 absent — Gallego, Hilderbran, Smithee, Turner
- WITNESSES:** For — (*Registered, but did not testify:* Pamela Beachley, Texas Cotton Ginners' Trust; Cathy Dewitt, Texas Association of Business; Patricia Kolodzey, Texas Medical Association; Lee Loftis, Independent Insurance Agents of TX; Lucinda Saxon, Texas Independent Reviewers Alliance)
- Against — None
- On — Royce Bicklein; Marianne Bogel; Rick Levy, Texas AFL-CIO (*Registered, but did not testify:* Roderick Bordelon, Amy Lee, Texas Department of Insurance — Division of Workers' Compensation; Kelly Kennedy, Sunset Advisory Commission)
- BACKGROUND:** The Division of Workers' Compensation (DWC) of the Texas Department of Insurance (TDI) administers and regulates the Texas workers' compensation system. The commissioner of workers' compensation is appointed by the governor and confirmed by the Senate for a two-year term. There are 697 TDI employees dedicated solely to workers' compensation functions.
- DWC is funded primarily through a maintenance tax assessed on all workers' compensation insurance policies written in Texas. The division oversees more than 270 insurance companies, and more than 96,000 health care providers operate within the system. DWC fields complaints from system participants, performs compliance audits, randomly selects system participants for performance evaluations, and oversees the division's medical advisor. The medical advisor and the medical quality review process use outside health care professionals as expert reviewers to determine if any violations of rules or fraud have occurred. DWC enforces

compliance with rules and regulations by assessing administrative penalties and referring fraud cases to the district attorney for prosecution.

Only governmental entities and companies that contract with the government must have workers' compensation insurance. All businesses may purchase workers' compensation, choosing either a non-network or a managed care system certified by TDI. If a business has workers' compensation insurance, it cannot be sued for a workers' injury.

Designated doctors. DWC uses a combination of eligibility, training, and testing requirements to determine if a doctor is qualified to be a designated doctor who gives medical opinions on behalf of the state. The division has approved training and an end-of-course test to judge doctors' proficiency to perform their duties.

Dispute resolution process. DWC oversees the process by which an injured employee or other system parties may dispute an insurance carrier's denial of a workers' compensation claim.

Indemnity disputes. An indemnity dispute occurs when an insurance carrier denies an injured employee's claim, stating that the injury or illness is not work related or that an injured employee is not eligible for payment of lost wages or other monetary compensation. Once an indemnity dispute has been filed with DWC, a benefit review conference is held. An injured employee is entitled to no more than two benefit review conferences. In the case of an appeal, there is a contested case hearing through the division overseen by a DWC judge. If that ruling is appealed, the case could be reviewed by an appeals panel that would determine whether or not the contested case hearing determination was correct. After an appeals panel review, the losing party may bring the case before a district judge.

Medical necessity disputes. A medical necessity dispute occurs when an insurance carrier denies an injured employees claim, stating that the medical care is not necessary. Once a medical necessity dispute involving a network provider has been filed, the case is reviewed by a utilization review agent to determine if a procedure or medication is medically necessary. If the agent's medical necessity determination is appealed, TDI assigns an independent review organization. If that decision is appealed, the case moves to district court.

For a medical necessity dispute resolution involving a non-network provider, the process is like that for a network provider until an appeal of the independent review organization decision. The venue for an appeal of a review organization's decision is determined by the amount of the claim. If it is less than \$3,000, there would be a contested case hearing within the division of workers' compensation. A contested case hearing decision appeal is heard by district court. If the claim is more than \$3,000, there would be a contested case hearing before the State Office of Administrative Hearings (SOAH). If the SOAH decision is appealed, the case moves to the district court.

Medical fee disputes. A medical fee dispute occurs after treatment has been provided to the injured worker when an insurance carrier and the health care provider dispute the fee owed to the health care provider. A medical fee dispute resolution process occurs only for non-network fee disputes because network parties must abide by the network contract. Once the dispute is filed with DWC, the division staff determines whether an insurance carrier denied payment improperly. If they determine payment should not have been denied, the insurance carrier must pay the disputed fee. The process to appeal the division staff's decision is determined by the amount of the claim. If the claim is less than \$2,000, there is a contested case hearing before DWC. An appeal of the contested case hearing decision is heard by a district court. If the claim is greater than \$2,000, the case has a contested case hearing before SOAH. An appeal of the contested case hearing decision is heard before a district court. District court proceedings are subject to a substantial evidence standard of judicial review.

DIGEST:

CSHB 2605 would continue the Division of Workers' Compensation (DWC) of the Texas Department of Insurance (TDI) until September 1, 2017. The bill would revise the dispute resolution process, transfer certain commissioner of workers' compensation duties to insurance carriers, change the certification and continuation of designated doctors, and amend the requirements for requesting and rescheduling benefit review conferences. The bill also would revise the composition and practices of the medical quality review panel and establish a quality assurance panel to assist the medical quality review panel. CSHB 2605 would allow the commissioner of workers' compensation to issue emergency cease and desist orders and would refine the deceptive practices definition.

The bill also would make conforming changes by removing outdated provisions, such as references to specific fee amounts and classes of administrative violations.

Under the bill, an insurance carrier would commit an administrative violation if the carrier did not initiate workers' compensation payments within 15 days of the claim or file a notice of refusal.

Transfer of certain duties to insurance carriers. The bill would transfer certain duties to the insurance carrier from the DWC commissioner, including:

- approving a request for a new treating doctor;
- establishing criteria for the selection of a new treating doctor;
- authorizing a grant of an advance in benefits to an injured employee in hardship cases;
- authorizing a grant of an extension of the 104-week maximum compensable treatment for spinal injuries; and
- authorizing approval of accelerated benefits.

The injured employee could dispute through a benefit review conference or independent review organization a decision by an insurance carrier to deny a request to select a new doctor. In certain cases, the DWC commissioner would adopt rules to implement procedures for disputing the insurance carrier's denial.

The bill would transfer the authority to approve supplemental benefits for an injured worker from DWC to the insurance carrier. The DWC commissioner would adopt the procedures by which an injured employee could dispute the denial of supplemental benefits by the insurance carrier through a benefit review conference.

Designated doctors. The DWC commissioner would have to develop a process for certifying designating doctors and could deny renewal of a designated doctor certification. The rules adopted by the commissioner would have to include a requirement that DWC evaluate the qualification of designated doctors for certification, including the doctor's educational experience, previous training, and demonstrated ability to perform the designated doctor duties.

Training for designated doctors. DWC would have to develop guidelines for certification training programs for designated doctors to ensure current and continued competency. These guidelines would include a standard curriculum, standard course materials, and testing criteria. DWC would review these guidelines periodically. DWC could authorize an independent training and testing provider to conduct the certification program.

Continuing designated doctor services. A designated doctor would have to continue treating the injured employees assigned to the doctor, including performing subsequent examinations or acting as a resource for division disputes, unless DWC authorized the doctor to discontinue services. The DWC commissioner would determine the circumstances under which a doctor would be permitted to discontinue services, including the doctor's leaving the workers' compensation system or a relocation of the doctor's residence or practice.

Requesting a benefit review conference. A party requesting a benefit review conference could be denied one if the party did not provide sufficient documentation at the time of the request. The DWC commissioner would establish the documentation necessary and would establish a process to evaluate the sufficiency of the documentation provided by a requestor.

Rescheduling a benefit review conference. A party who missed a benefit review conference without good cause and did not request a rescheduled conference would forfeit that conference. The DWC commissioner would adopt rules to define good cause. If the benefit review officer determined that available information pertinent to the resolution of disputed issues was not produced at the initial benefit review conference and a second benefit review conference had not already been conducted, a party who missed the initial conference could request a benefit review conference.

To reschedule a conference, the requesting party would have to submit a new request with the required documentation. DWC would evaluate the request in the same manner as it would an initial request.

Network medical necessity disputes. Spinal injuries would be treated like other medical necessity disputes within the network medical necessity dispute resolution process. A party would be entitled to a contested case hearing through DWC prior to appeal of an independent review organization's decision before the case moved to the district court. During

the contested case hearing, the hearing officer would be required to consider network approved, evidence-based treatment guidelines.

Medical necessity disputes. The bill would remove the State Office of Administrative Hearings (SOAH) from the medical necessity dispute resolution process. An appeal of an independent review organization decision would be heard in a contested case hearing within DWC and would not require the prerequisite of a benefit review conference. The decision of a hearings officer would be final unless a party were to appeal for judicial review.

Medical fee disputes. The bill would allow a party in a medical fee dispute to appeal a benefit review conference decision through arbitration or a contested case hearing conducted by SOAH. The cost of the contested case hearing would be paid by the non-prevailing party. The commissioner or DWC could participate in the contested case hearing if it involved interpretation of fee guidelines.

A benefit review conference in a medical fee dispute resolution hearing could not be resolved by negotiating fees that were inconsistent with the fee guidelines adopted by the commissioner.

Appeals panel. The appeals panel would be required to issue a written decision on an affirmed case if the case was one of first impression, involved a recent change in law, or involved errors at the contested case hearing that required correction but did not affect the outcome of the hearing. Errors in a contested case hearing would include findings of fact for which insufficient evidence existed, incorrect conclusions of law, findings of fact or conclusions of law that were not properly before the hearings officer, and any other legal errors.

Medical quality review panel. The medical advisor would have to select specialists from various health care specialty fields to serve on the panel. The medical advisor would have to notify the division if a representative from a particular specialty no longer would be necessary on the panel or if a new specialty should be added.

DWC and the commissioner, with input from the medical adviser and potentially affected parties, would have to adopt criteria for the medical case review process. The criteria would include a process for handling complaint-based medical case reviews and a process to select health care

entities and providers for compliance audit or review. The criteria would have to be published on the DWC website.

The DWC commissioner would adopt rules to govern the operation of the medical quality review panel, including qualifications for membership, composition of membership and the specialties to be represented, the length of time a member could serve, a conflict of interest policy, procedures and grounds for removal from the panel, and a procedure through which members would be notified of the status and enforcement outcomes resulting from the panel's process.

The DWC commissioner would adopt training requirements for panel members and could require members to receive training on any topic deemed relevant by the commissioner. The commissioner would require training on administrative violations that affect the delivery of appropriate medical care, confidentiality requirements, and the medical quality review criteria adopted by the commissioner.

Quality assurance panel. The medical adviser would establish a quality assurance panel within the medical quality review panel to assist the medical adviser, evaluate medical care, and recommend enforcement actions to the medical adviser.

Emergency cease and desist orders. The DWC commissioner could issue an emergency cease and desist order if the commissioner believed a person regulated by DWC had violated a law, rule, or order and that the alleged conduct would result in harm to the health, safety, or welfare of another person. The bill would prescribe the contents and delivery of a cease and desist order.

An affected person could contest the order within 30 days of receiving it. Pending a hearing, the order would remain in effect unless stayed by the commissioner. Upon receipt, the commissioner would schedule a hearing with SOAH within 10 days. After SOAH's decision, the commissioner would affirm, modify, or set aside the order.

Administrative violations proceeds. The bill would require all proceeds from administrative penalties to be deposited in the General Revenue Fund instead of the TDI operating, general revenue-dedicated account.

Commissioner's final order. The bill would require the DWC commissioner's final order after a SOAH hearing to include a statement of the right of the person to judicial review. An order of the commissioner would be subject to judicial review under the substantial evidence rule.

Unannounced investigative visits. The bill would allow DWC to perform unannounced on-site visits, during which any person regulated by the division would have to provide all records pertaining to the workers' compensation system. The commissioner would adopt rules for announced and unannounced visits.

Deceptive manner. Under the bill, a person would act in a deceptive manner if the person knew or should have known that the person's actions would convey or could be interpreted as conveying the false impression that an item was approved, endorsed, sponsored, or authorized by, the same as, or associated with DWC, TDI, the state, or an agency of this state or the person had connection with or authorization from DWC, TDI, the state, or an agency of this state.

Effective date. The provisions of the bill would apply only to processes beginning on or after September 1, 2011. Most of the provisions that have rulemaking would allow DWC until January 1, 2013, to go through the rulemaking process before the provision would go into effect. The bill would take effect on September 1, 2011.

SUPPORTERS
SAY:

The Division of Workers' Compensation (the division) should be continued within the Texas Department of Insurance because the state continues to need a neutral third party to resolve disputes and ensure injured employees are timely paid benefits. Oversight of the system is necessary to ensure the system works well and to minimize overall costs to the system. The Sunset Advisory Commission determined that the two commissioner system has been successful.

Transfer of certain duties to insurance carriers. DWC's oversight of individual cases creates a conflict of interest with its oversight duties. There are certain functions for which insurance carriers are better suited. The Sunset Advisory Commission identified certain decisions in which the division was involved unnecessarily. It would be appropriate to transfer these responsibilities to insurance carriers because they have more knowledge about the details of the specific cases since they have been involved from the beginning.

Designated doctors. Because the designated doctor's opinion holds presumptive weight in the dispute resolution process, it is important that these doctors be properly trained in the workers' compensation system and expertly qualified in their specialty. Current qualification requirements do not provide enough detail to ensure a necessary level of expertise and consistency. DWC does not verify a doctor's area of expertise, and the state should no longer rely on the honor system for its designated doctors.

The bill would specify that DWC could certify or revoke a doctor's designation within the workers' compensation system, which would allow timely action against a doctor who did not meet continuing qualifications or committed repeated violations.

It is important to strengthen the qualifications of those reviewing cases. The current system allows a state-of-the-art spine surgeon to be denied over and over as a provider by those who are not spinal expert doctors.

Dispute resolution processes. The bill would include a contested case hearing to hear the appeal of an independent review organization before an appeal to a district court for medical necessity disputes. Concerns that removing the State Office of Administrative Hearings (SOAH) from the medical necessity dispute resolution process would cut out due process are unfounded. DWC offers a similar process and would afford the same due process. Both SOAH and DWC hearings would include an administrative hearing with a judge. The addition of a contested case hearing would produce a record admissible to court during an appeal for judicial review, whereas the independent review organizations conduct informal desk reviews of medical records that are not formal, recorded proceedings.

Benefit review conference. The provision requiring documentation to request a benefit review conference would ensure all participants were prepared for requested hearings, which would increase the productivity of the entire system. Many hearings are rescheduled because participants do not have proper documentation, such as medical records.

Limiting the circumstances under which a party could request to reschedule a hearing would prevent disruptions to the hearing process. Rescheduling hearings creates gaps in DWC's hearing docket that cannot be filled on short notice and prevents division staff from conducting other mediations.

Appeals panel. Allowing an appeals panel to issue written affirmations in certain circumstances would ensure all system participants were well apprised of precedent set by the division as well as allow the division to better ensure consistency among its hearing officers.

Medical quality review panel. The changes made to the medical quality review panel and the quality assurance panel and their processes would make the review process more meaningful, increase objectivity, and increase the number of cases that receive enforcement action. The bill would prevent medical quality review cases from being discarded due to questions of objectivity. At present, the medical advisor is involved in all aspects of the medical quality review panel, which gives one person too much authority and influence over the process, potentially compromising review outcomes.

Qualifications. The bill would require the development of qualifications for the panel. Current law does not guide membership qualifications for panelists, and the qualifications adopted by DWC do not address the specific qualifications that could affect the quality of the reviews. DWC relies on a small number of health care professionals and a limited range of specialty backgrounds to perform all reviews, which hinders the division's ability to match specific cases with specific professionals based on specialty and qualification.

Training. The bill would require training for panelists, which would increase the number of cases recommended for enforcement action that result in final enforcement action. The current lack of training afforded to panelists is a violation of the Workers' Compensation Act.

Investigation unit. An agency should have clear statutory authority to conduct inspections to help ensure timely compliance of regulated entities, including the use of announced and unannounced inspections. It is important that DWC has the ability to investigate thoroughly since violations can result in significant and immediate harm to an injured employee's health and safety through the quality and timeliness of medical treatment, or to an employee's financial well being through the nonpayment of benefits.

Emergency cease and desist orders. Although current law gives DWC cease-and-desist authority over an entity that commits repeated administrative violations, allows repeated administrative violations to

occur, or violates a commissioner order or decision, DWC cannot take immediate action against a violator who does not already have a history of violations with the division. The authority granted by the bill would mirror the authority granted to TDI, which can issue emergency cease-and-desist orders against violators of the Insurance Code. DWC has been responsible with their current cease-and-desist issuance authority, only exercising it once in 2009, so it is reasonable to assume their responsibility with emergency authority.

OPPONENTS
SAY:

The workers' compensation process is broken in ways that would not be addressed by this bill. Injured employees struggle to get information and find the system to be secretive. Patients should be permitted to see their primary care doctor if they are injured at work. The system should focus first on treating injuries and paying the bills, then handle any dispute later. Delays in treatment cause further unnecessary injury, which doubles the cost of care.

An injured employee can be forced to wait for an unlimited time for a preauthorization if their need is not imminent. There should be a timeframe in which preauthorization had to be approved or denied.

Transfer of certain duties to insurance carriers. Allowing insurance carriers to be in charge of disputes in which they are a party would be unreasonable and unfair to the injured employee and would add disputes and delay to the system.

There is an inherent danger in giving insurance companies the authority to approve or deny claims. An insurance company can take from two to four months to overturn a decision. The delayed wait time would increase the length of time it takes to change treating doctors, which currently takes a maximum of 10 days.

Dispute resolution processes. The State Office of Administrative Hearings (SOAH) should not be removed from the dispute resolution process. SOAH brings an elevated level of expertise to the proceedings because administrative hearings are the agency's sole function.

Administrative violations proceeds. It is unnecessary to deposit administrative penalty proceeds into general revenue rather than the division's dedicated account because DWC spending is limited by legislative appropriation. DWC does not and cannot spend money beyond

its appropriation, so there is no incentive to accrue administrative penalties proceeds.

Benefit review conference. A certain level of documentation should not be required to request a benefit review conference because acquiring the appropriate documentation takes time. Proper documentation could be obtained between the request and scheduling of the hearing and the day of the hearing. The requirement would limit the due process afforded the injured worker. This requirement would favor insurance carriers because they have many ways to avoid benefit review conferences.

The provision that an injured worker would forfeit their right to a benefit review conference if the injured worker did not show up would be too strong of a punishment for cancellation.

Emergency cease-and-desist orders. Current law gives DWC cease-and-desist authority over an entity that commits repeated administrative violations, allows repeated administrative violations to occur, or violates a commissioner order or decision. While DWC's current authority requires a hearing to be held before the issuance can be ordered, there is no demonstrated need for an expedited process. If the commissioner has rarely exercised the current authority, it is not clear why emergency orders would be necessary.

OTHER
OPPONENTS
SAY:

Fee guidelines. All parties in a benefit review conference on a non-network medical fee dispute should have the ability to agree on a monetary level rather than DWC's adopted fee guidelines.

Designated doctors. The DWC commissioner should be able to establish a certification fee for designated doctors to be certified by DWC to cover the administrative cost of certifying the designated doctors.

DWC should be required to remove designated doctor scheduling information from the website because very current information and extraneous information above the statutory requirements is posted. People use this information to manipulate this system, which has a negative impact on injured workers.

NOTES:

The committee substitute differs from the original bill by extending the effective date for several provisions, including provisions related to designated doctors and the transfer of certain claim actions to insurance

carriers, to January 1, 2013. The committee substitute added a provision to define acting in a deceptive manner and updated and corrected incorrect citations, including references to the former Workers' Compensation Commission.

The companion bill, SB 658 by Huffman, was referred to the Senate Government Organization committee on March 16.