SUBCHAPTER A. IMPAIRMENT INCOME BENEFITS §§130.2 and 130.6

1. INTRODUCTION. The Commissioner of the Division of Workers' Compensation, Texas Department of Insurance, adopts amendments to §130.2 and §130.6, concerning certification of maximum medical improvement (MMI), impairment rating (IR), and designated doctor examinations for MMI and IR. The amended sections are adopted with changes to the proposed text as published in the February 3, 2006 issue of the *Texas Register* (31 Tex Reg 675).

2. REASONED JUSTIFICATION. The adopted amendments are necessary to implement changes to Labor Code §408.123 and §408.0041, as a result of House Bill (HB) 7 enacted by the 79th Legislature, Regular Session. HB 7 amended Labor Code §408.123 to require the treating doctor provide information to the injured employee (employee) for disputing a certification of MMI and the assignment of an IR. The adopted amendments to §130.2 set forth the process for the treating doctor to provide the notification to the employee. Since these certifications may occur for both network and non-network health care services, the additional notification ensures that the employee is notified of the assignment of the MMI/IR as soon as reasonably possible. This notice will be provided to the employee, along with the Report of Medical Evaluation, through the processes outlined in §130.1.

The adopted amendments to §130.6 address changes made to Labor Code §408.0041. The amendments delete the procedures set forth in existing subsections (a) – (h) and (k) since these have been moved, with modifications as appropriate, to adopted §126.7, which is published elsewhere in this issue of the *Texas Register*. The new §126.7 addresses designated doctor exams in general. Where necessary, the Division has made grammatical changes to §§130.2 and 130.6.

3. HOW THE SECTIONS WILL FUNCTION. The adopted amendments to §130.2 address changes made to Labor Code §408.123. This section requires the treating doctor to examine the injured employee to determine if the employee has any permanent impairment as a result of the compensable injury. If the treating doctor is not authorized by the Division to certify MMI and assign an impairment rating, the doctor must refer the employee to another doctor that is authorized by the Division for the certification. At the conclusion of the examination the doctor shall provide the employee written notice that the certification may be disputed. As a result of public comment, changes were made to §130.2 to provide that at the end of the examination a separate written notice that certification may be disputed will be provided with the Report of Medical Evaluation, as required by §130.1, in English or Spanish or other language common to the employee. The notice will also contain information that the impairment rating becomes final within 90 days if not disputed by the employee or the employee's representative. The Division shall mail a notice to the treating doctor, employee, the

employee's representative, if any, and the insurance carrier on the expiration of 98 weeks from the date the employee's Temporary Income Benefits (TIBs) began to accrue. The Division has also removed the requirement for rescheduled examinations due to a prospective date of MMI based on public comments.

The adopted amendments to §130.6 address changes made to Labor Code §408.0041. Section §130.6 provides procedural direction and guidance regarding the roles and responsibilities of the designated doctor when performing an examination for MMI/IR. Subsection (a) states any evaluation for maximum medical improvement (MMI) and/or impairment rating (IR) shall be conducted in accordance with §130.1.

Subsection (b) provides direction regarding the expectation of the designated doctor based on the absence or existence of MMI/IR certifications, and prohibits a designated doctor, who determines the employee has not reached maximum medical improvement (MMI) from assigning an impairment rating.

Subsection (f) provides that when the designated doctor issues multiple impairment ratings due to an unresolved dispute over the extent of the employee's compensable injury, the carrier shall pay benefits based on the conditions that have not been disputed by the carrier or have been finally adjudicated by the Division to be part of the compensable injury. A date on which a designated doctor may be requested has been added to the section as a result of comments.

4. SUMMARY OF COMMENTS AND AGENCY'S RESPONSE TO COMMENTS.

§130.2

General: A commenter believes the estimated savings in the first 30 – 60 days would be $90 million for functional capacity exams, including MRIs and EMGs. Another commenter complains that the rules only have minor changes and are flawed. The commenter believes that HB 7 was needed but the proposed rules do not correct the flaws in the system.

Agency Response: The amendments to §130.2 address the new requirement of HB 7 for the treating doctor to provide the injured employee a notice of MMI/IR, and that the rating may become final if not disputed within 90 days of receipt. The Division is unaware of the source of the estimated cost savings and the questions posed by the commenter are not germane to the proposed rule. The Division agrees that HB 7 was needed and believes that the rules comply with the requirements of HB 7. The Division believes that the rules improve the existing process and provide the necessary process for employees to receive notice of MMI/IR.

Comment: A commenter feels Labor Code §408.123 does not place the burden to notify the employee on the treating doctor.

Agency Response: The Division disagrees. Labor Code §408.123 clearly places the responsibility to provide the notice to the employee on the treating doctor.

Comment: Some commenters recommend that the Division include the notice required by Labor Code §408.123 in the instructions of the DWC Form-69 as the instructions are on the back side of the form rather than requiring a new form as this will provide a more streamlined process.

Agency Response: The Division disagrees. The instructions provide guidance in completing the form. Even if provided in the instructions, the Division does not expect many injured employees would read the instructions since they will not be completing the form. Additionally, the instructions are on the back of the DWC-69 only if copied onto the back of the form. It is the Division's experience that most DWC-69s received by the Division include only the front page of the form, not the instructions. The intent of Labor Code §408.123 is to provide the injured employee a separate and distinct notice that MMI/IR had been assigned and that the employee can dispute it. Including the language on the DWC-69 would not meet this intent.

§130.2(a)(3): A commenter states the rule appears to meet the intent of Labor Code §408.123 and requests that the notice be required in English and Spanish. The commenter also requests the Division create a standard form and make it available to all doctors. Several commenters request that the notice include language that the impairment rating may become final if not disputed in 90 days.

Agency Response: The Division agrees. The language has been changed to require the notice to be in English, or Spanish, or other common language to the employee.

The Division does not believe that a separate form is necessary but will prepare and post on the Division's webpage a sample notice that contains language that can be downloaded and used by the doctor's office that meets the rules requirements. The language will include language regarding the 90-day timeframe for disputing the assigned IR.

Comment: Several commenters feel the requirement to provide the notice at the conclusion of the exam is unreasonable and recommend that the notice be provided no later than five days after the conclusion of the exam. The commenters assert that this will allow the doctor time to complete necessary calculations and prevent the injured employee from having to wait at the doctor's office. Another commenter recommends deleting this paragraph as redundant and requests clarification of "conclusion of the exam."

Agency Response: The Division agrees and has changed the requirement. The notice must be provided with the Report of Medical Examination, which is filed no later than seven days after the conclusion of the exam in accordance with §130.1. The Division disagrees that the paragraph is redundant. Labor Code §408.123 requires the Commissioner to adopt a rule to require provision of the notice by the treating doctor. The Division disagrees that "conclusion of the exam" needs to be clarified because the Report of Medical Evaluation is provided in accordance with §130.1(d)(2) which provides the necessary direction for filing the report.

Comment: Several commenters recommend that "the employee's representative, if any" be added to the list of recipients of the 98 week notice. Other commenters recommend sending the letter to the insurance carrier. Another commenter suggests that the treating doctor provide a copy of the notice to the insurance carrier and the injured employee's attorney, if any. A commenter also requests clarification that both the DWC-69 and the notice are required to be sent.

Agency Response: The Division agrees and has added language to notify the injured employee's representative, if any, as well as the insurance carrier. The Division clarifies that the notice is required or addition to the DWC-69.

Comment: Several commenters don't feel the proposed language meets the requirements of Labor Code §408.123(c) because it does not provide information regarding how to dispute the impairment rating. The commenter provided recommended language.

Agency Response: The notice is required to advise the injured employee that the employee may dispute the MMI/IR. The language the Division will post on its webpage will also advise the injured employee, or the employee's representative, to contact the Division to dispute the MMI/IR by requesting a benefit review conference. An unrepresented injured employee may contact the Division in any manner to dispute the assigned MMI date and impairment rating and request a benefit review conference. If

the injured employee is represented by counsel, the representative must file the dispute and request dispute resolution in accordance with Labor Code Chapter 410.

§130.6: Several commenters feel requiring the designated doctor to reschedule the exam if MMI is anticipated within 60 days will get the subsequent exam scheduled quicker resulting in less administrative cost to the carrier; however, they also feel that this may be used by the designated doctor to prolong the MMI date to ensure a second exam. A commenter states that the designated doctor could possibly no longer be qualified to examine the employee. A commenter contends that this requirement may not work effectively for traveling designated doctors.

Agency Response: The Division disagrees that designated doctors will abuse this provision. However, the Division has removed the requirement for rescheduled examinations based on a prospective date of MMI. Prospective dates are not statutorily required and are not applicable for claims administration purposes. The Division reminds traveling designated doctors that they should be prepared to meet the requirements of the statute and rule if they are going to be traveling designated doctors.

§130.6(b): Several commenters question why different requirements exist regarding explanations of why the injured employee has reached, or not reached, MMI/IR.

Agency Response: Different circumstances require different actions on the part of the designated doctor. Subsection (b)(2) addresses the designated doctor's responsibilities

when only the date of MMI is in question, (b)(3) addresses the designated doctor's responsibilities when only the impairment rating is in question, and (b)(4) addresses the designated doctor's responsibilities when both MMI and impairment rating are in question and the designated doctor determines the injured employee has not reached MMI.

Comment: A commenter questions whether the doctor will be paid for multiple exams when issuing multiple impairment ratings due to no agreement (dispute) regarding the extent of injury.

Agency Response: The designated doctor will not be paid for multiple exams for issuing multiple impairment ratings. The designated doctor will be able to bill for each additional report of medical evaluation.

§130.6(b)(4): Several commenters request that the requirement to assign a prospective date of MMI if the designated doctor determines the injured employee has not reached MMI be deleted.

Agency Response: The Division agrees and has removed the requirement to assign a prospective date of MMI and to reschedule the examination based on a prospective date.

§130.6(e): Several commenters recommend clarifying that additional testing not subject to preauthorization is still subject to retrospective review. They contend that this allows carriers the means to ensure redundant or excessive testing is not being performed and are concerned that system medical costs will increase if the provision is not clarified.

Agency Response: The Division disagrees. A designated doctor should be able to obtain testing as required to make an assessment of the injured employee's condition without fear of not being reimbursed. If a party has evidence that a designated doctor is abusing this provision, this evidence should be submitted to the Division for appropriate enforcement action.

§130.6(f): Several commenters recommend changing the language to reflect "accepted" rather than "not disputed" and contend that it would provide a clearer and more affirmative response regarding the requirement to pay benefits.

Agency Response: The Division disagrees. There is an existing mechanism for reporting to the injured employee and the Division any disputed body parts and conditions. There is no mechanism for reporting what body parts and conditions have been accepted.

5. NAMES OF THOSE COMMENTING FOR AND AGAINST THE SECTIONS.

For, with changes: Rehab for Workers; ECAS; TIRR Systems; Lockheed Martin Aeronautics Company; Office of Injured Employee Counsel; American Insurance

Association; Texas Mutual Insurance Company; Texas Association of School Boards; The Boeing Company; Insurance Council of Texas; Property Casualty Insurers of America; Association of Fire and Casualty Insurers of Texas; Senator Gonzalo Barrientos; and various individuals.

Against: An individual.

6. STATUTORY AUTHORITY. The amendments to §§130.2 and 130.6 are adopted under the Labor Code §§408.0041, 408.123, 402.061, and 402.00111. Section 408.0041 provides for designated doctor examinations. Section 408.123 provides for certification of maximum medical improvement and evaluation of impairment ratings. Section 402.061 requires the Commissioner of Workers' Compensation to adopt rules necessary for the implementation and enforcement of the Texas Workers Compensation Act. Section 402.00111 provides that the Commmissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under Labor Code Title 5.

7. TEXT.

§130.2. Certification of Maximum Medical Improvement and Evaluation of Permanent Impairment by the Treating Doctor.

(a) A treating doctor shall either examine the injured employee (employee) and determine if the employee has any permanent impairment as a result of the

compensable injury as soon as the doctor anticipates that the employee will have no further material recovery from or lasting improvement to the work-related injury or illness, based on reasonable medical probability, or have another authorized doctor do so.

(1) A treating doctor who finds that the employee has permanent impairment but who is not authorized to assign impairment ratings as provided in §130.1 of this title (relating to Certification of Maximum Medical Improvement and Evaluation of Permanent Impairment), shall make a referral to a doctor who is authorized to do so on behalf of the treating doctor. Even if the treating doctor is so authorized, the doctor may choose to have another authorized doctor evaluate the employee for maximum medical improvement (MMI) and impairment in the place of the treating doctor. However, this evaluation shall be considered to be the report of the treating doctor.

(2) Other than subsections (c) and (d) of this section, nothing in this section requires a treating doctor to schedule an examination if the employee has been released from treatment and is not receiving temporary income benefits (TIBs). For example, when the patient is treated and released without further treatment for a minor injury, the treating doctor is not required to schedule and conduct an examination for MMI and permanent impairment.

(3) At the conclusion of an examination in which the treating doctor, or the certifying doctor in the event that the treating doctor is not authorized to certify MMI and assign an impairment rating, determines that the employee has reached maximum

medical improvement and assigns an impairment rating, the doctor shall provide the employee with a written notice that the certification may be disputed. The notice shall be provided as a separate document included with the Report of Medical Evaluation provided in accordance with §130.1 of this title. The notice must be provided in English, Spanish, or other language common to the employee, and shall include the following information:

(A) the date of maximum medical improvement;

(B) the assigned impairment rating;

(C) a statement that the impairment rating may become final if not disputed within 90 days, and if the employee, or the employee's representative, disagrees with the certification, they may dispute the certification by contacting the Division of Workers' Compensation and requesting a benefit review conference;

(D) the address and phone number of the local field office of the Division of Workers' Compensation (Division); and

(E) a statement that the employee may contact the Division for more information at 1- 800-252-7031.

(b) A certification of MMI and assignment of an impairment rating shall be performed and reported in accordance with the requirements of §130.1 of this title.

(c) The Division shall mail a notice to a treating doctor, the employee, the employee's representative, if any, and the insurance carrier on the expiration of 98 weeks from the date the employee's TIBs began to accrue if the employee is still

receiving TIBs. The Division's notice shall advise the treating doctor of the requirements under Chapter 408, Subchapter G of the Texas Workers' Compensation Act, and this section, and require that an impairment rating report be mailed to the Division no later than 104 weeks from the date TIBs began to accrue.

(d) Upon receipt of the Division's notice required in subsection (c) of this section, the treating doctor shall schedule and conduct an examination of the employee in accordance with §130.1 of this title to certify a MMI date (if earlier than the statutory MMI date as defined in §130.4 of this title (relating to Presumption that Maximum Medical Improvement (MMI) has been Reached and Resolution when MMI has not been Certified) and to assign an impairment rating. A treating doctor who is not authorized to certify MMI and assign impairment ratings, shall make a referral to a doctor who is authorized to do so on behalf of the treating doctor.

(e) If the carrier has not received a report of medical evaluation by the date of statutory MMI:

(1) the carrier may suspend TIBs and is not required to initiate impairment income benefits (IIBs) until such time as it receives a report of an impairment rating assigned in accordance with §130.1 of this title;

(2) the carrier or the employee may request the appointment of a designated doctor under §126.7 of this title (relating to Designated Doctor Examinations: Requests and General Procedures); and/or

(3) a carrier may make a reasonable assessment of what it believes the true impairment rating should be and, if it does so, shall initiate IIBs within five days of making the assessment. The carrier shall continue to pay IIBs until the assessment is paid in full or is superceded by an impairment rating assigned in accordance with §130.1 of this title.

§130.6. Designated Doctor Examinations for Maximum Medical Improvement and/or Impairment Ratings.

(a) Any evaluation relating to either maximum medical improvement (MMI), an impairment rating, or both, shall be conducted in accordance with §130.1 of this title (relating to Certification of Maximum Medical Improvement and Evaluation of Permanent Impairment).

(b) The designated doctor shall address the issue(s) in question and any issues the Division may request the designated doctor to consider and confine the report to only those issues.

(1) When there has been no prior certification of MMI, the designated doctor shall evaluate the injured employee (employee) for MMI, and if the doctor finds that the employee reached MMI, assign an impairment rating. If the designated doctor finds that the employee has not reached MMI, the doctor shall identify the reason(s) that the designated doctor does not believe the employee to have reached MMI.

(2) When there has been a prior certification of MMI and impairment rating and only the MMI date is in question, the designated doctor shall evaluate the date the employee reached MMI and shall not assign an impairment rating. If the certification of MMI in question was the treating doctor's certification and the designated doctor finds that the employee either was not at MMI or reached MMI on a date later than the treating doctor's certification, the designated doctor shall provide an explanation with clinical documentation to support why the employee had not reached MMI as of the date certified by the treating doctor.

(3) When the impairment rating is the only issue in question, the doctor shall assign an impairment rating based on the employee's medical condition on the MMI date.

(4) When MMI and permanent whole body impairment are in question and the designated doctor determines that the employee has not reached MMI, the designated doctor shall not assign an impairment rating.

(5) When the extent of the injury may not be agreed upon by the parties (based upon documentation provided by the treating doctor and/or insurance carrier or the comments of the employee regarding his/her injury), the designated doctor shall provide multiple certifications of MMI and impairment ratings that take into account the various interpretations of the extent of the injury so that when the Division resolves the dispute, there is already an applicable certification of MMI and impairment rating from which to pay benefits as required by the Act.

(c) When performing range of motion testing, if the AMA Guides specify that additional testing be performed because of consistency requirements, the designated doctor shall reschedule testing within seven days of the first date of testing unless there is no clinical basis for retesting, and then, the designated doctor shall document this in the narrative notes with the clinical explanation for not recommending re-examination.

(d) Range of motion, sensory, and strength testing should be performed by the designated doctor, when applicable. If this testing is not performed by the designated doctor, the health care provider performing the testing must have successfully completed Division approved training, must not have previously treated or examined the employee within the past 12 months, and must not have examined or treated the employee with regard to the medical condition being evaluated by the designated doctor. Use of another health care provider to perform testing under this subsection shall not extend the amount of time the designated doctor has to file the report and the designated doctor is responsible for ensuring that the requirements of this chapter are complied with.

(e) For testing other than that listed in subsection (d) of this section, the designated doctor may perform additional testing or refer the employee to other health care providers when deemed necessary to assess an impairment rating. Any additional testing required for the evaluation and rating, is not subject to preauthorization requirements in accordance with Labor Code §413.014 (relating to Preauthorization) and additional testing must be completed within seven working days of the designated

doctor's physical examination of the employee. Use of another health care provider to perform testing under this subsection can extend the amount of time the designated doctor has to file the report by seven working days.

(f) If the designated doctor provided multiple certifications of MMI/impairment ratings by operation of subsection (b)(5) of this section, the insurance carrier shall pay benefits based on the conditions that have not been disputed, or have been finally adjudicated by the Division, to be part of the compensable injury.

(g) This section is effective January 1, 2007 and a request for a designated doctor under this section may be made on or after January 1, 2007.

CERTIFICATION. This agency certifies that the adopted sections have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas, on _____, 2006.

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Norma Garcia
General Counsel
Division of Workers' Compensation
Texas Department of Insurance

IT IS THEREFORE THE ORDER of the Commissioner of Workers' Compensation that amendments to §§130.2 and 130.6, concerning certification of Maximum Medical Improvement and Evaluation of Permanent Impairment by the Treating Doctor and Designated Doctor Examinations for Maximum Medical Improvement and/or Impairment Ratings, are adopted.

AND IT IS SO ORDERED.

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ALBERT BETTS
COMMISSIONER OF WORKERS' COMPENSATION
TEXAS DEPARTMENT OF INSURANCE

ATTEST:

_____
Norma Garcia
General Counsel

COMMISSIONER'S ORDER NO. DWC-06-0034