STATE BAR of TEXAS

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President's Letter

Spring is here which once again brings the birthday of the "Father of Workers' Compensation," German Chancellor Otto von Bismarck, April 1, 1815–July 30, 1898. In addition to spring turkey season, it is also the time when a workers' compensation attorney's thoughts turn to the rapidly approaching Tenth Annual Advanced Workers' Compensation Seminar, which is set for August 15-16 2013, so mark you calendars accordingly. The legislature is in session and no significant changes are anticipated with the time period to file bills now closed by operation of the calendar and the Texas Constitution.

My term as Chairman of the section is rapidly drawing to a close. I would like to thank everyone for their help and their support for our endeavors for the section. I look forward to an orderly and peaceful transfer of leadership to Michael Sprain.

Your friend and colleague,
Joe R. Anderson

LETTER FROM THE EDITOR

Spring breaks. They are never long enough or far enough away because I still could not get my mind off work while riding a few roller coasters at Universal Studios in Orlando and seeing Mickey Mouse the next day at Disney's Magic Kingdom. With the twins in college and the 16-year old with a girl friend, it was great to have the family together for that week. I hope you were able to get some time off lately or at least have a break planned this summer. Like I've said before, "Work hard but don't forget about who you are working for."

I know most of you agree with me about the whirlwind pace we are running performing three (and sometimes four) per day CCH dockets and I don't even know how many BRCs you have to fit in between those. When I was in practice, four CCHs per week were about my limit. I'm impressed with how well everyone I see is doing their best to still professionally represent their clients with this roller coaster ride we are all on.

All I can say is keep up the good work. There have been a lot of changes since our 2012 Advanced Work Comp Seminar and there are sure to be plenty more by the time our next Advanced Work Comp Seminar comes around on August 15-16. While the legislature may not have its eye on us this time, that doesn't mean we won't see a host of new rules, forms, and AP/court decisions between now and then. Not that I have any insight to anything brewing. There have been and will always be enough percolating that it does not take much of a soothsayer to predict we have not gotten off this year's work comp roller coaster ride yet.

Hint – I will tip you off that you need to research and devote time to the new DWC-32 and new Designated Doctor rules under Rule 127. If you haven't noticed, these are mentioned several times in this issue and many AP decisions focus on Designated Doctors, DWC-32s and extent/MMI/impairment rating.

I don't know what is planned for the seminar this year. I know Joe and his cohorts will come up with talks and papers that will be best attended but at the very least required podding or reading. So, sign up and get on next year's roller coaster ride. Don't be stuck in the queue listening to teenagers talk and text about Thirty Seconds to Mars and who's their favorite to win Idol and OMG, LOL, and Buffy kissing Tommy and the monotony of Taylor Swift's love life set to music. Wow, I sound like my Dad! Maybe getting back to work is a good thing!

Ken Wrobel

NOTICE OF PHARMACY CLOSED FORMULARY DATA CALL ON LEGACY CLAIMS

On behalf of the Commissioner of Workers' Compensation, the Texas Department of Insurance (TDI), Workers' Compensation Research and Evaluation Group (REG), is issuing this data call to selected insurance carriers for the purpose of collecting information on legacy claims that have been prescribed and dispensed at least one of the drugs excluded from the Division of Workers' Compensation's adopted pharmacy closed formulary (i.e., N-Drugs) after September 1, 2012.

To complete this data call, selected insurance carriers must submit the requested information on all legacy claims with injury dates prior to September 1, 2011 with at least one drug excluded from the Division of Workers' Compensation's pharmacy closed formulary (i.e., N-Drugs) dispensed between September 1, 2012 and March 1, 2013. Each selected insurance carrier is required to provide **one** data submission per insurance carrier in the Excel matrix format provided by the REG. Multiple submissions by different insurance carrier representatives for an insurance carrier **will not** be accepted. A hard copy of the Excel matrix and instructions for completing the matrix is included with this memo. An electronic copy of the Excel matrix and instructions can be found on the agency website at http://www.tdi.texas.gov/wc/pharmacy/index.html. Data should be entered as explained in the *Instruction Sheet*. Failure to submit data in accordance with the instructions provided will result in additional requests for spreadsheet corrections.

Data must be submitted via secured e-mail to WCResearch@tdi.texas.gov by close of business on **April 1, 2013. Incomplete or inaccurate data not corrected and resubmitted by the due date will be considered late**.

This Notice of Pharmacy Closed Formulary Data Call on Legacy Claims is issued under the authority of Texas Labor Code §§401.024, 402.00111(b), 402.00128(b)(10) and (12) and Chapter 405. Failure to comply with a request for information is an administrative violation.

Please note that pursuant to Texas Labor Code §405.004, a working paper, including all documentary or other information, prepared or maintained by the REG to conduct an evaluation and prepare a report is excepted from public disclosure under the Open Records Act – Section 552.021, Texas Government Code.

However, if any of the requested data is deemed to be privileged or of a confidential nature, please designate and label the document and the particular protected text as such. Your designation should include a cover letter identifying the applicable statutory citation or common law privilege applicable to particular text. A generalized assertion of confidentiality or privilege is insufficient. In the event a request is made by a third party under Texas Public Information Act, TDI will refer the requested documents to the Office of the Attorney General for a determination whether the requested information is privileged or confidential and may be withheld from public disclosure.

For more information, please contact WCResearch@tdi.texas.gov.

What To Expect in Texas Workers' Compensation in 2013

By Stuart Colburn

A new year used to mean making resolutions. Apparently, it is now fashionable to make predictions. Predictions are infinitely more interesting than resolutions. Here are five things one might expect in Texas Workers' Compensation for 2013.

1. A Legislative Solution to the Supreme Court's Limitation of the Attorney/Client Privilege

Texas treats a workers' compensation insured (i.e., the employer) differently than, for example, an insured in a liability context. (For example, in a motor-vehicle accident, the attorney represents the actual insured. Therefore, communications between the attorney and a party sued for negligent handling of a motor vehicle enjoys the protections of the attorney/client privilege).

In workers' compensation, the insurance carrier is the defendant, not the insured/employer. And the insured in workers' compensation is not protected by the attorney/client privilege, according to Texas Supreme Court in *In re: XL Specialty Insurance Co,*. 373 S.W.3d 46 (Tex. 2012). In *XL Specialty Insurance Co.*, the Texas Supreme Court held this anomaly in Texas law necessarily means that the insured and the attorney do not enjoy attorney/client privilege. The Supreme Court refused to create an insured/insurer privilege. The Supreme Court noted the insurance carrier (and not the insured) is the defendant, and the attorney represents the carrier, not the insured. Thus, any communications between the insured and the lawyer are not protected by the attorney/client privilege. This holding has caused great consternation for insureds and carriers alike (Montana, apparently, reached a somewhat similar result).

Large insureds are understandably upset with this decision, especially those who operate in many states. Some states view workers' compensation as no different than a liability action; that is, the injured worker is pursuing a claim against his employer who purchases workers' compensation insurance. And all large insureds who essentially pay the claims themselves and select legal counsel expect the attorney/client privilege protects their communications with the attorney.

The Texas Supreme Court did allow for one attorney to represent both the insured and the insurer. The Joint Client Defense Doctrine could protect communications if the attorney represents both the insured and insurance carrier. However, most of the large carriers have decided that the Joint Client Defense Doctrine offers too many other pitfalls and refused pleas to employ the Doctrine. Hence, larger insureds are not protected by the attorney/client privilege even though they hire, select and pay for the attorneys.

Some expect a legislative fix. In the interim, carriers and carrier attorneys must presume that any communication sent to the insured is not protected by the attorney/client privilege absent a Joint Client Defense Agreement. Some plaintiff attorneys will seek these communications either as a matter of course or in the particular case depending upon the facts and the lawyer.

2. Insurance Carriers Will Continue to Focus on Cutting Costs to Improve Financial Performance

Although workers' compensation carriers currently enjoy a profitable operation in Texas, the loss ratio and operating ratios continue to deteriorate. Nationally, the ratios are quite abysmal; the worst in decades. The soft market and lower employment prevents an increase in premium revenue. Low interest rates produce small investment returns necessitating the need for underwriting profit. Carriers cannot experience these sustained losses and are responding accordingly by aggressively cutting costs.

Insurance companies are consolidating and closing offices, increasing caseloads on individual adjusters, and reducing claims staff. More adjusters are working from home to reduce overhead expenses.

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Proposed Amendments to Rule 130.1(c)(3) and SORM v. Joiner: "Breathe (In the Air)"[1]

Joe R. Anderson & Kirsten Grosenheider
Burns Anderson Jury & Brenner, L.L.P.

SORM v. Joiner: Is the consequence of noncompliance with Rule 130.1(c)(3) a complete disregard of the noncompliant impairment rating?

This was the main question to be resolved by the Texarkana Court of Appeals in the case of *State Office of Risk Management v. Joiner* (363 SW3d 242). Elaine Joiner slipped and fell at work in July 2004 and injured her right shoulder and right knee. Her treating doctor, Brent Davis, M.D., performed an exam July 17, 2006 and certified MMI as of July 5, 2006 with a 34% impairment. Dr. Davis later amended his date of MMI to July 17, 2006.

The Division appointed Elliot Bader, M.D. to serve as the designated doctor and after his exam on September 25, 2006, he certified MMI as of July 3, 2006 with a 7% impairment. After receiving a letter of clarification informing him of the date of statutory MMI, July 10, 2006, Dr. Bader issued an amended DWC-69 reflecting the statutory date of MMI but kept the 7% impairment.

At the CCH, the only issue to be resolved was the correct impairment rating. The parties stipulated the date of MMI was July 10, 2006. The Hearing Officer did not adopt the DD's report and instead adopted the report from Dr. Davis because his rating was performed in compliance with the AMA Guides. The Appeals Panel, however, rejected the adoption of Dr. Davis' report because it was not based on the injured worker's condition as of the stipulated date of MMI. The Hearing Officer's decision was reversed and Joiner appealed to district court.

The district court rendered judgment in favor of Joiner and ordered SORM to pay the 34% impairment rating. In affirming the lower court's decision, the Court of Appeals looks to the statutory intent of Rule 130.1(c)(3). The Court acknowledges Dr. Davis' rating failed to technically comply with the requirements of Rule 130.1(c)(3) but they looked to the preamble of the rule for guidance. The preamble provides:

> The new language in § 130.1(c)(3) states that an IR assessment for an injured employee must be based on the injured employee's condition as of the MMI date. This change clarifies that IR assessments must be based on the injured employee's condition as of the date of MMI and shall not be based on changes in the injured employee's condition occurring after that date, such as when the injured employee's condition changes as a result of surgery that takes place after the date of MMI.

1 This year marks the 50th anniversary of the release of Pink Floyd's eight studio album, ***The Dark Side of the Moon***. It was released on March 1, 1973. It was an immediate success, topping *Billboard's Top LPs & Tapes* chart for one week. It subsequently remained on the charts for 741 weeks from 1973 to 1988. With an estimated 50 million copies sold, it is Pink Floyd's most commercially successful album and one of the best-selling albums worldwide. In addition to its commercial success, ***The Dark Side of the Moon*** is one of Pink Floyd's most popular albums among fans and critics, and is frequently ranked as one of the greatest rock albums of all time.

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THE TIES THAT BIND

By Mike Donovan

It would have been a great story, how a Jew from New York and an Irish Catholic from the Jersey Shore had formed a permanent bond while first year law students out in Lubbock in '78. The event that created that bond? Why, a Bruce Springsteen concert of course.

Our Texas Tech classmates told us we were nuts. The initial semester is the one where the law professors tell you to "look to the student sitting to your right, then look at the student sitting to your left. One of you won't be coming back after the Christmas break." It was the semester they thinned the herd, separated the wannabes from the real future lawyers, where you flunk one course and you're done. They replace your seat with a new student in waiting. Rumor was the law school didn't even have to formally kick you out most times. You just leave in disgrace and didn't come back. And your whole grade is based on one final exam in December - no class participation, no pop quizzes, no term papers. Nothing.

Problem was Bruce was coming off a three year hiatus where he could not record or tour because of a contract dispute with his record label. This tour in the fall of 1978 was to promote his new album DARKNESS ON THE EDGE OF TOWN. Decades later it would be known as one of his best tours ever as his energy and passion for his music were at an all time high. He was shooting for perfection, requiring long sound checks, no booze or drugs before the show by the band, and minimum 3 hour shows. It would become known simply as "the 78 tour". But the tour was only going to hit Houston, Austin and Dallas, with the Dallas show being the Sunday night before our exams started Monday morning.

Barry and I had it all figured out. We could get out of the show by 11:00 p.m, drive straight back to Lubbock and make it back by 5:00 a.m., just in time to take a quick 2-3 hour nap and make it to the finals by 9:00 a.m. We would share the driving. What could possibly go wrong? "A lot", we were warned. I started to imagine the phone conversation with my dad, "What do you mean you flunked out of law school after the first semester? Did you study as hard as you could? What did you say? You *missed* a finals in Property? Because you were *late* getting back from *a rock concert?* In Dallas?? *The night before???* What were you thinking?!" It would be one of those moments you look back on twenty years later, when you're sitting at a desk with a placard that says "sales" on it, or your shirt that has your name on it, or maybe you're a teacher, or a real estate agent, and you think, "Ya… that was a life changing event. Talk about bad decisions."

But our east coast background made it feel like the trip to Dallas to see the Boss was a road trip not to be denied, so we studied our butts off before that Sunday morning take-off time, and then headed to the show at the Dallas Convention Center. And what a show it was — due to the holidays he played "Santa Claus is Coming to Town", "Because the Night", a little Presley tribute of "Heartbreak Hotel", the whole new album of course, and a 4 song encore. That turned out to be part of the problem. The show didn't end until midnight. But that was the least of our concerns. Once we came out of the convention center we realized an ice storm had hit the metropolis.

Who checks the weather reports when you're twenty-three years old? The storm was coming in from the west, so we were going to have to drive through bad weather all the way back to Lubbock. And by bad weather, I mean so bad that the interstate was stalled to a crawl because of the sleet and ice. It was so bad… (How bad was it?) It was so bad that when we final got to the I-20 Lubbock cut-off, the two lane road was iced over and we had to drive with two wheels on the shoulder of the road just to get enough traction to continue on at what seemed, at the fastest, a 20 mile per hour pace. We kept on trying to convince ourselves it was not that bad, but our wiggle room was being rapidly depleted as we slowly traveled across west Texas, trying to make it to our assigned seat by the 9 o'clock bell. I don't know if Barry was a practicing Jew, but I found myself praying a lot of Hail Marys on those last few hours of the 6 hour drive, which took damn near 9 hours to complete. I will never know if it was the prayers, or fate, or a break in the cold front, but we made it in town just in time to take the finals.

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ELECTION OF REMEDIES AS A WORKERS' COMPENSATION DEFENSE: THE FUTURE NON-VIABILITY OF A GROUP HEALTH CLAIM AS A BINDING ELECTION

By Caldwell Fletcher

The Texas Supreme Court left unanswered a question in *Valley Forge Ins. Co. v. Austin*, 105 S.W.2d 609 (Tex. 2003) which potentially impacts workers' compensation and healthcare insurers, together with injured workers. The direction the Court may take suggests that while the election of remedies doctrine is not dead as a worker's compensation defense, the statutory evolution of the 1989 Workers' Compensation Act[1] has left this defense behind.

The leading case is *Bocanegra v. Aetna Life Ins. Co.*, 605 S.W.2d 848 (Tex. 1980). There the Texas Supreme Court held:

> One's choice between inconsistent remedies, rights or states of facts does not amount to an election which will bar further action unless the choice is made with a full and clear understanding of the problem, facts and remedies essential to the exercise of an intelligent choice.[2]

Aetna claimed that Mrs. Bocanegra's prior settlement of a workers' compensation claim barred her action to recover unpaid medical bills from Aetna. The Supreme Court held that she had not exercised an informed choice under the election of remedies doctrine in Texas so as to bar her claim as a matter of law. While *Bocanegra* is the leading case, it is of scant guidance as it was decided under the pre-1989 Workers' Compensation Act.[3]

A case which may be more illuminative of the direction the Court is moving, inasmuch as it was decided under the 1989 Act, is *Medina v. Herrera*, 927 S.W.2d 597 (Tex. 1996). There Mr. Medina was assaulted at work and collected workers' compensation benefits for his injuries. He sued his employer and his supervisor for the assault, who responded that he was barred by his election of benefits and the Act's exclusive remedy provision.[4]

The Supreme Court held that Medina's receipt of benefits barred the action against the employer, but not the supervisor, who allegedly had assaulted Medina on the job. The Court relied in part on its conclusion that the remedies against the employer and the employer's workers' compensation carrier were "mutually exclusive" and that there would be no enforceable subrogation interest as against the employers' potential vicarious liability.

1. AUSTIN

Mr. Austin first verbally rejected then sought benefits in a workers' compensation case where the workers' compensation carrier, Valley Forge, alleged he had made a binding election of remedies by collecting group health benefits. The trial court made findings of fact including 1) that the group health carrier had the rights of a subclaimant under Tex. Lab. Cd. § 409.009, and 2) manifest injustice would not result from the injured worker's pursuit of medical benefits under a group health plan and workers' compensation benefits. The Fifth Court of Appeals, sitting in Fort Worth, held that the doctrine of election of remedies had been abrogated by the adoption of Section 409.009 Tex. Lab. Cd. which provides for a subclaim for a group health care insurer.[5] The Supreme Court denied the petition for review, holding that there was no bar under the election of remedies doctrine, but declining to reach the issues of statutory abrogation.[6] The Supreme Court need not have reviewed that issue in order to decide the case,[7] but since the *Austin* case the Legislature has adopted and the Division has passed Rules on H.B. 724 (codified at Tex. Lab. Cd. § 409.0091 and Rules 140.6 through 140.8). These additional legislative developments (in regards to group health carriers' rights to identify and prosecute subclaims) strongly suggest the erosion of the affirmative defense of election of remedies in the future, at least as to health insurance claims by the Claimant.

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Update on DWC Form-032

By Erika Copeland

Request for Designated Doctor Examination (DWC Form-032) is more than just a required document to be filed to obtain a designated doctor examination. **28 TAC § 127.1(b)(9)**. It provides both the basis for the selection of the designated doctor, and guidance for the issues to be determined in the required narrative report and TDI-DWC Forms. The DWC Form-032 must have the specific reason for the examination, any change of condition, current diagnoses, and a list of all compensable injuries. **28 TAC § 127.1(b)(1)- (4)**. This information is crucial to both the selection of the appropriate designated doctor, and for the designated doctor to identify the questions the division ordered to be addressed and provide a clear answer and basis for each determination within a reasonable degree of medical probability. **28 TAC § 127.220(a)(1)-(13)**.

The following fields are of particular significance in both the selection process and the doctor's examination:

Box 27-31 – Treating Doctor Information – This ensures all of the relevant necessary medical documentation can be obtained and subsequently reviewed by the designated doctor in addition to his examination of the injured employee. **28 TAC § 127.1(b)(5)**.

Box 33-34 – Network or Political Subdivision Health Plan Information – If the designated doctor is in the same network or political subdivision health plan as the injured employee, then the TDI-DWC will exclude the designated doctor on the basis of a disqualifying association. **28 TAC § 127.1(b)(6), 127.5(c)(1), 127.130(a), 127.140(a)(6)**.

Box 35 – Body Part and Diagnosis Information – The TDI-DWC will select the next available doctor on the designated doctor list based on the doctor's qualification criteria for the part of the body affected by the compensable injury and the injured employee's diagnosis. The requestor should report the injured employee's current diagnosis or diagnoses and part of the body affected by the injury in this field in order to facilitate the selection of a designated doctor qualified to address all of the requested issues. **28 TAC § 127.1(b)(3)**. For extent of injury issues, please remember to include a description of the accident or incident that caused the claimed injury and a list of all injuries in question. **28 TAC § 127.1(b)(11)(c)**.

Box 37 – Compensable Injury – This field requires the requestor to enter all injuries determined to be compensable by the TDI-DWC or accepted as compensable by the insurance carrier. **28 TAC § 127.1(b)(4)**. The requester should describe the nature of all of the undisputed compensable injuries with specificity in order for the doctor to provide accurate answers to all of the requested issues. (**Example:** If just "head" is listed in this field, then the designated doctor does not get a clear idea as to whether the injured employee suffered a laceration, a traumatic brain injury, etc.). The types of designated doctors qualified to address specific head injuries are different under the rules, therefore the injury must be specifically described in order for the TDI-DWC to select the designated doctor with the requisite qualifications for the examination. **28 TAC § 127.130**.

Box 42 A – Statutory Maximum Medical Improvement (MMI) Date – The designated doctor cannot certify an MMI date after the date of statutory MMI (with the exception of rare instances when that date may be extended by the Commissioner for spinal surgery). The designated doctor may, however, determine a clinical MMI date prior to the date of statutory MMI. **28 TAC § 130.1(b)(4)**. Requestors should ensure that this MMI date is accurate, if applicable, as it is likely it is the only document the designated doctor will receive with this information.

Box 42 C – Extent of Injury – This is different, and potentially broader in scope than the listed injuries in Box 37. A common error in this field is the listing of identical conditions listed in Box 37. This field should contain the diagnoses, body parts, and/or conditions about which there is a dispute on the issue of compensability. If the requestor seeks an examination on the extent of the compensable injury, the requestor must include a description of the accident or incident that caused the claimed injury and a list of all the injuries in question. **28 TAC § 127.1(b)(11)(C)**

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RECENT RULE ADOPTIONS FOR TDI-DWC

The following is a summary of some of the recent rule adoptions by TDI-DWC.

Amendments to 28 Texas Administrative Code (T127.25, 180.23; the r§180.21, and new §§127.100, 127.110, 127.120, 127.130, 127.140, 127.200, 127.210, and 127.220. (Adoption order published in TAC) §§127.1, 127.5, 127.10, 127.20, epeal of §130.6 and exas Register 7/20/2012).

The purpose of these adopted new and amended rules, effective on September 1, 2012, is to implement the statutory changes made in House Bill (HB) 2605 that affect designated doctor scheduling, certification, and qualifications. Additionally, the adopted rules seek to implement other changes necessary for the efficient administration of the designated doctor system and to clarify established TDI-DWC policies not currently expressed in rule. Lastly, these adopted rules repeal 28 TAC §180.21 of this title (relating to Division Designated Doctor List) and 28 TAC §130.6 of this title (relating to Designated Doctor Examinations for Maximum Medical Improvement and/or Impairment Ratings) and recodify the relevant provisions of these adopted repealed rules in 28 TAC Chapter 127. These adopted amendments, repeals, and new sections

New 28 TAC §§180.60 - 180.78. (Adoption order published in Texas Register 11/2/2012)

The adopted rules concern the Medical Quality involved in the medical quality review process, the Medical Quality Review Panel (MQRP), the MQRP membership process, medical case review, the medical quality review process, MQRP Training, conflicts of interest, and rights and responsibilities of persons on the panel. The adopted rules are effective January 1, 2013. They implement Texas Labor Code §413.05121, §413.05122, and amended §413.0512, which were enacted by HB 2605 by the 82nd Legislature, Regular Session, effective September 1, 2011. These statutes require the Commissioner of Workers' Compensation to adopt rules concerning the operation of the Medical Quality Review Panel and the establishment of the Quality Assurance Panel within the MQRP. The adopted rules are

New 28 TAC §§110.7, 110.103, 110.105, and 160.1, and amended 28 TAC §§110.1, 110.101, 160.2, and 160.3. (Adoption order published in the Texas Register 7/27/2012)

The adopted rules relate to various notice requirements and reporting requirements imposed upon subscribing and non-subscribing employers, specifically requirements for notifying the TDI-DWC of non-coverage status, termination of coverage by the employer, and occupational injuries, illnesses and fatalities. These adoptions also relate to requirements on employers for notifying employees of the employer's coverage status. Finally, these adopted rules reorganize, update, and clarify the language and requirements associated with these reporting requirements and are intended to ensure: (1) the TDI-DWC and employees obtain timely and accurate workers' compensation insurance coverage information from employers; and (2) workers' compensation system participants have both an increased understanding of applicable reporting requirements and are provided consistency with current practices concerning related reporting

This adoption also contains a new rule that January 1, 2013, that requires a self-insured political subdivision to notify the TDI-DWC when the political subdivision elects to provide medical benefits in accordance with Texas Labor Code §504.053(b)(2). The purpose of this new rule is to provide a mechanism that allows the TDI-DWC to effectively obtain this information. Adopted new 28 TAC §110.7 is effective August 2, 2012. Adopted new 28 TAC §110.103 is applicable January 1, 2013. Adopted new 28 TAC §110.105 and §160.1 and adopted amendments to 28 TAC §§110.1, 110.101, 160.2, and 160.3 are effective _____

MORE ON THE DWC-32 FORM

The Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC) revised and adopted the DWC Form-032, *Request for Designated Doctor Examination*, in July 2012 to conform to TDI-DWC rules adopted on July 9, 2012 regarding the designated doctor examination process, 28 Texas Administrative Code (TAC) §§127.1, 127.5, 127.10, 127.20, 127.25, 127.100, 127.110, 127.120, 127.130, 127.140, 127.200, 127.210, 127.220, and 180.23; and repealed 28 TAC §130.6 and §180.21.

Due to the new designated doctor selection criteria, which became *effective January 1, 2013, the DWC Form-032 has been revised again to remove the Addendum portion of the form*. The Addendum pertains to designated doctor selection criteria that are no longer effective. Therefore, the Addendum is no longer required.

Workers' compensation system participants are to use this newly adopted DWC Form-032 on or after January 1, 2013, when requesting designated doctor examinations.

The forms are available in English and Spanish for download from the TDI website at **www.tdi.texas.gov/forms/form20.html**.

MEMBERSHIP DRIVE

The Workers' Compensation Section is here to serve you but, in turn, needs your support. As you may or may not know, your membership lapses every year and needs to be renewed each year. Dues are only $25.00 and renewing your membership is easy. You can join on-line via your MyBarPage Or by going to the Work Comp Section website **http://www.texasworkerscompensationsection.com/index.php**. You can contact the State Bar or any of the section officers. They'll find you an application.

As you know, this Section is specifically dedicated to helping workers' compensation lawyers provide law-specific services to its clients. Whether you represent claimants, carriers or sub-claimants, are a solo practitioner, in-house counsel, practice in a small or large firm or with a governmental agency, the section provides invaluable benefits to you:

- **Discounted CLE:** Discounted registration at the annual Advanced Workers' Compensation Law Course CLE, an important CLE for practitioners wanting to stay on top of significant changes in the law. Your discount at this program ($25.00 off) alone covers the cost of your Section membership.

- **Publications:** The Workers' Compensation Section Newsletter, delivered directly to your desktop, contains timely summaries of significant legal decisions, up-to-date changes in rules, interesting articles written by the members of the section impacting the work comp lawyer's practice.

- **Website:** The Workers Compensation Law Section website is currently being updated and expanded. It provides you with access to valuable research and detailed information about upcoming CLE events and Section announcements.

If you have any questions about the Section and the services it provides to its members, please do not hesitate to contact any officer. We look forward to your continued membership in the Section.

JUST IN CASE YOU MISSED THESE CHANGES OR MEMOS

Adoption: Amend 28 TAC §134.803 and §134.807 Concerning Reporting Standards and State Specific Requirements

On January 28, 2013, the Commissioner of Workers' Compensation Rod Bordelon adopted amended 28 Texas Administrative Code (TAC) §134.803 and §134.807. The adoption was filed with the Office of the Secretary of State on January 28, 2013, for publication in the February 8, 2013 issue of the *Texas Register* and may be viewed on the Secretary of State website at http://www.sos.state.tx.us/texreg/index.shtml at that time. A courtesy copy of the adoption is currently available on the Texas Department of Insurance website at http://www.tdi.texas.gov/wc/rules/adopted/index.html.

The purpose of the adopted amendments is to make modifications to the Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC) rules that govern medical bill and payment reporting by insurance carriers that will allow insurance carriers to report ICD-10-CM and ICD-10-PCS codes to the TDI-DWC under those rules if health care providers in the Texas workers' compensation system use those codes on their medical bills.The adopted amendments are effective February 17, 2013.

Adoption: New, Amended, and Repealed Rules Regarding Texas Workers' Compensation Accident Prevention Services

On March 11, 2013 the Commissioner of Workers' Compensation Rod Bordelon adopted new 28 Texas Administrative Code (TAC) §166.2, amended §§166.1, 166.3, and 166.5, and repealed §§166.2, 166.4, and 166.6 - 166.9 regarding Texas Workers' Compensation Accident Prevention Services. The adoption was filed with the Office of the Secretary of State on March 11, 2013 for publication in the March 22, 2013 issue of the *Texas Register* and may be viewed on the Secretary of State website at http://www.sos.state.tx.us/texreg/index.shtml at that time. A courtesy copy of the adoption is available on the Texas Department of Insurance (TDI) website at http://www.tdi.texas.gov/wc/rules/adopted/index.html.

The purpose of these rules is to update various notice, service, and reporting requirements imposed upon insurance companies regarding accident prevention services associated with Texas Labor Code provisions in Chapter 411, Subchapter E, Accident Prevention Services.
The adopted rules are effective October 1, 2013.

The DWC Form-105, *Accident Prevention Services Worksheet*, and DWC Form-109, *Accident Prevention Services Annual Report*, have been revised to conform to the adopted rules. The forms will be available for download on or before October 1, 2013 from the TDI website at http://www.tdi.texas.gov/forms/form20.html.

Rulebook Supplement 2013-03 is available for download from the TDI website at http://www.tdi.texas.gov/wc/rules/supplements.html and contains adopted amended 28 Texas Administrative Code (TAC) §134.803 and §134.807.

Amended 28 TAC §134.803 and §134.807 were adopted on January 28, 2013 by Commissioner Bordelon and published in the February 8, 2012 issue of the *Texas Register* (38 TexReg 673). The amended sections became effective on February 17, 2013. The purpose of the adopted amendments is to make modifications to the TDI-DWC rules that govern medical bill and payment reporting by insurance carriers to the TDI-DWC. The amended rules will allow insurance carriers to report International

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APPEALS PANEL DECISION SUMMARIES

(December 13, 2012 – February 19, 2013 (122109))
http://www.tdi.texas.gov/appeals/2012cases

Don't rely on the summaries for your arguments. Make sure the decision applies to your case. Ken Wrobel

121133 – The amended certification did not include an accompanying narrative that documented any clinical findings of a physical examination nor did the Designated Doctor indicate that he re-examined the claimant prior to his amended certification. Because the designated doctor did not re-examine the claimant prior to his amended DWC-69 and did not have the operative report and additional medical records since the date of his March 4, 2011, examination of the claimant, the hearing officer erred in her determination that the MMI date is January 22, 2012.

121194 – Impairment rating - How to correctly calculate bilateral shoulder impairments. Also, the AP has previously stated that, where the certifying doctor's report provides the component parts of the rating that are to be combined and the act of combining those numbers is a mathematical correction which does not involve medical judgment or discretion, the Appeals Panel can recalculate the correct impairment rating from the figures provided in the certifying doctor's report and render a new decision as to the correct impairment rating.

121194 – SIBs – Because a new impairment rating has been rendered, the dates of the qualifying periods and SIBs quarters will change. The AP remanded the SIBs issues in dispute to the hearing officer to examine the evidence and make a determination regarding entitlement to SIBs based on the correct dates. Also, the issues of whether the carrier was relieved of liability because of the claimant's failure to timely file a DWC-52 for the second and third quarters were remanded to examine the evidence and make a determination regarding these issues based on the correct dates.

121200 – The hearing officer incorrectly read the Designated Doctor's description of his opinion of the compensable injury from the Letter of Clarification responses. The AP reversed the decision to be consistent with the Designated Doctor's opinion.

121215 – To the question of finality, failure to rate the entire compensable injury constitutes compelling medical evidence of a significant error in applying the appropriate AMA Guides or in calculating the impairment rating. Even if the certifying doctor rated the lumbar spine, the failure to consider and rate the administratively determined lumbar disc bulges at L3-4, L4-5, and L5-S1 is compelling medical evidence of a significant error by the certifying doctor.

121249 – The claimant had the burden to prove that he filed his claim of injury within one year of the date of his injury pursuant to Section 409.003, or had good cause for not timely filing.

121269 – The AP holds that the mere recitation of the claimed conditions in the medical records without attendant explanation how those conditions may be related to the compensable injury does not establish those conditions are related to the compensable injury within a reasonable degree of medical probability.

121272 – A designated doctor had already been appointed so the party could only dispute the first certification by requesting and setting a BRC.

121272 – The "validity" of a certification of MMI and/or impairment rating is determined as provided in Rule 130.12(c). Rule 130.12(c) provides that the report must be on a Report of Medical Evaluation (DWC-69) and this certification is valid if: (1) the MMI date is not prospective; (2) there is impairment determination of either no impairment or a percentage of [IR] assigned; and (3) the report is signed by the certifying doctor who is authorized under Rule 130.1(a) to make the impairment determination. The question then becomes whether the report contains an exception under Section 408.123(f).

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Community News

Charles Thurmond Cole

Charles Thurmond Cole, JD, 63, passed away at his home in Dallas, Texas on Friday, March 29, 2013. He received his undergraduate degree from Baylor University in 1971 and Juris Doctor Degree from Baylor University School of Law in 1973. After practicing civil and criminal law in Texas, Charles became a Hearing Judge for the Workman's Compensation Division of the Texas Department of Insurance. He was a member in good standing of the Texas Bar and spoke frequently at the State Bar Annual Advanced Workers Compensation Course. Charles was a retired member of Washington, D.C., based American Red Cross (ARC) Advisory Council on First Aid, Aquatics, Safety, and Preparedness (ACFASP) where he was the first non-medical member and served on the Sub-Council on Resuscitation. An active member at White Rock Community Church, Charles worked with the youth and recently enjoyed sponsoring a trip to see the Dead Sea Scrolls at SWBS in Ft. Worth.

Michele Wong-Krause

Michele Wong-Krause was informed she has been chosen by the State Bar of Texas, Asian Pacific Interest Section (APIS) to be the 2013 Justice Wellington Chew award recipient. The award will be presented on Saturday April 6, 2013 at the 17th Annual APIS Retreat & Conference at the Four Seasons in Austin, Texas. This year's retreat is extra special because it is being held in conjunction with the Southwest Regional meeting of the National Asian Pacific American Bar Association (NAPABA) Established in 2002, the Justice David Wellington Chew Award honors those individuals whose selfless contributions benefit the Asian-Pacific American legal community of Texas. The award was named after Justice Chew, who presided as Chief Justice of the Eighth Court of Appeals. Justice Chew was one of the first Asian-Pacific Americans in the Texas judiciary. Michele's response: "While I do not feel worthy of this award, words do not adequately express how honored and touched I am to receive this very significant and special award."

Correct Email Addresses for the Division

Make sure you have the correct email addresses for the Division. We are no longer @tdi.state.tx.us. Everyone now is @tdi.texas.gov. The old addresses won't work for very much longer.

Paul Coleman Jr

Paul Coleman Jr, the young son of **Paul Coleman** and **Jacquelyn "Jackie" Coleman**, hearing officer in the Houston East office, passed away on Friday March 22, 2013, after a long brave struggle with cancer. Please keep the Coleman family in your thoughts and prayers.

Community News

David Weston

David Weston, former hearing officer in the Dallas field office, underwent an extensive surgery to remove Stage 4 oral cancer on March 25, 2013. Please keep David and his family also in your thoughts and prayers.

Norman Darwin

Gov. Rick Perry reappointed **Norman Darwin** as the Injured Employee Public Counsel for a new term. Darwin, who hails from Benbrook, Texas, will help claimants with workers' compensation claims oversee the ombudsman program and advocate for fairness in the workers' compensation system. His term will expire on Feb. 1, 2015. The appointment is subject to Senate confirmation. Darwin is an attorney and has held the appointed office since 2005. He has previously served as the director of the Texas Trial Lawyers Association and was a past member of the American Board of Trial Advocates.

Rod Bordelon Jr

Gov. Rick Perry has reappointed **Rod Bordelon Jr**. of Austin as commissioner of Workers' Compensation at the Texas Department of Insurance (TDI) for a term to expire Feb. 1, 2015. Commissioner Bordelon has served as commissioner of Workers' Compensation at TDI since his appointment in September 2008. Commissioner Bordelon received a bachelor's degree from The University of Texas at Austin and a law degree from South Texas College of Law.

Fort Worth Filed Office

The Fort Worth Filed Office is holding a blood drive on May 31, 2012, from 8:30 a.m. to Noon. If you are in the neighborhood, have some time and have some blood, please come join our efforts to help save lives. Every pint helps up to three people.

ONLY IN THE WC

From **Jane Stone**, attorney — Long, long ago when I first started doing comp work, my boss at the time who shall remain nameless, had a client that arranged for us take town cars when we went Houston for hearings. Now that I work for myself, I've moved down to steerage (so to speak) when traveling to Dallas and renting a car to get to Denton. Ah, those were the days.....

What a great moo-de of transportation! Ken Wrobel

From **Ellen Vannah**, hearing officer — Claimant's attorney was questioning Carrier's witness at great length about was *possible*, and the witness naturally had to acknowledge that all of the scenarios proposed by counsel were, indeed, *possible*. So – Stuart Colburn's question on redirect went like this: Is it possible that aliens from another planet will land on Earth tomorrow?

What To Expect in Texas Workers' Compensation in 2013

Continued from page 5.

Carriers are scrutinizing vendor costs. Some are bringing services in-house, either to reduce costs or even create a profit center. Many payers are actively shopping vendor against vendor and choosing based upon price as opposed to quality. One could warn carriers that "penny wise is a pound foolish." Nevertheless, the rush to the bottom line will result in less attention to claims (despite the long tail of workers' compensation) in search of immediate cost relief, possibly at the expense of long term outcomes.

3. The Pharmaceutical Dance Will Continue

Opioid abuse has reached epidemic proportions. More people die from drug overdoses than motor-vehicle accidents and firearms. Opioid abuse and addiction is not just a workers' compensation issue but a societal issue. More and more teenagers are becoming addicted to prescribed drugs easily obtainable from the medicine cabinets of their parents.

The complicating factor is the huge sums of money involved in the prescribing and dispensing of such drugs. Doctors, pharmacies, repackagers, and the pharmaceutical companies all have a financial interest to create more demand and provide more supply.

In some ways, Texas provides a model for the country. Texas is one of the few states that legally prohibits most physicians from both prescribing and dispensing drugs. In other states, "physician dispensing" has led to a huge increase in the number of doctors prescribing drugs as a profit center resulting in higher cost to payers and greater rates of addiction. A physician Senator sponsored legislation in the last session that would allow physicians to dispense drugs. More doctors won elections and are now serving in the Texas legislature. Some vendors, including some with unscrupulous reputations in other states, would love to "open up" the Texas market by passing legislation that would allow physicians to directly dispense drugs to their patients.

Texas also adopted a closed formulary which is touted as a model for other states. The closed formulary has reduced both the costs and the number of dangerous or "N-class" prescriptions. On one hand, Texas Workers' Compensation Formulary should continue to reduce utilization and costs of dangerous "N-class" drugs. Reduced "N-class" prescriptions should result in faster recovery times and better outcomes. Still, state regulators and payers need to determine which doctors might change the prescription but increase the utilization or doses of more acceptable drugs. Insurance companies can be faulted for refusing to utilize retrospective review of drugs not requiring preauthorization. Insurance companies should be wary that the Division of Workers' Compensation and the Texas Department of Insurance are investigating and possibly pursuing action against adjusters that are making utilization review decisions without a URA license.

Texas has a weak Prescription Drugs Monitoring Program (PDMP). Model PDMPs include a "real time" access for providers and pharmacies. For example, some states require the provider to update the state database within five minutes of dispensing a drug. In Texas, the database is not updated until seven days after a prescription is filled. Texas' rudimentary PDMP is not user-friendly which makes it difficult for doctors and their staff to routinely access the database as a normal course before prescribing dangerous and addictive drugs. PDMP should be mandatory; that is, a provider must check the database before prescribing or dispensing certain drugs. Despite the clear benefits of a strong PDMP to reduce dangerous drugs being prescribed inappropriately, prescribers and dispensers are not enthusiastically calling for an extension of the program and fight many of the provisions. It will be interesting to see if the Texas Association of Business is successful in their endeavor to make Texas a national leader in the PDMP program.

4. Other States Will Look to Texas for Their Reform Efforts

The Texas Legislature has initiated a great deal of changes in the last decade. The regulators have now implemented rules pursuant to HB 2600, HB 7, and HB 2605. The result is a dramatic drop in premiums. Reform efforts include drug formularies, treatment guidelines, disability guidelines and networks. Treatment guidelines successfully promote evidence-based medicine (as opposed to medicine practiced by some doctors, which would only increase the amount of services that a doctor provides). Texas is a model other states are looking to import. Moreover, Texas' non-subscriber option is being studied seriously by other states.

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What To Expect in Texas Workers' Compensation in 2013

Continued from page 17.

5. Non-Subscription Will Expand Beyond the Texas Borders

Texas is the only state allowing employers to opt out of providing workers' compensation benefits to its workers. In the last ten years, this option has been enthusiastically selected and supported by large Texas employers.

Based on their success in Texas, some employers have advocated a non-subscription option in Oklahoma to address high workers' compensation costs in that state. Oklahoma came very close to passing such legislation in their last session. Republicans now enjoy a super majority which may make it easier to pass non-subscription legislation.

Since the last Oklahoma (and Texas) legislative sessions, Sedgwick underwrote a study of non-subscription performed by New Street Group. New Street Group studied non-subscription in Texas and found large employers experienced significant savings. The authors noted employers can save costs by limiting the injuries covered, increasing the legal standard for causation, excluding claims for any injury not reported within 24 hours, eliminating permanent impairment, providing carriers and adjusters with the ability to terminate income benefits and medical treatment without state regulator oversight or intrusion, and a more employer-friendly dispute resolution system than that provided by the state.

Even with reduced workers' compensation premiums in Texas, employers often recognize 50% - 90% savings with their non-subscribing plan. If Oklahoma successfully passes a non-subscription plan, proponents may seek additional expansion of the plan in Texas. States like Arkansas might also follow suit. Any pro-business state without significant union or claimant/attorney involvement in the political process would probably consider non-subscription as an option for employers in their state.

Conclusion

And of course, each of these predictions could be completely wrong.

Proposed Amendments to Rule 130.1(c)(3) and SORM v. Joiner: "Breathe (In the Air)"

Continued from page 6.

The Court concluded the intent of Rule 130.1 is to ensure the impairment rating does not take into account any changes in the employee's condition occurring after the date of MMI. Since there was no evidence to suggest Joiner suffered any additional problems between July 10, 2006 (the date of statutory MMI) and July 17, 2006 (the date of Dr. Davis' exam) or that her condition changed between the date listed by Dr. Davis on his first certification and statutory MMI. Thus the Court held, Dr. Davis' certification does not frustrate the intent of the rule and the trial court was correct in refusing to disregard Dr. Davis' report.

The issue of whether Dr. Davis' report was invalid under the AMA Guides was not decided by the Appeals Panel or the trial court so the Court did not decide the issue for the first time on appeal.

Proposed 28 TEX. ADMIN. CODE § 130.1

The purpose of this proposed amendment is to clarify the consequence of noncompliance with 28 Texas Administrative Code (TAC) §130.1(c)(3) (*see State Office of Risk Management v. Joiner*, 363 S.W.3d 242 (Tex. App. — Texarkana 2012, pet. filed)).

First, the proposed amendment clarifies current subsection (b)(2) by adding that the impairment rating must be assigned for the injured employee's condition on the date of MMI, otherwise the impairment rating is invalid. The comments note this is necessary to make clear that an impairment rating cannot be adopted unless the impairment rating reflects the employee's condition on the date of MMI. An impairment rating assigned to a date in time before or after the date of MMI is not adoptable.

Second, the proposed amendment to subsection (b)(2) adds that an impairment rating and the corresponding MMI date must be included in the Report of Medical Evaluation to be valid. The comments provide this is necessary because the requirements in §130.12(c)(1) – (3) regarding the Report of Medical Evaluation also affect the validity and finality of an MMI date and impairment rating. If an impairment rating is not specified on a Report of Medical Evaluation, then the impairment rating is invalid.

Third, the proposed amendment clarifies current subsection (c)(3), which states that assignment of an impairment rating for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination. The proposed amendment to subsection (c)(3) replaces "as of" the MMI date with "on" the MMI date to reiterate that the impairment rating must correspond to the MMI date.

Further, the proposed amendment to subsection (c)(3) adds that an impairment rating is invalid if it is based on the injured employee's condition on a date that is not the MMI date.

Finally, the proposed amendment to subsection (c)(3) adds that an impairment rating and the corresponding MMI date must be included in the Report of Medical Evaluation to be valid.

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Proposed Amendments to Rule 130.1(c)(3) and SORM v. Joiner: "Breathe (In the Air)"

Continued from page 19.

Current Status of the Proposed Rules

The Division published an informal draft of the amended section on the Division's website on November 28, 2012, and received ten informal comments. On February 4, 2013, the Division announced they would make a formal proposal of the amendments. The proposal was published in the February 8, 2013 issue of the Texas Register and may be viewed on the Secretary of State website at:

- http://www.sos.state.tx.us/texreg/index.shtml.

The Division is currently taking comments on the proposal which must be submitted no later than 5:00 p.m. CST on March 11, 2013. Comments may be submitted via the internet through the Division's internet website at:

- www.tdi.texas.gov/wc/rules/proposedrules/index.html
- by email at rulecomments@tdi.texas.gov
- or by mail or delivery to :

  Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, Office of Workers' Compensation Counsel, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645.

Text of the Proposed Rule

The text of the proposed amendments to Division Rule 130.1 is underlined below:

(b) Certification of Maximum Medical Improvement.

(1) (No change.)

(2) MMI must be certified before an impairment rating is assigned and the impairment rating must be assigned for the injured employee's condition on the date of MMI. An impairment rating is invalid if it is based on the injured employee's condition on a date that is not the MMI date. An impairment rating and the corresponding MMI date must be included in the Report of Medical Evaluation to be valid.

(3) – (4) (No change.)

(c) Assignment of Impairment Rating.

(1) (No change.)

(2) A doctor who certifies that an injured employee has reached MMI shall assign an impairment rating for the current compensable injury using the rating criteria contained in the appropriate edition of the AMA Guides to the Evaluation of Permanent Impairment, published by the American Medical Association (AMA Guides).

(A) (No change.)

(B) The appropriate edition of the AMA Guides to use for certifying examinations conducted on or after October 15, 2001 is:

(i) the fourth edition of the AMA Guides (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the AMA prior to May 16, 2000). If a subsequent printing(s) of the fourth

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Proposed Amendments to Rule 130.1(c)(3) and SORM v. Joiner: "Breathe (In the Air)"

Continued from page 20.

edition of the AMA Guides occurs, and it contains no substantive changes from the previous printing, the division [commission] by vote at a public meeting may authorize the use of the subsequent printing(s); or

(ii) (No change.)

(C) (No change.)

(3) Assignment of an impairment rating for the current compensable injury shall be based on the injured employee's condition on [as of] the MMI date considering the medical record and the certifying examination. An impairment rating is invalid if it is based on the injured employee's condition on a date that is not the MMI date. An impairment rating and the corresponding MMI date must be included in the Report of Medical Evaluation to be valid. The doctor assigning the impairment rating shall:

Proposed Rule 130.1 Interaction with Joiner

Joiner addresses when a physician's report of impairment fails to base the claimant's conditions on the date of MMI, is that IR invalid and not worthy of consideration as evidence. The *Joiner* Court held specifically that a "treating physician's certification of claimant's IR **was not invalid for failure to reflect** the correct date of maximum medical improvement." However, they noted, while Davis' report technically failed to comply with Section 130.1(c)(3), his report ***was still evidence*** of the extent of those impairments. It appears the proposed amendments to Rule 130.1 were adopted specifically to fix the deficiency noted by the Court's opinion in *Joiner*.[2] The Court in *Joiner* specifically noted:

> *"Nothing in the plain language of the rule indicates the intent to render an impairment rating of a certain date as "no evidence" of the impairment rating as of another date. That is, the rule does not state the consequence of noncompliance. To interpret the rule to impose a consequence of noncompliance—the complete omission of Davis' report—which is not included in the rule and which would not effectuate the intent of the rule,* ***is erroneous****.*
>
> This is especially true in light of the fact that 28 Tex. Admin.Code § 130.1(c)(5) indicates that an impairment rating assigned in violation of subsection (c)(4) is invalid.[14] *Clearly, the drafters of the rules intended certain impairment ratings to be invalid. However, the drafters failed to include similar language causing an impairment rating which technically fails to comply with Section 130.1(c)(3) to be invalid. If Section 130.1(c)(3) were intended to completely abrogate a report of medical evaluation because it lists an incorrect, retrospective date of maximum medical improvement, the drafters could clearly have indicated this result, just as was done in the case of an impairment rating assigned in violation of subsection 130.1(c)(4).*"[3]

2 the 'purpose' sentence within the introduction specifically cites to the case

3 *State Office of Risk Mgmt. v. Joiner*, 363 S.W.3d 242, 250-51 (Tex. App.—Texarkana 2012, pet. filed).

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Proposed Amendments to Rule 130.1(c)(3) and SORM v. Joiner: "Breathe (In the Air)"

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The proposed amendments do contradict, in part, with the Court's holding by requiring an impairment rating and the corresponding MMI date to be included in the same Report of Medical Evaluation to be valid and ***to be adoptable for settlement, at hearing, or at trial***.[4] However, while the proposed amendments do render a MMI date and IR not contained on the same DWC-69 invalid and not adoptable, it is still evidence of an injured employee's impairment as of the date of the physician's examination, as held by the *Joiner* Court.

The proposed amendments mostly clarify and reinforce that the IR is invalid ***if it is based on the injured employee's condition on a date that is not the MMI date***, which has already been addressed and held multiple times by the Appeals Panel.

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THE TIES THAT BIND

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And the story was to have a happy ending. We both passed the first semester finals, ended up graduating and going on to having pretty successful careers as partners in law firms in major metropolitan areas in Texas. We still meet up to have a beer every few years, were invited to and attended each other's weddings. But he ended up getting married three times so I came out on top in that aspect. I like to think the courage and the "screw it " attitude we showed by taking off to that concert on the eve of exams was part of what solidified our friendship and separated us from the normal first semester law school paranoid classmates. Surely some "Yankee" bred toughness was the seed that spawned our adventure.

Then I got cocky enough to want to write an article in the bar journal of our escapade, and therefore I needed to do a little research to see if I could find some minute details abut the concert that would jog my memory for the story. It is amazing what you can find on the internet these days, even the set list for a concert that took place almost 25 years ago! Unfortunately I also came across the little detail that derailed my whole tale of male bravado and bonding.

The concert was on a Saturday.

I couldn't believe it so I checked and rechecked a 1978 calendar. How could we have so rushed to get back to Lubbock if the show was on a Saturday? Even with bad weather that is plenty of time. So we rushed back just to have another whole day to study and chill before the big test? Where is the bravado in that? Sure, it was something the average law student still wouldn't do, but it is not something you write about, not some story you boast about in the company of friends, like I had been doing for twenty odd years. I was so devastated. I called Barry and said, "Do you remember if we had to take finals on a Sunday?" The obvious answer was no, but even he had no idea of the true timing of our return trip. Barry responded, "Maybe we spent a night in Dallas? I swear, Mike, I remember getting back to Lubbock in barely enough time to make the finals!" "Bullcrap, Barry! We've convinced ourselves of the lie over the years." There was a silence over the phone, and I finally muttered, "We're just a bunch of frauds, man." His response startled me, as he angrily shouted "No! We are NOT frauds. We are *embellishers*. That's all we did. Embellish!"

We ended the conversation shortly thereafter, promising to get together for a beer at the next seminar in San Antonio or Austin, but I don't know if it will be the same. It's like thinking you had a short sexual tryst with a girl, only to find out in reality you passed out and she left you snoring on her couch.

Well, at least the story still has a happy ending. I did see a fantastic concert.

Election of Remedies as a Workers' Compensation Defense: The Future Non-viability of a Group Health Claim as a Binding Election

Continued from page 8.

2. THE CHALLENGE OF CLAIMS

Group health care insurers are faced with challenges when a workers' compensation carrier denies a claim. While many policies exclude work-related injuries, oftentimes the lines between obvious injuries and other medical conditions are blurred. Many health carriers accept and pay the health claims without prior knowledge that a workers' compensation claim has been filed. This challenge continues in the case of an injured worker who seeks treatment under his/her own or a spouse's group health plan.

Section 409.009, Texas Labor Code states:

> § 409.009. Subclaims
>
> A person may file a written claim with the commission as a ***subclaimant*** if the person has:
>
> (1) provided compensation, including ***health care provided by a health care insurer***, directly or indirectly, to or for an employee or legal beneficiary; and
>
> (2) sought and been refused reimbursement from the insurance carrier. (Emphasis supplied).

The passage of H.B. 724 eliminated barriers to reimbursement that were being raised by Carriers, essentially treating health carriers as healthcare providers.

A "subclaimant," having met both prongs of this section, may file a claim for reimbursement with the Texas Department of Insurance, Division of Workers' Compensation. The Legislature's recent actions support the trend that health carriers' subclaims under Texas Labor Code § 409.009 and § 409.0091 are preferred to denied claims by workers compensation insurers based on election of remedies. In 2001, the Legislature established workers' compensation claims data entitlement to potential subclaimants such as group health insurers. They qualify for data entitlement by providing for such workers' compensation data review in their Anti-Fraud Programs under Tex. Lab. Cd. § 402.084(b) (8).

"The Texas workers' compensation system was designed as a 'fee for service' system . . . the initial treating doctor (chosen by the injured worker) provides medical care to the injured worker and submits those bills to the employer's insurance carrier for payment. . . . Disputes over the amount of medical payments . . . are handled administratively through [DWC]".[8] When the initial treating doctor bills a claimant's or his or her spouse's group health plan, instead of the worker's employer's insurance carrier, the group health plan, as a subclaimant, may recover administratively from the employer's insurance carrier after it pays the claim. A group health plan or other insurer may prosecute its subrogation rights within the Texas Workers' Compensation system. *See* Rules 140.6 through 140.8.

The legislative history of the Insurance Anti-Fraud Bill[9] and the concurrent changes made to Texas Labor Code § 402.084[10] manifest the outmoded nature of an election of remedies defense.[11] The plain text of the amendment confirms the legislative intent that group health carriers or their representatives may discover potential subclaims through requests for all electronic data available from the then Commission necessary to determine if a subclaim exists. Potential health insurance subclaimants may make these requests for information from the Division pursuant to their Anti-Fraud Programs.

There is an important principle at issue: timely treatment by the injured worker using medical benefits within the time frame(s) of the competing carriers (*see* footnote 18) to promptly approve and pay for medical benefits.[12] Equally important: does

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Election of Remedies as a Workers' Compensation Defense: The Future Non-viability of a Group Health Claim as a Binding Election

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the health insurer agree with the injured worker's selection of health benefits if the compensation claim or potential claim was not disclosed?

Identification and prosecution of subclaims also ensures that the injured worker is not billed for any portion of the medical charge (or co-pay) if the claim is found to be compensable.[13]

Simply put, our system of healthcare delivery demands the flexibility to pay medical claims from what may be a disputed workers' compensation claim and to enable health insurance carriers to seek administrative subrogation after payment. California workers' compensation cases recognize the public policies behind payment in a "lienable" position[14] and the subclaimants' administrative rights which accrue after such payment. The rules adopted by the rule making authority of the TDI/DWC confirm that a subclaimant may begin the subclaim prosecution or dispute resolution procedure by requesting a benefit review conference.[15] The author can attest that at this point in the subclaim, many Claimants are unaware that any administrative redress exists to a compensability or extent denial by a workers' compensation carrier.

There are macro-economic issues surrounding medical costs to a health care insurer as opposed to a workers' compensation carrier and attempts to reconcile these claims based on 1) the carriers' initial interpretation of their contractual payment responsibilities and 2) the question of compensability. Health care insurers will argue that on-the-job injuries are not the type of risk they bargained to insure. Studies in Texas have confirmed that the overall cost of providing similar treatment to injured workers is greater in the workers' compensation context than in the group health context.[16]

During a compensability dispute, an injured worker should and must have some recourse to prompt medical treatment. This reading of the Texas Labor Code § 409.009, § 409.0091 and Rules 140.6 through 140.8, adopted by the court of appeals in the *Austin* decision below, is consistent with the principle that the Workers' Compensation Act should be liberally construed so as to effectuate the purpose to which the Act intends.[17] The case for complete abrogation of the election of remedies defense is bolstered by the Legislature's express intent that health insurer reimbursement will lie whether or not the health carrier has requested reimbursement from the provider, whether or not the reimbursable procedure or treatment was preauthorized under the Act, or whether or not the reimbursement request issued within the timeframe applicable to a medical provider. Tex. Lab. Cd. § 409.0091(e).

Election of remedies as a workers' compensation defense may be contrary to the intricate regulations mandating that health carriers pay claims promptly.[18] In fact, it may not be within the time frame of "prompt pay" provisions of the Insurance Code that it is medically determined[19] whether a condition/disease arises from employment. Some conditions or diseases will be controversial by their very nature and their treatment under workers' compensation law: cardiac infarction under limited circumstances, psychological stress under limited circumstances, repetitive trauma and other occupational disease, such as toxic exposure. Texas Labor Code § 409.009 and § 409.0091 give these injured workers the best chance to have their medical claims covered during the administrative process.

3. THE FUTURE OF ELECTION OF REMEDIES

Election of remedies is arguably an outdated and outmoded defense in workers' compensation matters, given the realities of the respective carriers' (workers' compensation and group health) responsibilities to promptly investigate and pay claims according to their policies.[20]

None of this is to say that election of remedies may not continue to have some limited value as an evidentiary doctrine in workers' compensation cases. Certainly an alleged injury or occupational disease with a long history of being treated in a

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Election of Remedies as a Workers' Compensation Defense: The Future Non-viability of a Group Health Claim as a Binding Election

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non-occupational context may make it more likely that the claimant and others in privity with the Claimant in fact regarded the nature of the condition as other than claimed.[21] But to hold a Claimant barred by the use of health insurance is simply counter to the direction of the Legislature and sound public policy. As stated by an Appeals Panel of the Texas Department of Insurance, Division of Workers' Compensation:

> "To tell an entity that it may be a subclaimant to obtain reimbursement from the carrier but then not allow that entity to present evidence as a party to show compensability would be a hollow right, indeed."[22]

Revisiting the issue of whether § 409.009 and § 409.0091 Tex. Lab. Cd. abrogate the election of remedies doctrine will delineate the Supreme Court's position in *Medina*:[23]

> "Where coverage is disputed, the fact that the worker may have accepted some temporary benefits from the carrier will not in and of itself constitute an election of remedies."

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ACKNOWLEDGMENTS

The author acknowledges the research and writing contributions of Linda Thomas to this article.

ENDNOTES

1 Tex. Lab. Cd. § 401.001 et. seq.
2 *Bocanegra* at 852.
3 The pre-1989 law was codified at Rev. Civ. Stat. Art. 8309 et. seq.
4 Tex. Lab. Cd. § 408.001.
5 *Valley Forge Ins. Co. v. Austin*, 65 S.W.3d 371 (Tex. App. – Dallas 2001).
6 105 S.W.3d 609.
7 A factor included in the controlling rule of Appellate procedure as to whether or not to grant the petition is "whether the court of appeals appears to have committed an error of law of such importance to the state's jurisprudence that it should be corrected." Tex. R. App. Pro. 56(a) (1).
8 Research and Oversight Council on Workers' Compensation, et al, *SUMMARY REPORT: Striking the Balance: An Analysis of the Cost and Quality of Medical Care in the Texas Workers' Compensation System, A Report to the 77th Texas Legislature*, January, 2001, p. 3 .
9 House Bill 1562 (77th Legislative Session) (2001) effective Sept. 1, 2001.
10 Tex. Lab. Code § 402.084(d) was added by the adoption of the Anti-Fraud Bill in 2001 and provides:

> Information on a claim relating to a subclaimant under Subsection (b)(8) may include information, in an electronic data format, on all workers' compensation claims necessary to determine if a subclaim exists. The information on a claim remains subject to confidentiality requirements while in the possession of a subclaimant or representative. The commission by rule may establish a reasonable fee for all information requested under this subsection in an electronic data format by subclaimants or authorized representatives. The commission shall adopt rules under Section 401.024(d) to establish:
>
> (1) reasonable security parameters for all transfers of information requested under this subsection in electronic data format; and
>
> (2) requirements regarding the maintenance of electronic data in the possession of a subclaimant or the subclaimant's representative.

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11 *See* Section 3, The Future of Election of Remedies.

12 *See i.e.,* Texas Labor Code § 401.011(31) (A) ("medical benefit "includes payment "before and after the employee knew or should have known" nature of injury and relation to employment).

13 Texas Labor Code § 413.042(a) (no private claim by health care provider against claimant until injury is finally adjudicated not compensable); see also Texas Labor Code § 409.0091(o) and Rule 140.8(f) (concerning co-pays).

14 *Blue Cross v. Workers' Comp. Appeals Board, et al*, 63 Cal. Comp. Cases 282 (Court of Appeal, Second Appellate District, Division Three, February 5, 1998), (California workers' compensation fee schedule does not apply to health care insurance lien); *CNA Ins. Cos. v. Workers' Comp. Appeals Board, et al*, 62 Cal. Comp. Cases 1145 (Court of Appeal, First Appellate District, Division One, July 22, 1997) ("treatment provided on a lien basis may avoid such undesirable consequences to society as an injured worker going without needed treatment or burdening public resources").

15 Rule 140.6(c)(2); *see also* 28 Texas Admin. Code 141.1(b).

16 Research and Oversight Council, *supra*, Note 8 at 17.

17 *Albertson's v. Sinclair*, 984 S.W.2d 958 (Tex. 1999).

18 Chapter 542, Subchapter B Texas Insurance Code: Prompt Payment of Claims. "This subchapter applies to any insurer authorized to engage in business as an insurance company or to provide insurance in this state, including: (1) a stock life, health, or accident insurance company..." Tex. Ins. Code Ann. § 542.052 (West); *see also*, Texas Insurance Code, Payment of Clean Claims to Providers: "not later than the 45th day after the date on which a health maintenance organization receives a clean claim from a participating physician or provider in a nonelectronic format or the 30th day after the date the health maintenance organization receives a clean claim from a participating physician or provider that is electronically submitted, the health maintenance organization shall make a determination of whether the claim is payable …"Tex. Ins. Code Ann. § 843.338 (West). *Compare* Rule 134.801(c) which requires a medical bill to be submitted to a workers' compensation carrier not later than the first day of the 11th month after the service was provided.

19 Texas Labor Code § 409.009(2) provides that a subclaimant present its claim to the workers' compensation carrier before it is perfected and ripe. Therefore, it is consistent with the time frame of section 409.009(2) that if medical evidence developed as to employment relatedness after payment by the group health carrier, a subclaim could be presented for payment with no litigation, providing it was accepted by the workers' compensation carrier.

20 Workers' compensation carriers must controvert within 60 days. Texas Labor Code 409.021(c); *see also, Continental Casualty Co. v. Downs*, 81 S.W.3d (Tex. 2001) (carrier could not contest compensability after failure to begin benefit payments or send notice of refusal within seven days). Payment of benefits during this period does not affect the workers' compensation carrier's right to continue to investigate and deny during the 60 day period. Group health carriers or individual health carriers must advise whether they will pay or not pay or not within 15 days of receipt of all claims materials. *See* footnote 18.

21 Tex. R. Evid. 401.

22 Appeals Panel Decision 002026, Workers' Compensation Commission, Appeals Panel No. 219, State of Texas, October 16, 2000.

23 *Medina v. Herrera*, 927 S.W.2d 597, 605 (Tex. 1996).

Update on DWC Form-032

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Multiple Certifications – 28 TAC § 130.6(b)(5) was repealed effective September 1, 2012. A designated doctor will only issue multiple certifications of maximum medical improvement (MMI) and impairment ratings that take into account each possible outcome for the extent of the injury when the designated doctor is simultaneously requested to address MMI and/or impairment rating and the extent of the compensable injury. **28 TAC § 127.10(d)**. Requesters should only ask for multiple certifications on the DWC Form-032 when requesting MMI, impairment rating and extent of injury in the same request.

Accurate and complete information from the requestor on the DWC Form-032 helps facilitate selection of a qualified designated doctor and provides that doctor with valuable information to assist in evaluation of the issues in dispute.

DWC-32 TIP

In Box 37, the Designated Doctor schedulers are looking for specific diagnoses and not just body parts. For example, write "cervical sprain/strain" and not just "neck", or "torn rotator cuff of the left shoulder" and not just "left shoulder". The DWC-32s are starting to be rejected if Box 37 is lacking this specificity.

JUST IN CASE YOU MISSED THESE CHANGES OR MEMOS

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Statistical Classification of Diseases-10-Clinical Modification Codes (ICD-10-CM) and International Statistical Classification of Diseases-10-Procedural Coding System Codes (ICD-10-PCS) to the TDI-DWC under those rules if health care providers in the Texas workers' compensation system use those codes on their medical bills.

To obtain a hard copy of this rulebook supplement, call TDI-DWC Publications at 512-804-4240.

Adoption Orders: Utilization Review Agents – Subchapters R and U

The department has adopted new rules regarding Title 28 Texas Administrative Code Chapter 19, Subchapter R, concerning Utilization Review Agents; and Subchapter U, concerning Utilization Reviews for Health Care Provided Under Workers' Compensation Insurance Coverage. A copy of these adopted rules may be accessed at: http://www.tdi.texas.gov/rules/2013/documents/19.1701_New.pdf.

Repeal of Existing Subchapters R and U adopted rule: The department has adopted the repeal of existing Subchapters R and U. A copy of the adopted repeal rule may be accessed at: http://www.tdi.texas.gov/rules/2013/documents/19_1701_repeal.pdf.

These rules may interest health insurance companies, health maintenance organizations, third party administrators, and utilization review agents.

Adoption: Amend 28 TAC §134.803 and §134.807 Concerning Reporting Standards and State Specific Requirements

On January 28, 2013, the Commissioner of Workers' Compensation Rod Bordelon adopted amended 28 Texas Administrative Code (TAC) §134.803 and §134.807. The adoption was filed with the Office of the Secretary of State on January 28, 2013, for publication in the February 8, 2013 issue of the *Texas Register* and may be viewed on the Secretary of State website at http://www.sos.state.tx.us/texreg/index.shtml at that time. A courtesy copy of the adoption is currently available on the Texas Department of Insurance website at http://www.tdi.texas.gov/wc/rules/adopted/index.html.

The purpose of the adopted amendments is to make modifications to the Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC) rules that govern medical bill and payment reporting by insurance carriers that will allow insurance carriers to report ICD-10-CM and ICD-10-PCS codes to the TDI-DWC under those rules if health care providers in the Texas workers' compensation system use those codes on their medical bills.

The adopted amendments are effective February 17, 2013.

Rulebook Supplement 2013-01 Available Online for New and Amended Rules Relating to Notice and Reporting Requirements for Subscribing and Non-Subscribing Employers and New Rules Relating to the Medical Quality Review Panel

The Texas Workers' Compensation Rulebook Supplement 2013-01 contains rules adopted by the Commissioner of Workers' Compensation Rod Bordelon, and is available online from the Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC). The supplement pages may be downloaded from the TDI website at http://www.tdi.texas.gov/wc/rules/supplements.html

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JUST IN CASE YOU MISSED THESE CHANGES OR MEMOS

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Adoption: New 28 TAC §126.17 Concerning Guidelines for Examination by a Treating Doctor or Referral Doctor After a Designated Doctor Examination to Address Issues Other Than Certification of Maximum Medical Improvement and the Evaluation of Permanent Impairment

On December 17, 2012, the Commissioner of Workers' Compensation Rod Bordelon adopted new 28 Texas Administrative Code (TAC) §126.17. The adoption was filed with the Office of the Secretary of State on December 17, 2012 for publication in the December 28, 2012 issue of the Texas Register and may be viewed on the Secretary of State website at http://www.sos.state.tx.us/texreg/index.shtml at that time. A courtesy copy of the adoption is available on the TDI website at http://www.tdi.texas.gov/wc/rules/adopted/index.html.

DWC Form-057, *Request for Extension of Maximum Medical Improvement Date for Spinal Surgery*

The Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC) has adopted a revised DWC Form-057, *Request for Extension of Maximum Medical Improvement Date for Spinal Surgery*.

The form was revised to improve instructions to requestors, insure the certification of the requestor is compliant with the rules, improve the efficiency of processing by collecting all needed information on the form, and improve readability and formatting for use by requestors and by the TDI-DWC.

With adoption of the revised form, the decision of the TDI-DWC to either approve or deny the request will be issued on a separate order rather than on a copy of the request. The new DWC Form-057, which is effective on February 1, 2013, is available for downloaded from the TDI website at http://www.tdi.texas.gov/forms/form20.html.

Process for Appealing a Medical Fee Dispute Decision for Disputes Filed on or After June 1, 2012

If a party disagrees with a medical fee dispute decision issued for a dispute filed on or after June 1, 2012, the party may file an appeal with the Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC) in accordance with 28 Texas Administrative Code (TAC) §133.307.

Under 28 TAC §133.307(g), a party appealing a medical fee dispute decision must request a benefit review conference no later than 20 days from the date the decision is received by the party [See 28 TAC §141.1, regarding *Requesting and Setting a Benefit Review Conference*]. The decision is final if a request for the benefit review conference is not timely made to the TDIDWC.

If the medical fee dispute remains unresolved after a benefit review conference is held, a party may elect to resolve the dispute through binding arbitration, or a party may appeal the medical fee dispute decision by requesting a contested case hearing before the State Office of Administrative Hearings (SOAH).

To request a contested case hearing before SOAH, a party shall file a written request with the TDI-DWC's Chief Clerk of Proceedings not later than 20 days after conclusion of the benefit review conference.

Please note the non-prevailing party to a dispute must reimburse the TDI-DWC for the costs for services provided by the SOAH and any interest required by law as provided by that in Texas Labor Code §413.0312 and 28 TAC §133.307(h). For additional information on SOAH costs, visit the TDI website at http://www.tdi.texas.gov/wc/mfdr/documents/soahmfdcchcosts.pdf. Additional information on medical fee dispute resolution can be found on the TDI website at http://www.tdi.texas.gov/wc/mfdr/index.html.

APPEALS PANEL DECISION SUMMARIES (December 13, 2012 – February 19, 2013 (122109))
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121300 – A review of the medical records in evidence did not establish an attendant explanation of how COPD (or an aggravation of pre-existing COPD) was causally related to the work injury.

121311 – Designated Doctor did not certify an MMI date based on the claimant's condition or rate the entire compensable injury because he failed to consider, document, and analyze an impairment (which could include 0% IR) for the entire compensable injury.

121315 – Thirteen beneficiaries. Some got notice of the CCH. Some did not. Some should have gotten notice sent to their next of friend because they were minors. Decedent had at least two marriages with children from each. The same concepts of fairness and judicial economy that underlie Rule 39 and case law concerning necessary parties should be applied in these death benefit proceedings, especially where the beneficiary status of a minor child is concerned.

121363 – The issue before the hearing officer was, "[d]id [the] [c]arrier have good cause for failing to meet the requirements of Rule 141.1?" There is no DRIS entry in evidence or any other evidence that establishes that any DWC-45 was filed with the Division on October 17, 2011. Accordingly, the hearing officer's finding concerning a DWC-45 filed on October 17, 2011, is not supported by the evidence. With regard to whether the carrier had good cause for failing to meet the requirements of Rule 141.1, the hearing officer does not have in evidence before him the DWC-45 that was filed with the Division on October 25, 2011. The hearing officer erred by not taking official notice of the Division's records with regard to the filing of the DWC-45 with the Division. The AP remand the "good cause for failing to meet the requirements of Rule 141.1" issue.

121465 – That trauma could cause these diagnoses states no more than a possibility and is not enough to establish a causal connection.

121472 – In determining whether new evidence submitted with an appeal or response requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to a lack of diligence, and whether it is so material that it would probably result in a different decision. This was a very odd case with two dockets – an AM and PM case. The hearing officer found Claimant did not have a repetitive trauma injury in the morning but found she did have a repetitive trauma in the afternoon. This is a very unique case.

121474 – The hearing officer did not abandon his role as an impartial decision maker. The AP perceived no error in the denial of the Motion to Recuse Hearing Officer.

121547 – The claimant was recommended for further surgery for the compensable cervical injury and further material recovery could reasonably be anticipated. The hearing officer's decision Claimant was not at MMI was upheld. Claimant's doctor's office notes did not establish within a reasonable medical probability causation of the conditions in dispute and in fact indicate the claimant's shoulder problems may originate in the cervical spine. There was insufficient expert medical evidence linking the claimed shoulder extent-of-injury conditions to the compensable injury.

121559 – Claimant's doctors did not relate how the compensable fall down some stairs would cause, or aggravate, the depression, anxiety and/or gastroenteritis or that there was a causal connection between those conditions and the compensable injury within a reasonable medical probability. The diagnoses were found in his daily notes. There was insufficient expert medical evidence that the claimed conditions of anxiety and gastroenteritis were causally related to the compensable injury.

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121581 – Self-insured did not show for the first scheduled hearing. A ten day letter was sent and the self-insured responded. The hearing officer held a show cause hearing and, in the Background Information, stated he found the self-insured did not have good cause for its failure to appear at the May 11, 2012, CCH. However, the hearing officer did not make a finding of fact on no good cause. In the decision on remand, the hearing officer was to make a finding of fact whether the self-insured had good cause for its failure to appear at the first CCH.

121581 – The hearing officer's determination did not specifically conform to the disputed extent issue. The opinion given by the Designated Doctor did not establish causation, particularly as it was conclusory. The hearing officer erred in stating that the Designated Doctor's opinion established *prima facie* evidence of causation between the compensable injury and the conditions at issue.

121647 – Rule 142.13(c)(3) provides that the hearing officer shall make a determination whether good cause exists for a party not having previously exchanged information or documents to introduce evidence at the hearing. A causation letter was not timely exchanged despite being written four days before the BRC. There was insufficient discussion or evidence presented of what good cause may have existed and there is no finding of fact on good cause. Because that letter was the only expert medical evidence of causation, the AP reversed the hearing officer's determination that the compensable injury of extended to include the disputed injury.

121672 – When an injury is asserted to have occurred by way of an aggravation of a pre-existing condition, there must be evidence that there was a pre-existing condition and there was some enhancement, acceleration, or worsening of the underlying condition. The Designated Doctor's review of the medical records was not consistent with what the actual records stated.

121695 – Claimant had a severe ankle injury requiring the use of a short ankle-foot orthosis. The Designated Doctor correctly documented in his narrative report that the AMA Guides state that impairment for gait derangement should stand alone and not be combined with any other method of impairment. The Designated Doctor additionally stated that when an individual qualifies for more than one impairment, the evaluator should choose the higher of the two. The AMA Guides specifically provide gait derangement as a method for assessing impairment for lower extremity injuries.

121709 – The evidence established the claimant was not given notice that Dr. W was appointed as the designated doctor for the purposes of MMI/impairment rating. Therefore, Dr. W. was improperly appointed as the Designated Doctor to address MMI/impairment rating.

121740 – This was an affirmed case under Section 410.204(a)(1). The Designated Doctor certified the claimant had not yet reached MMI and therefore assigned no IR. The post-Designated Doctor RME doctor examined Claimant and found him to be at MMI. The evidence reflected the post-Designated Doctor RME doctor's certification was the first valid certification of MMI/IR. Claimant did not properly dispute that rating by requesting a BRC within 90 days because a Designated Doctor had already been appointed.

121761 – The Findings of Fact were inconsistent so the decision was remanded for corrections.

121772 – The doctor did not properly rate the eye injuries.

121786 – The AP held that the mere recitation of the claimed conditions in the medical records without attendant explanation how those conditions may be related to the compensable injury does not establish those conditions are related to the compensable injury within a reasonable degree of medical probability. Extent was found against the Claimant and the case was reversed for a proper impairment rating certification.

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121797 – The Findings of Fact and Conclusions of Law were inconsistent so the decision was remanded for corrections.

121823 – The hearing officer had to pick a second Designated Doctor because the first Designated Doctor would not provide the required information. The second Designated Doctor did not correctly rate the compensable injury and there were no other adoptable ratings in evidence. Dr. R was the treating doctor who did not request Dr. S to perform an IR evaluation. Rule 130.12(c)(3) provides that for a certification of MMI and/or IR to be valid it must be signed by a certifying doctor who is authorized by the Division under Rule 130.1(a) to make the assigned impairment determination. Dr. S's certification was not a valid certification pursuant to Rule 130.12. Consequently, Dr. S was not an authorized doctor pursuant to Rule 130.1(a) and his certification of MMI and IR could be adopted.

121826 – Inadequate expert medical evidence linking the extent of injury to the compensable injury.

121876 – The record does not reflect that the Designated Doctor considered the entire compensable injury. Good decision on how to rate a median nerve injury.

121893 – Workers' compensation coverage for volunteer reserve deputy constables. The self-insured is a political subdivision. Because the self-insured is a political subdivision, the applicable statute is Section 504.001 et seq. Section 504.001(2) defines employee as (A) a person in the service of a political subdivision who has been employed as provided by law; or (B) a person for whom optional coverage is provided under Section 504.012 or 504.013. Section 504.012(a) provides that a political subdivision may cover volunteer fire fighters, police officers, emergency medical personnel, and other volunteers that are specifically named. No evidence was presented at the CCH to establish that [Employer] had agreed to provide optional coverage for reserve deputy constables pursuant to Section 504.012.

121900 – Extremely complicated impairment rating certification of the wrist.

121909 – When an injury is asserted to have occurred by way of aggravation of a pre-existing condition, there must be evidence that there was a pre-existing condition and there was some enhancement, acceleration, or worsening of the underlying condition. The Treating Doctor did not explain how the fall would result in a right shoulder full thickness tear of the supraspinatus tendon or how that condition might go without medical documentation for 21 months.

121927 – In this case, none of the letters/reports from the doctors specifically link the cervical disc herniation at C5-6 and cervical radiculitis to the mechanism of injury or establish causation within a reasonable medical probability.

121983 – LIBS – The claimant contended he was entitled to LIBs based on an aggravation of a personality disorder that resulted in an inability to obtain or retain employment. Section 408.161 specifies the criteria for which entitlement to LIBs can be established. The aggravation of a personality disorder is not one of the specified conditions for which LIBs is payable. EXTENSION OF STAT MMI DUE TO SPINAL SURGERY - Section 408.104(a) provides that on application by either the claimant or the carrier, the Commissioner may extend the 104-week period if the claimant had spinal surgery, or has been approved for spinal surgery under Section 408.026 and the Commissioner rules within 12 weeks before the expiration of the 104-week period. Claimant applied for the extension almost 8 years after the stat MMI date. JURISDICTION TO DETERMINE MMI - Because a prior determination of MMI had been made, the hearing officer in the instant case determined that the Division does not have jurisdiction to determine the date of MMI. SIBS AND CARRIER WAIVER - The claimant failed to provide evidence to establish the date the carrier received the SIBs applications. Section 408.083 provides that an employee's eligibility for TIBs, IIBs, and SIBs terminates on the expiration of 401 weeks after the date of injury. Claimant filed her applications more than 7 days after the expiration of the 401 weeks.

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122022 – No medical provider specifically diagnosed an "L4-5 HNP" nor opined that an L4-5 HNP was causally related to the work injury. There was not an adoptable impairment rating certification in evidence.

122027 – When an injury is asserted to have occurred by way of aggravation of a pre-existing condition, there must be evidence that there was a pre-existing condition and there was some enhancement, acceleration, or worsening of the underlying condition.

122064 – There was no medical provider causally linking the claimed right elbow extensor tendon tear to the work injury or to the treatment of the compensable injury.

IMPORTANT WORKERS' COMPENSATION WEBSITES AND LINKS

Texas Department of Insurance
(note the change in the domain to .gov. All state agencies will be making this change.)
http://www.tdi.texas.gov/

TDI-Division of Workers' Compensation
http://www.tdi.texas.gov/wc/index.html

Administrative decisions including AP decisions and medical contested case decisions
http://www.tdi.texas.gov/wc/admindecisions.html

Advisories and bulletins
http://www.tdi.texas.gov/wc/news/advisories/index.html
http://www.tdi.texas.gov/bulletins/index.html

Appeals Panel Decision Manuel
http://www.tdi.texas.gov/wc/idr/apdmtoc.html

Medical Contested Case Hearing Manuel
http://www.tdi.texas.gov/wc/idr/mddmtoc.html

Medical Fee Dispute Resolution
http://www.tdi.texas.gov/wc/mfdr/

Workers' compensation forms
http://www.tdi.texas.gov/forms/form20.html

Requests for a Letter of Clarification (LOC) of a Designated Doctor's Report
http://www.tdi.texas.gov/wc/loc/index.html

SIBs Work Requirements per County
http://www.tdi.texas.gov/wc/employee/sibs.html

Carrier's Interrogatories to Claimant
http://www.tdi.texas.gov/wc/rules/documents/car_interr_cla.pdf

Important Worker's Compensation Websites and Links

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Claimant's Interrogatories to Carrier
http://www.tdi.texas.gov/wc/rules/documents/cla_interr_car.pdf

Proposed Rules
http://www.tdi.texas.gov/wc/rules/proposedrules/index.html

Informal Working Drafts
http://www.tdi.texas.gov/wc/rules/drafts.html

TxComp
https://txcomp.tdi.state.tx.us/twccprovidersolution/homehtml

TDI Search for Company's Attorney for Service
https://wwwapps.tdi.state.tx.us/inter/perlroot/consumer/attorney/attorney.html

Information on Networks
http://www.tdi.texas.gov/wc/wcnet/indexinjured.html

Texas Board of Legal Specialization
http://www.tbls.org/Default.aspx

Rule book supplements
http://www.tdi.texas.gov/wc/rules/supplements.html

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