

**SUBCHAPTER A: Designated Doctor Scheduling and Examinations**

**28 TAC §§127.1, 127.5, and 127.10**

**SUBCHAPTER B: Designated Doctor Certification, Recertification, and Qualifications**

**28 TAC §§127.100, 127.110, 127.130, and 127.140**

**SUBCHAPTER C: Designated Doctor Duties and Responsibilities**

**28 TAC §127.220**

**1. INTRODUCTION.** The Texas Department of Insurance, Division of Workers' Compensation (division) proposes amendments to 28 Texas Administrative Code (TAC) §127.1, *Requesting Designated Doctor Examinations*, §127.5, *Scheduling Designated Doctor Appointments*, §127.10, *General Procedures for Designated Doctor Examinations*, §127.100, *Designated Doctor Certification*, §127.110, *Designated Doctor Recertification*, §127.130, *Qualification Standards for Designated Doctor Examinations*, §127.140, *Disqualifying Associations*, and §127.220, *Designated Doctor Reports*.

In the Texas workers' compensation system, the division assigns a designated doctor to perform a medical examination to resolve questions about an injured employee's work-related injury. The questions are whether impairment was caused by the compensable injury; whether maximum medical improvement has been attained; the extent of the injured employee's compensable injury; whether the injured employee's disability is a direct result of the work-related injury; the ability of the injured employee to return to work; or similar issues. Prior amendments to the designated doctor program were enacted through House Bill 2605 of the 82nd Legislature, Regular Session. Since the implementation of House Bill 2605, the division has identified three areas to strengthen and improve designated doctor functions that require

rulemaking. The three areas are the designated doctor assignment process, qualification standards, and certification requirements. Labor Code §408.0041, *Designated Doctor Examination*, and §408.1225, *Designated Doctor*, provide statutory authority for the designated doctor program, including but not limited to, designated doctor assignments, designated doctor certification and recertification, and designated doctor qualification standards. Title 28 TAC Chapter 127 implements these Labor Code sections.

Over the last few years, participation in the designated doctor program has declined, particularly among licensed medical doctors and doctors of osteopathy. The division acknowledges that several factors may have contributed to this decline, such as the adoption of the division's enhanced training and testing requirements required under House Bill 2605. In proposing amendments to the designated doctor rules in 28 TAC Chapter 127, the number of licensed medical doctors and doctors of osteopathy serving as designated doctors is notable because these practitioners are qualified to evaluate nearly all musculoskeletal and non-musculoskeletal injuries seen in the workers compensation system. Licensed doctors of chiropractic has also declined over the last few years, but not at the same rate as medical doctors and doctors of osteopathy. In 2012, medical doctors made up 75% of designated doctors in the system and doctors of osteopathy made up 9% of designated doctors. By 2017, medical doctors represented only 30% of designated doctors in the system and doctors of osteopathy represented 4%. As licensed medical doctors and doctors of osteopathy are the only doctors qualified by rule to perform these types of examinations, a continuing downward trend in program participation by these practitioners could have severe consequences for system participants and injured employees in need of a designated doctor examination to

evaluate injuries of the non-musculoskeletal area of the body or certain complex diagnoses. Moreover, a continuing decline in available practitioners overall may force injured employees to travel further to attend an examination, or delay the dispute resolution process because of an inability to find a qualified designated doctor. This decline has prompted the division to focus on ensuring an adequate number of appropriately qualified doctors participate in the system.

House Bill 2605 of the 82nd Legislature Regular Session amended Labor Code §408.0041(b) to require that a medical examination be performed by the next available doctor on the division's list of certified designated doctors whose credentials are appropriate for "the area of the body affected by the injury and the injured employee's diagnosis." Additionally, House Bill 2605 deleted the requirement that a designated doctor's credentials be appropriate for the "issue in question" and the injured employee's "medical condition." In 2013, the division implemented an automated system to assign designated doctor examinations and adopted new rules governing designated doctor certifications, training, testing, and qualifications. Over time, the division's methodology for assigning examinations to designated doctors for evaluation of injuries to the musculoskeletal areas of the body has produced an unbalanced distribution of assignments among doctors qualified to perform these examinations. The division's concern is whether the distribution of available assignments is proper given the doctors' qualifications and the sheer number of designated doctor examinations assigned. To address these concerns, the division proposes amendments to 28 TAC §127.5 to address how the division assigns a designated doctor examination and provide an assignment distribution methodology more balanced for all doctors qualified to evaluate musculoskeletal areas of the body. It is expected that the new assignment methodology will increase the transparency of the designated doctor

assignment process and help retain licensed medical doctors and doctors of osteopathy on the designated doctor's list.

Labor Code §402.021(a) provides in part that a basic goal of the workers' compensation system is to ensure each injured employee has access to a fair dispute resolution process. The statute further provides that the legislative intent is that the workers' compensation system minimize the likelihood of disputes and resolve them promptly and fairly when identified. In furtherance of this legislative intent and corresponding goals of the workers' compensation system, the division has determined that examinations involving certain complex and rare diagnoses are most appropriately performed by doctors with extensive clinical expertise and appropriate designated doctor training. The division acknowledges that designated doctors may be authorized to evaluate certain conditions falling within the scope of their licenses. However, under Labor Code §408.0041(b), the division is required by rule to determine which doctor's credentials are appropriate for the area of the body affected by the injury and the injured employee's diagnosis. Therefore, in accordance with the statutory mandate, the division determined the qualification standards of designated doctors and aims to clarify those established standards to ensure the most optimally qualified doctor is selected for an examination.

To serve as a designated doctor in the workers' compensation system, a doctor has to maintain active certification as directed under Labor Code §408.1225(a). Designated doctor certification equips the division with the ability to ensure that a doctor has met proper eligibility requirements including educational experience, previous training, and knowledge of processes for the proper assignment of dates of maximum medical improvement and impairment ratings.

Labor Code §408.1225(a-3) requires the division to develop guidelines for certification training programs to ensure a designated doctor's competency and continued competency in assessment including testing criteria. Division-required testing and training is not static and new developments may require updates. It is important that designated doctors attend training with the most current information to ensure designated doctors are competent and demonstrate continued competency in performing specific designated doctor duties. Therefore, the division proposes to designate a time and reduce the time allotted for a doctor to submit documentation certifying successful completion of division-required training and testing when applying for certification or recertification. The effect of this designation shortens the time between attending a division-required training and applying for a designated doctor certification or recertification so that the doctor attends training with the latest information. Security of the designated doctor certification examination has become increasingly important in recent years and the division is committed to protecting the integrity of its division required tests. The division proposes limiting the number of times a doctor can take the examination in a given time period to increase security and protect the test content.

The proposed amendments are necessary to promote transparency of the designated doctor assignment process, retain licensed medical doctors and doctors of osteopathy, clarify certain designated doctor qualification standards and update certification requirements. Additionally, the division proposes non-substantive amendments throughout 28 TAC Chapter 127 to: (i) correct grammatical errors; (ii) conform to current agency style; (iii) re-letter and re-number rule text; (iv) update statutory citations; and (v) non-substantively simplify and clarify sections. In conjunction with this proposal, the division is proposing revisions to DWC Form 032,

*Request for Designated Doctor Examination*, DWC Form 068, *Designated Doctor Examination Data Report*, and an internal form titled *Presiding Officer's Directive to Order a Designated Doctor Exam* for consistency with amendments made in this proposal. Additional information regarding form revisions will be made available on the division's website along with a copy of the proposed rules.

As part of the development process for these proposed rules, the division posted an informal working draft of amendments to 28 TAC Chapter 127 on its website on August 18, 2017. In response to comments, the division made substantial changes to 28 TAC §127.5 and re-posted those changes to its website on November 1, 2017. The division received, considered, and incorporated recommendations from the informal comments.

## **2. EXPLANATION.**

### **Amended 28 TAC §127.1.**

Title 28 TAC §127.1 outlines the process for requesting a designated doctor examination. To request a designated doctor examination the insurance carrier, injured employee, or injured employee's representative, if applicable, must provide the division with certain information necessary to process the request. The DWC Form-032 *Request for Designated Doctor Examination* is the form prescribed by the division to request a designated doctor examination. The DWC Form-032 serves a variety of functions including providing information for claim record creation, information for associating the injured employee with the appropriate insurance carrier, updating injured employee information to notify parties, and assigning examinations to qualified designated doctors. It is important that the injured employee, injured employee's representative, if applicable, or insurance carrier provide accurate information on the form to prevent

unnecessary delay in updating information or assigning a designated doctor. The division acknowledges that requestors of designated doctor examinations may not be aware of certain information at the time of the request and aims to simplify requesting a designated doctor examination by no longer requiring certain information which may not be known to requestors at the time of requesting a designated doctor examination.

Amended §127.1(b) deletes the phrase in existing paragraph (2), “explain any change of condition if the requestor indicates that the injured employee’s medical condition has changed since a previous designated doctor examination on the same claim;” because the phrase is no longer necessary. Additionally, the amendment is necessary to simplify DWC Form 032 because the form contains a field to provide good cause for requesting an examination within 60 days. A change in an injured employee’s medical condition is an example of good cause which can be provided in the DWC Form 032 field.

Amended §127.1(b) re-numbers the subsection paragraphs, specifically existing paragraphs (3) – (7) and (9) - (12) to paragraphs (2) – (6) and (7) – (10), respectively. The non-substantive amendment is necessary to account for deleted text.

Amended §127.1(b)(2) adds the phrase “body part or body parts” and deletes the phrase “part of the body.” The non-substantive amendment is necessary to conform to agency style.

Amended §127.1(b)(3) deletes the words “provide a” and “of” to conform to agency style. Amended §127.1(b)(3) adds the phrase “court, or all injuries” to clarify that the requestor list all injuries determined part of the compensable injury by the division or a court of law or injuries accepted as compensable by the insurance carrier.

Amended §127.1(b) deletes the phrase in existing paragraph (8), “state whether the injured employee has attended any other designated doctor examinations on this claim and, if so, provide the date of the most recent examination and the name of the examining designated doctor;” because the phrase is no longer necessary. The amendment is necessary because the requestor may not be aware of this information and the division already maintains this information.

Amended §127.1(b)(9)(G) adds the word “designated” before the word “doctor.” The non-substantive amendment is necessary for clarity.

Amended §127.1(e) adds the phrase “administrative law judge” and deletes the phrase “hearing officer” in this subsection. The amendment is necessary to implement House Bill 2111 of the 85th Legislative, Regular Session, which replaced statutory references of “hearing officer” with “administrative law judge.”

Amended §127.1(f) adds the rule citation “§127.5(b)” and deletes the referenced rule citation “§127.5(a).” The amendment is necessary to update the rule citation.

Amended §127.1(g) deletes the date, “September 1, 2012” and adds “December 6, 2018” to delay the effective date and allow system participants sufficient time to prepare and update their systems.

**Amended 28 TAC §127.5.**

Labor Code §408.0041(b) requires a designated doctor examination to be performed by the next available doctor on the division's list of certified designated doctors whose credentials are appropriate for the area of the body affected by the injury and the injured employee's diagnosis as determined by commissioner rule. As previously discussed, the division implemented an automated system to standardize designated doctor examination assignments and increase efficiency in the

designated doctor assignment process. The system assigns examinations to the next available qualified designated doctor on the list based upon the injured employee's county of residence and maintains a separate rotation of designated doctors, by county, who are willing to perform examinations in that county. The system assigns examinations nightly in order to comply with Labor Code §408.0041(b), which in part requires the division to assign a designated doctor examination no later than the 10th day after a request is approved.

Depending on the volume of examinations in a given day, the next available qualified designated doctor can be assigned up to five examinations in a particular county. The assignment of up to five examinations reflects economies of scale that may be achieved with multiple assignments in a particular location. However, the number of examination requests varies each day and the division must assign only one examination to a designated doctor if that is the only examination for which a particular designated doctor is qualified and available. Designated doctors willing to conduct exams in rural counties may often have only one examination assigned at a time and the assignment of multiple examinations, when available, may offset the expenses associated with travel to rural counties for a single examination. The assignment of up to five examinations to the next available doctor for which the designated doctor is qualified in a particular county is beneficial to designated doctors because it decreases their expenses and creates scheduling efficiency for the designated doctor when travel is involved. Without the benefit of receiving additional designated doctor examinations, designated doctors may choose to decline individual assignments because it is not cost-effective when travel is involved.

Once the next available doctor is assigned an examination, the doctor moves to the bottom of the list in the county. Sometimes, an examination requires a doctor with qualifications other than the

next doctor on the list. When this occurs, the automated system searches the list to find the next qualified doctor for the examination, assigning only that examination to the designated doctor, and then moving the doctor to the bottom of the list in the county. This is due in part to the division's mandate to assign the next available doctor qualified to perform a designated doctor examination. Over time however, the division noticed an unintended consequence resulting from this assignment process. The assignment process distributed assignments for musculoskeletal conditions to licensed medical doctors and doctors of osteopathy in an unbalanced manner because when an examination required the qualifications of these practitioners and they were not the next doctor on the list, the licensed medical doctor or doctor of osteopathy moved to the bottom of the list after receiving the one examination and did not benefit from an assignment of up to five examinations. This unbalanced distribution is significant because 70% of all designated doctor examination requests involve only musculoskeletal conditions and licensed medical doctors or doctors of osteopathy rarely have an opportunity to receive multiple examinations of this type in the same county.

The proposed distribution methodology is consistent with Labor Code §408.0041(b) because it assigns requested medical examinations based on a designated doctor's credentials appropriate for the area of body affected and the injured employee's diagnosis determined by the qualifications standards in amended 28 TAC §127.130. The transparency of the distribution methodology will help prevent concerns about how a designated doctor is selected and allow the division to consider system participant's formal comments on the process and modify accordingly, to ensure a more equitable distribution of designated doctor appointments.

Amended §127.5(a) adds an applicability subsection. The amendment is necessary to clarify that the designated doctor assignment process applies to designated doctor examination requests made on or after the effective date of the section.

Amended §127.5(b) re-letters the section, specifically existing subsections (a), (b), (c), (d), (e), and (f) to subsections (b), (c), (d), (h), (i), and (l), respectively. The non-substantive amendment is necessary to account for added text.

Amended §127.5(c) adds the letter “(b)(4)” after the word “subsection” and deletes the letter “(a)(4)” to correct the subsection.

Amended §127.5(d) adds the letter “(h)” after the word “subsection” and deletes the letter “(d)” to correct the subsection.

Amended §127.5(e) provides that the division will maintain two independent lists in each county of the state to select the next available doctor. Amended §127.5(e) provides that one list will consist of designated doctors qualified to perform examinations under amended §127.130(b)(1) - (4) of this title and the other list will consist of designated doctors qualified to perform examinations under §127.130(b)(5)-(9) of this title. Amended §127.5(e) further provides that a qualified designated doctor can be placed on both lists. The amendment is necessary to show that designated doctors are placed on a list based on credentials appropriate for the area of body affected and the injured employee's diagnosis.

Amended §127.5(e)(1) provides that a designated doctor will be added to the appropriate list(s) for the county of each address the doctor has filed with the division. The amendment is necessary to explain when designated doctors are added to a list in a county.

Amended §127.5(e)(2) provides that a designated doctor will be placed at the bottom of the appropriate list(s) when a designated doctor adds an address to a county the doctor is not currently listed in. The amendment is necessary to explain the order in which a designated doctor will appear on a list in a county.

Amended §127.5(e)(3) provides that a designated doctor will be removed from a list when the designated doctor no longer has an address listed in a county. The amendment is necessary to explain when designated doctors are removed from a list in a county.

Amended §127.5(f) adds an introductory phrase "Except as provided in subsection (h) of this section, the division will assign designated doctor examinations as follows:" to explain how designated doctor examinations will be assigned. The amendment is necessary to establish that subsequent designated doctor examinations do not apply to the assignment methodology outlined in this section.

Amended §127.5(f)(1) provides that examination requests for a county will be sorted and distributed to the appropriate list each working day. The amendment is necessary to explain that examination requests received each twenty-four hour period are sorted based on the qualification standards necessary to perform the examination.

Amended §127.5(f)(2) that the division may assign up to five examinations to the next available doctor at the top of the appropriate list depending on the volume of requested examinations. The amendment is necessary to clarify that on any given day in a particular county a designated doctor has the opportunity to receive up to five examinations on either list. However, the number of examination requests varies each day and the division must assign only one examination

to a designated doctor if that is the only examination for which a particular designated doctor is qualified and available.

Amended §127.5(f)(3) provides that after a designated doctor receives an assignment from one list, the designated doctor will then move to the bottom of that list. The amendment is necessary to explain how designated doctors rotate in the list once they receive an assignment. Amended §127.5(f)(3) also clarifies that one list rotation does not affect the other list rotation.

Amended §127.5(g) provides that the division may exempt a designated doctor from the applicable qualification standard under section §127.130(d) and assign a designated doctor as necessary if there is no qualified and available designated doctor in the county of the injured employee. The amendment is necessary to ensure the division has administrative flexibility to select an appropriate designated doctor in uncommon circumstances, such as when a qualified doctor may not be qualified on the date of the examination because of various external factors, including pending disciplinary action by the doctor's licensing board.

Amended §127.5(h) adds the word "reassign" and deletes the word "use" to conform to agency style.

Amended §127.5(i) deletes the phrase "there exists" and adds the word "exists" after the phrase "a scheduling conflict" to conform to agency style. Amended §127.5(i) adds the sentences "An examination cannot be rescheduled without the mutual agreement of both the designated doctor and the injured employee. The designated doctor must maintain and document:" the amendment is necessary to remind system participants that an agreement to reschedule is mandatory and ensure that both parties to a designated doctor examination agree to reschedule if a scheduling conflict arises. The amendment is also necessary to help monitor rescheduled examinations agreed upon by

the injured employee and the designated doctor. The division has received complaints regarding designated doctors not contacting injured employees to obtain an agreement prior to rescheduling examinations as required by amended §127.5(i) of this title. Proper communication and mutual agreement on the date and time of the exam are critical, since the consequences of failure to attend the examination by the injured employee may include the suspension of temporary income benefits by the insurance carrier under §127.25(a) of this title.

Amended §127.5(i)(1) adds the phrase “the date and time of the designated doctor examination listed on the division’s order;” the amendment is necessary to ensure that 21 days has not elapsed since the originally scheduled examination.

Amended §127.5(i)(2) adds the phrase “the date and time of the agreement to reschedule with the injured employee;” the amendment is necessary to verify with the injured employee that an agreement was made.

Amended §127.5(i)(3) adds the phrase “how contact was made to reschedule, indicate the telephone number, facsimile number, or email address used to make contact;” the amendment is necessary to ensure the method and contact information is correct. An injured employee may change their phone number or email address and it is important that the division is able to verify the information if a scheduling issue or complaint arises.

Amended §127.5(i)(4) adds the phrase “the reason for the scheduling conflict;” the amendment is necessary to identify repeated patterns of rescheduling, whether by the designated doctor or the injured employee.

Amended §127.5(i)(5) adds the phrase “the date and time of the rescheduled designated doctor examination.” The amendment is necessary to verify that the rescheduled examination is set to occur within the 21 days of the originally scheduled examination.

Amended §127.5(j) add the sentence “Failure to document and maintain the information in subsection (i) of this section, creates a rebuttable presumption that the examination was rescheduled without mutual agreement of both the designated doctor and injured employee.” The amendment is necessary to clarify the responsibility of the designated doctor to maintain information about rescheduled examinations and emphasize the importance of a designated doctor obtaining a mutual agreement from the injured employee prior to rescheduling an examination.

Amended §127.5(k) adds the word “The” and deletes the phrase “If both the designated doctor and the injured employee agree to reschedule the examination, the” because the requirement to agree to reschedule is found in subsection (i) of this section.

Amended §127.5(l) deletes the date, “September 1, 2012” and adds “December 6, 2018” to delay the effective date and allow system participants sufficient time to prepare and update their systems.

**Amended 28 TAC §127.10.**

Title 28 TAC §127.10 addresses general procedures for designated doctor examinations, including requirements regarding the receipt of medical records and analyses, reports, and record retention.

Amended §127.10(d) deletes the word “possible” and adds the word “reasonable” before the phrase “outcome for the extent of the injury.” The amendment is necessary to clarify that the designated doctor need only to opine on outcomes reasonably argued to have occurred from the

injury when maximum medical improvement and/or impairment rating cases simultaneously include an extent of injury determination. The requirement to take into account each “possible” outcome when extent of injury is requested is impractical depending on the number of conditions in dispute. Taking into account each “reasonable” outcome will ensure that there are impairment ratings that an administrative law judge can rely on when settling a dispute.

Amended §127.10(k) deletes the date, “September 1, 2012” and adds “December 6, 2018” to delay the effective date and allow system participants sufficient time to prepare and update their systems.

**Amended 28 TAC §127.100.**

Labor Code §408.1225(a-2) requires the division to evaluate the qualification of designated doctors for certification using eligibility requirements including demonstrated ability to perform specific designated doctor duties. The statute also requires standard training and testing to be completed in accordance with division policies and guidelines. Labor Code §408.1225(a-3) requires the division to develop guidelines for certification training programs to ensure a designated doctor’s competency and continued competency in assessment including testing criteria. Division-required testing and training often require updates and designated doctors need to be equipped with the latest information. To ensure continued competency among designated doctors practicing in the workers’ compensation system, the division proposes to designate a time and reduce the time allotted for a doctor to submit documentation certifying successful completion of division-required training and testing when applying for certification or recertification. It is important that a doctor applying for designated doctor certification completes a division-required training course with the latest updates.

Test security is an important factor in ensuring continued competency among designated doctors practicing in the system. The division proposes testing limitations to prevent test memorization and anyone from gaining an unfair advantage in testing attempts. The division is determined to confront attempts to undermine testing opportunities including unauthorized disclosure of test questions through memorization. The new testing limitations allow for a cooling period between test attempts to help prevent test memorization and ensure continued competency.

Labor Code §408.1225(b) requires the division to ensure the quality of designated doctor decisions and reviews through active monitoring. Designated doctors who have previously practiced in the workers' compensation system may apply for certification when the period for applying for recertification has lapsed. Currently, 28 TAC §127.100 does not address specifically the division's authority to consider as part of the certification process the quality of a designated doctor's decisions if the doctor has previously served as designated doctor. The division adds factors to consider when evaluating whether a designated doctor should be certified similar to those used when evaluating a designated doctor for recertification. The factors help to ensure the division evaluates a previously certified designated doctor's demonstrated ability to perform specific designated doctor duties and to ensure the division continues active monitoring of a designated doctors.

Amended §127.100(a) adds an applicability subsection. The amendment is necessary to clarify that the section applies to designated doctor certification applications received on or after the effective date of this section.

Amended §127.100(b) re-letters the section, specifically existing subsections (a), (b), (c), (d), (e), (f), (g), and (h) to subsections (b), (c), (d), (f), (g), (h), (i), and (j), respectively. The non-substantive amendment is necessary to account for added text.

Amended §127.100(b) deletes two references to the phrase “who is not a designated doctor” before the words “must” to conform to agency style.

Amended §127.100(b)(1) adds the letter “(c)” and deletes the letter “(b)” after the word “subsection” to correct the subsection.

Amended §127.100(b)(2) adds the phrase “within the past 12 months” before the word “successfully.” The amendment is necessary to designate a time for submitting documentation certifying successful completion of all division-required training and testing. Twelve months is sufficient time to submit documentation of successful completion division-required and ensures the designated doctors are equipped with the latest information.

Amended §127.100(c) adds the letter “A” and deletes the phrase “For the purposes of subsection (a) of this section, a” to conform to agency style.

Amended §127.100(d) adds the sentences “If a doctor passes a division-required test, the doctor may not retest within a twelve month period. If a doctor fails a division-required test, the doctor may not retest more than three times within a six month period.” the amendment is necessary to emphasize the importance of test security and protecting the content of division-required tests.

Amended §127.100(d)(1) adds the phrase “After the first or second attempt, the doctor must wait 14 days before retaking the test; or” the amendment is necessary to identify the number and length of time between each attempt a doctor applying for designated doctor certification or recertification can sit for a division-required test.

Amended §127.100(d)(2) adds the phrase “after the third attempt, the doctor must wait six months before retaking the test.” The amendment is necessary to identify the number and length of

time between each attempt that a doctor applying for designated doctor certification or recertification can sit for a division-required test.

Amended §127.100(e) deletes the word “only” after the word “Approvals” to conform to agency style.

Amended §127.100(f) adds the word “may” and deletes the word “shall” after the word “Doctors” to conform to agency style.

Amended §127.100(f)(1) adds the phrase “and documentation” after the word “information.” The non-substantive amendment is necessary to clarify that a doctor is submitting documents, i.e. an application and certificates. Amended §127.100(f)(1) adds the letter “(b)” and deletes the letter “(a)” after the word “subsection” to correct the subsection. Amended §127.100(f)(1) deletes the phrase “, including having completed all division-required training and passed all division-required examinations” because it is no longer necessary with the addition of the phrase “and documentation.”

Amended §127.100(f)(2) adds the letter “(c)” and deletes the letter “(b)” after the word “subsection” to correct the subsection.

Amended §127.100(f)(4) adds the phrases “events, or occurrences,” “the commissioner determines to,” and “including but not limited to:” the amendments are necessary to clarify the commissioner’s authority to take action as necessary to restrict participation of a designated doctor as permitted under Labor Code §408.1225(b)(1).

Amended §127.100(f)(4)(A) adds the phrase “the quality of the doctor’s past reports as a certified designated doctor, if any;” Amended §127.100(f)(4)(B) adds the phrase “a history of complaints as a certified designated doctor, if any;” Amended §127.100(f)(4)(C) adds the phrase

“excess requests for deferral from the designated doctor list as a certified designated doctor, if any;” Amended §127.100(f)(4)(D) adds the phrase “a pattern of overturned reports by the division and/or a court as a certified doctor, if any;” Amended §127.100(f)(4)(E) adds the phrase “a demonstrated lack of ability to apply or properly consider the American Medical Association Guides to Evaluation or Permanent Impairment adopted by the division for the assignment of impairment ratings and all return-to-work and treatment guidelines adopted by the division as a certified designated doctor, if any;” Amended §127.100(f)(4)(F) adds the phrase “a demonstrated lack of ability to consistently perform designated doctor examinations in a timely manner as a certified designated doctor, if any;” Amended §127.100(f)(4)(G) adds the phrase “a demonstrated failure to identify disqualifying associations as a certified designated doctor, if any;” Amended §127.100(f)(4)(H) adds the phrase “a demonstrated lack of ability to ensure the confidentiality of the injured employee medical records and claim information provided to or generated by a certified designated doctor, if any;” the amendments are useful factors to consider during the certification process regardless of whether a doctor is currently serving as a designated doctor.

Amended §127.100(f)(4)(I) adds the phrase “applying for certification less than a year from denial of a previous designated doctor certification or recertification application, if any; or” the amendment is necessary to allow a designated doctor time to address a recommendation or establish a pattern of new conduct based on a denial of a previous designated doctor certification or recertification application.

Amended §127.100(f)(4)(J) adds the word “any” and deletes the phrase “such as” to conform to agency style.

Amended §127.100(h) adds the letter “(g)” and deletes the letter “(e)” after the word “subsection” to correct the subsection.

Amended §127.100(j) deletes the date, “September 1, 2012” and adds “December 6, 2018” to delay the effective date and allow system participants sufficient time to prepare and update their systems.

**Amended 28 TAC §127.110.**

Title 28 TAC §127.110 addresses designated doctor recertification. This section outlines requirements necessary for a designated doctor to renew their certification.

Amended §127.110(a) adds an applicability subsection. The amendment is necessary to clarify that the section applies to designated doctor recertification applications received on or after the effective date of this section. Amended §127.110(a) also deletes the phrase “If a designated doctor’s certification expires before January 1, 2013:” because the transitional language is no longer necessary.

Amended §127.110(a)(1) – (a)(4) deletes the transitional language because it applies to applications received before January 1, 2013.

Amended §127.110(b) deletes the phrase “on or after January 1, 2013” after the word “expires” and the phrase “after this date” because the language references obsolete transitional language.

Amended §127.110(b)(1) adds the number “12” and deletes the number “18” after the word “past.” This amendment is necessary for consistency with designated doctor certification rule in amended 28 TAC §127.100(b)(2).

Amended §127.110(b)(3) adds the rule citation “§127.100(c)” and deletes the rule citation “§127.100(b)” to correct the referenced rule citation. Amended §127.110(b)(3) adds the title of the referenced rule citation, “relating to Designated Doctor Certification” to conform to agency style. Amended §127.110(b)(3) adds the sentence “For purposes of recertification, division-required testing limitations as described in §127.100(d) of this title apply.” The amendment is necessary for consistency with testing limitations outlined in amended §127.100(d).

Amended §127.110(e)(1) adds the phrase “and documentation” after the word “information.” The non-substantive amendment is necessary to clarify that a doctor is submitting documents, i.e. an application and certificates. Amended §127.110(e)(1) deletes the phrase “, including verification of having timely completed all division-required training and passed all division-required examinations” because it is no longer necessary with the addition of the phrase “and documentation.”

Amended §127.110(e)(2) adds the rule citation “§127.100(c)” and deletes the rule citation “§127.100(b)” to correct the referenced rule citation.

Amended §127.110(e)(5) adds the phrase “events, or occurrences” and the phrase “the commissioner determines to” to clarify the commissioner’s authority to take action as necessary to restrict participation of a designated doctor as permitted under Labor Code §408.1225(b)(1).

Amended §127.110(e)(5)(I) deletes the word “other” for consistency with designated doctor certification rule in amended 28 TAC §127.100(f)(4)(J).

Amended §127.110(h) deletes the date, “September 1, 2012” and adds “December 6, 2018” to delay the effective date and allow system participants sufficient time to prepare and update their systems.

**Amended 28 TAC §127.130.**

In 2011, the Texas Sunset Advisory Commission, "(Sunset)," recommended that the division develop qualification requirements for designated doctors in part to ensure a level of expertise and consistency was present when resolving differing medical opinions in the dispute resolution process. Sunset stated that "the combination of eligibility, training, and testing standards used to determine an applicant's qualifications was insufficient to adequately ensure the applicant had the specific skill set necessary to serve as a designated doctor assessing injuries common to the workers' compensation system." Sunset further stated that, "simply because doctors are well qualified to practice in their given professions does not mean that they are capable, without demonstrating additional skills, to perform the specific functions required of a designated doctor, or have the appropriate credentials to assess a specific issue or medical condition in question." House Bill 2605 of the 82nd Legislature Regular Session, relating to the continuation and functions of the division of workers' compensation of the Texas Department of Insurance, amended Labor Code §408.0041(b) to require that a medical examination be performed by the next available doctor on the division's list of certified designated doctors whose credentials are appropriate for "the area of the body affected by the injury and the injured employee's diagnosis" and deleted the requirement that a designated doctor's credentials be appropriate for the "issue in question" and the injured employee's "medical condition." In 2013, the division implemented House Bill 2605 and in light of Sunset's recommendation, enhanced its qualification standards regarding injuries and diagnoses relating to a different area of the body (such as hand and upper extremity or feet, including the toes and heel) and matching that area of the body to particular doctor license types determined by the division to be qualified. Sunset stated that, "this recommendation will give the division the flexibility it needs to determine how to best combine qualification requirements to ultimately ensure that designated doctors have the ability to perform the

examinations required by state law.” The division was not and is not defining a doctor’s scope of practice. Rather the division is developing qualification standards for designated doctor examinations, as mandated through Labor Code §408.0041(b) and determined by commissioner rule. Additionally, the division recognized that the broad qualification categories could in some circumstances permit a designated doctor to evaluate a particular injury or diagnosis that would require the doctor to examine a complex diagnosis that may require a higher level of expertise in a particular medical specialty. Therefore, the division developed board certification categories to ensure that the most optimally qualified doctor is assigned while maintaining adequate flexibility to assign a designated doctor in counties where a specialist may not be available as described under §127.130(d) of this title.

Amended §127.130(a) adds an applicability section to clarify that the amended qualification standards apply to designated doctor assignments made on or after the effective date of this section. This is necessary to prevent confusion among current qualification standards applicable to designated doctor assignments made prior to the effective date of this rule. Amended §127.130(a) also deletes the transitional language because it is no longer necessary to describe qualification standards prior to January 1, 2013.

Amended §127.130(b) adds the letter “A” and deletes the phrase “For examinations performed on or after January 1, 2013, a” because the phrase is no longer necessary and a new sentence begins. Amended §127.130(b) adds the title of the referenced rule citation, “relating to Disqualifying Associations” to conform to current agency style.

Amended §127.130(b)(3) adds the phrase “musculoskeletal structures of the” before the word “torso” to delineate injuries that a licensed doctor of chiropractic, a licensed medical doctor, or doctor

of osteopathy are qualified to examine. The amendment is also necessary to clarify that some injuries related to the torso may involve non-musculoskeletal structures so as to require evaluation by a licensed medical doctor or doctor of osteopathy.

Amended §127.130(b)(5) adds the word “jaw” and deletes the word “jaws” to correct a grammatical error. Amended §127.130(b)(5) adds the phrase “including a temporomandibular joint” to clarify that this body part is included in the teeth and jaw body area.

Amended §127.130(b)(7) adds the sentence “To examine injuries and diagnoses relating to mental and behavioral disorders, a designated doctor must be a licensed medical doctor or doctor of osteopathy.” The non-substantive amendment is necessary to reassign “mental and behavioral disorders” to a new paragraph for division data collection purposes.

Amended §127.130(b)(8) re-numbers the paragraphs, specifically existing paragraphs (7), (8), to paragraphs (8), (9), respectively. The non-substantive amendment is necessary to account for added text. Amended §127.130(b)(8) adds the phrases “cuts to skin involving underlying structures” and “non-musculoskeletal structures of the torso;” these amendments are necessary to clarify that certain areas of the torso and any cuts to the skin involving underlying structures, i.e., nerves, blood vessels, or tendons, are injuries that a licensed medical doctor or doctor of osteopathy are qualified to examine. Licensed medical doctors and doctors of osteopathy possess the educational experience and training necessary to evaluate the impact of these injuries. The division notes that other injuries involving underlying structures of the skin such as, rotator cuff tears, anterior cruciate ligament (ACL) tears, carpal tunnel syndrome, or injuries involving compression or inflammation of nerves, tendons or ligaments, are not cuts and are appropriately suited for evaluation by licensed medical doctors, doctors of osteopathy, or doctors of chiropractic. Amended §127.130(b)(8) adds the

words “hernia;” “respiratory;” “endocrine;” “hematopoietic;” and “urologic” to clarify the body areas that a licensed medical doctor or doctor of osteopathy are qualified to examine. Amended §127.130(b)(8) deletes the phrase “mental and behavioral disorders;” and the words “tendon lacerations; and dislocations.” The amendments are necessary to reassign mental and behavioral disorders into an independent paragraph for division data collection purposes and relocate dislocations to a board certification category because dislocations are complex injuries less frequently seen in the workers’ compensation system and board certified medical doctors and doctors of osteopathy possess the educational experience and training necessary to evaluate the severity of these injuries. The amendment is also necessary because tendon lacerations are examples of cuts to an underlying structure of the skin and no longer necessary to describe separately.

Amended §127.130(b)(9) adds the number “(8)” and deletes the number “(7)” after the word “paragraphs” to correct the referenced paragraphs in the subsection.

Amended §127.130(b)(9)(A) adds the phrase “including concussion and post-concussion syndrome,” to clarify and recognize the most commonly diagnosed traumatic brain injuries. Amended §127.130(b)(9)(A) also deletes the word “or” and adds the word “and” to correct the board specialty name.

Amended §127.130(b)(9)(B) adds the words “and diagnoses,” “fracture” and the phrase “or cauda equina syndrome” to clarify conditions that are similar to but not injuries to the spinal cord. Amended §127.130(b)(9)(B) deletes the words “including,” and “fractures” and adds the letter “a” to reference a single spinal fracture. The amendment is necessary to clarify that a single spinal fracture is appropriate under this category.

Amended §127.130(b)(9)(C) adds the phrase “deep partial or full thickness burns, also known as 2nd” before the word “3rd” and deletes the phrase “over 9 percent or greater of the body.” The amendment is necessary to conform to current medical terminology. Additionally, the amendment is necessary to clarify that 2nd, 3rd, or 4th degree burns covering any portion of the body surface area are complex and not limited to over 9 percent or greater of the body.

Amended §127.130(b)(9)(D) adds the board specialty “plastic surgery” to the list of appropriate certifications from American Board of Medical Specialties or American Osteopathic Association Bureau of Osteopathic Specialists qualified to examine complex regional pain syndrome (CRPS). The amendment is necessary because plastic surgery doctors possess the educational experience and training necessary to evaluate the severity of these injuries and are trained in their residency to evaluate this diagnosis. Designated doctors' board certified in plastic surgery are qualified to perform designated doctor examinations on several complex diagnoses infrequently seen in the workers' compensation system. These diagnoses include severe burns, and multiple fractures under amended §127.130(b)(9)(C) and (E).

Amended §127.130(b)(9)(E) adds the words “joint dislocation,” and the phrase “pelvis or hip fracture.” Amended §127.130(b)(9)(E) deletes the words “bone,” “excluding,” and “spinal fractures.” The amendments are necessary to clarify injuries that are more complex and less frequently seen in the workers' compensation system. Additionally, board certified medical doctors and doctors of osteopathy possess the educational experience and training necessary to evaluate the severity of these injuries.

Amended §127.130(b)(9)(G) adds the word “burns” and deletes the phrase “exposure limited to skin exposure” to conform to current medical terminology.

Amended §127.130(e) adds the word “qualification” after the word “appropriate” and deletes the word “selection” to correct the grammatical error. Amended §127.130(e) deletes the letter “(a)” and the words “or,” “either,” and “as applicable,” to correct the subsection and grammar.

Amended §127.130(g)(1) adds the rule citation “§127.110(b)” and deletes the rule citations “§127.110(a) or (b)” to correct the referenced rule citation.

Amended §127.130(g)(2) deletes the letter “(a)” and the words “or,” “either,” and “as applicable,” to correct the subsection and grammar.

Amended §127.130(i) deletes the date, “September 1, 2012” and adds “December 6, 2018” to delay the effective date and allow system participants sufficient time to prepare and update their systems.

**Amended 28 TAC §127.140.**

Amended §127.140(d) adds the rule citation “§127.5(b)” and deletes the rule citation “§127.5(a)” to correct the referenced rule citation.

Amended §127.140(g) deletes the date, “September 1, 2012” and adds “December 6, 2018” to delay the effective date and allow system participants sufficient time to prepare and update their systems.

**Amended 28 TAC §127.220.**

Amended §127.220(c) deletes the phrase in existing paragraph (2) “list all injuries included on the examination request as:” the phrase in existing subparagraph (2)(A) “determined to be compensable by the division;” the phrase in existing subparagraph (2)(B) “accepted as compensable by the insurance carrier; or” and the phrase in existing subparagraph (2)(C) “for informational

purposes only, the diagnosis code for each injury;" because the information is no longer necessary for the designated doctor examination data report.

Amended §127.220(c)(2) re-numbers the paragraphs in the subsection, specifically existing paragraphs (3), (4), (5), (6), and (7) to paragraphs (2), (3), (4), (5), and (6), respectively. The non-substantive amendment is necessary to account for deleted text.

Amended §127.220(d) deletes the date, "September 1, 2012" and adds "December 6, 2018" to delay the effective date and allow system participants sufficient time to prepare and update their systems.

**3. FISCAL NOTE.** Joseph McElrath, Deputy Commissioner of Business Process has determined that for each year of the first five years the amended sections are in effect, there will be no fiscal impact to state or local governments as a result of the enforcing or administering the proposal. Mr. McElrath also determined that there will be no measurable effect on local employment or the local economy as a result of the amended sections.

**4. PUBLIC BENEFIT/COST NOTE.** Mr. McElrath has determined that for each year of the first five years amended 28 TAC §§127.1, 127.5, 127.10, 127.100, 127.110, 127.130, 127.140, and 127.220 are in effect, there will be several anticipated public benefits as a result of the enforcement and administration of the proposal. The public benefits anticipated as a result of the proposal include: (i) streamline the amount of information needed to request a designated doctor examination (ii) transparency in the designated doctor assignment process; (iii) increased monitoring over rescheduled designated doctor appointments; (iv) reduced referrals and re-designations to specialists due to clarification of certain qualification requirements; (v) increased efficiency due to a

limit on the number of multiple certifications required; (vi) increased test security and ensured competency due to new testing limitations.

Injured employees will benefit from the proposal because amendments to 28 TAC §127.1 simplify the process of requesting a designated doctor exam through DWC Form 032. The amendments are expected to improve the initial selection process and simplify the examination request form. Injured employees will benefit from the increased awareness of the new designated doctor assignment process because injured employees and their representatives will have increased knowledge of the assignment process. Injured employees will benefit from the requirement that designated doctors maintain and document information regarding an agreement to reschedule a designated doctor examination because it will help reduce instances where a designated doctor reschedules an examination without the injured employee's consent. Injured employees will benefit from the amended qualifications because the amendments will likely result in fewer referrals and re-designations which can delay benefits received while a case is in dispute resolution.

Designated doctors will benefit from the proposal because the amended qualifications will further clarify diagnoses and reduce the risk of re-designations and referrals. For example, distinguishing between musculoskeletal and non-musculoskeletal structures of the torso will likely reduce the need to assign a different designated doctor for injuries involving the torso and minimize disputes that may arise from those injuries. Designated doctors will benefit from the increased awareness of the new designated doctor assignment process because the process describes how designated doctors are added to and removed from the designated doctor list for a county as well as how the division assigns examination requests each day. Additionally, the designated doctor assignment process will provide a better opportunity for licensed medical doctors and doctors of

osteopathy to perform all examinations for which they are qualified under 28 TAC §127.130(b). This benefit is expected to encourage licensed medical doctors and doctors of osteopathy to maintain their designated doctor certifications. Designated doctors will also benefit from the limit of multiple certifications required when issues involving maximum medical improvement, impairment rating and extent of injury are requested because it minimizes the effort associated with determining an unlimited number of multiple certifications. Designated doctors will benefit from the increased security of the new testing limitations because the limitations will protect the integrity of the test and prevent doctors from gaining an unfair advantage due to unlimited opportunities of testing.

Insurance carriers will benefit from the proposal because amendments to 28 TAC §127.1 simplify the process of requesting a designated doctor exam through DWC Form 032. The amendments are expected to improve the initial selection process and simplify the designated doctor examination request form. Insurance carriers will benefit from the amended qualifications because the amendments will likely result in fewer referrals and re-designations for certain injuries increasing the efficiency of dispute resolution. Insurance carriers will benefit from the increased awareness of the new designated doctor assignment process because insurance carriers will have increased knowledge of the assignment process.

Additionally, Mr. McElrath has determined that for each year of the first five years amended 28 TAC §§127.1, 127.5, 127.10, 127.100, 127.110, 127.130, 127.140, and 127.220 are in effect, no probable economic cost has been identified to persons required to comply with the rule.

#### **5. EXAMINATION OF COSTS UNDER GOVERNMENT CODE §2001.0045.**

Government Code §2001.0045(b) provides that a state agency may not adopt a proposed rule for which a fiscal note states that the rule imposes a cost on regulated persons, including another

state agency, a special district, or local government, unless on or before the effective date of the proposed rule the state agency repeals a rule that imposes a total cost on regulated persons that is equal to or greater than the total cost imposed on regulated persons by the proposed rule or amends a rule to decrease the total cost imposed on regulated persons by an amount that is equal to or greater than the cost imposed on the persons by the proposed rule.

The division does not impose a cost on regulated persons in the proposed amendments to Chapter 127, therefore an examination of cost under Government Code §2001.0045(b) is not required. Moreover, the proposed amendments do result in a cost savings to system participants because two required DWC forms are reduced by one page. In fiscal year 2017, the division received approximately 41,000 DWC 032 forms and 12,500 DWC 068 forms. If the majority of DWC 032 forms were mailed to the division and other parties, the amendments could result in a cost savings of roughly \$12,300. However, the division is not able to estimate the exact amount of cost savings because the DWC forms are shared and submitted in different manners, i.e., fax, or mail. On average, printing costs are \$.10 per page, by reducing DWC Form-032 and DWC Form-068 by one page, the division anticipates a cost savings because it reduces the number of pages required to be printed for a form, which ultimately is required to be provided to all parties involved in the claim.

#### **6. ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS.**

Government Code §2006.002(c) provides that if a proposed rule may have an adverse economic impact on small businesses and rural communities, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule on small businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. Government Code §2006.001(1)(a) defines "rural

community" as a municipality with a population of less than 25,000. Government Code §2006.001(2) defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit, is independently owned and operated, and has fewer than 100 employees or less than \$6 million in annual gross receipts.

The division determined that the proposed amendments may have an adverse economic impact on certain small or micro businesses. The vast majority of designated doctors participating in the Texas workers' compensation system will have practices that constitute small or micro businesses that are required to comply with the proposed amendments. As of September 1, 2017, there were approximately 344 designated doctors licensed as doctors of chiropractic, 157 designated doctors licensed as doctors of medicine, and 20 designated doctors licensed as doctors of osteopathy. Out of the 177 designated doctors licensed as doctors of medicine and doctors of osteopathy, 142 are board certified in a specialty by the American Board of Medical Specialties (ABMS) or American Osteopathic Association Bureau of Osteopathic Specialists (AOABOS) and qualified to perform examinations under amended §127.130(b)(9).

Amended 28 TAC §127.5 provides a designated doctor assignment methodology which may result in a decrease in revenue for doctors of chiropractic, licensed medical doctors and doctors of osteopathy who are not board certified in a specialty by the ABMS or AOABOS. However, the division is unable to estimate the impact to these practitioners because of various factors that affect a doctor's revenue including but not limited to the number of counties the doctor is listed in, the doctor's willingness to travel for examinations, and general qualifications.

Amended 28 TAC §127.130(b)(9)(E) provides that certain board certified designated doctors are qualified to examine pelvis and hip fractures. This proposed amendment may result in a

decrease in revenue for doctors of chiropractic, licensed medical doctors and doctors of osteopathy who are not board certified in a specialty by the ABMS or AOABOS. Amended 28 TAC §127.130(b)(9)(E) also provides that certain board certified designated doctors are qualified to examine joint dislocation injuries. This proposed amendment may result in a decrease in revenue for licensed medical doctors and doctors of osteopathy who are not board certified in a specialty by the ABMS or AOABOS. However, the division estimates that the decrease in revenue resulting from these amendments will be minimal because designated doctor examinations requiring practitioners qualified to examine these complex diagnoses are infrequent in the workers' compensation system.

At least 10 insurance carriers are considered small or micro businesses required to comply with the proposed amendments. However, the division determined that the proposed amendments will not have an adverse economic impact on insurance carriers. The division also determined that the proposed amendments will not have an adverse economic impact on rural communities.

Under Government Code §2006.002(c), before adopting a rule that may have an adverse economic effect on small or micro businesses, an agency must prepare a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the proposed rule. In preparing this proposal, the division determined that there is no feasible alternative to accomplish the objectives of the proposal and minimize any adverse economic impact on certain designated doctors that qualify as small or micro businesses under Government Code §2006.001(1) and (2). Labor Code §408.0041(b) requires a medical examination requested under subsection (a) to be performed by the next available doctor on the division's list of certified designated doctors whose credentials are appropriate for the area of the body affected by the injury and the injured employee's diagnosis as determined by commissioner rule. Exempting designated doctors whose practices

overwhelmingly qualify as small or micro businesses from the proposed qualification standards or the designated doctor assignment process would frustrate the purpose of the statutory mandate. Similarly, not adopting the proposed qualification standards or the designated doctor assignment process would be inconsistent with the legislative intent that the workers' compensation system minimize the likelihood of disputes and resolve them promptly and fairly when identified because assigning the appropriate qualified designated doctor is directly aligned with that intent. Lastly, the division proposed several clarification amendments to the qualification standards and simplified compliance by eliminating certain information necessary to request a designated doctor examination. Although the amendments may present a potential adverse economic impact to small businesses, the amendments may also present a positive economic impact. The division acknowledges that individual doctors may experience costs relevant to their small businesses, but those costs are dependent on individual factors and cannot be quantified.

## **7. GOVERNMENT GROWTH IMPACT STATEMENT.**

Government Code §2001.0221(a) & (b) requires a state agency to prepare a government growth impact statement that reasonably describes whether, during the first five years, the proposed rule creates or eliminates a government program; creates or eliminates employee positions; increases or decreases future legislative appropriations to the agency; increases or decreases fees paid to the agency; creates a new regulation; expands, limits or repeals an existing regulation; increases or decreases the number of individuals subject to the rule's applicability; and positively or negatively affects the state's economy.

Mr. McElrath has determined that for each year of the first five years the proposed amendments are in effect, the proposed amendments will not create or eliminate a government

program; create or eliminate employee positions; increase or decrease future legislative appropriations to the agency; increase or decrease fees paid to the agency; increase or decrease the number of individuals subject to the rule's applicability; nor positively or negatively affect the state's economy.

Mr. McElrath has determined that for each year of the first five years the proposed amendments are in effect, a new regulation will be created and certain existing regulations will expand or limit designated doctor requirements. The proposed amendments will create and expand requirements under 28 TAC §127.5. The designated doctor assignment process creates a new regulation because it describes a procedure of the agency that will determine how designated doctors are assigned examinations. The amendment will increase the transparency of the designated doctor assignment process and help retain licensed medical doctors and doctors of osteopathy. Additionally, designated doctors will be required to maintain and document specific information when an agreement to reschedule a designated doctor examination has occurred between the designated doctor and injured employee. Title 28 TAC §127.10(i)(2) requires designated doctors to maintain records regarding circumstances of rescheduled examinations; therefore the expansion is not a new regulation but rather identifies the type of information the division would likely request in an investigation. The amendment will allow the division to investigate and better monitor rescheduling occurrences to reduce incidents of designated doctor rescheduling without the injured employee's consent as required by rule. The proposed amendments will limit the requirements under 28 TAC §127.10. Currently, the rule requires designated doctors to provide multiple certifications for each possible outcome when maximum medical improvement and/or impairment rating (MMI/IR) and extent of injury (EOI) are performed simultaneously in a single

examination. The proposed amendment will instead require designated doctors to provide multiple certifications for each reasonable outcome of MMI/IR and EOI. The amendment will minimize the effort associated with determining an unlimited number of multiple certifications. The proposed amendments will expand the requirements under 28 TAC §127.100 and §127.110. Doctors applying for either certification or recertification will be required to submit certificates within 12 months, certifying that the designated doctor has successfully completed all division-required training and testing. The amendment will help ensure that designated doctors receive the latest information. Additionally, doctors will be limited in the number and length of time between testing attempts. Repeat testing attempts without a limit or cooling period in between jeopardizes test integrity. The amendment will protect the integrity of the test and prevent doctors from gaining an unfair advantage due to unlimited opportunities of testing. The proposed amendments will limit and expand certain requirements under 28 TAC §127.130. Work-related injuries involving joint dislocations and pelvis or hip fractures are limited to evaluations by licensed medical doctors or doctors of osteopathy who are "board certified." The division acknowledges the complexity frequently associated with an examination of a joint dislocation, and pelvis or hip fracture; and will assign these injuries to board certified licensed medical doctors or doctors of osteopathy. The amendment will ensure the division assigns the most optimally qualified doctor for the injured employee's diagnosis. Work-related injuries involving complex regional pain syndrome will expand the qualification standard to permit evaluation by designated doctors who are board certified in plastic surgery. This amendment will expand the type of specialists that are qualified to examine injuries in this category.

**8. TAKINGS IMPACT ASSESSMENT.** The division has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right

to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

**9. REQUEST FOR PUBLIC COMMENT.** If you want to comment on the proposal, submit your written comments by 5:00 p.m. CST on June 18, 2018. Send written comments to [rulecomments@tdi.texas.gov](mailto:rulecomments@tdi.texas.gov) or by mail to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, Office of General Counsel, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645. A request for a public hearing must be sent separately from your written comments. If a hearing is held, the division will consider written comments and public testimony presented at the hearing.

**10. STATUTORY AUTHORITY.** The amendments are proposed under Labor Code §402.00111, *Relationship Between Commissioner of Insurance and Commissioner of Workers' Compensation; Separation of Authority; Rulemaking*, §402.00116, *Chief Executive*, §402.00128, *General Powers and Duties of Commissioner*, §402.061, *Adoption of Rules*, §408.0041, *Designated Doctor Examination*, §408.0043, *Professional Specialty Certification Required for Certain Review*, §408.025, *Reports and Records Required from Health Care Providers*, §408.1225, *Designated Doctor*. Labor Code §402.00111 requires the commissioner of workers' compensation to exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code. Labor Code 402.00116 requires the commissioner to administer and enforce the Texas Workers' Compensation Act and other workers' compensation laws of this state and laws granting jurisdiction or applicable to the division or commissioner. Labor Code §402.00128 requires the commissioner to conduct the daily operations of the division and implement division policy. Labor Code §402.061 requires the commissioner of workers' compensation to adopt rules as necessary for the implementation and

enforcement of the Texas Workers' Compensation Act. Labor Code §408.0041(b) provides that a requested medical examination be performed by the next available doctor on the designated doctor list whose credentials are appropriate for the area of the body affected by the injury and the injured employee's diagnosis. Labor Code §408.0041(e) provides that the report of the designated doctor has presumptive weight unless the preponderance of the evidence is to the contrary. Labor Code §408.0041(f) provides that unless ordered by the commissioner, the insurance carrier shall pay benefits based on the opinion of the designated doctor during the pendency of any dispute. Labor Code §408.0043 requires designated doctors, other than dentists and chiropractors, who review a specific workers' compensation case to meet certain professional specialty requirements. Labor Code §408.025(a) provides that commissioner shall adopt requirements for reports and records that are required to be filed with the division or provided to the injured employee, the employee's attorney, or the insurance carrier by a health care provider. Labor Code §408.1225(a-2) requires standard training and testing to be completed in accordance with policies and guidelines developed by the division. Labor Code §408.1225(a-3) requires the division to develop guidelines that ensure competency in assessments including testing criteria. Labor Code §408.1225(a-4) requires the division to implement a procedure to periodically review and update the guidelines developed in Labor Code §408.1225(a-3).

## **11. TEXT.**

### **SUBCHAPTER A: Designated Doctor Scheduling and Examinations**

#### **§127.1. Requesting Designated Doctor Examinations.**

(a) (No change)

(b) To request a designated doctor examination a requestor must:

(1) provide a specific reason for the examination; ~~[(2) explain any change of condition if the requestor indicates that the injured employee's medical condition has changed since a previous designated doctor examination on the same claim;]~~

(2)[(3)] report the injured employee's current diagnosis or diagnoses and body part or body parts ~~[part of the body]~~ affected by the injury;

(3)[(4) provide a] list ~~[of]~~ all injuries determined to be compensable by the division or court, or all injuries accepted as compensable by the insurance carrier;

(4)[(5)] provide general information regarding the identity of the requestor, injured employee, employer, treating doctor, insurance carrier;

(5)[(6)] identify the workers' compensation health care network certified under Chapter 1305, Insurance Code through which the injured employee is receiving treatment, if applicable;

(6)[(7)] identify whether the claim involves medical benefits provided through a political subdivision under Labor Code §504.053(b)(2) and the name of the health plan, if applicable;

~~[(8) state whether the injured employee has attended any other designated doctor examinations on this claim and, if so, provide the date of the most recent examination and the name of the examining designated doctor;]~~

(7)[(9)] submit the request on the form prescribed by the division under this section.

A copy of the prescribed form can be obtained from:

(A) the division's website at [www.tdi.texas.gov/wc/indexwc.html](http://www.tdi.texas.gov/wc/indexwc.html); or

(B) the Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744 or any local division field office location;

(8)~~[(40)]~~ submit the request to the division and a copy of the request to each party listed in subsection (a) of this section who did not request the designated doctor examination;

(9)~~[(44)]~~ provide all information listed in subparagraphs (A) - (G) of this paragraph below applicable to the type of examination the requestor seeks:

(A) – (F) (No Change)

(G) if the requestor seeks an examination on topics under subsection (a)(6) of this section, specify the issue in sufficient detail for the designated doctor to answer the question(s); and

(10)~~[(42)]~~ provide a signature to attest that every reasonable effort has been made to ensure the accuracy and completeness of the information provided in the request.

(c) – (d) (No change)

(e) If a division administrative law judge~~[hearing officer]~~ or benefit review officer determines during a dispute regarding the compensability of a claim as a whole that an expert medical opinion would be necessary to resolve a dispute as to whether the claimed injury resulted from the claimed incident, the administrative law judge~~[hearing officer]~~ or benefit review officer may order the injured employee to attend a designated doctor examination to address that issue.

(f) A party may dispute the division's approval or denial of a designated doctor request through the dispute resolution processes outlined in Chapters 140 - 144 and 147 of this title

(relating to Dispute Resolution processes, proceedings, and procedures). Parties may not dispute a designated doctor examination request or any information on the request until the division has either approved or denied the request. Additionally, a party is entitled to seek an expedited contested case hearing under §140.3 of this title (relating to Expedited Proceedings) to dispute an approved or denied request for a designated doctor examination. The division, upon timely receipt and approval of the request for expedited proceedings, shall stay the disputed examination pending the decision and order of the expedited contested case hearing. Parties seeking expedited proceedings and the stay of an ordered examination must file their request for expedited proceedings with the division within three working days of receiving the order of designated doctor examination under §127.5(b)~~§127.5(a)~~ of this title (relating to Scheduling Designated Doctor Appointments).

(g) This section will become effective on December 6, 2018~~September 1, 2012~~.

#### **§127.5. Scheduling Designated Doctor Appointments.**

(a) Applicability. This section applies to designated doctor examination requests made on or after the effective date of this section.

(b)~~(a)~~ The division, within 10 days after approval of a valid request, shall issue an order that assigns a designated doctor and shall notify the designated doctor, the treating doctor, the injured employee, the injured employee's representative, if any, and the insurance carrier that the designated doctor will be directed to examine the injured employee. The order shall:

(1) – (5) (No change)

(c)~~(b)~~ The examination address indicated on the order in subsection (b)(4)~~(a)(4)~~ of this section may not be changed by any party or by an agreement of any parties without good cause and the approval of the division.

(d)~~(e)~~ Except as provided in subsection (h)~~(d)~~ of this section, the division shall select the next available doctor on the designated doctor list for a medical examination requested under §127.1 of this title (relating to Requesting Designated Doctor Examinations). A designated doctor is available to perform an examination at any address the doctor has filed with the division if the doctor:

(1) – (4) (No change)

(e) To select the next available doctor, the division will maintain two independent designated doctor lists for each county in this state. One list will consist of designated doctors qualified to perform examinations under §127.130(b)(1)-(4) of this title, and the other list will consist of designated doctors qualified to perform examinations under §127.130(b)(5)-(9) of this title. Nothing in this section prevents a qualified designated doctor from being on both lists.

(1) A designated doctor will be added to the appropriate designated doctor list for the county of each address the doctor has filed with the division.

(2) When a designated doctor adds an address for a county the doctor is not currently listed in, the doctor will be placed at the bottom of the appropriate list for that county.

(3) When a designated doctor removes the only address for a county the doctor is currently listed in, the designated doctor will be removed from the list for that county.

(f) Except as provided in subsection (h) of this section, the division will assign designated doctor examinations as follows:

(1) Each working day all examination requests within a given county will be sorted and distributed to the appropriate list based on the designated doctor qualification standards.

(2) Depending on the volume of requested examinations, the division will then assign up to five examinations to the next available designated doctor at the top of the appropriate list.

(3) Assignment of an examination moves the designated doctor receiving the assignment to the bottom of the list from which the designated doctor was selected. Receipt of an assignment on one list does not change a designated doctor's position on the other list.

(g) Nothing in this section prevents the division from exempting a designated doctor from the applicable qualification standard under §127.130(d) of this title. The division may assign a designated doctor as necessary if there is no available designated doctor in the county of the injured employee.

(h)[(d)] If the division has previously assigned a designated doctor to the claim at the time a request is made, the division shall reassign[use] that doctor again unless the division has authorized or required the doctor to stop providing services on the claim in accordance with §127.130 of this title. Examinations under this subsection must be conducted at the same examination address as the designated doctor's previous examination of the injured employee or at another examination address approved by the division.

(i)[(e)] The designated doctor's office and the injured employee shall contact each other if [there exists] a scheduling conflict exists for the designated doctor appointment. The designated doctor or the injured employee who has the scheduling conflict must make the contact at least one working day prior to the appointment. The one working day requirement will be waived in an

emergency situation. An examination cannot be rescheduled without the mutual agreement of both the designated doctor and the injured employee. The designated doctor must maintain and document:

(1) the date and time of the designated doctor examination listed on the division's order;

(2) the date and time of the agreement to reschedule with the injured employee;

(3) how contact was made to reschedule, indicate the telephone number, facsimile number, or email address used to make contact;

(4) the reason for the scheduling conflict; and

(5) the date and time of the rescheduled designated doctor examination.

(j) Failure to document and maintain the information in subsection (i) of this section, creates a rebuttable presumption that the examination was rescheduled without mutual agreement of both the designated doctor and injured employee.

(k) The~~[If both the designated doctor and the injured employee agree to reschedule the examination, the]~~ rescheduled examination shall be set to occur no later than 21 days after the scheduled date of the originally scheduled examination and may not be rescheduled to occur before the originally scheduled examination. Within one working day of rescheduling, the designated doctor shall contact the division, the injured employee or the injured employee's representative, if any, the injured employee's treating doctor, and the insurance carrier with the time and date of the rescheduled examination. If the examination cannot be rescheduled no later than 21 days after the scheduled date of the originally scheduled examination or if the injured employee fails to attend the rescheduled examination, the designated doctor shall notify the division as soon as possible but not

later than 21 days after the scheduled date of the originally scheduled examination. After receiving this notice, the division may select a new designated doctor.

(l)(f) This section will become effective on December 6, 2018~~[September 1, 2012]~~.

#### **§127.10. General Procedures for Designated Doctor Examinations.**

(a) – (c) (No change)

(d) Any evaluation relating to either maximum medical improvement (MMI), an impairment rating, or both, shall be conducted in accordance with §130.1 of this title (relating to Certification of Maximum Medical Improvement and Evaluation of Permanent Impairment). If a designated doctor is simultaneously requested to address MMI and/or impairment rating and the extent of the compensable injury in a single examination, the designated doctor shall provide multiple certifications of MMI and impairment ratings that take into account each reasonable ~~[possible]~~ outcome for the extent of the injury. A designated doctor who determines the injured employee has reached MMI or who assigns an impairment rating, or who determines the injured employee has not reached MMI, shall complete and file a report as required by §130.1 of this title and §130.3 of this title (relating to Certification of Maximum Medical Improvement and Evaluation of Permanent Impairment by a Doctor Other than the Treating Doctor). If the designated doctor provided multiple certifications of MMI and impairment ratings, the designated doctor must file a Report of Medical Evaluation under §130.1(d) of this title for each impairment rating assigned and a Designated Doctor Examination Data Report pursuant to §127.220 of this title (relating to the Designated Doctor Reports) for the doctor's extent of injury determination. The designated doctor, however, shall only submit one narrative report required by §130.1(d)(1)(B) of this title for all impairment ratings assigned and extent of injury findings. All designated doctor narrative

reports submitted under this subsection shall also comply with the requirements of §127.220(a) of this title.

(e) – (j) (No change)

(k) This section will become effective on December 6, 2018~~[September 1, 2012]~~.

## **SUBCHAPTER B: Designated Doctor Certification, Recertification and Qualifications**

### **§127.100. Designated Doctor Certification.**

(a) Applicability. This section applies to designated doctor applications received on or after the effective date of this section.

(b)~~[(a)]~~ In order to serve as a designated doctor, a doctor ~~[who is not a designated doctor]~~ must be certified as a designated doctor. To be certified as a designated doctor, a doctor ~~[who is not a designated doctor]~~ must:

(1) submit a complete designated doctor certification application as described by subsection (c)~~[(b)]~~ of this section;

(2) submit a certificate or certificates certifying that the doctor has within the past 12 months successfully completed all division required trainings and passed all division required testing on the specific duties of a designated doctor under the Act and division rules, including demonstrated proficient knowledge of the currently adopted edition of the American Medical Association Guides to Evaluation of Permanent Impairment and the division's adopted treatment and return-to-work guidelines;

(3) be licensed in Texas;

(4) have maintained an active practice for at least three years during the doctor's career. For the purposes of this subsection, a doctor has an active practice if the doctor maintains or has maintained routine office hours of at least 20 hours per week for 40 weeks per year for the treatment of patients; and

(5) own or subscribe to, for the duration of the doctor's term as a certified designated doctor, the current edition of the American Medical Association Guides to Evaluation of Permanent Impairment adopted by the division for the assignment of impairment ratings and all return-to-work and treatment guidelines adopted by the division.

~~(c)~~~~(b)~~ A~~For the purposes of subsection (a) of this section, a~~ complete designated doctor certification application must be completed on the division's required form for certification applications and must include:

(1) – (9) (No change)

~~(d)~~~~(e)~~ If a doctor passes a division-required test, the doctor may not retest within a twelve month period. If a doctor fails a division-required test, the doctor may not retest more than three times within a six month period.

(1) After the first or second attempt, the doctor must wait 14 days before retaking the test; or

(2) After the third attempt, the doctor must wait six months before retaking the test.

(e) The division shall notify a doctor of the commissioner's approval or denial of the doctor's application to be certified as a designated doctor in writing. Denials will include the reason(s) for the denial. Approvals ~~[only]~~ certify a doctor for a term of two years and will include the effective date and expiration date of the certification. Approvals will also include the

examination qualification criteria under §127.130 of this title (relating to Qualification Standards for Designated Doctor Examinations) that the division has assigned to the designated doctor as part of the doctor's certification.

~~(f)(d)~~ Doctors may~~shall~~ be denied certification as a designated doctor:

(1) if the doctor did not submit the information and documentation required by subsection ~~(b)(a)~~ of this section~~[, including having completed all division required training and passed all division required examinations];~~

(2) if the doctor did not submit a complete application for certification as required by subsection ~~(c)(b)~~ of this section;

(3) for having a relevant restriction on their practice imposed by a state licensing board, certification authority, or other appropriate state or federal agency, including the division;  
or

(4) for other activities, events, or occurrences that the commissioner determines to warrant denial of a doctor's application for certification as a designated doctor, including but not limited to:

(A) the quality of the doctor's past reports as a certified designated doctor, if any;

(B) a history of complaints as a certified designated doctor, if any;

(C) excess requests for deferral from the designated doctor list as a certified designated doctor, if any;

(D) a pattern of overturned reports by the division and/or a court as a certified designated doctor, if any;

(E) a demonstrated lack of ability to apply or properly consider the American Medical Association Guides to Evaluation of Permanent Impairment adopted by the division for the assignment of impairment ratings and all return-to-work and treatment guidelines adopted by the division as a certified designated doctor, if any;

(F) a demonstrated lack of ability to consistently perform designated doctor examinations in a timely manner as a certified designated doctor, if any;

(G) a demonstrated failure to identify disqualifying associations as a certified designated doctor, if any;

(H) a demonstrated lack of ability to ensure the confidentiality of injured employee medical records and claim information provided to or generated by a certified designated doctor, if any;

(I) applying for certification less than a year from denial of a previous designated doctor certification or recertification application; or

(J) any~~[such as]~~ grounds that would allow the division to sanction a health care provider under the Act or division rules.

(g)~~[(e)]~~ Within 15 working days after receiving a denial, a doctor may file a written response with the division, which addresses the reasons given to the doctor for denial.

(1) – (2) (No change)

(h)~~[(f)]~~ Designated doctors whose application for certification is approved but wish to dispute the examination qualification criteria under §127.130 of this title that the division assigned to the doctor may do so through the procedures described in subsection (g)~~[(e)]~~ of this

section. Designated doctors must include in their response to the division the specific criteria they believe should be modified and documentation to justify the requested change.

~~(i)~~~~(g)~~ Designated doctors who are designated doctors on the effective date of this section shall be considered certified for the duration of the designated doctor's current certification. Before the expiration of the designated doctor's current certification, the designated doctor timely must apply for recertification under the applicable requirements of §127.110 of this title (relating to Designated Doctor Recertification).

~~(j)~~~~(h)~~ This section will become effective on December 6, 2018~~[September 1, 2012]~~.

#### **§127.110. Designated Doctor Recertification.**

(a) Applicability. This section applies to designated doctor applications received on or after the effective date of this section. ~~[If a designated doctor's certification expires before January 1, 2013:~~

~~(1) A doctor previously admitted to the division's designated doctor list who seeks to remain on the list must renew the doctor's application status by submitting to the division verification that the doctor has completed a minimum of 12 additional hours of division required training and passed all division required testing described under §127.100(a) of this title (relating to Designated Doctor Certification) since the effective date of the designated doctor's last certification or recertification. Designated doctors must also submit a complete application that meets the requirements of §127.100(b) of this title. Designated doctors who submit the materials required by this subsection will be recertified as designated doctors if the materials are submitted before January 1, 2013.]~~

~~[(2) The division shall notify a designated doctor of its receipt of this submitted information in writing, and this notice will renew the designated doctor's certification for a period of two years. The notice will also include the effective and expiration dates of that certification.]~~

~~[(3) A designated doctor who seeks to be recertified as a designated doctor and fails to renew the doctor's application status under paragraph (1) of this subsection prior to the expiration of the designated doctor's certification commits an administrative violation and will be prohibited from performing designated doctor examinations until the doctor renews the doctor's application status.]~~

~~[(4) Designated doctors who fail to renew their application status before January 1, 2013 must instead apply for recertification under the procedures described under subsection (b) of this section.]~~

(b) If a designated doctor's certification expires ~~[on or after January 1, 2013]~~, the designated doctor must apply for recertification. Designated doctors ~~[doctor]~~ seeking recertification ~~[after this date]~~ must:

(1) submit to the division certificate(s) evidencing that the doctor has, within the past 12~~[18]~~ months, successfully completed all division required trainings and passed all division required testing on the specific duties of a designated doctor under the Act and division rules, including demonstrated proficient knowledge of the current division adopted edition of the American Medical Association Guides to the Evaluation of Permanent Impairment and the division's adopted treatment and return-to-work guidelines;

(2) own or subscribe to, for the duration of the doctor's term as a certified designated doctor, the current edition of the American Medical Association Guides to Evaluation

of Permanent Impairment adopted by the division for the assignment of impairment ratings and all return-to-work and treatment guidelines adopted by the division; and

(3) submit to the division a complete application for recertification that meets the requirements of §127.100(c)[§127.100(b)] of this title (relating to Designated Doctor Certification). For purposes of recertification, division-required testing limitations as described in §127.100(d) of this title apply.

(c) – (d) (No change)

(e) The division may deny an application for recertification under subsection (b) of this section for the following reasons:

(1) the doctor did not submit the information and documentation required by subsection (b) of this section~~[, including verification of having timely completed all division-required training and passed all division-required examinations];~~

(2) if the doctor failed to properly update the doctor's initial application for certification under §127.100(c)[§127.100(b)] of this title;

(3) for having a relevant restriction on their practice imposed on the doctor by a state licensing board, certification authority, or other appropriate state or federal agency, including the division;

(4) for requesting unnecessary referral examinations or testing or failure to comply with requirements of §180.24 of this title (relating to Financial Disclosure) when requesting referral examinations or additional testing; or

(5) for other activities, events, or occurrences that the commissioner determines to warrant denial of a doctor's application for recertification as a designated doctor, including but not limited to:

(A) – (H) (No change)

(I) any ~~other~~ grounds that would allow the division to sanction a health care provider under the Act or division rules.

(f) – (g) (No change)

(h) This section will become effective on December 6, 2018~~[September 1, 2012]~~.

### **§127.130. Qualification Standards for Designated Doctor Examinations.**

(a) Applicability. This section applies to designated doctor assignments made on or after the effective date of this section. ~~[For examinations performed before January 1, 2013, a designated doctor is qualified to perform a designated doctor examination on an injured employee if the designated doctor has credentials that are appropriate to the issue in question and the injured employee's medical condition, that meet the requirements of Labor Code §408.0043, §408.0045, and applicable division rules, and the designated doctor has no applicable disqualifying associations under §127.140 of this title (relating to Disqualifying Associations).]~~

(b) A~~[For examinations performed on or after January 1, 2013, a]~~ designated doctor is qualified to perform a designated doctor examination on an injured employee if the designated doctor meets the appropriate qualification criteria for the area of the body affected by the injury and the injured employee's diagnosis and has no disqualifying associations under §127.140 of

this title (relating to Disqualifying Associations). A designated doctor's qualification criteria are determined as follows:

(1) – (2) (No change)

(3) To examine injuries and diagnoses relating to the spine and musculoskeletal structures of the torso, a designated doctor must be a licensed medical doctor, doctor of osteopathy, or doctor of chiropractic.

(4) To examine injuries and diagnoses relating to feet, including toes and heel, a designated doctor must be a licensed medical doctor, doctor of osteopathy, doctor of chiropractic, or doctor of podiatric medicine.

(5) To examine injuries and diagnoses relating to the teeth and jaw[jaws], including a temporomandibular joint, a designated doctor must be a licensed medical doctor, doctor of osteopathy, or doctor of dental surgery.

(6) To examine injuries and diagnoses relating to the eyes, including the eye and adnexal structures of the eye, a designated doctor must be a licensed medical doctor, doctor of osteopathy, or doctor of optometry.

(7) To examine injuries and diagnoses relating to mental and behavioral disorders, a designated doctor must be a licensed medical doctor or doctor of osteopathy.

(8)[(7)] To examine injuries and diagnoses relating to other body areas or systems, including but not limited to internal systems; ear, nose, and throat; head and face; skin; cuts to skin involving underlying structures; non-musculoskeletal structures of the torso; hernia; respiratory; endocrine; hematopoietic; urologic; ~~mental and behavioral disorders; tendon~~

~~lacerations; and dislocations~~], a designated doctor must be a licensed medical doctor or doctor of osteopathy.

~~(9)~~~~(8)~~ Notwithstanding paragraphs (1) – ~~(8)~~~~(7)~~ of this subsection, a designated doctor must be a licensed medical doctor or doctor of osteopathy who has the required board certification to examine any of the following diagnoses. For purposes of this section, a designated doctor is "board certified" in a required specialty or subspecialty, as applicable, if the designated doctor holds a general certificate in the required specialty or a subspecialty certificate in the required subspecialty from the American Board of Medical Specialties (ABMS) or if the designated doctor holds a primary certificate in the required specialty and a certificate of special qualifications or certificate of added qualifications in the required subspecialty from the American Osteopathic Association Bureau of Osteopathic Specialists (AOABOS).

(A) To examine traumatic brain injuries, including concussion and post-concussion syndrome, a designated doctor must be board certified in neurological surgery, neurology, physical medicine and rehabilitation, or psychiatry by the ABMS or board certified in neurological surgery, neurology, physical medicine ~~and~~~~or~~ rehabilitation, or psychiatry by the AOABOS.

(B) To examine spinal cord injuries and diagnoses, ~~including~~ a spinal fracture~~fractures~~ with documented neurological deficit, or cauda equina syndrome, a designated doctor must be board certified in neurological surgery, neurology, physical medicine and rehabilitation, orthopaedic surgery, or occupational medicine by the ABMS or board certified in neurological surgery, neurology, physical medicine and rehabilitation, orthopedic surgery,

preventive medicine/occupational-environmental medicine, or preventive medicine/occupational by the AOABOS.

(C) To examine severe burns, including chemical burns, defined as deep partial or full thickness burns, also known as 2nd, 3rd or 4th degree burns~~[over 9 percent or greater of the body]~~, a designated doctor must be board certified in dermatology, physical medicine and rehabilitation, plastic surgery, orthopaedic surgery, surgery, or occupational medicine by the ABMS or board certified in dermatology, physical medicine and rehabilitation, plastic and reconstructive surgery, orthopedic surgery, surgery (general), preventive medicine/occupational-environmental medicine, or preventive medicine/occupational by the AOABOS.

(D) To examine complex regional pain syndrome (reflex sympathetic dystrophy), a designated doctor must be board certified in neurological surgery, neurology, orthopaedic surgery, plastic surgery, anesthesiology with a subspecialty in pain medicine, occupational medicine, or physical medicine and rehabilitation by the ABMS or board certified in neurological surgery, neurology, orthopedic surgery, plastic surgery, preventive medicine/occupational-environmental medicine, preventive medicine/occupational, anesthesiology with certificate of added qualifications in pain management, or physical medicine and rehabilitation by the AOABOS.

(E) To examine multiple ~~[bone]~~ fractures, joint dislocation, [excluding] and pelvis or hip fracture~~[spinal fractures]~~, a designated doctor must be board certified in emergency medicine, orthopaedic surgery, plastic surgery, physical medicine and rehabilitation, or occupational medicine by the ABMS or board certified in emergency medicine, orthopedic

surgery, plastic surgery, physical medicine and rehabilitation, preventive medicine/occupational-environmental medicine, or preventive medicine/occupational by the AOABOS.

(F) To examine complicated infectious diseases requiring hospitalization or prolonged intravenous antibiotics, including blood borne pathogens, a designated doctor must be board certified in internal medicine or occupational medicine by the ABMS or board certified in internal medicine, preventive medicine/occupational-environmental medicine, or preventive medicine/occupational by the AOABOS.

(G) To examine chemical exposure, excluding chemical burns~~[exposure limited to skin exposure]~~, a designated doctor must be board certified in internal medicine, emergency medicine, or occupational medicine by the ABMS or board certified in internal medicine, emergency medicine, preventive medicine/occupational-environmental medicine, or preventive medicine/occupational by the AOABOS.

(H) To examine heart or cardiovascular conditions, a designated doctor must be board certified in internal medicine, emergency medicine, occupational medicine, thoracic and cardiac surgery, or family medicine by the ABMS or board certified in internal medicine, emergency medicine, preventive medicine/occupational-environmental medicine, preventive medicine/occupational, thoracic and cardiovascular surgery or family practice and osteopathic manipulative treatment by the AOABOS.

(c) – (d) (No change)

(e) A designated doctor who performs an initial designated doctor examination of an injured employee and had the appropriate qualification ~~[selection]~~ criteria to perform that examination under ~~[either]~~ subsection~~[(a) or]~~ (b) of this section, ~~[as applicable,]~~ shall remain

assigned to that claim and perform all subsequent examinations of that injured employee unless the division authorizes or requires the designated doctor to discontinue providing services on that claim.

(f) (No change)

(g) The division will prohibit a designated doctor from providing services on a claim if:

(1) the doctor has failed to become recertified as a designated doctor under §127.110(b)~~§127.110(a) or (b)~~ of this title (relating to Designated Doctor Recertification);

(2) the doctor no longer has the appropriate qualification criteria under ~~either~~ subsection ~~[(a) or]~~ (b) of this section, ~~[as applicable,]~~ to perform examinations on the claim;

(3) – (6) (No change)

(h) (No change)

(i) This section will become effective on December 6, 2018~~September 1, 2012~~.

#### **§127.140. Disqualifying Associations.**

(a) – (c) (No change)

(d) Insurance carriers shall notify the division of any disqualifying associations between the designated doctor and injured employee because of the network affiliations described under subsection (a)(6) of this section within five days of receiving the division's order of designated doctor examination under §127.5(b)~~§127.5(a)~~ of this title (relating to Scheduling Designated Doctor Appointments).

(e) – (f) (No change)

(g) This section will become effective on December 6, 2018~~September 1, 2012~~.

## **SUBCHAPTER C: Designated Doctor Duties and Responsibilities**

### **§127.220. Designated Doctor Reports.**

(a) – (b) (No change)

(c) Designated doctors who perform examinations under §127.10(f) of this title must, in addition to filing a narrative report that complies with subsection (a) of this section, also file a Designated Doctor Examination Data Report in the form and manner required by the Division. A Designated Doctor Examination Data Report must:

(1) include general information regarding the identity of the designated doctor, injured employee, insurance carrier, as well as the identity of the certified workers' compensation health care network under Chapter 1305, Insurance Code, if applicable, or whether the injured employee is receiving medical benefits through a political subdivision health care plan under Labor Code §504.053(b)(2) and the identity of that plan, if applicable;

~~[(2) list all injuries included on the examination request as:]~~

~~[(A) determined to be compensable by the division;]~~

~~[(B) accepted as compensable by the insurance carrier; or]~~

~~[(C) for informational purposes only, the diagnosis code for each injury;]~~

(2)~~[(3)]~~ identify the question(s) the division ordered to be addressed by the designated doctor examination;

(3)~~[(4)]~~ provide a clearly defined answer for each question to be addressed by the designated doctor examination and only for each of those questions. For extent of injury

examinations, the designated doctor should also provide, for informational purposes only, a diagnosis code for each disputed injury;

(4)~~(5)~~ state the date of the examination, the time the examination began, and the address where the examination took place;

(5)~~(6)~~ list any additional testing conducted or referrals made as part of the evaluation, including the identity of any health care providers to which the designated doctor referred the injured employee under §127.10(c) of this title, the types of tests conducted or referrals made and the dates the testing or referral examinations occurred;

(6)~~(7)~~ be signed by the designated doctor who performed the examination.

(d) This section will become effective on December 6, 2018~~September 1, 2012~~.

**12. CERTIFICATION.** The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Issued at Austin, Texas, on April 27, 2018.

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Nicholas Canaday III  
General Counsel  
Texas Department of Insurance,  
Division of Workers' Compensation