

TITLE 28. INSURANCE

PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 129: INCOME BENEFITS—TEMPORARY INCOME BENEFITS Section 129.5

INTRODUCTION. The Texas Department of Insurance, Division of Workers' Compensation (DWC) adopts amendments to 28 Texas Administrative Code (TAC) §129.5, *Work Status Reports*. The amendments are adopted with the changes to the proposed text as published in the April 20, 2018 issue of the Texas Register (43 TexReg 2360) and will be republished. The amendments conform DWC's rules to the legislative changes adopted by House Bill (HB) 2546, 85th Legislature, Regular Session, which amended Labor Code §408.025 to include a new subsection (a-1) to allow a treating doctor to delegate to a physician assistant the authority to complete and sign a work status report. The delegating treating doctor is responsible for the acts of the physician assistant under Labor Code §408.025.

In response to written comments, and to more closely mirror the actual language in Labor Code §408.025(a-1), throughout the proposed rule text, DWC replaced the term "health care practitioner" with the term "physician assistant."

In accordance with Government Code §2001.033, DWC's reasoned justification for these rules is set out in this order, which includes the preamble. The following paragraphs set forth a detailed section-by-section description of, and reasoned justification for, all amendments to 28 TAC §129.5.

DWC adopts an amendment to 28 TAC §129.5(a)(1) to replace the reference to “§133.4 of this title (relating to Consulting and Referral Doctors)” with “§180.22(c) and (e) of this title (relating to Health Care Provider Roles and Responsibilities,” which describes the responsibilities of treating and referral doctors.

Amended 28 TAC §129.5 adds “or delegated physician assistant” after the word “doctor” throughout. This amendment conforms the rule to the legislative change. Regardless of whether a doctor or delegated physician assistant is completing, signing, or filing a work status report, the requirements specified by the rule are the same.

Amended 28 TAC §129.5 includes several non-substantive amendments and editorial corrections throughout the rule, including re-lettering existing subsections and internal references to reflect the addition of subsection (b); the addition of the terms “injured” before the word “employee” and “insurance” before the word “carrier” and deleting “(employee)” in §129.5(a)(4) and “(carrier)” in §129.5(e)(3) to conform to agency drafting style; of this section in subsection (g); removing unnecessary commas and changing “a” to “an” in one instance to correct grammar; and changing “Commission” to “division” to reflect the change in the agency’s name.

New 28 TAC §129.5(b) adds, “A treating doctor may delegate authority to complete, sign, and file a work status report to a licensed physician assistant authorized under Labor Code §408.025. The delegating treating doctor is responsible for the acts of the physician assistant under this subsection.” This change is necessary to implement HB 2546 and updates the rule to conform to the amended statute.

Amended §129.5(e)(3) deletes “to” after the word “not.” This non-substantive change corrects a typographical error.

Amended §129.5(f) adds “by hand delivery or electronic transmission if the injured employee agrees to receive the report by electronic transmission” and (i)(3) adds “or delivered by electronic transmission if the injured employee agrees to receive the report by electronic transmission.” These changes allow delivery and receipt of the work status report via electronic transmission with the injured employee’s agreement. These changes promote efficiency within the workers' compensation system by allowing for electronic delivery of work status reports following an examination. By allowing electronic transmission to an injured employee, the injured employee will have greater access to prompt, high-quality medical care which is a DWC goal under Labor Code §402.021(b). In implementing DWC’s goals, the Legislature requires the workers’ compensation system to take maximum advantage of technological advances to provide the highest levels of service possible to system participants. DWC notes that this amendment does not change the requirements relating to when the work status report must be provided to an injured employee.

Amended 28 TAC §129.5(i)(1) and (i)(2) delete “facsimile or” from the paragraphs because facsimile is already included in the definition of electronic transmission in 28 TAC §102.4(m) of this title.

Amended 28 TAC §129.5(k) removes “(on anyone’s behalf)” to clarify that a required medical examination doctor is not authorized to conduct an examination “on

anyone's behalf" and corrects the reference to 28 TAC §126.6(g), *Order for Required Medical Examination*.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Comment: Commenter asked DWC to clarify that only treating doctors who are physicians licensed to practice medicine in the state of Texas may delegate the completion and signing of a work status report to a Texas-licensed physician assistant.

DWC Response: DWC appreciates the comment but declines to make the requested change because it is unnecessary. Labor Code §408.025 adopted by HB 2546 refers specifically to Chapter 204 of the Occupations Code which defines requirements for supervising physicians and the authority of physician assistants who act as the agent of the supervising physician for any medical services that are delegated by that physician.

Comment: Commenter expressed concern that the phrase "or delegated health care practitioner" is not tied back to subsection (b) and limits the authority of a delegated health care practitioner to one who is authorized to accept delegation under Texas Labor Code §408.025. Commenter recommends a different definition of "delegated health care practitioner." Another commenter requested that "licensed health care practitioner" be removed from the proposed rule and replaced with "physician assistant" as stated by HB 2546.

DWC Response: DWC agrees in part and has made several changes throughout the rule to replace the term "health care practitioner" with the term "physician assistant"

throughout the rule to more closely mirror the language in Labor Code §408.025(a-1) added by HB 2546. DWC declines to adopt a different definition of “delegated health care practitioner” since the adopted rule now mirrors the actual language in Labor Code §408.025.

Comment: Commenter sought clarification that DWC’s intent is that the fees associated with filing a work status report would be paid when providing the services via telemedicine.

DWC Response: DWC agrees and notes that adopted §129.5(i)(3) provides that work status reports may be delivered to an injured employee electronically and reimbursed when the health care provider renders services via telemedicine.

Comment: Commenter requested the fee for completing a work status report be increased to \$30 and include language that an annual adjustment to the fee will be considered.

DWC Response: DWC appreciates the comment but declines to make the requested changes at this time since the purpose of the adopted rule amendments is to conform DWC’s rules to the legislative changes adopted by HB 2546 and since a fee increase was not included as part of the proposed amendment. DWC notes, however, that it will continue to review and monitor its medical fee guidelines to ensure that they meet the statutory requirements in Labor Code §413.011 to be “fair and reasonable and designed to ensure the quality of medical care and to achieve effective medical cost control.”

Comment: Commenter stated that they have observed misdiagnosis by nurse practitioners and physician assistants and that injured employees deserve to have a physician as their treating doctor. The commenter acknowledges that physician assistants and nurse practitioners may treat injured employees, but believes that these health care providers should not be the treating doctor. The commenter goes on to say that if a physician assistant is allowed to sign a work status report, then a nurse practitioner should also be able to complete a work status report.

DWC Response: DWC appreciates the comment but declines to make the requested change and notes that the Legislature amended Labor Code §408.025 to specifically allow a treating doctor to delegate to a physician assistant the authority to complete and sign a work status report. The delegating treating doctor is responsible for the acts of the physician assistant under Labor Code §408.025.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For: None

For, with changes: Texas Medical Association, Texas Academy of Physician Assistants

Against: An individual

Neither for nor against: Texas MedClinic

STATUTORY AUTHORITY. Amended 28 TAC §129.5 is adopted under the authority of Labor Code §401.024, Labor Code §402.00111, Labor Code §402.00116, Labor Code §402.021, Labor Code §402.061, Labor Code §408.004, Labor Code §408.025, and

Labor Code §415.0035. The proposed amendments support the implementation of the Workers' Compensation Act, Texas Labor Code Title 5, Subtitle A.

Labor Code §401.024, *Transmission of Information*, states that the commissioner may prescribe the form and manner for transmitting any authorized or required electronic transmission.

Labor Code §402.00111, *Relationship Between Commissioner of Insurance and Commissioner of Workers' Compensation; Separation of Authority; Rulemaking*, states that the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority, under the Texas Workers' Compensation Act.

Labor Code §402.00116, *Chief Executive; Separation of Authority*, establishes the commissioner of workers' compensation as DWC's chief executive and administrative officer, and requires the commissioner to administer and enforce the Act.

Labor Code §402.021, *Goals; Legislative Intent; General Workers' Compensation Mission of Department*, states two basic goals of the Texas workers' compensation system are to ensure that each employee has access to prompt, high-quality medical care and receives services to facilitate the employee's return to employment as soon as it is safe and appropriate. In implementing these goals, the system must take maximum advantage of technological advances to provide the highest levels of service possible to system participants.

Labor Code §402.061, *Adoption of Rules*, states that the commissioner shall adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act.

Labor Code §408.004, *Required Medical Examinations; Administrative Violation*, states that the commissioner may require an employee to submit to a medical examination to resolve a question about the appropriateness of health care received.

Labor Code § 408.025, *Reports and Records Required from Health Care Providers*, states that a treating doctor may delegate to a physician assistant the authority to complete and sign a work status report.

Labor Code §415.0035, *Additional Violations by Insurance Carrier or Health Care Provider*, states that a health care provider commits an administrative violation if that person fails or refuses to timely file required reports.

TEXT.

§129.5 Work Status Reports

(a) As used in this section:

(1) the term "doctor" means either the treating doctor or a referral doctor, as defined by §180.22(c) and (e) of this title (relating to Health Care Provider Roles and Responsibilities);

(2) "substantial change in activity restrictions" means a change in activity restrictions caused by a change in the injured employee's medical condition which either prevents the injured employee from working under the previous restrictions or which allows the injured employee to work in an expanded and more strenuous capacity than the prior restrictions permitted (approaching the injured employee's normal job);

(3) "change in work status" means a change in the injured employee's work status from one of the three choices listed in subsection (a)(4) of this section to another of the choices in that subsection; and

(4) the term "work status" refers to whether the injured employee's medical condition:

(A) allows the injured employee to return to work without restrictions (which is not equivalent to maximum medical improvement);

(B) allows the injured employee to a return to work with restrictions;
or

(C) prevents the injured employee from returning to work.

(b) A treating doctor may delegate authority to complete, sign, and file a work status report to a licensed physician assistant authorized under Texas Labor Code §408.025. The delegating treating doctor is responsible for the acts of the physician assistant under this subsection.

(c) The doctor or delegated physician assistant shall file a Work Status Report in the form and manner prescribed by the division.

(d) The doctor or delegated physician assistant shall be considered to have filed a complete Work Status Report if the report is filed in the form and manner prescribed by the division, signed, and contains at minimum:

(1) identification of the injured employee's work status;

(2) effective dates and estimated expiration dates of current work status and restrictions (an expected expiration date is not binding and may be adjusted in

future Work Status Reports, as appropriate, based on the condition and progress of the injured employee);

(3) identification of any applicable activity restrictions;

(4) an explanation of how the injured employee's workers' compensation injury prevents the injured employee from returning to work (if the doctor believes that the injured employee is prevented from returning to work); and

(5) general information that identifies key information about the claim (as prescribed on the report).

(e) The doctor or delegated physician assistant shall file the Work Status Report:

(1) after the initial examination of the injured employee, regardless of the injured employee's work status;

(2) when the injured employee experiences a change in work status or a substantial change in activity restrictions; and

(3) on the schedule requested by the insurance carrier, its agent, or the employer requesting the report through its insurance carrier, which shall not exceed one report every two weeks and which shall be based upon the doctor's or delegated physician assistant's scheduled appointments with the injured employee.

(f) The Work Status Report filed as required by subsection (e) of this section shall be provided to the injured employee at the time of the examination by hand delivery or electronic transmission if the injured employee agrees to receive the report by electronic transmission, and shall be sent, not later than the end of the second working day after the date of examination, to the insurance carrier and the employer.

(g) In addition to the requirements under subsection (e), of this section, the treating doctor or delegated physician assistant shall file the Work Status Report with the insurance carrier, employer, and injured employee within seven days of the day of receipt of:

(1) functional job descriptions from the employer listing available modified duty positions that the employer is able to offer the injured employee as provided by §129.6(a) of this title (relating to Bona Fide Offers of Employment); or

(2) a required medical examination doctor's Work Status Report that indicates that the injured employee can return to work with or without restrictions.

(h) Filing the Work Status Report as required by subsection (g) of this section does not require a new examination of the injured employee.

(i) The doctor or delegated physician assistant shall file the Work Status Report as follows:

(1) A report filed with the insurance carrier or its agent shall be filed by electronic transmission;

(2) A report filed with the employer shall be filed by electronic transmission if the doctor or delegated physician assistant has been provided the employer's facsimile number or email address; otherwise, the report shall be filed by personal delivery or mail; and

(3) A report filed with the injured employee shall be hand delivered to the injured employee or delivered by electronic transmission if the injured employee agrees to receive the report by electronic transmission, unless the report is being filed pursuant

to subsection (g) of this section and the doctor or delegated physician assistant is not scheduled to see the injured employee by the due date to send the report. In this case, the doctor or delegated physician assistant shall file the report with the injured employee by electronic transmission if the doctor or delegated physician assistant has been provided the injured employee's facsimile number or email address; otherwise, the report shall be filed by mail.

(j) Notwithstanding any other provision of this title, a doctor or delegated physician assistant may bill for, and an insurance carrier shall reimburse, filing a complete Work Status Report required under this section or for providing a subsequent copy of a Work Status Report which was previously filed because the insurance carrier, its agent, or the employer through its insurance carrier asks for an extra copy. The amount of reimbursement shall be \$15. A doctor or delegated physician assistant shall not bill in excess of \$15 and shall not bill or be entitled to reimbursement for a Work Status Report which is not reimbursable under this section. Doctors or delegated physician assistants are not required to submit a copy of the report being billed for with the bill if the report was previously provided. Doctors or delegated physician assistants billing for Work Status Reports as permitted by this section shall do so as follows:

(1) CPT code "99080" with modifier "73" shall be used when the doctor or delegated physician assistant is billing for a report required under subsections (e)(1), (e)(2), and (g) of this section;

(2) CPT code "99080" with modifiers "73" and "RR" (for "requested report") shall be used when the doctor or delegated physician assistant is billing for an

additional report requested by or through the insurance carrier under subsection (e)(3) of this section; and

(3) CPT code "99080" with modifiers "73" and "EC" (for "extra copy") shall be used when the doctor or delegated physician assistant is billing for an extra copy of a previously filed report requested by or through the insurance carrier.

(k) As provided in §126.6(g) of this title (relating to Order for Required Medical Examinations), a doctor who conducts a required medical examination in which the doctor determines that the injured employee can return to work immediately with or without restrictions shall file the Work Status Report required by this section, but shall do so in accordance with the requirements of §126.6(g).

CERTIFICATION.

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

Issued at Austin, Texas, on October 10, 2018.

✕

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

The commissioner adopts amendments to §129.5.

Cassie Brown
Commissioner of Workers' Compensation

COMMISSIONER'S ORDER NO. _____

ATTEST:

_____ X

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