

No. 2020-6538

**Official Order
of the
Texas Commissioner of Workers' Compensation**

Date: 10-28-2020

Subject Considered:

Fiscal Year 2021 Research Agenda for the
Workers' Compensation Research and Evaluation Group

General remarks and official action taken:

The commissioner of workers' compensation considers the Fiscal Year (FY) 2021 Research Agenda for the Workers' Compensation Research and Evaluation Group (REG) at the Texas Department of Insurance, Division of Workers' Compensation (DWC).

The Texas Labor Code requires the REG to conduct professional studies and research related to the operational effectiveness of the Texas workers' compensation system and annually publish a workers' compensation research agenda.

DWC published the proposed research agenda in the August 21, 2020, issue of the *Texas Register* (45 TexReg 5980) and sought public review and comment. DWC received four comments and no requests for a public hearing.

Summary of Comments and Agency Response.

General Comments:

Comment: One commenter states that the REG plays a critical role in monitoring the Texas workers' compensation system, and the proposed FY 2021 Research Agenda includes the appropriate research projects given the ongoing COVID-19 pandemic, its impact on the Texas workers' compensation system, and the staffing and resources available to the REG.

Response: The REG acknowledges the comment.

Comment: A commenter supports the project to publish the 2021 Workers' Compensation Health Care Network Report Card and states that the REG's research and

evaluation of workers' compensation health care networks is crucial to understanding whether networks are adequately serving injured employees.

Response: The REG acknowledges the comment.

Specific Comments:

Comment: A commenter supports the proposed study on the use of telemedicine in the Texas workers' compensation system. The commenter suggests that the REG's study include the adequacy of remote or virtual examinations in resolving extent of injury and maximum medical improvement/impairment rating disputes.

Response: The REG acknowledges the comment and notes that the American Medical Association (AMA) has formed a workers' compensation technical committee that is currently looking at the issue of virtual impairment rating examinations for workers' compensation claims. The REG will monitor the AMA's work on this issue.

Comment: A commenter supports the proposed research project on the initial impact of COVID-19 on the Texas workers' compensation system. The commenter believes that COVID-19 has greatly impacted injured employees' ability to navigate the workers' compensation dispute resolution process. The commenter recommends that the REG also study the impact of COVID-19 on the Texas workers' compensation dispute resolution process and remote proceedings, including the win/loss rate for injured employees, any complications in presenting evidence, and the availability of broadband access for injured employees to access the remote proceedings. A second commenter also recommends a study on COVID-19 dispute outcomes.

Response: The REG notes that the proposed study on the impact of COVID-19 will include an analysis of the frequency and outcome of any disputes that arise on COVID-19 claims, as well as the impact of virtual dispute resolution proceedings on the timeliness of disputes and dispute outcomes for injured employees and insurance carriers.

Comment: A commenter recommends that the REG analyze the impact of COVID-19 on insurance rates and premiums to determine the impact of the large number of employers that have gone out of business due to premiums and the resulting impact of changes to the premium base on the DWC and Office of Injured Employee Counsel maintenance tax.

Response: The REG acknowledges the suggestion and notes that the Texas Department of Insurance (TDI), Property and Casualty Actuarial Office, already monitors estimated premium levels for Texas employers to assist TDI in setting the maintenance tax rate that funds DWC and OIEC. In addition, DWC estimates employer participation rates on a biennial basis using employer information obtained by the Texas Workforce Commission,

and these estimates consider changes in the number and size of Texas employers with workers' compensation coverage, as well as the impact of certain factors, such as COVID-19, on insurance purchasing decisions.

Comment: A commenter states that the COVID-19 pandemic has impacted the designated doctor examination process because examinations were suspended for a period to prevent the spread of the virus. The commenter states that the necessary delay in these examinations likely had an impact on the amount of income benefits paid to injured employees and recommends that the REG study this impact.

Response: The REG acknowledges the comment and will make a note to monitor the impact of the pandemic on income benefits as data becomes available. However, it is too early, and the income benefit data is too immature to accurately analyze the current impact. There are multiple factors, in addition to the availability of designated doctor exams, that affect an injured employee's eligibility for and duration of income benefits, including the availability of jobs for injured employees. It will be difficult to distinguish the impact of these various factors since they occur at the same time.

Comment: A commenter states that the national media has been reporting an increase in opioid abuse since the beginning of the pandemic. The commenter suggests that the REG study the impact of the pandemic, if any, on the use of opioid drugs in the Texas workers' compensation system.

Response: The REG acknowledges the comment and notes that it already tracks opioid use for injured employees annually through the annual workers' compensation network report card. Included in the report card are the percentage of network and nonnetwork injured employees that receive opioids at six months post-injury, the average number of opioid prescriptions dispensed, the average number of days an injured employee received opioids, and the average cost per opioid prescription. The 2021 Workers' Compensation Health Care Network Report Card is one of the scheduled projects for this research agenda and will analyze claims that occurred during the pandemic from January 2020 through May 2020.

Comment: A commenter says that prior authorization is an ongoing source of frustration for many physicians, and the prior authorization processes in workers' compensation are no exception. The commenter states that the tedious prior authorization processes found in workers' compensation deter some orthopedic surgeons from participating in the system. A commenter recommends that the REG perform an analysis to determine which aspects of the state's treatment guidelines result in the highest level of prior authorization

denials. In addition, the commenter recommends a study to analyze prior authorization processes, including:

- taking a sample that consists of the top 10 most used musculoskeletal codes to determine how many times those services were denied on first pass and how often they were later overturned by an Independent Review Organization (IRO);
- performing research to determine why IROs overturned an insurance carrier's initial decision;
- determining how many cases that were referred to peer-to-peer evaluation were already within the guidelines that were put forward in the insurance carriers' medical necessity guidelines;
- assessing whether there is a correlation between denial or delay of care, return to work, and establishment of disability score; and
- examining which insurance carriers have the highest overturned rates by IROs.

Response: The REG acknowledges the comment and recognizes the importance of an effective and fair utilization review process for system participants. As part of its statutorily required efforts to monitor the impacts of the 2005 legislative reforms, the REG plans to analyze trends associated with medical necessity disputes resolved by IROs. This analysis will include an analysis of the frequency, type, timeliness, and outcome of medical necessity disputes over time, including the percentage of these disputes that uphold the insurance carrier's utilization review decisions. The results of this analysis will be incorporated into the REG's biennial report to the Legislature, which is due December 1, 2020.

Regarding preauthorization, the REG does not have access to any data source for preauthorization requests and outcomes because that data is not reported to TDI or DWC. Currently, the only data that the REG may access includes medical services that were rendered, billed, and paid for by injured employees.

Comment: A commenter states that DWC's enforcement efforts and process have had a significant impact on the behavior of system participants, and DWC is required by statute to monitor the performance of system participants and take enforcement actions when appropriate. The commenter remarks that DWC's enforcement efforts and focus has changed over time, and DWC has been charged with taking action on noncompliance that would have, before recent court decisions, risen to the level of bad faith on the part of an insurer. The commenter remarks DWC has a very active system monitoring and enforcement program, but there has been no report or study on this program or on the most common acts of noncompliance within the Texas workers' compensation system.

Response: The REG acknowledges the suggestion and notes that DWC publishes all enforcement consent orders on its website and provides summary level presentations of complaint statistics and enforcement outcomes at regular stakeholder meetings. Given the requirements of the REG this fiscal year and serving as a resource during the upcoming legislative session, the REG does not currently have the resources to take on this project at this time.

Comment: A commenter states that fraud within the Texas workers' compensation system has long been a major concern, and there has not been a study done by the REG on fraud within the Texas workers' compensation system since the 1998 study by the former Workers' Compensation Research and Oversight Council on Workers' Compensation. If possible, the commenter recommends a research project that analyzes and reports on workers' compensation fraud in the Texas system. Specifically, the commenter recommends that the study include a report on:

- DWC's fraud unit and its activities;
- DWC's prosecutors and their prosecution efforts;
- the number of known fraud cases and fraud referrals received by DWC over the past 10 years;
- an overview of the action DWC took on fraud referrals to include the number of cases closed versus the number of fraud cases opened;
- the number of fraud cases referred to Texas district attorneys;
- the number of fraud convictions;
- a breakdown of the fraud referrals by subject; and
- an analysis of any barriers or staffing issues that may be preventing DWC from pursuing a greater number of workers' compensation fraud cases.

Response: The REG acknowledges the suggestion and notes that before 2016, workers' compensation fraud activities were handled by the TDI Fraud Unit. DWC moved workers' compensation cases back to DWC and formed the DWC Fraud Unit in 2016. DWC was able to embed a prosecutor dedicated to workers' compensation fraud in the Travis County District Attorney's Office soon after. DWC publishes several of the suggested fraud statistics on its website and provides a summary of the Fraud Unit's activities as part of its biennial report to the Texas Legislature. Given the requirements of the REG this fiscal year and serving as a resource during the upcoming legislative session, the REG does not currently have the resources to take on this project at this time.

Comment: A commenter recommends that the REG should study the impact of the legislative changes last session on first responder cancer presumptions. These legislative

changes were very significant and warrant a study on the impact of the changes and DWC's activity related to enforcement, benefit review conferences, and contested case hearings. The study of this issue should examine the frequency of these claims and their disposition, the number of disputes and dispute outcomes, the number of enforcement cases initiated against political subdivisions, and a summary of the basis of the enforcement actions. The REG should also analyze the financial impact of these legislative changes on medical and income benefit costs.

Response: The REG acknowledges the comment and notes that Senate Bill 2551 took effect on June 10, 2019. Since then, approximately 100 cancer claims have been filed by first responders, and many of these claims were filed in the past six months or are still actively in the dispute resolution process. At this time, these claims are not mature enough to analyze the cost impact of the legislation, but the REG will continue to monitor the frequency and outcome of these claims to prepare for the upcoming legislative session in 2021.

Comment: A commenter proposes that the REG research whether transitioning away from an average wholesale price (AWP)-based pharmacy fee schedule would reduce system costs for the Texas workers' compensation system while maintaining adequate access to medication and services.

The REG should consider alternative benchmarks to AWP, such as the National Average Drug Acquisition Cost. In researching alternative pricing benchmarks to AWP, the commenter proposes that the REG include a comparison of pharmacy-dispensed drug prices under alternative fee benchmarks to identify combinations of alternative benchmarks that have prices available for the largest percentage of drugs and that minimize costs.

Response: The REG acknowledges the comment and notes the importance of understanding the various pharmacy reimbursement benchmarks used in health systems, including workers' compensation. Given the requirements of the REG this fiscal year and serving as a resource during the upcoming legislative session, the REG does not currently have the resources to take on this project at this time. However, the REG will explore ways to access data on these various alternative benchmarks, and if this data is readily available, will consider this project for a future research agenda.

Order

It is ordered that the FY 2021 Research Agenda for the Workers' Compensation Research and Evaluation Group is adopted as follows:

1. Complete and publish the 2021 Workers' Compensation Health Care Network Report Card required under Texas Insurance Code §1305.502 and Texas Labor Code §405.0025.
2. Analyze the initial impact of COVID-19 on the Texas workers' compensation system, including claim frequency, claim costs, disputes, and return-to-work outcomes.
3. Study the use of telemedicine in the Texas workers' compensation system, including trends on the types and cost of services being performed, the types of health care providers providing these services, and the demographic trends of injured employees receiving telemedicine services.

The REG will consider expanding the scope of the research projects or conducting more projects to accommodate stakeholder suggestions, subject to the resources and data available.



Cassie Brown
Commissioner of Workers' Compensation