

SUNSET COMMISSION DECISIONS



TEXAS WORKERS' COMPENSATION COMMISSION

September 2004

AGENCY INFORMATION

Agency at a Glance

The Texas Workers' Compensation Commission (TWCC) was created in 1990 as part of a broad effort to reform the workers' compensation system in Texas. The Workers' Compensation Act provides for no-fault income-replacement benefits and medical care for workers who are injured on the job and are unable to earn their preinjury wage. TWCC administers key parts of the system including ensuring the timely, appropriate, and cost-effective delivery of benefits to injured workers; overseeing and regulating system participants to ensure compliance with statutes and rules; and providing training and informational services to help system participants understand and operate within the system.

To accomplish this, TWCC:

- oversees a benefit delivery system and provides income and medical-related dispute resolution services;
- certifies doctors to provide medical services and reviews medical utilization patterns of health-care providers;
- develops and adopts fee and treatment guidelines for medical services;
- provides health and safety resources, education services, and training for system participants;
- certifies employers who choose to self-insure as their own workers' compensation insurance carriers; and
- performs compliance audits and fraud investigations, and enforces compliance with statutes and rules.

Key Facts

- **Funding.** In fiscal year 2003, the Commission operated on a \$55 million budget, including \$2.3 million in federal funds. The agency is required to cover its state appropriations via maintenance taxes on workers' compensation insurance premiums.
- **Staffing.** The Commission is authorized to employ a total of 1,050 people in its 24 field offices and central office in Austin.
- **System Participation.** In fiscal year 2003, 251 insurance carriers wrote workers' compensation insurance policies. Approximately 65 percent of Texas employers, employing approximately 84 percent of the workforce, carried workers' compensation insurance coverage in 2003. The remaining employers self-insure, offer alternative benefits, or offer no workers' compensation coverage.
- **Workers' Compensation Claims.** In fiscal year 2003, workers reported 178,081 claims, with at least one day of lost time. The average cost of a workers' compensation claim was \$3,400.
- **Self Insurers.** In fiscal year 2003, TWCC issued 51 certificates representing 257 employers as self-insurers covering about 250,000 employees, allowing the employer to act as its own workers' compensation insurance carrier.

- **Dispute Resolution.** In fiscal year 2003, TWCC received 59,989 benefit disputes. The agency informally resolved 88 percent of cases. TWCC also received 15,883 valid medical disputes, the majority of which were medical fee disputes.
- **Compliance.** In fiscal year 2003, TWCC issued 866 penalties with fines totaling \$548,500.

**CHAIRMAN SOLOMONS'
PROPOSAL
FOR THE
TEXAS WORKERS' COMPENSATION COMMISSION**

The following three motions were adopted and replace the Sunset staff recommendations as set out in the decision materials. The motions incorporate all applicable staff recommendations, including the Across-the-Board recommendations.

Motion 1: Transfer regulatory functions of the workers' compensation system to the Texas Department of Insurance and education functions to the Texas Workforce Commission. Abolish the Texas Workers' Compensation Commission and create the Office of Employee Assistance.

Workers' Compensation Functions at TDI

1. Transfer regulatory functions of TWCC to TDI including, but not limited to, customer assistance for policyholders, the Accident Prevention Services Program, and the functions of the Medical Quality Review Panel.
2. Transfer Medical Dispute Resolution to TDI. Initial informal resolution takes place at carrier, continued disputes settled by Independent Review Organization (IRO). The carrier has no appeal, although a worker may appeal to district court. Ensure IRO decisions include specific elements for use in an appeal and in evaluation of IROs (Sunset 5.1).
3. Transfer Income Dispute Resolution to TDI.
 - a. Initial informal dispute resolution at carrier (Sunset 4.1). TDI holds a pre-hearing conference to identify contested issues for the contested case hearing (CCH). Appeal of a CCH decision goes to district court.
 - b. Require TDI to provide participants with a list of information that participants may need at the CCH (Sunset 4.4).
 - c. Require TDI to create a precedent manual for income dispute decisions (Sunset 4.5).
4. Keep research function (old ROC) at TDI and rename as Workers' Compensation Research and Evaluation Group. Continue funding through maintenance tax.

Workers' Compensation Functions at TWC

5. Transfer workplace education and safety functions to TWC.
 - a. Includes the Occupational Safety and Health Consultation Program (OSHCON), workplace accident data collection, and education on best practices for return to work programs and workplace safety.
 - b. Continue funding through maintenance tax.

New Office of Employee Assistance

6. Abolish TWCC and establish an independent Office of Employee Assistance (OEA) led by a single director appointed by the Governor and approved by the Senate. Administratively attach the OEA to the Texas Department of Insurance for services such as human resources, computers, etc.
 - a. Provide legal representation and public advocacy regarding TDI rulemaking on workers' compensation.
 - b. Authorize OEA to accept or reject cases for representation based on standards they would adopt by rule.

- c. Transfer the Ombudsman program to provide constituent services for injured workers. Direct Ombudsman to coordinate services with the Department of Assistive and Rehabilitative Services (DARS) and the Texas Workforce Commission (TWC).
- d. OEA will coordinate with the TWC and local workforce development boards to develop a workplace literacy and basic skills curriculum that bridges the skills gap between workers and current and emerging jobs.
- e. As a management action, OEA should consider contracting for some portion of their worker assistance activities, including use of legal aid clinics at law schools.
- f. Sunset staff should work with the Legislative Budget Board to obtain full funding for the OEA in the fiscal note process.

Additional Provisions

- 7. Eliminate programs inconsistent with the new approach to workers' compensation including the Approved Doctor List, the Field Safety Representative Program, the Hazardous Employer Program, the Rejected Risk Program, the Approved Professional Source Program, and the Drug Free Workplace Program.
- 8. Add language detailing workers' compensation purpose, mission, goals etc. Require TDI to analyze effectiveness in meeting these statutory goals. (Sunset 1.1 - 1.2). The statute shall clearly state that the purpose of this Act is to ensure that:
 - a. Every injured worker shall be treated with dignity and respect when injured on the job;
 - b. Every injured worker shall have access to a fair and accessible dispute resolution process;
 - c. Every injured worker shall have access to prompt, quality medical care within the framework established by the state; and
 - d. Every injured worker shall receive services to facilitate return to work as soon as it is deemed safe and appropriate by his or her medical provider.
- 9. Apply Sunset recommendations to improve regulatory oversight (Sunset 7.1 - 7.3).
- 10. Eliminate the Medical Advisory Committee (Sunset 9.1 and 9.2).

Motion 2: Require workers' compensation to operate as close as possible to current Group Health Insurance regulation to improve injured workers' health care outcomes and better contain costs.

Closely Align Workers' Compensation to Group Health Insurance

1. Authorize networks regulated under TDI. Match provision of network services to group health. Key elements include:
 - a. Require all services be ordered by a primary care provider.
 - b. Limit retrospective review of medical necessity.
 - c. Apply group health prompt payment procedures to workers' compensation.
 - d. Establish competition and a broad choice of medical providers within the network structure where feasible.
2. Require employees to use network if employer has contracted for one through the carrier. However, employee retains the right to refuse workers' compensation benefits within the first five days of employment.
3. Require the State and political subdivisions to use networks where available and practicable.
4. For out-of-network services, direct the Commissioner of Insurance to adopt new fee guidelines and set conversion factors for most medical practices.
5. Authorize the Commissioner of Insurance to identify under-served areas and adopt appropriate standards and guidelines.
6. Open workers' compensation coverage to group health insurance carriers.

Better Cost Containment

7. Allow functional capacity assessments of non-injured employees to set base capacity if an injury should later occur and to ensure employees have physical capacity to safely perform duties of a job. TDI/carriers should consider discounts for employers using these assessments.
8. Require system participants to report fraud, with penalties for failure to report. Expand jurisdictions where fraud cases can be filed. Allow support of fraud prosecution using maintenance tax proceeds.
9. Authorize carriers, for lost time cases, to obtain a physical exam to detail the full extent of injuries related to the compensable injury. Limit future claims to those injuries identified unless a further exam determines a related compensable injury.
10. Require carriers to file with TDI the percentage discounts used for return-to-work and safety programs. TDI should examine whether to mandate any of these discounts.
11. Require TDI to adopt return-to-work guidelines (Sunset 2.6).

12. Require the Workers' Compensation Research and Evaluation Group to do report cards on quality, costs, provider availability and other factors of workers' compensation networks. The Research Group should also examine:
 - a. Impacts of requiring electronic billing and payments in the workers' compensation system; and
 - b. Fee guidelines for non-network services, including impacts of the current approach and alternatives.

Motion 3: Enhance the delivery and quality of benefits for injured workers to focus on improving outcomes for return-to-work.

1. Increase the existing cap on income benefits from 100 percent to 130 percent of the State Average Weekly Wage (SAWW). Tie the SAWW to the Workforce Commission's standard amount.
2. Eliminate the 28-day waiting period to receive payment for the first week of benefits. First week benefits would now be payable after the 14th day of lost time.
3. Require skilled case management as early as is practicable for lost time disability cases.
4. Encourage use of single points of contact for injured workers at TDI, OEA, and carrier.
5. Networks/carriers must survey injured workers to obtain data on satisfaction of services and report results to the research group at TDI for the "report card."
6. Apply Sunset return to work recommendations 2.1 - 2.5 that elevate return to work in the mission and in promotional/training materials for both TDI and TWC.
7. TDI should ensure all workers' compensation forms and explanatory materials are prepared in plain language (Sunset 8.3) and in Spanish where appropriate.
8. Require TDI to establish protocols for injured workers receiving supplemental income benefits to obtain workforce and occupational training (TWC and DARS) where appropriate (Sunset 6.1).
9. Set compliance standards for SIB recipients work search requirements to replace the current standard of "good faith effort" (Sunset 6.2).

Commission Decision: The Commission adopted all recommendations included in Motions 1, 2, and 3.

ISSUES / RECOMMENDATIONS

Issue 1 The Texas Workers' Compensation Commission Lacks Strategic Direction.

Recommendations

Change in Statute

1.1 Add explicit language to TWCC's enabling statute detailing the agency's purpose, mission, and goals.

This recommendation would specify TWCC as the state agency established to oversee the provision of workers' compensation benefits in Texas. The statute would also include the following goals.

- Promote safe and healthy workplaces through appropriate incentives, education, and other actions.
- Ensure the system encourages the safe and timely return of injured employees to productive roles in the workplace.
- Ensure the system provides both income and medical benefits that are appropriate in a manner that is timely and cost-effective.
- Ensure the system provides timely, appropriate, and high-quality medical care supporting restoration of the worker's physical condition and earning capacity.
- Minimize the likelihood of disputes and resolve them promptly and fairly when identified.
- Promote compliance with the Act and rules through performance-based incentives.
- Promptly detect and appropriately address acts or practices of noncompliance with the Act and rules.
- Effectively educate and clearly inform all system participants of their rights and responsibilities and how to appropriately interact in the system.
- Take maximum advantage of technological advances to provide the highest levels of service possible to system participants and to promote communication among system participants.

With strategic statutory guidance in place, the recommendation would clarify that the agency may adopt any rules necessary and appropriate to implement its powers and duties under the Workers' Compensation Act.

1.2 Require TWCC to analyze its effectiveness in meeting the statutory goals, identify organizational and operational changes to address deficiencies, and make recommendations to the Legislature on needed statutory changes.

This recommendation will ensure that TWCC, through its strategic planning process, implements a strategic management approach that would require it to evaluate the agency against set statutory standards, and then make modifications to its organizational structure and programs to address shortfalls in the performance of the system. The statute would require TWCC to work closely with the workers' compensation research function to obtain the necessary data and analysis to assist with the performance evaluation. Issues the agency identifies that require statutory resolution would be communicated to the Legislature before each regular session.

1.3 Create the Texas Workers' Compensation Research Council, administratively attached to TWCC, reporting directly to the Commission.

This recommendation would restructure the research function as follows.

- Transfer the current research function from TDI to the Texas Workers' Compensation Research Council, administratively attached to TWCC.
- Specify that the Council reports directly to the Commission itself.
- Create a five-member Board to provide direction for the Council, composed of one TWCC Commissioner representing employers, one TWCC Commissioner representing employees, the Commissioner of Insurance (or designee), and two public members.

The Council would work closely with the Commission, in an independent, supporting role, to conduct professional studies and research related to the effectiveness of the workers' compensation system. The Council would have no role of oversight related to TWCC's operations. Statute would require the Council to work closely with the Commission to develop its research agenda. The Council would prepare a biennial report to the Legislature, identifying system problems and recommendations on legislative changes needed to address those problems.

The Commission would determine its appropriate representatives on the Council. The Insurance Commissioner would serve as an ex-officio, voting member. The Governor would appoint the public members, subject to similar conflict of interest provisions as the TWCC Commissioners related to regulated entities.

The Council's Board would develop a budget for the Council and hire employees to conduct its work. TWCC would include the Council's budget as an item in its request for legislative appropriations, and the Legislature would separately appropriate money to the Council within the appropriations to TWCC. Based on legislative action, TWCC would set the maintenance tax to offset the cost at the same time it sets the tax to cover its appropriation. TWCC would provide administrative support such as information technology, office space, payroll processing, and human resources.

1.4 Remove the statutory requirements designating specific Commission divisions.

This recommendation would remove all statutory references to TWCC divisions in the Labor Code, allowing the agency flexibility to organize as necessary to deal with changing system oversight requirements. The Executive Director would still need the approval of the Commission to allocate functions among the divisions.

Management Action

1.5 TWCC should identify and implement opportunities to better integrate the Medical Advisor into agency operations.

This recommendation would require the agency to make better use of the expertise and input of the Medical Advisor across all agency operations. Historically, the Medical Advisor has not been formally involved in all agency policy and rule development related to medical issues in the workers' compensation system. As the Medical Advisor becomes better integrated into agency operations, TWCC needs to ensure a stable funding source to support the activities of the position and clearly communicate the role of the Medical Advisor to system participants.

Fiscal Implication

This recommendation will not have a direct fiscal impact to the State. If the Legislature continues the current resources allocated to the workers' compensation research function, using the existing organizational structure, the function's annual budget at TDI of about \$830,000 from the General Revenue Fund would continue to be required for its operation. The statute would require TWCC to annually adjust the maintenance tax to offset the appropriation. Removing the statutory organizational requirements could allow the agency to realize savings through reorganization. Without specific proposals, Sunset staff cannot estimate the savings for this report.

Responses

Agency

The Commission agrees with these recommendations with the following exceptions.

Recommendation 1.3: Although the Commission fully agrees that it would be beneficial to create a Workers' Compensation Research Council attached to the Commission, it would be more beneficial for the Council to report directly to the Commissioners. The agency also recommends that only one biennial report to the Legislature be developed by the Commission, with input from the Council, to identify system problems and recommend statutory changes. Since the Council and the Commission will be working in supportive roles, the production of separate reports does not appear necessary or efficient.

Agency Modifications:

1. Modify the recommendation to specify that the workers' compensation research function reports directly to the Workers' Compensation Commissioners, removing the requirement for an independent Board.
2. Modify the recommendation to remove the requirement that the Workers' Compensation Research Council develop a separate biennial report to the Legislature.

(Mike Hachtman, Chairman and Richard F. Reynolds, Executive Director – Texas Workers' Compensation Commission)

Affected Agency

The Texas Department of Insurance (TDI) believes that the statutory elimination of the Research and Oversight Council on Workers' Compensation's (ROC) oversight function also eliminated the adversarial relationship that existed between the ROC and TWCC. The current structure of the research function fulfills the original policy goal established during the 1989 workers' compensation reforms by ensuring that independent and objective information regarding the operational effectiveness of the system is available to policymakers, system participants, and TWCC. TDI believes that this does not prevent TWCC from working closely with the research function to obtain necessary data, integrate the function's findings into its policymaking process, and establish an effective working relationship between TWCC and the research function. The current structure of the research function complements TDI's other responsibilities regarding the regulation of workers' compensation research. (Jose Montemayor, Commissioner of Insurance – Texas Department of Insurance)

For

Supports Recommendations 1.1 and 1.4: Richard Levy, Legal Director – Texas AFL-CIO, Austin

Against

None received.

Modifications

3. Maintain a research and oversight function but structure it to operate independently of the agency it reviews. (Dr. David N. Henkes, Chair – Texas Medical Association Ad Hoc Committee on Workers’ Compensation, Austin; Joe Woods – Property Casualty Insurers Association of America, Austin)
4. Maintain the research functions housed either at the Department of Insurance or within the Legislature. (Richard Levy, Legal Director – Texas AFL-CIO, Austin)

Recommended Action: Adopt Recommendations 1.1 through 1.5.

Commission Decision: The Commission adopted the proposal offered by the Chair, Representative Solomons, as detailed beginning on page 3. The proposal incorporates Recommendations 1.1, 1.2, and 1.4 as applied to the Texas Department of Insurance (TDI).

Issue 2 Lack of Effective Return to Work Initiatives Result in Higher Costs to Employers and Poor Outcomes for Injured Workers.

Recommendations

Change in Statute

2.1 Specify that part of TWCC's statutory mission is to promote and help ensure the safe and timely return of injured employees to productive roles in the workforce.

The Legislature should clearly articulate an explicit return to work goal in the agency's statute. TWCC should subsequently refocus and update its strategic plan to include the new return to work goal and propose corresponding performance measures to the Legislature. The agency should then consider organizational, policy, and rule changes needed to support return to work efforts. TWCC should also evaluate the most efficient methods for augmenting its employer outreach services. At a minimum, the agency should consider cost effective approaches, under existing statutory duties and authority, to provide integrated workplace safety and return to work consultations, technical assistance, and training opportunities to small and medium sized employers.

2.2 Require TWCC, in partnership with system stakeholders, to evaluate and improve the benefit delivery system to promote the safe and timely return of injured employees to work.

TWCC should use the enhanced stakeholder process recommended in Issue 3 to review and take all actions within the agency's authority to modify administrative rules, agency policies, and practices to ensure they support the return to work goal. The review should also evaluate statutory barriers and make recommendations to the Legislature for any needed changes. The Commission should report these recommendations no later than December 2006.

At a minimum, the review should evaluate needed changes to develop or enhance effective up-front communication and medical treatment planning between injured workers, employers, carriers, and doctors. This effort would promote high quality medical care that would help injured workers heal in appropriate time frames and return to work.

2.3 Require the agency to provide employers with information and best practices on methods to enhance return to work communication and services.

TWCC should augment existing return to work program information provided to employers to include methods for appropriately assisting injured workers to identify doctors from the agency's Approved Doctor List, and assessing doctors that provide high quality care and effective occupational medicine treatment practices that lead to returning employees to productive work. The information provided to employers should also help foster effective working relationships with local doctors and insurance carriers to improve return to work communication, and access to return to work coordination services provided by insurance carriers. Additionally, the agency should make available research and best practice information on return to work programs for Texas employers.

2.4 Require TWCC to provide injured workers with information on the benefits of early return to work, and making informed medical decisions.

TWCC should include plain language information in its letters, brochures, and other materials for public dissemination informing injured workers of the benefits of early return to work, how to access medical services appropriately, identify and designate a treating doctor, and information on the role and

responsibility of their treating doctor. This recommendation would expand the existing content of information that TWCC is statutorily required to make available to employees. In addition, the agency should include information to assist injured workers with questions about return to work issues and accessing high quality medical care as part of the customer service requirements in Issue 8 of this report.

Management Action

2.5 TWCC should partner with the Texas Workforce Commission and the State's workers' compensation research function to obtain return to work outcome information.

The agency should formalize an agreement with the Texas Workforce Commission (TWC) to match employment data from TWC against workers' compensation claims data to determine return to work outcomes. TWCC should continue this partnership until it has a formal system functioning, as a result of the Business Process Improvement project, and sufficient collected data to regularly report return to work outcomes to the Legislature. The agency should consider gathering outcome data from claims dating back to at least 2001, when the Legislature formally required TWCC to collect this information. TWCC should coordinate these data collection efforts with whichever state agency performs the workers' compensation research function.

2.6 TWCC should adopt return to work guidelines and clarify their appropriate use for system stakeholders.

The agency should formally adopt return to work guidelines that meet the requirements of the Labor Code. At a minimum, the agency should use the guidelines to monitor treating doctors' performance and provide information back to them on where their treatment practices compare to the average treatment practices in the system. TWCC should clarify the appropriate use of the guidelines by system participants for medical decisionmaking.

Fiscal Implication

These recommendations would have a fiscal impact to the State. Any increased budgetary needs would be dependent on the agency's reassessment of how best to implement its existing return to work authority, such as its outreach and education programs for employers. A corresponding adjustment to the insurance premium maintenance tax would offset any budgetary changes. Updating current outreach information to injured workers would have a minimal fiscal impact to redesign agency letters and brochures. The agency would use existing policy development staff to evaluate and update the benefit delivery system to support effective return to work communication.

Responses

Agency

The Commission agrees with the recommendations. (Mike Hachtman, Chairman and Richard F. Reynolds, Executive Director – Texas Workers' Compensation Commission)

Affected Agency

The Texas Workforce Commission (TWC) has entered into an Information Exchange Contract with TWCC to detect fraudulent Unemployment Insurance claims that would also allow TWCC to match employment data from TWC against workers' compensation claims data to determine return to work outcomes. (Diane Rath, Ron Lehman, and Ronald G. Congleton; Commissioners – Texas Workforce Commission)

For

Dr. David N. Henkes, Chair – Texas Medical Association Ad Hoc Committee on Workers’ Compensation, Austin

Mary Hennigan, Executive Director – Texas Occupational Therapy Association, Inc.

Richard Levy, Legal Director – Texas AFL-CIO, Austin

Fred and Sue Worley, Emory

Jamie Helebrook, Grapevine

Against

None received.

Modification

1. Explore providing support for injured workers who are transitioning back into the workforce, including comprehensive retraining and job redesign functions with employer and employee incentives for good return to work outcomes. (Richard Levy, Legal Director – Texas AFL-CIO, Austin)

Recommended Action: Adopt Recommendations 2.1 through 2.6.

Commission Decision: The Commission adopted the proposal offered by the Chair, Representative Solomons, as detailed beginning on page 3. The proposal incorporates Recommendations 2.1 through 2.6 as applied to TDI.

Issue 3 The Agency Does Not Adequately Use Stakeholder Input in Its Rulemaking and Policymaking Processes.

Recommendations

Change in Statute

3.1 Require TWCC to modify its approach to rulemaking to provide for structured public input while developing rules.

This recommendation would require the agency to develop a more open and strategic process for use in the development of rules. The new rulemaking process would include:

- the development, periodic review, and update of a public rulemaking docket that establishes priorities for the coming year;
- public notice of the availability of informal draft rules that include the subject and scope of the rule; any known issues for consideration during rule development, including potential changes to agency forms, data collection requirements, and fiscal implications; and a list of interests likely to be impacted by the rule;
- designation of a facilitator to coordinate discussion, negotiation, and mediation among system participants to attempt to reach consensus during stakeholder group meetings on significant rulemaking projects;
- development of a revised draft rule by program area staff with recommendations to the Commission that include a discussion of relevant issues raised during stakeholder meetings that could not be resolved in the rule as drafted; and
- publication of the proposed rule using the standard process defined in the Administrative Procedures Act.

Management Action

3.2 Direct the agency to develop a method for strategic preparation of an annual rulemaking docket, to be made available online.

As a first step, TWCC should periodically conduct a strategic examination of issues (brought to agency attention through legislation, public comment, rulemaking petitions, and staff suggestions) that have the potential to be the subject of rulemaking in the coming year. Having identified focus areas for policy and rulemaking action, agency staff should then compile and submit a docket of proposed future rulemaking projects to the Commission for approval. The adopted docket would be easily accessible on the agency's Web site. The agency, once it decides on the rulemaking focus for the year, would designate staff members to act as leaders for each rulemaking project. Team leader names and contact information, along with timelines for development of each rulemaking project, would be linked to the rulemaking docket on the agency's Web site.

3.3 The agency should ensure that the Commission has public input available for decisionmaking.

This recommendation would direct TWCC to develop a revised process to ensure that the Commission has a full array of input available for its decisionmaking. This should include a public hearing process that allows interested parties to present input directly to the Commission during rulemaking hearings.

An improved process would allow the Commission the opportunity to engage stakeholders in discussions clarifying or further developing their positions on proposed rules. Factors that should be evaluated include: the effectiveness of the public hearing process for proposed rules, as a tool for both agency staff and Commission members; and the appropriate level of detail presented by staff in Commission governing board meetings about stakeholder concerns expressed during the rulemaking process.

Fiscal Implication

These recommendations will have no significant fiscal impact to the State.

Responses

Agency

The Commission agrees with the recommendations. (Mike Hachtman, Chairman and Richard F. Reynolds, Executive Director – Texas Workers’ Compensation Commission)

For

Joe Woods – Property Casualty Insurers Association of America, Austin

Daniel Chin, General Manager/General Counsel – Envoy Medical Systems, Austin; Gilbert Prudhomme, General Counsel/Director – Independent Review, Inc., Austin; and Jeff Cunningham – ZRC Services, dba ZIROC, Sulphur Springs

Tim Weitz – Texas Physical Therapy Association, Austin

Kymberly P. Grant, Executive Administrator – Doctors Guild of Texas #4, Carrollton

Richard Levy, Legal Director – Texas AFL-CIO, Austin

Against

None received.

Modifications

1. Ensure balanced representation on stakeholder groups used for rule development. (Dr. David Gude, Chair – Medical Advisory Committee, San Antonio)
2. Ensure representation of all system participants on stakeholder groups. (Ed Smith, D.O., Vice President – Texas Ambulatory Surgery Center Society, Hurst)

Recommended Action: Adopt Recommendations 3.1 through 3.3.

Commission Decision: The Commission took no action.

Issue 4 TWCC's Process for Resolving Workers' Compensation Benefit Disputes Is Cumbersome, and Discourages Early Resolution.

Recommendations

Change in Statute

4.1 Require the parties involved in an income benefit dispute to try to resolve the dispute themselves before filing a dispute at TWCC.

This recommendation would require injured workers, employers, and workers' compensation insurance carriers to first try to resolve income benefit disputes between themselves before filing a dispute at TWCC. The agency would be authorized to adopt rules to ensure documentation of the initial attempt to resolve the dispute, including telephone calls or written correspondence. Requiring the disputing parties to first try to resolve a dispute themselves would reduce the number of disputes handled by TWCC. This would allow the agency to focus its efforts on more difficult disputes rather than inserting the State as a third party in a situation that could and should be resolved informally between the disputing parties.

4.2 Require all Benefit Review Officers to meet SOAH's basic training requirements for state employees administering mediation processes, and prohibit recommendations on the unresolved issues in Benefit Review Conferences.

Under this recommendation, all Benefit Review Officers would be required to complete basic training standards that include completing a minimum of 40 classroom hours of training in dispute resolution techniques, in a course conducted by an alternative dispute resolution system or other dispute resolution organization. Prohibiting the Benefit Review Officers from making recommendations on the unresolved issues in the BRCs will clarify their role as a mediator rather than that of a judge.

4.3 Prohibit TWCC from conducting more than two BRCs for each dispute before proceeding to a Contested Case Hearing.

This recommendation would limit the number of Benefit Review Conferences (BRCs) that could be conducted for each dispute. If a dispute is not resolved at the first or second BRC, the parties could resolve the dispute themselves or proceed to a Contested Case Hearing. Limiting the number of BRCs would encourage participants to be more prepared and possibly more willing to resolve disputes informally at a BRC.

4.4 Require TWCC to provide participants with a list of information that participants may need at a BRC and CCH.

This recommendation would require TWCC to determine what information is most useful to have to help resolve disputes at both BRCs and CCHs. The list may include information such as medical reports, medical information, or wage records. Publishing this list would provide participants in the dispute resolution process guidance on the type of information they should have available at a BRC or CCH. Informing participants ahead of time would encourage them to come prepared so that the dispute can be more easily resolved rather than being rescheduled due to a lack of information.

4.5 Require TWCC to create a precedent manual for workers' compensation disputes.

Creating a precedent manual would result in better and more consistent decisions at each level of the dispute resolution process. The Appeals Panel judges would vote to adopt a decision in a particular case as a precedent decision. These decisions would be published in the manual divided by subject areas, and available on the agency's Web site.

Establishing a precedent manual would provide a reference to precedent-establishing decisions of the Appeals Panel for all participants in the workers' compensation system. TWCC would train its employees on the manual and ensure that decisions at each stage of the dispute resolution process are made based on it. TWCC should use the precedent manual, established by the Texas Workforce Commission for appealed unemployment insurance cases, as a model in developing its precedent manual.

4.6 Restructure the Appeals Panel as a single, three-member appeal tribunal, and require it to issue decisions only on reversed or remanded cases within 45 days.

This recommendation would replace TWCC's pool of nine administrative law judges with a single, three-person Appeals Panel. The Appeals Panel would review all of the appealed CCH decisions, and issue written decisions only for those that the Appeals Panel decides to reverse or remand. The Appeals Panel would continue to review the appealed CCH decisions to ensure the decisions are legally sound, but would also ensure that the decisions are consistent with the newly-established precedent manual. The Appeals Panel would continue to receive support from the agency's Program Attorneys. In case of an extended absence of an Appeals Panel Judge, the agency could designate a Program Attorney to act as an administrative law judge on the Appeals Panel. Due to the shift in the workload, the Appeals Panel would be required to issue their decisions no later than the 45th day, instead of the 30th day, after the day on which the written response to the request for appeal is filed.

Management Action

4.7 TWCC should conduct more contested case hearings by telephone.

This recommendation would direct TWCC to take advantage of conducting contested case hearings by telephone rather than in-person, to improve the efficiency of these hearings. Conducting contested case hearings by telephone should reduce both the amount of time it takes and the cost involved to resolve income benefit disputes.

Fiscal Implication

Requiring Benefit Review Officers to complete mediation training will have a one-time cost of approximately \$33,000. This cost is offset by reducing the number of Appeals Panel Judges from nine to three, resulting in an estimated savings of \$368,000 each fiscal year. Limiting the number of benefit review conferences will result in additional annual savings of about \$113,000.

Responses

Agency

The Commission agrees with the recommendations and recommends additional statutory changes to streamline the dispute resolution process.

Agency Modification

1. Provide that a Benefit Review Conference (BRC) cannot be scheduled unless the necessary minimum information is available. Give TWCC authority to adopt rules concerning the minimum information that must be available before setting a BRC. Delete the statutory requirement that a Contested Case Hearing (CCH) be scheduled at the time a BRC is scheduled, since many BRCs do not result in a CCH.

Staff Comment: Delaying the BRC could result in longer overall timeframes for dispute resolution may result.

(Mike Hachtman, Chairman and Richard F. Reynolds, Executive Director – Texas Workers' Compensation Commission, Austin)

Affected Agency

The State Office of Administrative Hearings (SOAH) supports Recommendation 4.2 requiring TWCC Benefit Review Officers who act as mediators to meet SOAH's basic training requirements for state employees administering mediation processes. (Sheila Bailey Taylor, Chief Administrative Law Judge – State Office of Administrative Hearings)

For

Laura Crouch, Itasca

Against

Opposes Recommendations 4.1 and 4.7: Richard Levy, Legal Director – Texas AFL-CIO, Austin

Modifications

2. Transfer the contested case hearing functions to SOAH, abolish the Appeals Panel, and allow appeals directly to district court after contested case hearings. (John D. Pringle, Austin)

Staff Comment: This modification would require SOAH to conduct about 7,200 hearings per year around the state (hearings must be conducted not more than 75 miles from the claimant's residence.) Since SOAH does not currently have the infrastructure to support this work, costs of providing hearings would increase.

3. Explore options to provide more legal resources to injured workers, including increased fee-shifting when the worker prevails and a legal services program for injured workers. (Richard Levy, Legal Director – Texas AFL-CIO, Austin)

Staff Comment: As required by statute, TWCC maintains an ombudsman program to assist injured workers in obtaining benefits. TWCC has about 60 ombudsmen working in the 24 regional field offices to assist, but not advise, injured workers. A legal services program would require a higher level of funding than the current ombudsman program.

Recommended Action: Adopt Recommendations 4.1 through 4.7 with the last part of Agency Modification 1, which would delete the current provision requiring that a Contested Case Hearing be scheduled at the time a BRC is scheduled.

Commission Decision: The Commission adopted the proposal offered by the Chair, Representative Solomons, as detailed beginning on page 3. The proposal incorporates Recommendations 4.1, 4.4, and 4.5 as applied to TDI. Recommendation 4.5 would apply to key contested case decisions and court decisions.

Issue 5 TWCC's Medical Dispute Resolution Process Lacks the Transparency and Oversight Necessary to Ensure Fair and Timely Resolution.

Recommendations

Change in Statute

5.1 Require every IRO decision to include specific elements to ensure the validity and fairness of the decision.

Require every IRO decision to include the following elements.

- A listing of all the medical records and other documents reviewed.
- A description and the source of the screening criteria or clinical basis used in making the decision.
- An analysis and explanation for the decision, including findings and conclusions to support the decision.
- A description of the qualifications of the reviewing physician or provider.
- Certification by the IRO that the reviewing provider has certified that no known conflicts of interest exist between that provider and any of the treating providers, or insurance carrier providers who reviewed the case for decision before referral to the IRO.

This recommendation would improve the transparency of the IRO decision process by requiring IRO decisions to include certain elements. These additional elements would provide system participants with the information necessary to determine whether the IRO had enough justification for the decision. Improving the validity of IRO decisions would discourage unnecessary appeals to SOAH and help TWCC ensure more timely resolution of medical disputes. However, if an IRO decision is appealed, this additional information would also help SOAH in weighing the evidence both for and against the decision. Finally, TWCC could use this additional information to better oversee and evaluate IROs in the process, and to help identify medical issues in the workers' compensation system that may need additional evaluation or clarification.

5.2 Require TWCC and TDI to develop a Memorandum of Understanding to improve the regulation and oversight of Independent Review Organizations in the workers' compensation system.

The MOU should:

- clearly delineate which agency is responsible for monitoring IROs and enforcing compliance with the Workers' Compensation Act, TWCC rules, and other laws relating to workers' compensation; and
- require TWCC and TDI to develop a system to track the overall performance and compliance of the IROs.

Currently, regulation and oversight of IROs in the workers' compensation system is split between TDI and TWCC. TWCC can adopt rules to oversee IROs, but does not have the authority necessary to enforce these rules. Although TWCC and TDI have adopted a Memorandum of Understanding

(MOU) to provide a cooperative regulatory framework for the IROs, this MOU is not required and does not clearly specify the duties necessary to ensure effective regulation or oversight of the IROs. This recommendation would require TWCC and TDI to develop a new MOU to clearly delineate the responsibilities of each agency. This delineation will ensure that IROs are held accountable to the Workers' Compensation Act as well as TWCC rules. The MOU should also require TWCC and TDI to assess the overall performance and compliance of each IRO.

5.3 Require the nonprevailing party to pay the cost of the SOAH appeal.

This recommendation would require the nonprevailing party, except for an injured worker, to pay for the SOAH hearing in an appealed workers' compensation medical dispute. Although TWCC is not typically a party in these disputes, the agency has greater authority over the disputing parties and would therefore be the appropriate entity to recover the cost of the hearing from the nonprevailing party. TWCC would adopt rules for this purpose. However, in accordance with the current statute, this recommendation would not require an injured worker to pay for an appeal to SOAH. Insurance carriers would continue to pay the IRO costs for injured workers.

5.4 TWCC should set a monetary threshold for medical disputes that can be appealed to SOAH.

This recommendation would require TWCC, in consultation with SOAH, to analyze the dollar amount of the medical disputes appealed to SOAH to determine whether a SOAH appeal typically costs more than the actual amount in dispute. Based on its analysis, TWCC would determine and adopt rules to set the monetary threshold at which disputes would be eligible for a SOAH appeal. Disputes involving amounts more than the threshold would continue to be appealed to SOAH. Disputes involving amounts less than the threshold would not be eligible for an appeal to SOAH and the IRO or TWCC decision would be final. However, this recommendation would not prevent any party from seeking judicial review. A party who exhausts its administrative remedies through TWCC, an IRO, or SOAH, and who is aggrieved by the final decision, may seek judicial review of the decision.

Fiscal Implication

Requiring the nonprevailing party in a medical dispute to pay for an appeal to the State Office of Administrative Hearings will result in a savings of about \$999,000 each fiscal year.

Responses

Agency

The Commission agrees with these recommendations with the following exceptions.

Recommendation 5.1: The statute should specify that the weight of medical evidence must be contrary to the IRO decision for SOAH to overturn an IRO decision. This would prevent non-medical persons from overturning medical decisions unless clearly warranted by the medical evidence and should reduce the number of disputes appealed to SOAH, generating cost savings from fewer hearings.

Agency Modification

1. Specify that the great weight of medical evidence must be contrary to the IRO decision for SOAH to overturn an IRO decision.

Staff Comment: This modification would change the SOAH proceeding from an administrative due process hearing (de novo) to a limited review of medical evidence contrary to the IRO decision.

Recommendation 5.3: Require SOAH to collect the costs for hearings since TWCC is not a party to most of the hearings. Requiring TWCC to collect the costs of SOAH hearings creates a collection process for TWCC which is not a regular function of the agency.

Agency Modification

2. Require SOAH to collect the costs for hearings.

(Mike Hachtman, Chairman and Richard F. Reynolds, Executive Director – Texas Workers' Compensation Commission)

Affected Agencies

The State Office of Administrative Hearings (SOAH) supports the recommendations aimed at ensuring fair and timely resolution of disputes, discouraging unnecessary appeals to SOAH, and reducing associated costs. SOAH agrees that TWCC, as the agency with authority over the parties, is the appropriate agency to recover the cost of the SOAH hearing from the nonprevailing party. (Sheila Bailey Taylor, Chief Administrative Law Judge – State Office of Administrative Hearings)

Recommendation 5.1: The Texas Department of Insurance (TDI) suggests amending the statute to provide that the IRO decision has presumptive weight, unless the great weight of the other medical evidence is to the contrary. This would elevate the significance of the IRO decision and make the burden of overturning it greater, discouraging some appeals. Alternatively, the statute could be amended to provide that the decision of the IRO is final, as is the case in the health-care system.

TDI Modifications

3. Amend the statute to provide that the IRO decision has presumptive weight, unless the great weight of the other medical evidence is to the contrary.

Staff Comment: See comment on Agency Modification 1, above.

4. Amend the statute to provide that the decision of the IRO cannot be appealed to SOAH.

Staff Comment: This change would eliminate the right to an administrative hearing on most medical disputes. The IRO review of medical records is not a hearing.

Recommendation 5.2: TDI, through its existing MOU with TWCC addressing oversight and complaints about IROs, has established a good working relationship with TWCC. TDI suggests that rather than statutorily requiring an MOU, the concerns regarding oversight of IROs could better be addressed by changing the law to give TWCC clear enforcement authority over IROs that violate TWCC statutes and rules. The statute could also prescribe administrative penalties for violations of the Workers' Compensation Act, TWCC rules, and other laws related to workers' compensation.

TDI Modification

5. Give TWCC clear statutory enforcement authority, including administrative penalty authority, over IROs that violate TWCC statutes and rules.

Staff Comment: This change would result in two agencies, TWCC and TDI, having enforcement authority over IROs.

(Jose Montemayor, Commissioner of Insurance – Texas Department of Insurance)

For

Laura Crouch, Itasca

Supports Recommendations 5.1 and 5.3: Gilbert Prud'homme, Vice President of Operations and General Counsel – Independent Review Inc., Austin

Against

Daniel Chin, General Manager/General Counsel – Envoy Medical Systems Austin and Jeff Cunningham – ZRC Services, dba ZIROC, Sulphur Springs

Opposes Recommendation 5.2: Gilbert Prud'homme, Vice President of Operations and General Counsel – Independent Review Inc., Austin

Opposes Recommendation 5.3: Dr. David N. Henkes, Chair – Texas Medical Association Ad Hoc Committee on Workers' Compensation, Austin; Mary Hennigan, Executive Director – Texas Occupational Therapy Association, Inc., Austin

Modifications

6. Delay any modifications to the IRO process until a comprehensive statistical analysis of available IRO results can be conducted. (Daniel Chin, General Manager/General Counsel – Envoy Medical Systems, Austin and Jeff Cunningham – ZRC Services, dba ZIROC, Sulphur Springs)
7. Require any peer review process utilized by an insurer or carrier as an internal review mechanism to follow the same guidelines and criteria as the IRO process established by TDI, including a review by a practicing physician who is in the same or similar specialty. (Dr. David N. Henkes, Chair – Texas Medical Association Ad Hoc Committee on Workers' Compensation, Austin)
8. Require the dispute resolution process for the determination of medical necessity to include access to the IRO system established and administered by TDI, and require the initial cost to be born by the insurer or carrier and not by the physician. (Dr. David N. Henkes, Chair – Texas Medical Association Ad Hoc Committee on Workers' Compensation, Austin)
9. Require the determination of the IRO to have presumptive weight. (Dr. David N. Henkes, Chair – Texas Medical Association Ad Hoc Committee on Workers' Compensation, Austin; Gilbert Prud'homme, Vice President of Operations and General Counsel – Independent Review Inc., Austin)
10. Allow multiple disputes to be consolidated into a single case for consideration during the dispute resolution process. (Tim Weitz – Texas Occupational Therapy Association, Austin; Jay Dhingra, Vice President of Managed Care – HCA, Irving; Dr. David N. Henkes, Chair – Texas Medical Association Ad Hoc Committee on Workers' Compensation, Austin)

11. Provide for recovery of attorney fees related to SOAH cases. (Mark A. Weitz – RGOI Assoc., Ltd., McAllen)
12. Prohibit SOAH from denying workers' compensation insurance carriers' defenses to payment based on TWCC's position that failure to list a ground for denying a medical bill on the TWCC 62 form means the unlisted ground has been waived. (John D. Pringle, Austin)

Recommended Action: Adopt Recommendations 5.1 through 5.4.

Commission Decision: The Commission adopted the proposal offered by the Chair, Representative Solomons, as detailed beginning on page 3. The proposal incorporates Recommendation 5.1.

Issue 6 The Supplemental Income Benefit Program Creates Unnecessary Disputes and Does Not Effectively Return Permanently Disabled Workers Back to Employment.

Recommendations

Change in Statute

6.1 Require TWCC to improve access to return to the workforce programs for SIB recipients.

This recommendation would require the agency to better use existing state resources to assist SIB recipients to return to the workforce by implementing the following.

- Identify and attempt to remove barriers to successful employment of SIB recipients at the Texas Workforce Commission, the Department of Assistive and Rehabilitative Services, and private vocational rehabilitation programs.
- Ensure data is tracked between TWCC and the Texas Workforce Commission, the Department of Assistive and Rehabilitative Services, and insurance carriers, including outcome data.
- Establish a referral mechanism to the Texas Workforce Commission and Local Workforce Centers.
- Create a method to promote employment success that will include post referral contact by TWCC with SIB recipients.

Identifying barriers to successful employment and improved data sharing, within the standards of federal privacy requirements, with workforce programs will inform TWCC of changes needed to assist SIB recipients to successfully re-enter the workforce. TWCC should train existing staff to understand and specialize in SIBs to respond to questions and assist workers in their effort to return to the workforce. Staff could target SIB recipients to assist based on level of impairment, giving an injured worker a continuous point of contact that would be an expert on return to work programs, such as those at the Department of Assistive and Rehabilitative Services and Local Workforce Centers. Staff could also encourage SIB recipients to contact their insurance carrier for a referral to a private vocational rehabilitation program. If an injured worker is never able to return to the workforce, staff can inform SIB recipients of possibilities of other forms of benefits, such as Social Security Disability Income.

Issue 8 recommends the agency establish a call center that would consolidate most of the customer assistance, although at least one customer assistant would remain at each field office to assist walk-ins. The existing customer assistant staff person could be trained to provide services to SIB recipients, in addition to their duties to assist walk-ins. Due to the small number of SIB recipients, most field offices will have few SIB recipients to have post referral contact with. For instance, Dallas, the largest field office, should have approximately 140 SIB recipients a year to contact and many of the smaller field offices, such as San Angelo and Lufkin, should only have about 10 SIB recipients a year to contact.

6.2 Set compliance standards for SIB recipients work search requirements, which would replace the current standards for good faith effort.

This recommendation would set straightforward standards to define efforts of SIB recipients. SIB recipients would have to meet at least one of the following standards:

- Participation with Department of Assistive and Rehabilitative Services or private vocational rehabilitation program;
- Active participation with the Texas Workforce Commission; or
- Active work search efforts documented by number of job applications.

TWCC should establish rules that will define the level of activity a SIB recipient should have with the Texas Workforce Commission and the Department of Assistive and Rehabilitative Services. TWCC should also establish rules that define the number of job applications required for a SIB recipient to submit to meet the new work search requirements. The requirements should be defined with recognition of rural and other appropriate employment availability factors. TWCC should look to practices of other agencies, such as the Texas Workforce Commission, to help define the number of job applications required. This new requirement would take away the ambiguity of good faith effort. The burden of proof of participation in these programs would continue to be on the injured worker. Ultimately, the agency should see a significant decline in disputes arising from the question of good faith work search efforts.

Fiscal Implication

Reducing the number of supplemental income benefit disputes will result in an annual savings of approximately \$112,000.

Responses

Agency

The Commission agrees with the recommendations. (Mike Hachtman, Chairman and Richard F. Reynolds, Executive Director – Texas Workers’ Compensation Commission)

Affected Agencies

To effectively outreach to SIB recipients, it is necessary that the Texas Workforce Commission (TWC) receive information identifying individuals with additional needs. This information will also allow for tracking the progress of individuals returning to employment. TWC also stands ready to work with TWCC regarding referrals to the workforce system and development of job search requirements. (Diane Rath, Ron Lehman, and Ronald G. Congleton; Commissioners – Texas Workforce Commission)

The Department of Assistive and Rehabilitative Services (DARS) welcomes the opportunity to collaborate with TWCC to create a more effective referral process for SIB recipients and will be happy to work with TWCC in the refinement of rules for making a good faith effort to obtain employment. DARS wants to clarify that all applicants to the vocational rehabilitation program who are determined eligible receive services that are needed to achieve their employment goal. Those persons who do not

receive services are not denied services due to limited funding, but because they do not meet the eligibility criteria for the public vocational rehabilitation program. (Terrell I. Murphy, Commissioner – Department of Assistive and Rehabilitative Services)

For

None received.

Against

None received.

Modifications

1. Clarify that the focus of the recommendations is to assist the work search efforts and remove barriers to reemployment rather than defining a minimum number of job applications that SIB recipients must complete to meet the work search requirements. (Richard Levy, Legal Director – Texas AFL-CIO, Austin)
2. Require insurance carriers to fund vocational rehabilitation programs for injured workers, rather than referral to Department of Assistive and Rehabilitative Services at state expense. (Fred and Sue Worley, Emory)

Recommended Action: Adopt Recommendations 6.1 and 6.2.

Commission Decision: The Commission adopted the proposal offered by the Chair, Representative Solomons, as detailed beginning on page 3. The proposal incorporates Recommendations 6.1 and 6.2 as applied to TDI.

Issue 7 TWCC's Regulatory Approach Is Inefficient and Does Not Emphasize or Reward Overall Performance.

Recommendations

Change in Statute

7.1 Require TWCC to provide incentives for overall compliance and emphasize performance-based oversight linked to regulatory outcomes.

This recommendation would require the agency to implement the following.

- Develop key regulatory goals to provide for assessing performance of insurance carriers and medical providers. The goals should align with regulatory goals of the agency, such as improving workplace safety and return to work outcomes, in addition to goals that support timely payment of benefits and increased communication.
- Regularly assess (at least every two years) the performance of carriers and medical providers based on meeting key regulatory goals, overall compliance history across programs, and dispute resolution practices to identify entities that are having an adverse impact on the workers' compensation system, and that may require enhanced regulatory oversight. The agency should conduct this assessment through data maintained by the agency and self-reporting by regulated entities.
- Develop regulatory tiers based on the regular performance assessment. The regulatory tiers should distinguish between poor performers, entities who generally are average performers, and consistently high performers. TWCC should focus its regulatory oversight towards poor performers.
- Develop incentives within each tier that promote greater overall compliance and performance. The agency should work with system participants to develop these incentives through the enhanced stakeholder process detailed in Issue 3 of this report. Some regulatory incentives could include modified penalties, self-audits, or flexibility based on performance. TWCC should ensure high performing entities are publicly recognized, and allow them to use that designation as a marketing tool.
- Authorize the agency to conduct audits of carriers' accident prevention services based on the comprehensive risk assessment, rather than every two years. The agency should still review these services regularly, but would be able to provide incentives for less regulation of carriers based on performance.

7.2 Require the agency to establish rules that govern the filing of a complaint against a regulated entity, and to make information on the process available on its Web site.

This recommendation would ensure that TWCC clearly defines the method for filing a complaint in rule, and accepts public input into the process. The rules should encourage informal resolution through the agency's customer assistance function for appropriate types of complaints before initiating the formal complaint process, and should define what constitutes a frivolous complaint. TWCC should develop, and post on its Web site, a simple and standardized form for filing complaints, and information on the filing process.

7.3 The agency should prioritize complaint investigations based on risk.

TWCC should develop a formal risk-based complaint investigation system that takes into consideration the severity of the alleged violation, whether the alleged violator showed continued or willful noncompliance, or if an order of the Commission has been violated when prioritizing its complaint investigations. TWCC should develop additional risk-based criteria as needed.

Fiscal Implication

These recommendations would not have a fiscal impact to the State.

Responses

Agency

The Commission agrees with the recommendations. (Mike Hachtman, Chairman and Richard F. Reynolds, Executive Director – Texas Workers’ Compensation Commission)

For

Richard Levy, Legal Director – Texas AFL-CIO, Austin

Fred and Sue Worley, Emory

Against

None received.

Modifications

1. Require all reports related to physical medicine services to distinguish the provider offering the care, whether the provider is an occupational therapist, a physical therapist, a medical doctor, a chiropractor, a licensed assistant, or an unlicensed aide. (Mary Hennigan, Executive Director – Texas Occupational Therapy Association, Inc., Austin)
2. Require provider audits to be directed at outliers, not at those who consistently provide quality care that falls within nationally recognized treatment guidelines that are peer reviewed by national medical specialty organizations and recognized by the national guidelines clearinghouse. (Dr. David N. Henkes, Chair – Texas Medical Association Ad Hoc Committee on Workers’ Compensation, Austin)

Recommended Action: Adopt Recommendations 7.1 through 7.3.

Commission Decision: The Commission adopted the proposal offered by the Chair, Representative Solomons, as detailed beginning on page 3. The proposal incorporates Recommendations 7.1 through 7.3 as applied to TDI.

Issue 8 TWCC Does Not Adequately Inform Injured Workers About the Workers' Compensation System.

Recommendations

Change in Statute

8.1 Require TWCC to centralize the majority of its customer assistance functions into call centers.

This recommendation would increase the consistency and efficiency of customer service efforts. Call centers would allow inquires to be answered in a queue, rather than dealt with by each individual field office with some offices receiving much higher call volumes than others. The agency's existing informational database should be improved to provide detailed information regarding potential inquires related to workers' compensation, to ensure quality and consistency of information provided by the customer assistants. TWCC should determine the number and location of call centers, although only a small number will allow the agency to take advantage of call center efficiencies. TWCC should explore the option of sharing call center resources with other agencies such as the Texas Workforce Commission and the Health and Human Services Commission, who have or plan to implement call centers. Under this arrangement, TWCC could share infrastructure resources with and lease space from those agencies to save on some of the costs of developing and maintaining call centers. Generally, one customer assistant would remain in most field offices to handle walk-in questions. Larger offices may require additional staff. TWCC should reallocate all other customer assistant positions to the call center.

Management Action

8.2 TWCC should improve its Web site to be more customer friendly.

This recommendation would make it easier for all participants to find the needed information on the agency's Web site and would decrease the number of inquiries the agency receives by phone. The Web site should have individual portals on its home page for different system participants, including employers, injured workers, health-care providers, and insurance companies. The informational database used by customer assistants should be made available on the Web site to ensure consistency of information between customer assistants and the Web site. The Web site should have a Frequently Asked Questions link for injured workers that would clarify often misunderstood, frequently asked, or confusing parts of the workers' compensation system. The Web site should have return to work information for injured workers and employers that will provide steps for how an injured worker can to return to work and programs available to help injured workers access services such as job training and vocational rehabilitation.

8.3 The agency should review and revise all its forms, standard letters, and brochures to ensure the use of plain language.

This recommendation would further ensure that all system participants have the information they need regarding the workers' compensation system. The workers' compensation system can be complicated and confusing, and clear information is vital for injured workers to protect their rights and receive proper benefits under the law.

Fiscal Implication

Centralizing call center operations will allow a reduction in customer service staff of five supervisors, with an annual savings of about \$200,000. Creating the call centers will have a one-time implementation cost of approximately \$400,000.

Responses

Agency

The Commission agrees with the recommendations but believes the fiscal savings may not be as great as anticipated. (Mike Hachtman, Chairman and Richard F. Reynolds, Executive Director – Texas Workers' Compensation Commission)

For

None received.

Against

Richard Levy, Legal Director – Texas AFL-CIO, Austin

Recommended Action: Adopt Recommendations 8.1 through 8.3.

Commission Decision: The Commission adopted the proposal offered by the Chair, Representative Solomons, as detailed beginning on page 3. The proposal incorporates Recommendation 8.3 as applied to TDI and amended to include preparing documents in Spanish where appropriate.

Issue 9 The Medical Advisory Committee Is Not an Effective Resource for the Agency.

Recommendations

Change in Statute

9.1 Abolish the Medical Advisory Committee.

This recommendation would abolish the Medical Advisory Committee and remove the requirement for the Director of Medical Review to receive advisory committee recommendations. The agency would retain the statutory authority to appoint advisory committees as needed.

9.2 Authorize the Medical Advisor to appoint ad hoc medical workgroups.

This recommendation would allow the Medical Advisor to access additional medical expertise as needed to assist the agency in developing and reviewing medical policies and fee and treatment guidelines. These workgroups, focused on policy and rulemaking efforts at the agency, would exist independently from the Medical Quality Review Panel, which focuses on quality of care issues, and would provide program area staff with additional medical expertise as appropriate in the development of certain policies and rules.

Fiscal Implication

According to the agency, the current annual cost of operating the Medical Advisory Committee is about \$47,500. Since these resources are drawn from the agency's operating divisions, abolishing the committee would allow the resources to be reallocated within the agency.

Responses

Agency

The Commission agrees with the recommendations. (Mike Hachtman, Chairman and Richard F. Reynolds, Executive Director – Texas Workers' Compensation Commission)

For

Richard Levy, Legal Director – Texas AFL-CIO, Austin

Against

Bubba Klosterman – Texas Occupational Therapy Association, Austin

Tim Weitz – Texas Physical Therapy Association, Austin

Modifications

1. Abolish informal stakeholder groups used in rule development and restructure the MAC to allow for meaningful public input. (Dr. David Gude, Chair – Medical Advisory Committee, San Antonio)
2. Specify that the information disseminated to any advisory committees and ad hoc medical workgroups created by the agency or its Medical Advisor and their recommendations be readily available to the public. (Dr. David Gude, Chair – Medical Advisory Committee, San Antonio)

3. Restructure the MAC to be an integral part of the policymaking process of the workers' compensation system, not an adjunct advisory body to the Medical Review Division of TWCC. (Dr. David N. Henkes, Chair – Texas Medical Association Ad Hoc Committee on Workers' Compensation, Austin)
4. Require the MAC to approve rules before they are proposed to the Commission. (Tim Weitz – Texas Physical Therapy Association, Austin)
5. Restructure the MAC to improve the committee's functionality or abandon the process and use ad hoc committees geared to specific rules or issues. (Jay Dhingra, Vice President of Managed Care – HCA, Irving)
6. Clarify the role of the MAC in statute and require it to report to the agency's Executive Director. (Mary Hennigan, Executive Director – Texas Occupational Therapy Association, Inc., Austin)

Recommended Action: Adopt Recommendations 9.1 and 9.2.

Commission Decision: The Commission adopted the proposal offered by the Chair, Representative Solomons, as detailed beginning on page 3. The proposal incorporates Recommendations 9.1 and 9.2.

Issue 10 Texas Has a Continuing Need for the Texas Workers' Compensation Commission.

Recommendation

Change in Statute

10.1 Continue the Texas Workers' Compensation Commission for 12 years.

Fiscal Implication

If the Legislature continues the current functions of the Workers' Compensation Commission, using the existing organizational structure, the agency's annual appropriation of about \$55 million from the General Revenue Fund would continue to be required for its operation. The State would continue to assess the maintenance tax collected on workers' compensation insurance premiums to recover TWCC's operating costs.

Responses

Agency

The Commission agrees with the recommendation. (Mike Hachtman, Chairman and Richard F. Reynolds, Executive Director – Texas Workers' Compensation Commission)

For

None received.

Against

None received.

Modification

1. Transfer TWCC's responsibilities to an administrative division under the Department of Insurance, who would be responsible for rulemaking and enforcement related to the Workers' Compensation Act. (Elizabeth J. Lee, President – Physiatry Reimbursement Specialists, Inc., Hurst; C.M. Schade, M.D., Ph.D., President – Patient Advocates of Texas, Mesquite)

Recommended Action: Adopt Recommendation 10.1.

Commission Decision: The Commission took no action.

ACROSS-THE-BOARD RECOMMENDATIONS

Texas Workers' Compensation Commission	
Recommendations	Across-the-Board Provisions
Do Not Apply	1. Require public membership on the agency's policymaking body.
Update	2. Require provisions relating to conflicts of interest.
Already in Statute	3. Require unbiased appointments to the agency's policymaking body.
Already in Statute	4. Provide that the Governor designate the presiding officer of the policymaking body.
Already in Statute	5. Specify grounds for removal of a member of the policymaking body.
Update	6. Require training for members of the policymaking body.
Already in Statute	7. Require separation of policymaking and agency staff functions.
Already in Statute	8. Provide for public testimony at meetings of the policymaking body.
Modify	9. Require information to be maintained on complaints.
Apply	10. Require the agency to use technology to increase public access.
Apply	11. Develop and use appropriate alternative rulemaking and dispute resolution procedures.

Recommended Action: Adopt staff recommendations.

Commission Decision: The Commission adopted the proposal offered by the Chair, Representative Solomons, as detailed beginning on page 3. The proposal incorporates all applicable staff recommendations.

NEW ISSUES

New Issues

The following issues were raised in addition to the issues in the staff report. These issues are numbered sequentially to follow the staff's recommendations.

Medical Care - Service Delivery System

11. Give employers and carriers the ability to require injured workers to obtain medical care from provider networks organized by the employers and/or carriers and certified by the Texas Department of Insurance. (Ron Luke J.D., Ph.D., President – Forté, Austin)
12. Allow the establishment of regional managed care networks, regulated by the Department of Insurance, in appropriate areas of the state to deliver workers' compensation benefits. (Jay Dhingra, Vice President of Managed Care – HCA, Irving)
13. Allow insurance carriers to manage the delivery of medical benefits through managed care networks. (Joe Woods – Property Casualty Insurers Association of America, Austin)
14. If the workers' compensation delivery system moves to use of networks, require the system to include the same standards for patient protection, prompt payment, and adequacy of network standards delegated by statute to the Texas Department of Insurance. (Dr. David N. Henkes, Chair – Texas Medical Association Ad Hoc Committee on Workers' Compensation, Austin)
15. Require the use of nationally recognized, peer-reviewed medical guidelines developed by national medical specialty organizations to improve the delivery of workers' compensation medical services. (Dr. David N. Henkes, Chair – Texas Medical Association Ad Hoc Committee on Workers' Compensation, Austin)

Staff Comment: TWCC is currently authorized, but not required to develop these guidelines. The agency has been considering proposing rules regarding guidelines and indicates they have been working with stakeholder groups toward this end.

16. Allow injured workers to retain their right to choose their own treating doctor. (Scott Sexton, Union Steward – Teamsters, Longview; Richard Levy, Legal Director – Texas AFL-CIO, Austin)
17. Ensure that any managed care network is open to all providers and does not result in a decrease in reimbursement for services. (Mary Hennigan, Executive Director – Texas Occupational Therapy Association, Inc., Austin)

Medical Care - Fee Schedules

18. Require TWCC to meet its statutory requirement to review the fee schedule biennially to account for cost-of-practice factors. (Dr. David N. Henkes, Chair – Texas Medical Association Ad Hoc Committee on Workers' Compensation, Austin; C.M. Schade, M.D., Ph.D., President – Patient Advocates of Texas, Mesquite)
19. Require the fee schedule to take into account the additional administrative burdens and complexity of treating work-related injuries. (Dr. David N. Henkes, Chair – Texas Medical Association Ad Hoc Committee on Workers' Compensation, Austin)

20. Consider the use of multiple conversion factors within the Medical Fee Guidelines to make the fees fair and reasonable in a commercial environment. (Dr. Stephen M. Norwook – Texas Orthopaedic Association Workers’ Compensation Chair, Austin)
21. Base reimbursement for services provided by ambulatory surgical centers on state-determined groups of procedures, not on federal Medicare reimbursement methodologies. (Edward W. Smith, D.O., Vice President – Texas Ambulatory Surgery Center Society, Hurst)
22. Reevaluate the adequacy of the medical fee guidelines. (C.M. Schade, M.D., Ph.D., President – Patient Advocates of Texas, Mesquite)

Medical Care - Authorized Providers

23. Require the agency to periodically revise the Approved Doctor List to include only doctors that are currently accepting workers’ compensation patients. (Laura Crouch, Itasca)
24. Require TWCC to mail each treating doctor a list of patient rights concerning ethics and quality of care according to the American Medical Association’s Guidelines to Ethics. Any doctor that disregards the guidelines should be permanently suspended from treatment. (Kathleen C. Cooney, R.N. – Fredricksburg)
25. Authorize licensed acupuncturists to provide reimbursable services under the workers’ compensation system. (Stuart Bailey, Communications Manager – Academy of Oriental Medicine, Austin)

Medical Care - Billing and Payment

26. Apply the prompt payment principles included in S.B. 418 (78th Regular Session) to workers’ compensation benefits. (Mary Hennigan, Executive Director – Texas Occupational Therapy Association, Inc., Austin)
27. Require health care providers in the workers’ compensation system to bill and process payments electronically. (Tim Weitz – Texas Physical Therapy Association, Austin)
28. Allow doctors and injured workers to use collection agencies to collect late payments from insurance carriers. (Fred and Sue Worley, Emory)

Medical Care - Authorization and Review

29. Prohibit insurers from renegeing on reimbursement to physicians when medical care was provided as the result of the individual seeking medical care when accompanied by their employer who says the injury is the result of a work-related incident. (Dr. David N. Henkes, Chair – Texas Medical Association Ad Hoc Committee on Workers’ Compensation, Austin)
30. Specify that the cost of an audit should not be borne by a physician unless a significant violation of the law or rules has been finally adjudicated and costs should be limited to those that were reasonable and necessary to determine a violation. (Dr. David N. Henkes, Chair – Texas Medical Association Ad Hoc Committee on Workers’ Compensation, Austin)

Staff Comment: This issue is the subject of current litigation.

31. Require mandatory, binding pre-authorization of an injured workers' treatment plan. Establish policies and procedures to review the care provided and determine future care needs if the initial plan needs modification. (Mary Hennigan, Executive Director – Texas Occupational Therapy Association, Inc., Austin)
32. Require that the first evaluation of the injured worker to include a list of all possible conditions that exist based on the observations of the medical professional and the complaints of the worker so appropriate tests may be scheduled without preemption. (Bill Reid, Steward – Teamsters Local 769, Forney)
33. Require insurance carriers to have medical directors for workers' compensation, similar to the requirements for group health insurance. (Chris Kean, C.O.O. – The San Antonio Orthopedic Group, San Antonio)
34. Require pharmacies to be notified by the insurance carrier of peer reviews in progress. (Rose Jiles-Williams, Third Party Manager – Plum Creek Pharmaceuticals, Inc., Amarillo)
35. Allow pharmacies to pre-authorize medications. (Rose Jiles-Williams, Third Party Manager – Plum Creek Pharmaceuticals, Inc., Amarillo)
36. Remove the 90-day time limit for dispute of maximum medical improvement or an impairment rating. (Kathleen C. Cooney, R.N. – Fredricksburg)
37. Prohibit anyone from sending or obtaining any medical record without signed authorization from the injured worker. (Kathleen C. Cooney, R.N. – Fredricksburg)
38. Delete the requirement for doctors to not rely on the subjective symptoms perceived by the employee when making medical evaluations. (Kathleen C. Cooney, R.N. – Fredricksburg)
39. Allow injured workers to file suit against insurance companies for lost wages and damages in situations where the injured worker suffers needlessly from lack of necessary health care. (Kathleen C. Cooney, R.N. – Fredricksburg)
40. Allow for reimbursement of all travel expenses incurred by the injured employee seeking medical care at the allowed rate set by the IRS. (Kathleen C. Cooney, R.N. – Fredricksburg)
41. Prohibit independent review of medical disputes and require all medically necessary treatment, as prescribed by the treating doctor, to be reimbursed within 45 days. (Kathleen C. Cooney, R.N. – Fredricksburg)
42. Enhance penalties for insurance carriers that deny claims when the denials are overturned. (Charles Smith, Comfort)
43. Enhance penalties for insurance carriers that demonstrate a pattern of abuse using peer reviews to deny medical treatment. (Sharon Boyd Reno, M.P. – Doctor's Guild, Carrollton)
44. Prohibit the use of internal peer reviews by insurance carriers to determine appropriate medical care. (James F. Wildermuth – Doctor of Chiropractic, Houston; Fred and Sue Worley, Emory; Scott Sexton, Union Steward – Teamsters, Longview)
45. Require an insurance company to notify the worker when refusing payment for medical care. (Fred and Sue Worley, Emory)

46. Review insurance carriers that frequently deny medical care. (Fred and Sue Worley, Emory)
47. Require insurance carriers to cover the cost of medical problems that result from the initial denial of treatment of injuries. (Fred and Sue Worley, Emory)

Medical Care - Access

48. Review the implementation of the medical fee schedules to determine if they are adversely impacting physician participation and access to care. (Julie Nicole and Larry Michael Beasley, Austin)

Medical Care - Designated Doctor

49. If health care networks are created, require the use of an independently assigned designated doctor to determine maximum medical improvement and the permanent impairment rating in health care networks used to treat injured workers. (Ross E. Crutchfield, President – Churchill Evaluation Centers, Arlington)
50. TWCC rules should be changed to allow the designated doctor to bill the insurance carrier a flat fee to offset some of the costs for patient no-shows and last minute cancellations. The carrier should be allowed to deduct this fee from the injured workers's weekly benefits at a rate of no more than 25 percent of the weekly benefit. (Ross E. Crutchfield, President – Churchill Evaluation Centers, Arlington)
51. TWCC orders appointing the designated doctor should contain language informing the injured worker that a no-show or cancellation after a certain date without good cause will result in an automatic reduction of benefits when the insurance carrier pays the designated doctor. In the event the no-show or cancellation was for good cause, the carrier will pay the withheld benefits and is entitled to seek reimbursement from the Subsequent Injury Fund. (Ross E. Crutchfield, President – Churchill Evaluation Centers, Arlington)
52. Specify that any doctor that has a complaint filed with TWCC concerning a designated doctor exam is suspended from performing any other exams until the complaint is resolved. If the complaint is proved valid, the doctor should be permanently barred from performing exams. (Kathleen C. Cooney, R.N. – Fredricksburg)
53. Remove the requirement that the report of the designated doctor have presumptive weight. (Kathleen C. Cooney, R.N. – Fredricksburg)
54. Allow injured workers to change to any licensed doctor as they find necessary and inform TWCC in writing of the change. (Kathleen C. Cooney, R.N. – Fredricksburg)
55. Require designated doctors to maintain an open practice. (Kymberly P. Grant – Doctor's Guild, Carrollton)
56. Require doctors of a similar speciality to make impairment ratings. (Fred and Sue Worley, Emory)
57. Require impairment rating to be revised after subsequent surgeries. (Fred and Sue Worley, Emory)

Medical Care - Dental

58. Authorize treating dentists to refer parts of cases to dental specialists such as oral surgeons, periodontists, endodontists. Do not require dental specialists to be on the list. Allow dentists not on the Approved Doctor List to treat patients if approved dentists are not available within a given area. (Dr. Mitchell R. Wilkinson – Dentist, Austin)
59. Require fee schedules to be at least within the 80th percentile of dental fees within a given geographic area. (Dr. Mitchell R. Wilkinson – Dentist, Austin)
60. Require dentists to be given a written pre-estimate of compensation based upon their treatment plans before treatment begins. (Dr. Mitchell R. Wilkinson – Dentist, Austin)
61. Require a dental consultant to be included on the staff of the agency to resolve problems between patients, carriers, and treating dentists. (Dr. Mitchell R. Wilkinson – Dentist, Austin)

Benefit Delivery System

62. Repeal Commission Rule 129.6 related to bona fide offers of employment. (John D. Pringle, Austin)
Staff Comment: The rule provides that an offer is bona fide if it is reasonable, geographically accessible, and the injured worker is physically able to perform the job duties.
63. Provide lifetime income benefits for employees with brain injuries that affect workers to the point that they cannot meet the daily demands of employment. (Laura Crouch, Itasca)
64. Require the availability of ombudsman services to be communicated to injured workers as soon as possible after an injury. (Laura Crouch, Itasca)
65. Provide injured worker orientation at the earliest opportunity after an accident. (Bill Reid, Steward – Teamsters Local 769, Forney)
66. Remove statutory limits for benefits and compensate injured workers at the full rate of their basic weekly wage at the time of injury with an allowance for increased cost of living added yearly. If the injured worker cannot return to work, compensation should be paid until the age of 62. (Kathleen C. Cooney, R.N. – Fredricksburg)
67. Improve the information provided to employers and employees before accidents occur. (Charles Smith, Comfort; Ken Davis, Executive Vice President – JMK International, Weatherford)
68. Provide for a 3 percent annual increase in Death Benefits, similar to Lifetime Income Benefits. (Charles Smith, Comfort)
69. Ensure that eligibility rules for Death Benefits are applied to both spouses and same sex partners of the deceased injured worker. (Charles Smith, Comfort)
70. Allow workers with total and permanent disabilities to draw lifetime income and medical benefits. (Fred and Sue Worley, Emory)
71. Require SIBs to start the day a worker is determined disabled by the doctor, not on the date of injury. (Fred and Sue Worley, Emory)

72. Require insurance companies to request orders at TWCC regional offices where case files are maintained. (Fred and Sue Worley, Emory)
73. Require insurance adjusters to provide license numbers on request and to notify injured workers when they change companies. (Fred and Sue Worley, Emory)
74. Increase fines and penalties for violations of TWCC rules. (Gilbert Ramos Sr., Waco)

TWCC Governance

75. Change the governance structure of TWCC to a single commissioner appointed by the Governor. Transfer worker health and safety functions to the Texas Workforce Commission and the regulation of self-insured employers to the Texas Department of Insurance. (Ron Luke J.D., Ph.D. – President, Forté, Austin)
76. Retain administration of the workers' compensation act separate and independent from administration of the insurance code with a single, full-time commissioner appointed by the Governor. (Joe Woods – Property Casualty Insurers Association of America, Austin)
77. Replace the six member part-time Commission with three full-time Commissioners. (Richard Levy, Legal Director – Texas AFL-CIO, Austin)
78. Expand the Commission to nine members with the additional members representing the various types of health care providers who are involved in the workers' compensation system. (Mary Hennigan, Executive Director – Texas Occupational Therapy Association, Inc., Austin)
79. Add a healthcare provider representative to the Commission (Edward W. Smith, D.O., Vice President – Texas Ambulatory Surgery Center Society, Hurst)
80. Require injured worker representation on the Workers' Compensation Commission. (Fred and Sue Worley, Emory)

TWCC Operations

81. Provide for some recourse for injured employees in cases where TWCC and its employees lie or misrepresent the facts. (Jean O'Neill, Round Rock)
82. Increase pay for TWCC workers. (Fred and Sue Worley, Emory)

Worker Health and Safety

83. Replace TWCC's current Accident Prevention Services Program with a new risk-based approach that would require insurers to advise policyholders of their rights to receive accident prevention services, defining the services and describing how to obtain them and how to complain if the services are not provided. (Joe Woods – Property Casualty Insurers Association of America, Austin)
84. Close loopholes in the non-subscription status of companies including waivers and arbitration agreements that deny injured workers protection of the law. (Richard Levy, Legal Director – Texas AFL-CIO, Austin)
85. Require TWCC to collect non-subscribers' data and information on workplace injuries. (Richard Levy, Legal Director – Texas AFL-CIO, Austin)

86. Modify the commission's statutory authority to ensure that extra-hazardous employers improve their workplace safety practices. (Richard Levy, Legal Director – Texas AFL-CIO, Austin)

Recommended Action: Staff makes no recommendation on any of the new issues.

Commission Decision: The Commission did not adopt any of the new issues.

