

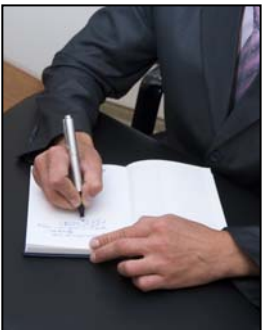


OIEC QUARTERLY REVIEW

October - December 2008 (Issue 12)

Letter from the Public Counsel

Dear Friends:



I would like to express my appreciation to the workers' compensation stakeholder organizations who have invited me to participate in their annual meetings this past year. Every such opportunity enables me to develop a more personal relationship with the members of the group and to become better informed about the issues that concern them.

In the past year, I have been given the opportunity to share with them the perspectives that the Office of Injured Employee Counsel (OIEC) has formed regarding the issues that we consider important to the interests of injured employees. It is my firm belief that the interests of all of the stakeholders are best served by a system that is most fair to everyone. A dynamic political process certainly has its place but like the settlement of a lawsuit, a resolution that benefits all of the parties best serves each of them.

OIEC has made some legislative recommendations that we strongly feel will make the system work better and that will benefit everyone. In those cases where I have been given an opportunity to explain the need for the changes that we have recommended, some apprehension has been alleviated. We will continue to work with all of the stakeholders to improve the process that, in my opinion, is already establishing precedents for meaningful reform across the country.

Sincerely,

Norman Darwin
Public Counsel

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Please provide feedback, ask questions, or send a request to be added to the Quarterly Review distribution list at OIECinbox@oiec.state.tx.us.

Regulatory and Legislative Recommendations Introduced by the Office of Injured Employee Counsel



As a result of the change in focus and goals of the workers' compensation system resulting from House Bill (HB) 7, OIEC offered the following regulatory and legislative recommendations to be considered in the 81st Texas Legislature on behalf of injured employees of Texas pursuant to Texas Labor Code §§404.106 and 404.108.

Designated Doctor Disputes. OIEC recommends that in cases where the injured employee disagrees with the opinion of the designated doctor and either the treating doctor or a referral doctor has not conducted an examination to assess maximum medical improvement (MMI) and an impairment rating (IR) prior to the issuance of a designated doctor's report on those issues, that the statute be amended to require the insurance carrier to pay the cost of an examination by the treating doctor, if the treating doctor is qualified and willing to conduct the examination, or a referral doctor, in those instances where the treating doctor is either unable or unwilling to conduct an MMI/IR examination.

Judicial Review. OIEC recommends that Texas courts should appoint an attorney ad litem to either represent an injured employee or refer the case to another attorney to provide competent representation at district court if the final administrative decision was in favor of the injured employee. If the injured employee does not prevail in district court with the representation of a court appointed attorney ad litem, OIEC recommends a provision be added to provide that the injured employee's attorney's fees should be paid from the Subsequent Injury Fund.

Political Subdivisions and Health Care Networks' Requirements in the Workers' Compensation System. OIEC recommends that political subdivisions be required to provide the same notice to employees that certified networks are required to provide to their employees.

Eligible Parents Receipt of Death Benefits. OIEC recommends that the statutory definition of eligible parents be amended by removing the language that requires receipt of burial benefits as a prerequisite for the receipt of death benefits. OIEC also recommends that good cause be established by the eligible parents for failure to timely file a claim within one year of the date of the employee's death.

Ombudsman Program and the Injured Employees' Rights and Responsibilities.

OIEC recommends amending its enabling statute to:

- Clarify an injured employee's right to seek assistance with a dispute before SOAH;
- Hold Ombudsman and injured employee communications confidential to protect the agency's staff from information revealed by the injured employee;
- Change the statutory authority to adopt OIEC's notice to injured employees' rights and responsibilities from the Commissioner of Insurance and the Commissioner of Workers' Compensation to the Public Counsel to allow for flexibility in the notice when the statute or rules change;
- Refuse service to threatening or abusive injured employees or injured employees pursuing a criminal act; and
- Limit the agency from being able to access the regulator's attorney-work product to protect the integrity of the agency and other agency's administrative dispute resolution processes.

(Continued on page 3)



Regulatory and Legislative Recommendations (Continued)

Waiver for Injuries and Diagnoses that Manifest After the Initial 60-Day Waiver Period. OIEC recommends establishing another 60-day waiver period for insurance carriers to make the determination of whether to contest compensability (i.e., whether the injury was work-related) or relatedness of an additional injury or diagnosis. If the carrier fails to challenge the compensability within 60 days of the date it received written notice of the additional injury or diagnosis, the additional injury or diagnosis would become compensable as a matter of law.

Preauthorization and Compensability or Relatedness Issues. OIEC recommends that an insurance carrier that does not raise a compensability or relatedness issue in either its initial denial or the denial of reconsideration of a requested treatment or service waives its right to raise a compensability or relatedness challenge to that specific treatment or service if the treatment or service is ultimately preauthorized in the medical dispute resolution process. OIEC also recommends that the issue shall be resolved in the same hearing as the medical necessity issue in the Texas Department of Insurance, Division of Workers' Compensation administrative dispute resolution process.

Confidentiality of Independent Review Organization (IRO) and Letters of Clarification to the IRO. OIEC recommends that Insurance Code §4202.009 be repealed and a new process for seeking clarification of an IRO decision be created to enable an IRO to reconsider its decision and issue a new decision in response to a request for clarification.

Repeal of 90-day Provision. OIEC recommends that the 90-day provision requiring a claimant to dispute a determination of maximum medical improvement with a concurrent impairment rating within 90 days be repealed, and the statute changed to enable an injured employee the full 104-week period for their condition to stabilize.

OIEC's FY 2009-2013 Strategic Plan



In 1991, Texas initiated a process of strategic planning for all State agencies within the executive branch of government. TEX. GOV. CODE, CHAPTER 2056. The goal of strategic planning is to anticipate and accommodate the future by identifying issues, opportunities, and problems. Strategic planning is a long-term, future-oriented process of assessment, goal setting, and decision-making that maps an explicit path between the present and a vision of the future. It guides budget preparation and establishes a basis for measuring success.

A strategic plan is a formal document that communicates the agency's goals, directions, and outcomes to various audiences, including the Governor and the Legislature, client and constituency groups, the public, and agency employees. State agencies are required to submit a five-year Strategic Plan to the Legislative Budget Board, the Governor's Office, and other agencies every even-numbered year. OIEC's Strategic Plan, covering fiscal years (FY) 2009-2013, was submitted in July 2008.

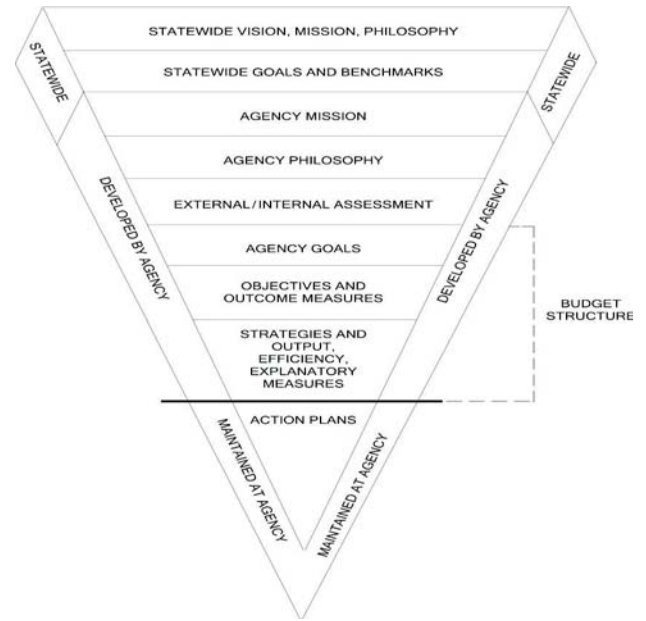
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Strategic Plan (Continued)

The template used to develop the Strategic Plan comprises nine “tiers.” The Governor and the Legislative Budget Board develop the first two, which contain the statewide vision, mission, philosophy, goals, and benchmarks (i.e., “statewide elements”). These elements serve as a foundation for the strategic planning process. Agencies develop the elements in the remaining tiers as they prepare their strategic plans. Figure 1 shows the nine tiers of the strategic planning template. Each tier is linked to the others.

Highlights of OIEC’s FY 2009-2013 Strategic Plan include an overview of agency functions, organizational and fiscal aspects, service population demographics, economic variables, opportunities for improvement, and the agency’s proposed budget structure for the FY 2010-2011 biennium. A copy of the Strategic Plan is available in the Publications section of the OIEC website.



Strategic Planning Template

OIEC’s FY 2010-2011 Legislative Appropriations Request



OIEC submitted its Legislative Appropriations Request (LAR) for fiscal years FY 2010-2011 in August 2008. The LAR is the bridge between the development of the agency’s strategic plan and the General Appropriations Act (GAA) by providing a fiscal expression of the agency’s priorities/goals. This fiscal expression includes quantitative information such as projected performance, projected cost, and methods of financing proposed for state services.

The LAR uses performance measures developed and approved for the agency’s strategic plan. For the FY 2010-2011 LAR, the actual performance for fiscal year 2007 is reflected. A good faith effort was made to identify expected performance for fiscal year 2008 and projected performance for fiscal years 2009, 2010, and 2011.

During the 81st legislative session, the Legislature will review OIEC’s LAR and approve a budget for OIEC for the FY 2010-2011 biennium. Agency appropriations are requested based on OIEC’s three main goals which are to assist, educate, and advocate on behalf of the injured employees of Texas.

OIEC’s FY 2009-2013 Strategic Plan and FY 2010-2011 LAR are available on its website at: <http://www.oiec.state.tx.us/resources/publications.html>.



Filing of *Amicus Curiae* brief with the Supreme Court of Texas

An *amicus curiae* brief was filed in December with the Supreme Court of Texas regarding a Court of Appeals decision, which would adversely affect injured employees as a class. (An *amicus curiae* brief is a brief filed with the court by someone that is not a party to the case who believes that the court's decision may affect its interest.)

The central issues in the case are: (1) whether or not the date of maximum medical improvement (MMI) can be determined by an impairment rating, (2) whether the determination of MMI includes the concept that material recovery or lasting improvement to the injured employee's injury must be secondary to medical treatment. The Court of Appeals rejected the designated doctor's impairment rating as not having been properly calculated under the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition. Because it had rejected the designated doctor's impairment rating, the Court of Appeals also rejected the MMI date certified by the designated doctor. The Court of Appeals adopted the date of MMI and impairment rating of a required medical examination doctor who had improperly assigned an earlier date of MMI based on his determination that material or lasting improvement must occur secondary to medical treatment. This assertion is outside of the requirements of the Texas Labor Code. Essentially, the Court of Appeals adopted a rule that would allow MMI to be determined after an impairment rating has been assigned. However, the workers' compensation statute and rules clearly establish that MMI must be reached before an impairment rating is assigned.

In keeping with OIEC's charge to advocate on behalf of the injured employees of Texas, Public Counsel Norman Darwin's *amicus* brief requests the Supreme Court grant a Motion for Rehearing and reverse the Court of Appeals' decision. OIEC hopes to persuade the Supreme Court to grant the petition for review and to establish that the rejection of a doctor's impairment rating does not result in the rejection of the MMI date associated with that impairment rating, unless the medical evidence establishes that the MMI date is also incorrect.

Program Area Updates

Ombudsman Program. The Ombudsman Program is excited to announce that it has implemented the "single point-of-contact" process. When a dispute is identified, a single Ombudsman is assigned to the claim until the dispute is resolved or adjudicated. This process allows the injured employee to develop a working relationship with a single Ombudsman, an Ombudsman accountable for a particular claim, and brings efficiency to the dispute resolution process.

Customer Service. Nearly half of the Customer Service Representatives (CSRs) have been with OIEC for one year now. The CSRs have worked diligently to develop their customer service skills and workers' compensation knowledge. They have become extremely proficient at identifying problems and resolving disputes. By being involved earlier in the process, the CSRs keep problems from becoming disputes or more quickly determine that a proceeding might be necessary to resolve the dispute. This could effectively shorten the time that injured employees may be without benefits.

Question of the Quarter

I was told the other day that there is a limit on the number of Benefit Review Conferences (BRCs) that can be held on my dispute. Is this true?

Yes, that is true. Texas Labor Code §410.026(b)(2) states that only two BRCs may be held on a particular disputed issue before it must be elevated to the next hearing level, a Contested Case Hearing. That is why it is important to have your documentation and information prepared before the Benefit Review Conference is held, when possible. This enhances the possibility of having the issue resolved in your favor.

It is important to understand that this limit of BRCs is by issue, not by claim. Your workers' compensation claim could have several disputed issues over the years, each of which could have up to two BRCs held. For example, if the compensability (i.e. whether your injury is work-related) of your claim is denied; that is an issue on which there could only be two BRCs held. However, if that issue is resolved and somewhere down the road there is an issue with your average weekly wage, you could have up to BRCs held on that disputed issue as well.



New Public Outreach Initiatives

OIEC's Public Service Announcement Is Now Showing. Tune into PBS, and you can view OIEC's Public Service Announcement featuring Luz Loza, Director of the Ombudsman Program. The statewide announcement was produced as an outreach effort to broadcast OIEC's services to the injured employees of Texas. This increased outreach contributes to fulfilling OIEC's mission to assist, educate, and advocate on behalf of the injured employees of Texas. The announcement, produced in both English and Spanish, may be viewed on public television at various times. This announcement will air until August 31, 2009.

New and Improved OIEC Publications. Continuing its outreach efforts, OIEC has developed new, professional publications to provide to its customers. The publications are part of an OIEC information packet that includes:

- **A Folder:** OIEC employees will provide this folder to each of its new customers with copies of the new publications and suggest they keep all their important workers' compensation papers in this folder. The inside of the folder also has a designed area for the injured employee to write important claim information, names and phone numbers.
- **Four brochures:** About OIEC, Injured Employee Rights and Responsibilities, Customer Service, and Ombudsman Program.
- **Four flowcharts:** What to Do When You Get Injured, Medical and Indemnity Disputes, Medical Fee and Medical Retrospective Necessity Disputes, and Prospective Medical Necessity Disputes.

There are separate English and Spanish versions of the folders and brochures, and the flowcharts are double-sided with English on front and Spanish on the back. The brochures are already available on the OIEC website on the Publications page at www.oiec.state.tx.us/resources/publications.html. All of the new publications should be available both online and in printed format by April 2009.

OIEC Gives Back



OIEC is an agency that assists people in their time of need, so it isn't surprising that OIEC employees would want to expand their impact and make a difference in their communities at large. In the last quarter, OIEC employees were involved in the SECC Charitable Campaign, Hurricane Ike Disaster Response, and donations to the Helping Hands Home for neglected and abused children.

State Employee Charitable Campaign. Every year, from September 1st through October 31st, OIEC employees enthusiastically raise money during the State Employee Charitable Campaign (SECC). The SECC is the only statutorily authorized charitable campaign for Texas state employees, and it is governed by state employees.

OIEC employees in each field office chose their own charities and ways to raise money. The Houston East Field Office raised over \$1,000 – the most money of any field office. Food fundraisers were very popular. Many weeks you could find hot dogs, nachos, barbeque, donuts or even sundaes available for employees to purchase for this good cause. Other offices had a “snack store” where employees could purchase sodas, coffee snacks, and pastries with the profits going to SECC.

Their efforts paid off! OIEC raised over \$7,500 during those two months of field office fundraising. The results do not end there though. Employees also have the opportunity to have money deducted from their paychecks to support charitable causes of their choice throughout the year.



OIEC Gives Back (Continued)

Hurricane Ike Disaster Response. Hurricane Ike made landfall near Galveston Island on Saturday, September 13, 2008, causing extensive damage on the Texas Coast and to areas inland. OIEC employees were keenly aware of the challenges faced by injured employees during this difficult time and did what they could to ease their difficulties. They gave them information about social services, contacted their health care providers and relayed information to insurance adjusters when appropriate.

OIEC was also able to help in a "hands-on" manner in FEMA's Disaster Recovery Centers as part of Texas Department of Insurance (TDI) disaster response. Houston Ombudsman, Topaz Lantz, volunteered for two weeks during which she assisted consumers with insurance-related questions (auto, home, and health), reviewed insurance policies, and contacted insurance companies for information or to help consumers file claims. She said that it was hard to hear about the devastation, yet it was also rewarding to help in "her own backyard."

Helping Hands Home. For 114 years, Helping Hand Home for Children has provided a place to heal for abused, neglected, and abandoned children. The Home is the oldest continuously operating residential childcare agency in Travis County, a priceless resource kept strong and viable through donations and community support. The children look forward to Christmas, and OIEC Central Office wanted to be a part of that time for them. For each year the agency has been operational, OIEC employees generously donated toys, books, games, and clothes, which are sure to bring smiles to the children who have been forced to struggle with life's obstacles at an early age.

Employee Spotlight

Stephen E. Gossett is a Regional Staff Attorney (RSA) for OIEC. Although RSAs are statutorily prohibited from having direct contact with injured employees, they do have a direct impact through their individualized assistance to the Ombudsmen and Customer Service Representatives assigned to their teams. This assistance comes in the form of legal research, advice on techniques and strategy, and training delivery. Stephen was one of the first RSAs hired and has been employed with OIEC for over two and a half years.

Born while his mother was visiting her family home in Quanah Texas, Stephen lived in Washington D.C. until he was two years old at which time his family moved to Dallas. He has lived in Dallas County ever since.

Stephen is a graduate of the University of Texas at Austin and St. Mary's University Law School. He began his legal career as a criminal defense attorney. He then worked for sixteen years as an insurance defense litigator both in-house and in private practice. He has tried approximately 25 jury trials during his career as an insurance defense attorney. Stephen also practiced health care subrogation law for ten years prior to joining the OIEC in June 2006.

Stephen has two children: a girl and a boy. His son graduated from college in December 2008, making him the third generation University of Texas at Austin graduate. Stephen's wife teaches fourth grade in Dallas.

Stephen has many hobbies including reading (mostly history, heavy on Civil War), collecting, tinkering with mechanical wristwatches (part of what he collects), gardening, walking, traveling (especially anywhere with mountains), and appreciating classic and antique cars and trucks. He also hopes to someday try his hand at writing.

"I'm proud, and feel fortunate, to be a part of OIEC. I am constantly impressed with the dedication and commitment to their work shown by every member of the OIEC Team," Stephen commented. His supervisor, Elaine Chaney, Director of Legal Services, stated "Stephen is an excellent fit for the RSA position. He has a wealth of experience and also brings a healthy dose of common sense and good judgment to the job." OIEC is fortunate to have Stephen as part of its team of dedicated employees.



Case Study: Heart Attack

Denton Field Office Ombudsman, Marie Ruddick-Potter, recently assisted an injured employee when the compensability of his heart attack was disputed.

On the day of the heart attack, the injured employee, a firefighter, was involved in a training exercise. He wore 75 pounds of clothing, equipment, and breathing gear on a warm, 90-degree day as he led trainees through a smoke-filled two-story building, up and down the stairs. After doing this for about 90 minutes, the injured employee had chest pain and was found to have suffered a heart attack.

The insurance carrier disputed the compensability of the heart attack stating that it was a natural progression of a pre-existing condition rather than his exertions during the training activity. The injured employee argued that although he had had a triple bypass five years earlier, he had returned to work without restrictions and had been fine until this training exercise. He argued that it was his work that was a substantial contributing factor to his heart attack that day.

The Ombudsman worked closely with the injured employee to obtain the medical documentation from the emergency room physician. This documentation supported that the injured employee's work that day was a substantial contributing factor to his heart attack. The issue went to a Contested Case Hearing where the Hearing Officer found that the injured employee did indeed sustain a compensable heart attack.

Marie's knowledge, skills, ability, and diligence in this case were critical to its outcome. She said the training she had received on cross-examining expert witnesses from OIEC Regional Staff Attorneys (RSA) was particularly helpful in this case. Her RSA noted that he thought it was going to be a difficult case for the injured employee to win but that with Marie's positive outlook on the claim that he knew she would do an excellent job for the injured employee. The outcome of the case shows that she did have an impact on the case.

This case also illustrates the importance of medical documentation in the process. Medical documentation is often the best or only way for the injured employees to support their claims. Health care providers play a critical role in the workers' compensation process, and injured employees depend on their participation and cooperation. OIEC appreciates the health care providers' role in this process and is committed to working closely with workers' compensation participants to ensure that medical documentation is available when appropriate.



Heart Attack and Compensability

Proving that a heart attack is compensable can be difficult. Texas Labor Code §408.008 states that the heart attack must:

- occur at a definite time and place,
- be caused by a specific event occurring in the course and scope of the employee's employment,
- have a preponderance of the medical evidence regarding the attack indicating that the employee's work (rather than the natural progression of a pre-existing heart condition or disease) was a substantial contributing factor of the attack,
- not have been triggered solely by emotional or mental stress factors, unless it was precipitated by a sudden stimulus.

