

**Acute Care Inpatient Hospital Fee Guideline**  
**28 TAC §134.401**

**1. INTRODUCTION.** The Commissioner of Workers' Compensation (Commissioner), Texas Department of Insurance, Division of Workers' Compensation (Division), adopts the repeal of 28 Texas Administrative Code §134.401, concerning the acute care inpatient hospital fee guideline. This repeal is adopted without changes to the proposal as published in the February 22, 2008, issue of the *Texas Register* (33 TexReg 1487) and will not be republished.

**2. REASONED JUSTIFICATION.** The repeal of §134.401 is necessary due to the adoption of §134.403 and §134.404, effective March 1, 2008, which implement Labor Code §413.011 by adopting standardized reimbursement structures using the most current methodologies, models, values and weights used by the Centers for Medicare and Medicaid Services (CMS).

Section 134.401 was adopted in 1997 to implement Labor Code §413.011 and provided for per diem reimbursement and a "stop-loss" provision. The stop-loss provision was intended to compensate for unusually costly services and has generated substantial litigation.

Labor Code §413.011 was amended in 2001 by House Bill (HB) 2600, 77<sup>th</sup> Legislature, Regular Session. That legislation directed the Division of Workers' Compensation to adopt a reimbursement structure modeled along the lines of the

Medicare system. Section 134.401 did not contain a reimbursement structure that met the statutory requirements.

In accordance with the directive of HB 2600, the Division adopted §134.403, concerning Hospital Fee Guideline – Outpatient and §134.404, concerning Hospital Facility Fee Guideline – Inpatient, which superseded the provisions of §134.401 for reimbursements due to admissions on and after March 1, 2008. Section 134.403 and §134.404 implemented Labor Code §413.011 by adopting a standardized reimbursement structure using the most current methodologies, models, values and weights used by the CMS.

With the adoption of §134.403 and §134.404, §134.401 no longer meets the needs of the workers' compensation system for services provided on or after March 1, 2008.

Repeal of §134.401 is also necessary since it does not meet the requirements of Labor Code §413.011 concerning the adoption of a standardized reimbursement structure using the most current methodologies, models, values and weights used by the CMS. While §134.1 does not explicitly provide for a standardized reimbursement structure using the most current methodologies, models, values and weights used by the CMS, it is broad enough to encompass those requirements. Section 134.1(f) states, "Fair and reasonable reimbursement shall: (1) be consistent with the criteria of Labor Code §413.011." Labor Code §413.011(a) requires the Commissioner to "adopt health care reimbursement policies and guidelines that reflect the standardized

reimbursement structures found in other health care delivery systems with minimal modifications to those reimbursement methodologies as necessary to meet occupational injury requirements” and to achieve that standardization by adopting the most current reimbursement methodologies, models, and values or weights used by the federal CMS. To properly implement the fair and reasonable standard as set forth in §134.1(f), the requirements from Labor Code §413.011(a) “that most current reimbursement methodologies, models, and values or weights used by the federal Centers for Medicare and Medicaid Services” be used, would be incorporated. As a result, using the fair and reasonable standard of §134.1 as the default would more closely conform to the requirements of Labor Code §413.011 than would §134.401.

For this reason, the Division adopts the repeal of §134.401.

New §134.403 and §134.404 will apply to reimbursement based on hospital admissions on or after March 1, 2008. Section 134.401 will continue to apply to reimbursements related to admissions prior to March 1, 2008.

**3. HOW THE SECTION(S) WILL FUNCTION.** The repeal of §134.401 removes the former §134.401, which covered reimbursements for inpatient hospital fees for services related to admissions prior to March 1, 2008. Reimbursement for services related to admission dates on or after March 1, 2008 will now proceed under the guidelines set forth in §134.403 and §134.404. Section 134.404(a)(2) provides that “[f]or admission dates prior to March 1, 2008, the law and Division of Workers’

Compensation (Division) rules in effect for those dates of service shall apply,” therefore, the provisions of §134.401 will continue to be applied to services related to admission dates prior to March 1, 2008.

#### **4. SUMMARY OF COMMENTS AND AGENCY RESPONSE.**

**Comment:** Several commenters stated that they support the repeal of §134.401 because it did not comply with the requirements of Labor Code §413.011.

**Agency Response:** The Division appreciates the supportive comment.

**Comment:** One commenter stated that he opposes the repeal of §134.401 because of the uncertainty of how a repeal will affect pending cases.

**Agency response:** The Division disagrees that there is any uncertainty and clarifies that §134.401 will continue to apply to reimbursements related to hospital admissions prior to March 1, 2008.

**Comment:** Several commenters stated that the repeal is unnecessary because HB 7 provided that the prior Texas Workers' Compensation Commission (TWCC) rules would remain in effect until superceded by rules of the Division and the new §134.403 and §134.404 have superceded §134.401.

**Agency Response:** The Division disagrees that the repeal is unnecessary. As noted in the Reasoned Justification above, §134.401 does not meet the requirements of Labor

Code §413.011 concerning the adoption of a standardized reimbursement structure using the most current methodologies, models, values and weights used by the Centers for Medicare and Medicaid Services (CMS). While §134.1 does not explicitly provide for a standardized reimbursement structure using the most current methodologies, models, values and weights used by the CMS, it is broad enough to encompass those requirements and incorporates them in §134.1(f)(1) by stating that they shall be “be consistent with the criteria of Labor Code §413.011.” Labor Code §413.011(a) requires the Commissioner to “adopt health care reimbursement policies and guidelines that reflect the standardized reimbursement structures found in other health care delivery systems with minimal modifications to those reimbursement methodologies as necessary to meet occupational injury requirements” and to achieve that standardization by adopting the most current reimbursement methodologies, models, and values or weights used by the federal CMS. To properly implement the fair and reasonable standard as set forth in §134.1(f), the requirements from Labor Code §413.011(a) “that most current reimbursement methodologies, models, and values or weights used by the federal Centers for Medicare and Medicaid Services” be used, would be incorporated. As a result, using the fair and reasonable standard as the default would more closely conform to the requirements of Labor Code §413.011 than would §134.401.

Second, while HB 7 did provide that the rules of the former TWCC would remain in effect until superseded by rules of the Division, new §134.403 and §134.404 specifically apply only to cases occurring on or after March 1, 2008 and do not

supercede the rules that applied to reimbursements based on admissions prior to March 1, 2008. Indeed, §134.404(a)(2) provides that “[f]or admission dates prior to March 1, 2008, the law and Division of Workers' Compensation (Division) rules in effect for those dates of service shall apply.” Section 134.401 is the Division rule in effect prior to March 1, 2008.

**Comment:** Several commenters asked that the reasoned justification set out in the proposal for the rule repeal be expanded to more fully set forth the Division's reason for the repeal. Specifically, they suggested that the preamble state that the 1997 rule is not Medicare based and that the 1997 rule does not achieve effective medical cost control.

**Agency Response:** While the Division considers the reasoned justification in the proposal a sufficient statement of the justification for the repeal of §134.401, it has elaborated on the stated reasons in the Reasoned Justification section of this adoption order. The preamble states that the 1997 rule was not Medicare based. It does not state whether the 1997 rule achieved effective medical cost control.

**Comment:** Several commenters requested that the preamble specifically state that the provisions of §134.401 will continue to apply to all pending and future disputes based on services from admissions prior to March 1, 2008.

**Agency Response:** The Division agrees. The changes in reimbursement under the adopted §134.404 apply only to those medical services provided in an inpatient acute

care hospital with an admission date on or after March 1, 2008 (28 TAC §134.404(a)(1)). As noted in §134.404(a)(2) “[f]or admission dates prior to March 1, 2008, the law and Division of Workers' Compensation (Division) rules in effect for those dates of service shall apply.” Section 134.401 was effective beginning August 1, 1997 and continued until its repeal. Reimbursement for medical services provided in an inpatient acute care hospital with an admission date prior to March 1, 2008 will be processed under the law and rules in effect on the date of admission and the former rule §134.401 will continue in effect for that purpose.

**Comment:** Several commenters suggested that the rule repeal should have a “savings clause” to ensure that §134.401 will continue to apply to all pending and future disputes on services prior to March 1, 2008.

**Agency Response:** The Division disagrees. The repeal preamble is explicit that §134.401 will continue to apply to all disputes on services prior to March 1, 2008. In addition, newly adopted §134.403(a)(4) makes it clear that Division rules in effect for dates of service prior to March 1, 2008 will apply to those services. Section 134.401 is the rule that was in effect for the dates of service prior to March 1, 2008. A “savings clause” would not make the applicability of §134.401 any clearer than the present text and is not necessary.

**Comment:** Several commenters requested that the preamble and rule specifically state that the provisions of §134.401 will not apply to disputes on services based on admissions prior to March 1, 2008, but that the default rule, §134.1(e)(3), will apply.

**Agency Response:** The Division disagrees. Section 8.005(c) of HB 7, 79th Legislature, provides that “A rule of the Texas Workers' Compensation Commission relating to a duty of that commission that is transferred to the authority of the division of workers' compensation of the Texas Department of Insurance under Subtitle A, Title 5, Labor Code, as amended by this Act, continues in effect as a rule of the commissioner of workers' compensation until the date on which the rule is superseded by a rule adopted by the commissioner of workers' compensation.” This adoption order repeals the present rule effective from March 1, 2008 forward. The repeal does not deal with the validity of §134.401 but is used to transition into the new §134.403 and §134.404. The newly adopted §134.404(a)(4) retains the effectiveness of the rule for the relevant periods of service.

Additionally, the parties who provided services based on hospital admissions prior to March 1, 2008 did so with the expectation that they would be reimbursed under the rules in effect at that time, specifically §134.401. Retroactively applying §134.1(e)(3) rather than §134.401, which was in effect at the time the services were rendered, would almost surely generate disputes and litigation.

## 5. NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL



**For With Changes:** American Insurance Association; Christus Health Care Gulf Coast; Flahive, Ogden, & Latson; HCA; Hospital Partners of America; Insurance Counsel of Texas; Pringle and Gallagher; Texas Hospital Association; Texas Mutual Insurance Company; and Zenith Insurance.

**Against:** Vista Medical Center Hospital.

**6. STATUTORY AUTHORITY.** The repeal is adopted pursuant to Labor Code §402.00111 and §402.061. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under the Labor Code and other laws of this state. Section 402.061 provides that the Commissioner of Workers' Compensation has the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

**7. TEXT.**

§134.401. Acute Care Inpatient Hospital Fee Guideline.

**8. CERTIFICATION.** This agency certifies that the adopted section has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued at Austin, Texas, on \_\_\_\_\_, 2008.

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Norma Garcia  
General Counsel  
Texas Department of Insurance  
Division of Workers' Compensation

**IT IS THEREFORE THE ORDER** of the Commissioner of Workers' Compensation that the repeal of §134.401 concerning the acute care inpatient hospital fee guideline, is adopted.

**AND IT IS SO ORDERED.**

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ALBERT BETTS  
COMMISSIONER OF WORKERS' COMPENSATION  
TEXAS DEPARTMENT OF INSURANCE

ATTEST:

\_\_\_\_\_  
Norma Garcia  
General Counsel

COMMISSIONER'S ORDER NO. \_\_\_\_\_