

CHAPTER 180: MONITORING AND ENFORCEMENT
28 TAC §180.1

INTRODUCTION. The Texas Department of Insurance, Division of Workers' Compensation (DWC) adopts an amendment to 28 Texas Administrative Code §180.1, Definitions to align the rule with Texas Labor Code §408.0043, Professional Specialty Certification Required for Certain Review, as amended by Senate Bill (SB) 1742, 86th Legislature, Regular Session (2019), effective September 1, 2019. The Legislature added subparagraph (c) to §408.0043 to require that, when a health care service is requested, ordered, provided, or to be provided by a physician, a physician performing a peer review, utilization review, or independent review, it must be of the same or a similar specialty as that physician who requested or performed the health care service.

DWC adopts §180.1 without changes to the proposed text published in the November 27, 2020, issue of the *Texas Register* (45 TexReg 8487).

REASONED JUSTIFICATION. The amended §180.1(4) is necessary to add to the definition of "appropriate credentials" language from Labor Code §408.0043(c) to require that a reviewing physician have the same or similar specialty as the physician that requested or performed the health care service. Amended §180.1(4) cites the credential requirements for dentist reviewers under Labor Code §408.0044 and chiropractor reviewers under Labor Code §408.0045. An insurance carrier, independent review organization, or utilization review agent must determine on a case-by-case basis whether a physician reviewer's credentials are consistent with the specialty of the physician who requested or performed the health care service under review and the type of health care service under review. The required comparison of the requesting physician's credentials to the reviewing physician's credentials is consistent with existing Texas Department of Insurance (TDI) requirements

in 28 TAC §12.202 for independent review and 28 TAC §19.1706 for utilization review of group health services.

The amendment is limited to utilization reviews, independent reviews, or peer reviews by physicians of health care services requested or provided by physicians. In addition, the existing DWC and TDI rules governing medical necessity disputes (28 TAC §133.308), peer reviewers (28 TAC §180.22(g)), and utilization review personnel (28 TAC §19.2006) continue to apply. The reviewing health care provider must have the appropriate credentials under 28 TAC §180.1(4), including the "certifications, education, training, and experience to provide the health care that an injured employee is receiving or is requesting to receive."

This amendment does not alter the appropriate credentials for designated doctors, doctors performing required medical examinations, or doctors serving as members of the medical quality review panel. In addition, the amendment does not alter the appropriate credentials for utilization reviews, independent reviews, or peer reviews of health care services requested or provided by other types of health care providers.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Commenters: DWC received four written comments, and no oral comments. Commenters in support of the proposal with changes were: The Office of Injured Employee Counsel, Insurance Council of Texas, and an individual. A commenter against the proposal was MedicusRx.

Comment on §180.1.

One commenter proposed additional language to require other health care professionals to meet the requirements of Labor Code §408.0043.

Agency Response to Comment on §180.1.

DWC disagrees. The amendment aligns the current definition of "appropriate credentials" in §180.1(4) with the current statutory requirements for doctors who perform certain reviews of health care services in the Texas workers' compensation system. The language added to the rule mirrors the language and the requirements of Labor Code §408.0043. Because additional changes were not included in the 2019 statutory changes, DWC's position is that such rule changes are not necessary at this time. Other health care providers performing reviews still must have the appropriate credentials under §180.1(4), including the certifications, education, training, and experience to provide the health care that an injured employee is receiving or is requesting to receive. Including other health care professionals in the amendment to §180.1 is inconsistent with DWC's interpretation of Labor Code §408.0043.

Comment on §180.1. One commenter suggested that physicians who serve as arbiters and experts under Labor Code §408.0043(a)(6) should be required to have the same or similar specialty as the doctor under investigation.

Agency Response to Comment on §180.1.

DWC acknowledges the comment, but the suggestion is outside the scope of the statutory authority in Labor Code §408.0043(c). The amendment is limited to utilization reviews, independent reviews, or peer reviews by physicians of health care services requested or provided by physicians. The amendment does not alter the appropriate credentials for designated doctors, doctors performing required medical examinations, or doctors serving as members of the medical quality review panel.

Comment on §180.1.

One commenter requested that the rule define "similar specialty" to guide system participants on what credentials a reviewing physician must have to perform a review of

health care services if the reviewing physician is not of the "same specialty." The commenter stated that a definition will help reduce potential compliance issues and uncertainty when the reviewing physician is not of the "same specialty" but may be of a "similar specialty."

Agency Response to Comment on §180.1.

DWC disagrees that the term "similar specialty" should be specifically defined in this rule. DWC's position is that the definition of "appropriate credentials" as amended provides sufficient guidance to the system participants. The definition of "appropriate credentials" includes "the certifications, education, training, and experience to provide health care that an injured employee is receiving or is requesting to receive."

The language from Labor Code §408.0043 requires that a reviewer possess the certifications, education, training, and experience to provide the health care being reviewed and the physician be of the "same or a similar specialty." These statutory requirements establish a two-pronged approach to enhance physician matching when physicians are reviewing health care services. The same or similar standard allows flexibility on a case-by-case basis in situations when the match of the same specialty would impede or unnecessarily complicate the health care review process. DWC will monitor complaints and insurance carrier and physician compliance on a case-by-case basis, considering the circumstances of the review and the availability of reviewing physicians.

Comment on §180.1.

One commenter stated that the amendment will result in increased costs, unnecessary treatment, and poor outcomes because requiring a reviewing physician to have the same or a similar specialty as the physician who requested the medical service under review will cause tunnel vision in health care. The commenter stated that delays will occur if

requesting physicians are not immediately available to consult with the reviewing physicians. The commenter stated that there is no medical literature to support that the use of a clinical peer in the same or a similar specialty will lead to improved treatment outcomes. Instead, the commenter recommended an interdisciplinary approach to reviewing care to encourage consultation with other specialties.

Agency Response to Comment on §180.1.

DWC disagrees that the amendments to 28 TAC §180.1 will result in increased costs, unnecessary treatment, and poor outcomes. Aligning the rule with statutory language does not add any cost to the system or modify standards for medical necessity or reasonableness of the treatment proposed or provided to injured employees.

The commenter's concerns are outside the scope of the rule because the comment relates to the statutory changes the Legislature made to Labor Code §408.0043 under SB 1742 in 2019. The amendment to §180.1(4) aligns the definition of "appropriate credentials" with the statutory requirements in Labor Code §408.0043 for physicians who perform peer reviews, utilization reviews, or independent reviews of health care services in the Texas workers' compensation system.

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STATUTORY AUTHORITY. The commissioner of workers' compensation adopts the amendment to 28 TAC §180.1 under Labor Code §§401.011, 402.00111, 402.00116, 402.061, 408.021, 408.027, 408.0043, and Texas Insurance Code §4201.054.

Labor Code §401.011 provides general definitions of the Texas Workers' Compensation Act.

Labor Code §402.00111 provides that the commissioner of workers' compensation will exercise all executive authority, including rulemaking authority under Title 5 of the Labor Code.

Labor Code §402.00116 provides that the commissioner will administer and enforce this title, other Texas workers' compensation laws, and other laws granting jurisdiction to or applicable to DWC or the commissioner.

Labor Code §402.061 provides that the commissioner of workers' compensation will adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

Labor Code §408.021 provides that the injured employee is entitled to all health care reasonably required by the injury that cures or relieves the effects naturally resulting from the compensable injury, promotes recovery, or enhances the injured employee's ability to return to or retain employment.

Labor Code §408.027 provides how the health care provider must submit a claim for payment and how the carrier must pay, reduce, deny, or determine to audit the health care provider's requests for health care services.

Labor Code §408.0043 outlines the professional specialty certification requirements of doctors, other than chiropractors or dentists, to perform health care services, including utilization reviews, independent reviews, or peer reviews.

Insurance Code §4201.054 provides that the commissioner of workers' compensation regulates all people who perform utilization review of medical benefits and has rulemaking authority to implement such regulation under Title 5 of the Labor Code.

TEXT.

§180.1. Definitions.

The following words and terms, when used in this chapter, will have the following meanings:

(1) Act--The Texas Workers' Compensation Act, Labor Code, Title 5, Subtitle A.

(2) Administrative violation--A violation, failure to comply with, or refusal to comply with the Act, or a rule, order, or decision of the commissioner. This term is synonymous with the terms "violation" or "violate."

(3) Agent--A person who a system participant uses or contracts with for the purpose of providing claims service or fulfilling duties under the Labor Code, Title 5 and rules. The system participant who uses or contracts with the agent may also be responsible for the administrative violations of that agent.

(4) Appropriate credentials--The certifications, education, training, and experience to provide the health care that an injured employee is receiving or is requesting to receive. Under Texas Labor Code §408.0043, a physician who performs a peer review, utilization review, or independent review of health care services requested, ordered, provided, or to be provided by a physician must be of the same or similar specialty as the physician who requested, ordered, provided, or will provide the health care service. A dentist must meet the requirements of Texas Labor Code §408.0044. A chiropractor must meet the requirements of Texas Labor Code §408.0045.

(5) Commissioner--The commissioner of workers' compensation.

(6) Complaint--A written submission to the division alleging a violation of the Act or rules by a system participant.

(7) Compliance Audit (also Performance Review)--An official examination of compliance with one or more duties under the Act and rules. A compliance audit does not include monitoring or review activities involving the Medical Advisor or the Medical Quality Review Panel.

(8) Conviction or convicted--

(A) A system participant is considered to have been convicted when:

(i) a judgment of conviction has been entered against the system participant in a federal, state, or local court;

(ii) the system participant has been found guilty in a federal, state, or local court;

(iii) the system participant has entered a plea of guilty or nolo contendere (no contest) that has been accepted by a federal, state, or local court;

(iv) the system participant has entered a first offender or other program and judgment of conviction has been withheld; or

(v) the system participant has received probation or community supervision, including deferred adjudication.

(B) A conviction is still a conviction until and unless overturned on appeal even if:

(i) it is stayed, deferred, or probated;

(ii) an appeal is pending; or

(iii) the system participant has been discharged from probation or community supervision, including deferred adjudication.

(9) Department--Texas Department of Insurance.

(10) Division--Texas Department of Insurance, Division of Workers' Compensation.

(11) Emergency--As defined in §133.2 of this title (relating to Definitions). This definition does not apply to "emergency" as used in the term "ex parte emergency cease and desist orders."

(12) Frivolous--That which does not have a basis in fact or is not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

(13) Frivolous complaint--A complaint that does not have a basis in fact or is not

warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

(14) Immediate post-injury medical care--That health care provided on the date that the injured employee first seeks medical attention for the workers' compensation injury.

(15) Notice of Violation (NOV)--A notice issued to a system participant by the division when the division has found that the system participant has committed an administrative violation and the division seeks to impose a sanction in accordance with Labor Code, Title 5 or division rules.

(16) Peer Review--An administrative review by a health care provider performed at the insurance carrier's request without a physical examination of the injured employee.

(17) Remuneration--Any payment or other benefit made directly or indirectly, overtly or covertly, in cash or in kind, including, but not limited to, forgiveness of debt.

(18) Rules--The division's rules adopted under Labor Code, Title 5.

(19) Sanction--A penalty or other punitive action or remedy imposed by the commissioner on an insurance carrier, representative, injured employee, employer, or health care provider, or any other person regulated by the division under the Act, for an administrative violation.

(20) SOAH--The State Office of Administrative Hearings.

(21) System Participant--A person or their agent subject to the Act or a rule, order, or decision of the commissioner.

CERTIFICATION. This agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas, on January 20, 2021.



Kara Mace
Deputy Commissioner for Legal Services
TDI, Division of Workers' Compensation

The commissioner adopts amended 28 TAC §180.1.



Cassie Brown
Commissioner
TDI, Division of Workers' Compensation

Commissioner's Order No. 2020-6662.