CHAPTER 137. RETURN-TO-WORK

SUBCHAPTER A. General Provisions

§137.1. Disability Management Concept.

(a) Disability management is a process designed to optimize health care and return to work outcomes for injured employees to avoid delayed recovery in the Texas Workers' Compensation System.

(b) This chapter is designed to provide disability management tools, such as treatment and return to work guidelines, treatment protocols, treatment planning, and case management to benchmark, manage, and achieve improved outcomes. The Division may use these tools for the following purposes, including, but not limited to:

(1) resolving income benefit disputes;
(2) resolving medical benefit disputes;
(3) establishing performance-based tiers;
(4) defining performance-based incentives;
(5) determining sanctions or penalties;
(6) performing medical quality reviews; or
(7) assessing other matters deemed appropriate by the Commissioner of Workers' Compensation.

(c) The Division will utilize this chapter to implement and interpret specific provisions contained in Labor Code §413.011(a) and (e), and this chapter takes precedence over any conflicting payment policy provisions adopted or utilized by the Centers for Medicare and Medicaid Services (CMS) in administering the Medicare program.

(d) Independent Review Organization (IRO) decisions regarding medical necessity made in accordance with Labor Code §413.031 and §133.308 of this title (relating to Medical Dispute Resolution by Independent Review Organizations), which are made on a case-by-case basis, take precedence in that case only, over adopted treatment guidelines, treatment protocols, treatment planning and Medicare payment policies.

The provisions of this §137.1 adopted to be effective January 18, 2007, 32 TexReg 191.

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SUBCHAPTER B. Return To Work

§137.10. Return to Work Guidelines.

(a) Insurance carriers, health care providers, and employers shall use the disability duration values in the current edition of *The Medical Disability Advisor, Workplace Guidelines for Disability Duration,* excluding all sections and tables relating to rehabilitation, (MDA), published by the Reed Group, Ltd. (Division return to work guidelines), as guidelines for the evaluation of expected or average return to work time frames.

(b) Information on how to obtain or inspect copies of the Division return to work guidelines may be found on the Division's website: www.tdi.state.tx.us.

(c) The Division return to work guidelines provide disability duration expectancies. The Division return to work guidelines shall be presumed to be a reasonable length of disability duration and shall be used by:

(1) health care providers to establish return to work goals or a return to work plan for safely returning injured employees to medically appropriate work environments;

(2) insurance carriers as a basis for requesting a designated doctor examination to resolve an issue regarding an injured employee's ability to return to work as well as a basis to initiate case management and to refer an injured employee to vocational rehabilitation providers; and

(3) employers, insurance carriers, health care providers, and injured employees to facilitate and improve communications among the parties regarding the return to work goals or plans established by health care providers.

(d) The health care provider, insurance carrier, employer, and Division may consider co-morbid conditions, medical complications, or other factors that may influence medical recoveries and disability durations as mitigating circumstances when setting return to work goals or revising expected return to work durations and goals.

(e) Disability duration values in the guidelines are not absolute values and do not represent specific lengths or periods of time at which an injured employee must return to work; the values represent points in time at which additional evaluation may take place if full medical recovery and return to work have not occurred. System participants may, however, determine additional evaluation is appropriate at any time during a claim. The disability duration values depict a continuum from the minimum time to the maximum time for most individuals to return to work following a particular injury. An insurance carrier may request additional return to work information from a health care provider at any time. An insurance carrier may not use the Division return to work guidelines as the sole justification or the only reasonable grounds for reducing, denying, suspending or terminating income benefits to an injured employee.

(f) For all diagnoses or injuries that are not addressed by the Division return to work guidelines, system participants shall establish disability duration parameters and return to work goals in accordance with the principles of evidence-based medicine as defined by Labor Code §401.011(18-a).

(g) This section is effective on or after May 1, 2007.

The provisions of this §137.10 adopted to be effective January 18, 2007, 32 TexReg 193.

§137.41. Purpose.

The purpose of §§137.41 - 137.48 is to set forth the terms, conditions, and requirements for the return-to-work pilot program for small employers.

The provisions of this §137.41 adopted to be effective February 22, 2006, 31 TexReg 1037

§137.42. Definitions.

The following words and terms shall have the following meanings only for the purposes of the return-to-work pilot program for small employers:

(1) Alternative duty—Job duties that are different from the injured employee's normal or regular pre-injury job duties and that are assigned specifically to facilitate the injured employee's doctor-identified work restrictions or limitations.

(2) Eligible employer—Any employer that:

(A) is not a state agency or political subdivision of the state;

(B) employs at least two but not more than 50 employees on each business day during the preceding calendar year; and

(C) has workers' compensation insurance coverage in Texas.

(3) Eligible expense—An expenditure of funds or costs incurred by an eligible employer on or after January 1, 2006 for workplace modifications or other costs that are necessary to reasonably facilitate an injured employee's doctor-identified restrictions that are intended to facilitate the early and sustained return to work of an employee who has a compensable injury. An indemnity benefit, medical benefit, or health care for which an insurance carrier is liable is not an eligible expense.

(4) Modified duty—The injured employee's normal or regular pre-injury job with workplace modifications or changes to facilitate doctor-identified work restrictions or limitations.

(5) Return-to-work account (account)—The Texas Department of Insurance, Division of Workers' Compensation's return-to-work account for small employers.

(6) Return-to-work account administrator (administrator)—The administrator of the Texas Department of Insurance, Division of Workers' Compensation's return-to-work account and the return-to-work pilot program for small employers.

(7) Single employer—An employer operating one or more businesses under the same federal employer identification number. In the absence of a federal employer identification number, a single employer is established by the employer's social security number.

(8) State appropriation year—The State of Texas' fiscal accounting year that begins September 1 and ends August 31 of the following year.

(9) Workplace modification—Physical adjustments or adaptations to the worksite; or equipment, devices, furniture, or tools that are necessary to reasonably facilitate an injured employee's doctor-identified restrictions to return the employee to modified or alternative duty.

The provisions of this §137.42 adopted to be effective February 22, 2006, 31 TexReg 1037

§137.43. Return-to-Work Account Administrator.

The Commissioner of Workers' Compensation shall appoint a qualified employee of the Texas Department of Insurance, Division of Workers' Compensation (Division) to serve as the return-to-work account administrator to implement the provisions of this subchapter.

The provisions of this §137.43 adopted to be effective February 22, 2006, 31 TexReg 1037

§137.44. Return-to-Work Account for Small Employers.

(a) The workers' compensation return-to-work account is a special account in the general revenue fund. The Texas Department of Insurance, Division of Workers' Compensation shall deposit into the account an amount not to exceed $100,000 each state appropriation year from administrative penalties received by the Division. The maximum amount of disbursements from the account may not exceed $100,000 each state appropriation year.

(b) Disbursements of funds from the account are dependent on the availability of funds in the account.

(c) The total reimbursement that any single employer may receive from the account is $2,500 for all workplace modification expenditures made during the state appropriation year for all injured employees.

(d) Disbursements from the account to approved eligible employers shall be made on a reimbursement basis subject to verification of employer eligibility, receipts and expenditures, workplace modifications, the employee's return to work, and approval of the employer's application.

(e) For purposes of making disbursements from the account, the date the employer's completed application for reimbursement from the return-to-work account is received by the Division shall be considered the official date of service.

(f) Reimbursements shall be processed in the order that completed applications are received by the Division.

(g) Reimbursements of approved applications shall be funded from the account in the state appropriation year in which the application is received.

(h) Approved reimbursements shall be immediately processed for funding subject to the availability of funds in the account. Applications may be denied in whole or in part due to the lack of available funds in the account.

The provisions of this §137.44 adopted to be effective February 22, 2006, 31 TexReg 1037

§137.45. Employer Eligibility for Reimbursement from the Return-to-Work Account.

(a) In order to be eligible to receive reimbursement from the return-to-work account, an employer must:

(1) be an eligible employer that has incurred an eligible expense;

(2) have Texas workers' compensation insurance in effect on the date the employee is injured and be able to provide proof of coverage;

(3) submit an Application for Reimbursement from the Return-to-Work Account for Small Employers; and

(4) provide any additional or supplemental information to the return-to-work account administrator that may be deemed necessary by the Division.

(b) An employer that willfully applies for or receives reimbursement from the account knowing that the employer is not an eligible employer commits a violation.

The provisions of this §137.45 adopted to be effective February 22, 2006, 31 TexReg 1037

§137.46. Application for Reimbursement from the Return-to-Work Account.

(a) An eligible employer seeking reimbursement from the return-to-work account shall submit to the Division an Application for Reimbursement from the Return-to-Work Account for Small Employers.

(b) Applications shall be available on the Division's website (www.tdi.state.tx.us/wc) and at the Division's central office. Upon request, the Division shall provide an application form to an employer.

(c) Applications shall be submitted to the Division in the manner prescribed by the Division.

(d) The date the completed application is received by the Division shall be the official date for purposes of processing the application.

(e) An application that has information missing or that does not include itemized expenditures, receipts, or other documentation necessary to support the application and to justify the workplace modification may be returned to the employer for completion, documentation supplementation, or the application may be denied.

(f) Upon completion of the application evaluation, the return-to-work account administrator shall notify the employer in writing of the approval or denial of the application.

The provisions of this §137.46 adopted to be effective February 22, 2006, 31 TexReg 1037

§137.47. Criteria for Evaluation of Applications.

An employer must provide the following information on the application to be considered for reimbursement from the account:

(1) The date the employee returned to work, and if available, the injured employee's Texas Department of Insurance, Division of Workers' Compensation claim number.

(2) A statement or certification that the injured employee returned to work in either a modified or alternative duty capacity.

(3) A statement or certification that the employer was able to sustain the employment of the injured employee as a result of the workplace modification.

(4) A copy of the Division's "Work Status Report" from the injured employee's examining doctor that specifies the injured employee's physical restrictions or limitations, which necessitated the provision of a workplace modification in order for the employee to return to work in a modified or alternative duty capacity.

(5) A detailed description of the workplace modification, including any supporting information such as receipts, photos or diagrams of the modification, and how the modification facilitates the doctor-identified physical restrictions or limitations.

(6) Documentation of the expenses that provided the workplace modification or other costs necessary to facilitate the injured employee's return to work.

The provisions of this §137.47 adopted to be effective February 22, 2006, 31 TexReg 1037

§137.48. Return-to-Work Account Administrator Determinations.

(a) The administrator shall make determinations regarding the following:

(1) the employer's eligibility to participate in the program;

(2) the appropriateness of the workplace modification in facilitating the injured employee's return to work based on doctor-identified restrictions;

(3) the effectiveness of the workplace modification in facilitating the injured employee's early and sustained return to work;

(4) the cost of the workplace modification in relation to usual and customary costs of the same or similar modification; and

(5) the appropriateness of other costs incurred by the employer to return the injured employee to work in a modified or alternate duty capacity.

(b) The administrator or designee may make an on-site evaluation or request information from the employer or providers of a workplace modification in order to verify that:

(1) the workplace modification was provided;

(2) the workplace modification was a reasonable modification and expenditure; and

(3) the injured employee returned to work as a result of the workplace modification.

(c) The administrator shall utilize the National Institute of Health's "Searchable Online Accommodation Resource," U.S. Department of Labor resources, Texas Department of Assistive and Rehabilitative Services resources, or similar resources in evaluating and verifying workplace modifications and associated costs. The administrator may consult with a rehabilitation counselor or specialist when verifying the appropriateness of workplace modifications and costs.

(d) The administrator may approve or deny in whole or in part the employer's request for reimbursement from the account.

(e) Decisions regarding approval or denial of applications, the reason for approval or denial of an application, and the amount to be disbursed from the account may not be appealed and are the sole discretion of the return-to-work account administrator.

The provisions of this §137.48 adopted to be effective February 22, 2006, 31 TexReg 1037

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SUBCHAPTER C. Treatment Guidelines

§137.100. Treatment Guidelines.

(a) Health care providers shall provide treatment in accordance with the current edition of the *Official Disability Guidelines – Treatment in Workers' Comp*, excluding the return to work pathways, (ODG), published by Work Loss Data Institute (Division treatment guidelines), unless the treatment(s) or service(s) require(s) preauthorization in accordance with §134.600 of this title (relating to Preauthorization, Concurrent Review and Voluntary Certification of Health Care) or §137.300 of this title (relating to Required Treatment Planning).

(b) Information on how to obtain or inspect copies of the Division treatment guidelines may be found on the Division's website: www.tdi.state.tx.us.

(c) Health care provided in accordance with the Division treatment guidelines is presumed reasonable as specified in Labor Code §413.017, and is also presumed to be health care reasonably required as defined by Labor Code §401.011 (22-a).

(d) The insurance carrier is not liable for the costs of treatments or services provided in excess of the Division treatment guidelines unless:

(1) the treatment(s) or service(s) were provided in a medical emergency; or

(2) the treatment(s) or service(s) were preauthorized in accordance with §134.600 or §137.300.

(e) An insurance carrier may retrospectively review, and if appropriate, deny payment for treatments and services not preauthorized under subsection (d) of this section when the insurance carrier asserts that health care provided within the Division treatment guidelines is not reasonably required. The assertion must be supported by documentation of evidence-based medicine that outweighs the presumption of reasonableness established by Labor Code §413.017.

(f) A health care provider that proposes treatments and services which exceed, or are not included, in the treatment guidelines may be required to obtain preauthorization in accordance with §134.600, or may be required to submit a treatment plan in accordance with §137.300.

(g) The insurance carrier shall not deny treatment solely because the diagnosis or treatment is not specifically addressed by the Division treatment guidelines or Division treatment protocols.

(h) This section applies to health care provided on or after May 1, 2007.

The provisions of this §137.100 adopted to be effective January 18, 2007, 32 TexReg 194.

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SUBCHAPTER D. Treatment Planning

§137.300 Required Treatment Planning.

(a) A treatment plan shall include the identification of all reasonably anticipated health care treatment and services to be provided to the injured employee for a minimum of 30 days. Treatment plans shall be consistent with the principles of evidence-based medicine and health care reasonably required as defined in Labor Code 401.011(18-a) and (22-a) and shall be submitted for preauthorization by the treating doctor. Treatment plans are required when:

(1) treatment or service is anticipated to exceed or is not included in Division treatment guidelines or Division treatment protocols in accordance with §137.100 of this title (relating to Treatment Guidelines); and the treatment or service will be provided after the greater of:

(A) 60 days from the date of injury; or

(B) the optimum days listed in §137.10 of this title (related to Return to Work Guidelines);

(2) a diagnosis is not included in Division treatment guidelines or Division treatment protocols; or

(3) deemed necessary by the Commissioner as a result of sanctions imposed in accordance with Labor Code §408.0231(e) and (f) and other relevant sections of this title.

(b) A treatment plan is not required for treatments and services within the Division treatment guidelines or Division treatment protocols unless the treatments or services are submitted as part of a required treatment plan in accordance with subsection (a) of this section.

(c) When a health care provider identifies treatments and services that require preauthorization in accordance with §134.600 of this title (relating to Preauthorization, Concurrent Review, and Voluntary Certification of Health Care), the treatment or service may be submitted for preauthorization by a health care provider unless the health care is submitted as part of a treatment plan in accordance with subsection (a) of this section.

(d) When a health care provider develops a treatment plan pursuant to subsection (a) or (b) of this section, it shall be submitted by the treating doctor to the insurance carrier and processed as a preauthorization request pursuant to §134.600. If the health care provider is not the treating doctor and identifies services that require a treatment plan pursuant to subsection (a) of this section, the health care provider shall confer with the treating doctor to develop the required treatment plan in accordance with subsection (a) of this section.

(e) The treating doctor shall confer with the health care providers, insurance carriers, employers, or injured employees as necessary to develop the treatment plan. The treatment plan shall include the identity and contact information of the health care providers involved in the delivery of care proposed within the treatment plan.

(f) The treating doctor shall inform the parties identified in subsection (e) of this section of the approval or denial of the treatment plan.

(g) This section applies to health care provided on or after May 1, 2007.

The provisions of this §137.100 adopted to be effective January 18, 2007, 32 TexReg 195.