

TEXAS WORKERS' COMPENSATION **Education Conference**



2016 Workers' Compensation Rulemaking Update — DWC General Counsel

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Rulemaking Overview

- Texas administrative agencies including TDI must adhere to the Texas Administrative Procedure Act (APA) when proposing and adopting rules.
- The APA is in Texas Government Code Subchapter B, Chapter 2001.

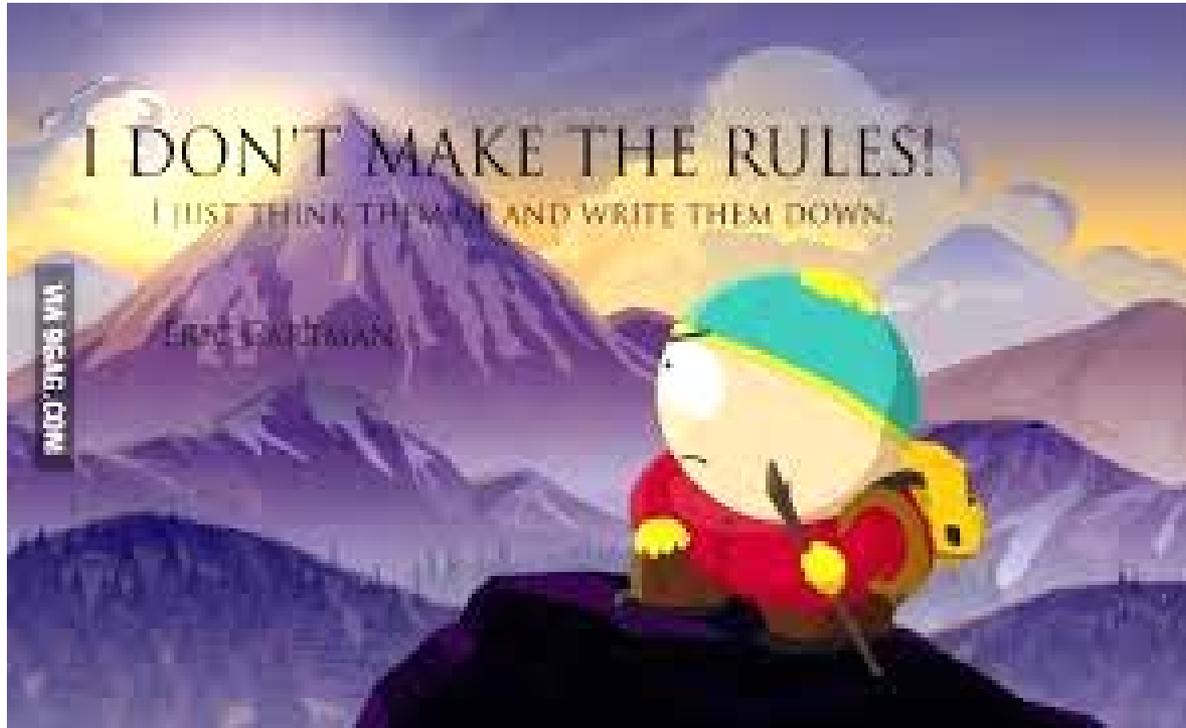
Rulemaking Overview

- The rulemaking process begins at the proposal stage. During this stage, the proposed rule is published with the *Texas Register* and the public is given an opportunity to provide comments.
- Rulemaking may also begin informally outside the APA to elicit feedback on more complex rules being considered.

Rulemaking Overview

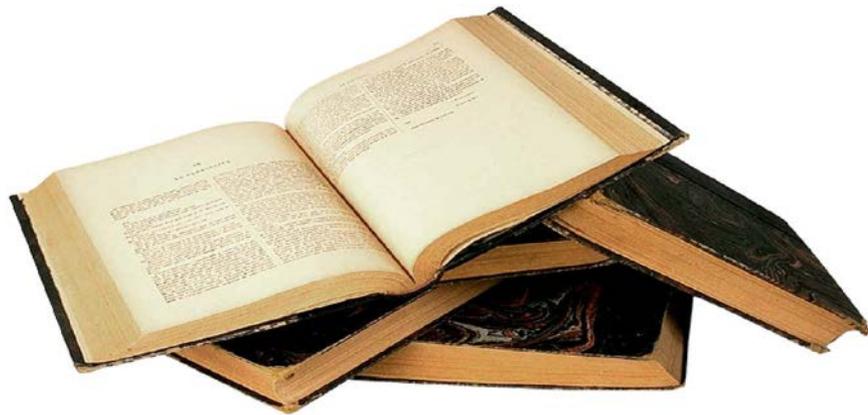
- The next stage of the rulemaking process is the adoption stage. During this stage, the agency provides responses to public comments received and the rule is published for adoption with the *Texas Register*.
- The rule then becomes effective 20 days from filing with the Secretary of State unless a later date is provided in the rule text.

Eric Cartman says:





TDI-DWC Legislative Rules Projects



Legislative Amendment Rule Projects

- 28 Texas Administrative Code (TAC) §132.13, Burial Benefits; SB 653
- 28 TAC §132.7, Death Benefits; HB 1094
- 28 TAC §104.1, Rule Petitions; HB 763
- 28 TAC §129.3 & §129.11, Temporary Income Benefits (TIBs); SB 901
- 28 TAC §1.2201 (Contract Monitoring) Joint Project with TDI

Burial Benefits

- Burial benefits remained at \$6,000 from 1999 until 2015, when amendments were passed during the 2015 Legislative session.
- According to the National Funeral Director Association, the median cost for a funeral in 2012:
 - \$7,045 w/o vault
 - \$8,343 w/ vault
 - Other associated fees are not included

Burial Benefits – SB 653

28 TAC §132.13 – Burial Benefits

- SB 653 amended Labor Code §408.186 to increase the maximum repayment of burial benefits from \$6,000 to \$10,000, based on a compensable injury occurring on or after September 1, 2015.
- 28 TAC §132.13 was amended to implement SB 653 and increase the maximum amount of burial benefit reimbursement from \$6,000 to \$10,000.
- Rule became effective 3/20/16.

Death Benefits

- An eligible spouse is entitled to death benefits until remarriage or the spouse's death.
- The 2015 Legislative session made an exception for spouses of first responders.
- Labor Code §504.055 defines first responder as an individual employed by a political subdivision of the state including but not limited to: a peace officer, emergency care attendant, a firefighter, or a volunteer.

Death Benefits – HB 1094

- HB 1094 amended Labor Code §408.183 to allow an eligible spouse of a first responder to remarry and remain eligible for death benefits for life if the first responder was killed in the course and scope of employment or while providing services as a volunteer.
- Applies only to claims with a date of injury on or after September 1, 2015

28 TAC §132.7- Duration of Death Benefits for Eligible Spouse

- Rule was amended to implement HB 1094.
- Rule became effective 3/20/16.

Rule Petitions – HB 763

- Gov't Code §2001.021 allows an interested person to petition an agency for adoption of a rule under the APA.
- HB 763 amended Gov't Code §2001.021 to establish a residency requirement and define an interested person as
 - a Texas resident,
 - a business entity located in Texas,
 - a governmental subdivision located in Texas, or
 - a public or private organization located in Texas that is not a state agency.

Rule Petitions – HB 763

- HB 763 also requires that 51% of petition signatures be from Texas residents, if a state agency requires petition signatures. **Note:** TDI-DWC does not require petition signatures.

28 TAC §104.1 – Contents of Rule-Making Petitions

- Rule was amended to implement HB 763 by allowing interested persons, as defined in Gov't Code §2001.021, to submit rule petitions.
- Rule was also amended to require a statement that the petitioner is an interested person and to eliminate the petitioner's signature requirement.

28 TAC 104.1 – Contents of Rule-Making Petitions

- TDI-DWC further amended the rule to allow electronic submission of petitions, in addition to other methods.
- Rule petitions must be filed with the commissioner by personal delivery, certified mail, or by email to rulecomments@tdi.texas.gov.
- Rule became effective 3/10/16.

Temporary Income Benefits (TIBs)

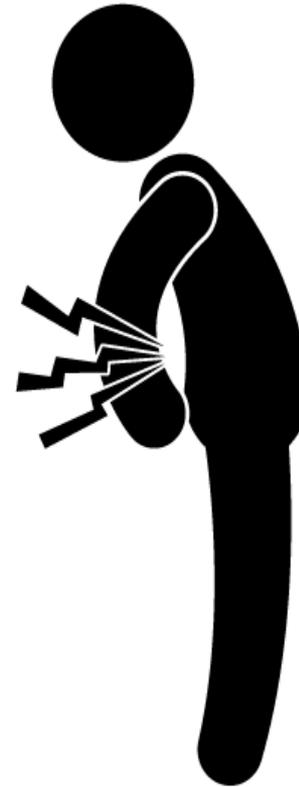
- Temporary income benefits (TIBs) are the first level of income benefits that an injured employee may receive under the workers' compensation system.
- TIBs are calculated as 70% of the injured employee's lost wages.
- People earning below a certain benchmark rate receive 75% of their lost wages for the first 26 weeks of disability.

TIBs – SB 901

- Since 1999, the benchmark earning rate to receive 75% of lost wages for the first 26 weeks was less than \$8.50 per hour.
- SB 901 amended Labor Code §408.103(a) to increase the benchmark earning rate for TIBs from less than \$8.50 to less than \$10 an hour.
- Effective September 1, 2015, if an injured employee earns less than \$10/hr, the employee will receive 75% of lost wages for the first 26 weeks of disability. If an injured employee earns more than \$10/hr, the employee will receive 70% of lost wages.

TIBS EXAMPLE

- This year Bob and Sam slipped and injured their backs at work. They both work 40 hrs a week. Bob earns \$10.50/hr and Sam earns \$9.50/hr. After their injuries they both are unable to work.
- Bob earns a average weekly wage (AWW) of \$420 and post injury earnings are \$0. His TIBs amount would be calculated as: $420 - 0 = 420$ (lost wages) * .70 = **\$294**
- Sam earns a AWW of \$380 and post injury earnings are \$0. His TIBs amount would be calculated as: $380 - 0 = 380$ (lost wages) * .75 = **\$285 for the first 26 weeks** then $380 * .70 = \$266$ thereafter.



28 TAC §129.3 & §129.11 – (TIBs)

- 28 TAC §129.3 and 28 TAC §129.11 were amended to implement SB 901 by changing the rate of \$8.50 to \$10.00 for dates of injury after September 1, 2015.
- Rules became effective 2/28/16.

State Agency Contracting – SB 20

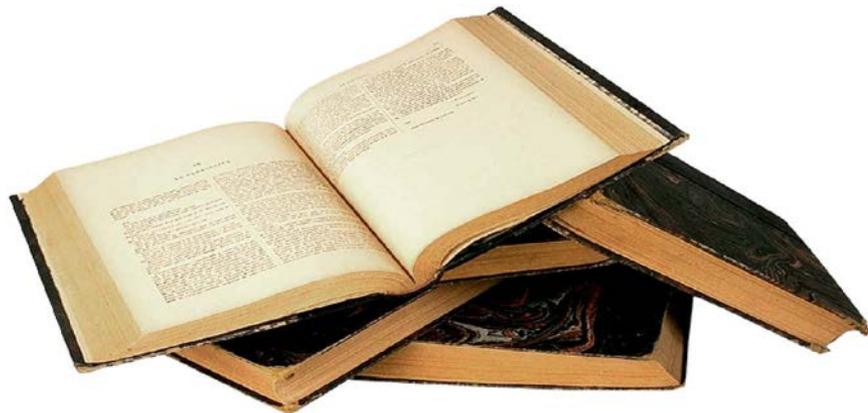
- SB 20 amends Gov't Code Chapter 2261 and requires each state agency by rule to establish a procedure to identify contracts that require enhanced contract or performance monitoring and prescribes certain reporting requirements.
- The purpose of this bill is to reform state agency contracting by clarifying accountability, increasing transparency, and ensuring a fair competitive process.

New 28 TAC §1.2201 – Enhanced Contracts and Performance Monitoring

- The rule states that the procurement director will evaluate contracts with a value greater than \$25,000 (and may evaluate contracts with a value less than \$25,000) to determine whether enhanced contract or performance monitoring is appropriate. If the procurement director determines the enhanced contract or performance monitoring is appropriate, the director will report to the commissioner of insurance and/or the commissioner of workers' compensation:
 - The basis for the determination that the enhanced contract or performance monitoring is appropriate;
 - Any serious issues or risks identified with the contract, if applicable; and
 - The department's plan for carrying out the enhanced contract or performance monitoring.

TDI-DWC Non-Legislative Rules Projects

- 28 TAC §110.108 & §110.110 (Notices)
- 28 TAC §§134.204, 134.209 -134.250 (Medical Fee Guidelines for Workers' Compensation)
- 28 TAC §134.202 & §134.302 (Repealed)



Notices regarding Work-Related Communicable Diseases

- 28 TAC §110.108 addresses employer posting requirements for employee notices about the Health and Safety Code which may affect qualifying for workers' compensation benefits following a work-related exposure to a reportable communicable disease.
- 28 TAC §110.110 addresses reporting requirements for building or construction projects for governmental entities.

28 TAC §110.108 & §110.110 (Notices)

- Amendments to these rules update the division's phone number on notices employers are required to post.
- Employees use the phone numbers to report possible exposure to communicable diseases or HIV or to inquire about, verify, or report the lack of coverage at construction sites.
- Rules became effective 12/14/15.



28 TAC §§134.204, 134.209 -134.250 (Medical Fee Guideline for Workers' Compensation)

- 28 TAC §134.204 addresses the billing and reimbursement requirements for a variety of workers' compensation specific services.
- Specific services include but not limited to case management, functional capacity evaluations, return-to-work rehabilitation programs, designated doctor examinations, maximum medical improvement evaluations and impairment ratings.

28 TAC §§134.204, 134.209 -134.250 (Medical Fee Guidelines for Workers' Compensation)

- Amendments to the rule consisted of a non-substantive reorganization to create a more comprehensive format by separating the billing and reimbursement requirements for multiple services into new sections.
- The reorganization was necessary to streamline compliance for system participants and future amendments to the guidelines.

28 TAC §§134.204, 134.209 -134.250 (Medical Fee Guidelines for Workers' Compensation)

- §134.209 – Applicability
- §134.210 – Medical Fee Guideline for Workers' Compensation Specific Services
- §134.215 – Home Health Services
- §134.220 – Case Management Services
- §134.225 – Functional Capacity Evaluations
- §134.230 – Return to Work Rehabilitation Programs
- §134.235 – Return to Work/Evaluation of Medical Care
- §134.239 – Billing for Work Status Reports
- §134.240 – Designated Doctor Examinations
- §134.250 – Maximum Medical Improvement Evaluations and Impairment Rating Examinations

Non Substantive Reorganization of §134.204 Stakeholder Chart

TITLE 28. INSURANCE
 Part 2. Texas Department of Insurance
 Division of Workers' Compensation
 Chapter 134. Benefits-Guidelines for Medical Services, Charges and Payments

**SUBCHAPTER C. MEDICAL FEE GUIDELINES
 Amended 28 TAC §134.204.**

Existing 28 TAC §134.204. (Existing Language)	Amended 28 TAC §134.204. Deleted Text ● Added text ● (Amended Language)
§134.204. Medical Fee Guideline for Workers Compensation Specific Services.	§134.204. Medical Fee Guideline for Workers Compensation Specific Services.
(a) Applicability of this rule is as follows:	(a) Applicability of this rule is as follows:
(1) No change.	(1) No change.
(2) This section applies to workers' compensation specific codes, services and programs provided on or after March 1, 2008.	(2) This section applies to workers' compensation specific codes, services and programs provided <u>from</u> on or after March 1, 2008 <u>until September 1, 2016</u> .
(3) – (5) No change.	(3) – (5) No change.
(b) – (n) No change.	(b) – (n) No change.

**SUBCHAPTER C. MEDICAL FEE GUIDELINES
 New 28 TAC §§134.209 – 134.250.**

Existing 28 TAC §134.204. (Existing Language)	New 28 TAC §§134.209 – 134.250. Deleted Text ● Added text ● (Adopted Draft Language)
§134.204. Medical Fee Guideline for Workers Compensation Specific Services.	New §134.209. Applicability.
(a) Applicability of this rule is as follows:	Applicability of this rule is as follows:
(1) This section applies to workers' compensation specific codes, services and programs provided in the Texas workers' compensation system, other than:	<u>(a) [This] Sections [section] 134.209, 134.210, 134.215, 134.220, 134.225, 134.230, 134.235, 134.239, 134.240, and 134.250 of this title apply[applies] to workers' compensation specific codes, services, and programs provided in the Texas workers' compensation system, other than:</u>
(A) professional medical services described in §134.203 of this title (relating to Medical Fee Guideline for Professional Services);	<u>(1) professional medical services described in §134.203 of this title[relating to Medical Fee Guideline for Professional Services];</u>

28 TAC §134.202 & §134.302 (Repealed)

- During the non-substantive reorganization two rules were repealed because they were previously superseded and no longer effective.
- **§134.202 – Medical Fee Guideline**
- **§134.302 – Dental Fee Guideline**
- Rules effective 07/07/16 and applicable to workers' compensation specific codes, services, and programs provided on or after September 1, 2016.

Rule Review

- Government Code §2001.039 requires state agencies to review each of its rules not later than the fourth anniversary of its effective date and consider readopting, amending, or repealing the rule.
- The goal is to determine if the reason for adopting the rule continues to exist.

Rule Review

- The division is currently reviewing 28 Texas Administrative Code (TAC) Chapters 49, 53, 55, 56, 57, 59, 114, 116, 144, and 180 in compliance with Gov't Code §2001.039. We expect to propose for comment this fall.

TDI-DWC

Recently Revised/New Forms



Forms

- DWC Form-042 (Claim for Death Benefits)
- DWC Form-048 (Travel Reimbursement Form)
- DWC Form-067 (Designated Doctor Certification Application)
- DWC Electronic Data Interchange (EDI) Forms-01, 02, and 03
- **NEW** DWC Form-154 (Complaint Form)

DWC Form-042 (Claim for Death Benefits)

- When a person dies due to a work-related injury or illness, certain family members may be able to get death benefit payments.
- This form includes a reference to burial benefits and was revised along with 28 TAC §132.13 to comply with HB 653 increasing the maximum amount of burial benefits from \$6,000 to \$10,000.
- Form effective April 1, 2016.

DWC Form-048 (Travel Reimbursement Form)

- DWC Form-048 is used by an injured employee to request reimbursement from an insurance carrier for travel expenses to obtain medical treatment or attend a designated doctor examination, required medical examination, or post-designated doctor examination.

DWC Form-048 (Travel Reimbursement Form)

- DWC Form-048 was revised to incorporate amendments to 28 TAC §134.110(a) which added the three exam types eligible for reimbursement.
- Form revisions also incorporated plain language and include a separate Spanish form.
- Form effective April 11, 2016

DWC Form-067 (Designated Doctor Certification Application)

- Revisions to DWC Form-067 include minor updates to the applicant information, disclosure questions, and applicant authorization, attestation, and release sections for compliance and clarity.
- Revisions minimize the use of an applicant's social security number for tracking purposes.
- Form effective September 1, 2016

DWC EDI Forms-01, 02, and 03

- EDI forms are used to establish profiles for insurance carriers or trading partners that submit claim or medical electronic data interchange records to the division.
- EDI Form-01 is used for claims and 251 health plan data.
- EDI Form-02 and 03 are used for medical claim submission only.

DWC EDI Forms-01, 02, and 03

- Revisions to the EDI forms update contact information. EDI Form-01 includes format changes consistent with other DWC forms.
- EDI Form-02 and 03 were last updated in 2011 with the medical state reporting rules and only update contact information.
- Forms will become effective later this fall.

DWC Form-154 (Complaint Form)

- Previously, the division and TDI's Consumer Protection section used a joint form for complaint submission. The form covered complaints involving auto, homeowners, life, health, and title insurance, as well as workers' compensation complaints.
- In spring 2016, the division created a form tailored to workers' compensation complaints. DWC Form-154 is now available as one of several options for individuals to submit a complaint involving workers' compensation to the division.

DWC Form-154 (Complaint Form)

- New DWC Form-154 provides a simple, standardized form in (English and Spanish) for filing workers' compensation complaints and may be submitted via email, fax, or mail.
- A person may also submit a complaint without using the form through the TDI website, email, fax, written correspondence, or in person.
- Form effective March 1, 2016

Complaint Info

Complaints can be submitted by:

Website: <http://www.tdi.texas.gov//wc/indexwc.html>

E-mail: DWC-ComplaintResolution@tdi.texas.gov

Fax: (512) 490-1030

Mail: Texas Department of Insurance

Division of Workers' Compensation, MS-8

7551 Metro Center Drive, Suite 100

Austin, Texas 78744

Current TDI-DWC Rule Project



Attorney Fees

- 28 TAC §152.6 (Attorney Fees)
- 28 TAC §152.3 & §152.4 (Repeal and Reenactment)
- DWC Form-150 (Notice of Representation)
- **NEW** DWC Form-150a (Notice of Withdrawal)
- DWC Form-151 (Attorney Application for Web Access)
- DWC Form-152 (Application for Attorney Fees)

Attorney Fees

- 28 TAC Chapter 152 was originally enacted in 1991 under the authority of Labor Code §408.221 and §408.222.
- Chapter 152 outlines eligibility to earn a fee, the application for requesting an attorney fee, the division's approval or denial of fees, and payment of approved fees.
- The rule project repeals and re-enacts §152.3 and §152.4 because of the substantial amendments required to reflect changes in the industry over the 25 years since the rules were originally adopted.

28 TAC §152.3 & §152.4

- New §152.3 will provide: (1) a detailed process for attorneys claiming a fee for representing a claimant or insurance carrier (2) the steps to contest the division's approval, partial approval, or denial of a fee request, and (3) the division's enforcement authority.
- New §152.4 will provide: (1) a maximum hourly rate for legal services of \$200 for attorneys and \$65 for legal assistants; (2) additional time at the pre-benefit review conference stage of a dispute for legal services, and (3) the steps to request and receive a fee for hours above the guidelines for legal services.

28 TAC §152.6

- The attorney fees rule project also enacts new §152.6 to regulate attorney withdrawal in the workers' compensation system and help prevent an attorney's withdrawal from having a material adverse effect on the client or the system as a whole.
- New §152.6 requires attorneys to comply with the Texas Disciplinary Rules of Professional Conduct when withdrawing representation. Under §152.6, an attorney must submit to the division a notice of withdrawal or a motion to withdraw, depending on the circumstances of the withdrawal and whether notice of a proceeding has been received.

Attorney Fees

- The rules are designed to ensure there is quality representation available within the workers' compensation system and reflect changes in the industry since the rules were originally adopted.
- The rules allow more time for preparation and case management in order to encourage early resolution of claim disputes.

DWC Form-150 (Notice of Representation)

- Amendments remove the “notification of withdrawal section” (which becomes a separate form, DWC150a).
- The form provides a streamlined document for claimant attorneys to meet the duty to notify the division of representation within 10 days.



New DWC Form-150a (Notice of Withdrawal of Representation)

- The new form provides a streamlined document for attorneys to notify the division when withdrawing representation.
- Claimants and other parties may also use the form to notify the division when the attorney-client relationship has been terminated.

DWC Form-151 (Attorney Application for Web Access)

- Amendments are non-substantive in nature and primarily amend the form for clarity and to conform to current agency style.

DWC Form-152 (Application for Attorney Fees)

- Amendments to the form primarily update and conform to the requirements of new §152.3. The amendments are intended to ensure the division is receiving the necessary information to fulfill its statutory duty to approve attorney fees in the workers' compensation system.

OPEN RECORDS UPDATE



Are birthdates of the general public “confidential by law”?

- In *Paxton v. Dallas*, the city claimed that birthdates of members of the general public are “confidential by law.”
- The court held that birthdates are confidential under common-law privacy pursuant to Supreme Court’s decision in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex.2010).
 - See *Paxton v. City of Dallas*, No. 03-13-00546-CV. 2015 WL 3394061 (Tex. App.-Austin May 22, 2015, pet. denied).

OPEN RECORDS REQUEST

- If you would like to view or get copies of our records, you must send a written request by email or fax to David Wheelus, Public Information Coordinator, at OpenRecords@tdi.texas.gov or 512-490-1021.
- You may also submit a request by mail to David Wheelus, Public Information Coordinator, Texas Department of Insurance, P.O. Box 149104, Mail Code 110-1C, Austin, Texas 78714-9104; or in person at 333 Guadalupe, Austin, Texas 78701.