

SUBCHAPTER A. GENERAL PROVISIONS
28 TAC §137.5 Case Manager Certification

1. INTRODUCTION. The Commissioner of Workers' Compensation (Commissioner), Texas Department of Insurance (Department), Division of Workers' Compensation (Division) adopts new §137.5, concerning Case Manager Certification. The new section is adopted with changes to the proposed text as published in the September 17, 2010, issue of the *Texas Register* (35 TexReg 8477).

In accordance with Government Code §2001.033, the Division's reasoned justification for these amendments is set out in this order, which includes the preamble, which in turn includes the rule. The preamble contains a summary of the factual basis of the rule, a summary of comments received from interested parties, names of the entities that commented and whether they were in support of or in opposition to the adoption of the rule, and the reasons why the Division agrees or disagrees with the comments and recommendations.

2. REASONED JUSTIFICATION. This new section implements statutory amendments to Labor Code §401.011(5-a) and §413.021 under House Bill (HB) 7, enacted by the 79th Legislature, Regular Session, effective September 1, 2005 and Senate Bill (SB) 1814, enacted by the 81st Legislature, Regular Session, effective June 19, 2009. One of the objectives of HB 7 was to amend Labor Code §413.021 to require insurance carriers to evaluate compensable injuries that could potentially result in lost time from employment as early as practicable to determine if case management is necessary for

the injured employee's case. HB 7 amended Labor Code §413.011 to allow the Commissioner to adopt rules relating to return-to-work guidelines and disability management that are designed to improve return-to-work outcomes through appropriate management of work-related injuries or conditions. In addition, HB 7 defined case management in Labor Code §401.011(5-a) as "a collaborative process of assessment, planning, facilitation, and advocacy for options and services to meet an individual's health needs through communication and application of available resources to promote quality, cost-effective outcomes." HB 7 also provided that case managers must be appropriately licensed in this state to perform services and that insurance adjusters cannot serve as case managers. SB 1814 modified Labor Code §413.021 from requiring that case managers be appropriately licensed in Texas to requiring that case managers be appropriately certified.

The Legislature has determined that a basic goal of the workers' compensation system is that "each injured employee shall receive services to facilitate the employee's return to employment as soon as it is considered safe and appropriate by the employee's health care provider," Labor Code §401.021(a)(4), and that "[i]t is the intent of the legislature that, in implementing the goals described by Subsection (a), the workers' compensation system of this state must ... (2) encourage the safe and timely return of injured employees to productive roles in the workplace" Labor Code §401.021(b). The Commissioner has also determined that the Division wants the best return-to-work outcomes for the injured employee. The Legislature has further given the Commissioner rulemaking authority to promulgate rules to regulate the workers'

compensation system and enforce the Workers' Compensation Act (Act). Labor Code §§402.00111, 402.00128(b)(12) and 402.061. When the Legislature provides general rulemaking authority to an agency as necessary to carry out the purposes of a statute, it forecloses the position that the Legislature intended to spell out the exact details of all operations under the statute. *Gerst v. Oak Cliff Savings and Loan Ass'n*, 432 S.W.2d 702 (Tex. 1968). Due to the breadth of the coverage in the Act and the myriad of complex regulatory issues facing the Division, such rulemaking authority must be inherently broad. The delegation of authority to the Commissioner allows for the regulatory flexibility necessary for the Commissioner to fulfill his statutorily imposed duties in adopting rules as necessary to fully implement the Act while meeting the changing demands facing the workers' compensation system in Texas.

Additionally, if the plain language of a statute is ambiguous, as it seems to be based on the different interpretations proposed by the various commenters, then the Commissioner may exercise his rulemaking authority to promulgate rules as long as "the rule harmonizes with the general objectives of the statute," which, in this circumstance, would be returning more injured employees back to work and having better return-to-work outcomes for injured employees through the use of case management. *State Bd. Of Ins. v. Deffebach*, 631 S.W.2d 794, 798 (Tex.Civ.App. 1982) (promulgation of presumptive rates for credit life and health and accident insurance); see also, *State Bd of Examiners In Optometry v. Carp*, 412 S.W.2d 307 (Tex. 1967). In addition, the Division has determined that Labor Code §413.021(a), at most, provides a minimum standard and not a maximum ceiling for the certification

requirements for case managers in the workers' compensation system. Because it acts as a minimum requirement, the Division may still rely on general rulemaking authority to ensure that the general objectives of the Act are met.

In the case of workers' compensation health care networks, the Legislature has specified that appropriately certified case managers are to be used to provide medical case management services. Insurance Code §1305.303(j). In non-network settings, the Legislature has required insurance carriers to use case managers who are appropriately certified to conduct evaluations when case management services may be required. Labor Code §413.021(a). That section also requires insurance carriers, with the agreement of participating employers, to "provide the employer with return-to-work coordination services on an ongoing basis as necessary to facilitate an employee's return to employment." §413.021(a). Part of the return-to-work coordination services, as defined in §413.021(b), consists of "vocational case management to coordinate the efforts of the employer, the treating doctor, and the injured employee to achieve timely return to work." §413.021(b)(3). The Legislature has also required the Division to "use certified rehabilitation counselors or other appropriately trained or credentialed specialists to provide training to division staff regarding the coordination of return-to-work services." Labor Code §413.021(d). In the case of vocational rehabilitation services, the statute gives the Commissioner the authority to require certain credentials and qualifications in order to provide services in connection with a workers' compensation insurance claim. Labor Code §409.012(e). Those credentials and qualifications would include certifications to perform case management functions. All of

the above statutory citations show a legislative intent to focus on requiring certifications on the part of both the Division and insurance carriers.

As part of its determination that the Division seek the best return-to-work outcomes for the injured employees and in response to comments received for the proposed rule, the Division has determined that requiring appropriately certified case managers when providing all case management activities is consistent with the legislative intent to provide quality case management for all injured employees. The Division has also determined that the requirement to utilize only appropriately certified case managers is consistent with cost-effective treatment and return-to-work principles established by using appropriately certified case managers, will alleviate ambiguity in the system, will improve return-to-work outcomes for injured employees, and will provide a higher quality of care for all injured employees. The requirement for using appropriately certified case managers in all settings will better harmonize health care management and return-to-work services for injured employees within both the network and non-network systems. This clarification to Division rules will simplify and streamline regulatory oversight of the case management process while further implementing the primary objective of the Workers' Compensation Act which is returning injured employees to work. The Division has determined that this requirement will be most efficiently and fully achieved through a phase-in process, using skilled, non-certified case managers under the supervision of appropriately certified case managers as an interim step which will allow those skilled, non-certified case managers the opportunity

to accumulate sufficient work experience to sit for an appropriate certification examination.

Initially the Division formally proposed new §137.5 (regarding Certified Case Managers) in the November 27, 2009, issue of the *Texas Register* (34 TexReg 8460). Notice of a public hearing regarding this proposal was published in the January 1, 2010, issue of the *Texas Register* (35 TexReg 137) and the hearing was held on January 11, 2010 at the Division's central office in Austin, Texas. After the public hearing and receipt of 119 public comments, the Division withdrew the proposed rule from the April 23, 2010, issue of the *Texas Register* (35 TexReg 3246).

The Division informally posted a revised draft new rule to the Division's website on May 18, 2010. The Division then formally proposed new §137.5 (regarding Case Manager Certification) in the September 17, 2010, issue of the *Texas Register* (35 TexReg 8477). The Division received 16 comments during the comment period.

In response to comments from interested parties, the Commissioner has adopted these sections with some changes to the proposal as published.

In response to written comments on the published proposal and to clarify the rule, the Division has made non-substantive changes to: (1) proposed §137.5(f)(1), by adding the word "work" before "experience;" and (2) proposed §137.5(g) by changing "shall" to "may" and by adding the phrases "that occurs after the effective date outlined in subsection (a) of this section," and "accrual of the."

Also as a result of comments, the Division has amended §137.5(g) which, as proposed, provided an 18-month period for skilled, non-certified case managers to

provide case management services before certification was required to provide for a 24-month aggregate total of providing supervised case management services in order to accumulate the required work experience necessary to take a certification examination.

3. HOW THE SECTIONS WILL FUNCTION. The purpose of the adopted §137.5 is to establish certification standards for case managers used by insurance carriers for non-network workers' compensation claims. Case management requirements for certified network claims are governed by Insurance Code §1305.303 and §10.81 of this title (regarding Quality Improvement Program). The certification categories adopted in §137.5 are consistent with those set out for workers' compensation health care networks under §10.81 and reflect a desire to harmonize the requirements for certified case managers that provide services to injured employees.

New §137.5(a) provides that the rule is applicable to all case management services provided by an insurance carrier under the Labor Code. Pursuant to Labor Code §§412.041(i), 412.0125(b)(4), 413.021(a) and 501.002(a) this rule is also applicable to the State Office of Risk Management (SORM). The Division states that §137.5(a) shall become effective September 1, 2011 to allow system participants ample time to implement these certification requirements.

New §137.5(b) elaborates on the limitations of the rule, indicating it does not apply to case management services provided by a certified workers' compensation network, by certain political subdivisions, or by a health care provider subject to

§134.204 of this title (relating to Medical Fee Guideline for Workers' Compensation Specific Services).

New §137.5(c) establishes a requirement for a case manager to obtain certification from a national accrediting agency in one of six certification categories. These are the same requirements and certification categories that currently apply to case managers who perform case management services for claims in certified workers' compensation networks under §10.81 of this title. The six certification categories are case management, case management administration, continuity of care, disability management, occupational health, or rehabilitation case management.

New §137.5(d) requires an insurance carrier to use a case manager who is appropriately certified in accordance with this section when conducting evaluations to determine if case management services are required for an injured employee's case in accordance with the provisions of the Labor Code, including Labor Code §413.021(a).

New §137.5(e) requires the use of either a certified case manager or a skilled, non-certified case manager that meets the requirements of §137.5(f) when providing any other case management services to an injured employee other than those specified in §137.5(d).

New §137.5(f) defines the eligibility requirements for skilled, non-certified case managers to provide services other than those identified in subsection (d) of this title.

New §137.5(g) allows a skilled, non-certified case manager to provide supervised case management services for an aggregate total of no more than 24 months unless the skilled, non-certified case manager becomes certified in accordance with §137.5(c).

New §137.5(h) requires insurance carriers to verify and document that the case managers they use are complying with the requirements of §137.5(d), (e) and (f).

New §137.5(i) provides that an adjuster may not serve as a case manager for an injured employee's claim.

New §137.5(j) clarifies that case managers shall be reimbursed according to their contractual agreement with the insurance carrier and not according to adopted fee guidelines in Division rules.

New §137.5(k) provides that an insurance carrier may be held liable for administrative violations in accordance with Labor Code provisions and Division rules if the requirements of this section are not met.

4. SUMMARY OF COMMENTS AND AGENCY'S RESPONSE TO COMMENTS.

General: Commenters support the proposed rule requiring insurance companies to utilize case managers who are certified when conducting evaluations to determine if case management services are required or when providing case management services. Certification is the preferred way to demonstrate that a case manager possesses the proper qualifications which are education, skills, knowledge, and experience required to render appropriate services, delivered according to sound principles, including evidence based practice.

Agency Response: The Division appreciates the supportive comments and agrees that certification of a case manager improves the professional standards for the oversight of coordinated care of injured employees.

General: Commenters offer numerous interpretations of Labor Code §413.021 in comparison with the proposed rule. One commenter states that adoption of the proposed rules may exceed the Commissioner's rule making authority, and it is questionable public policy because the proposed rule restricts the available pool of competent and trained individuals who could perform case management. The commenter further states the statute does not call for case management services, if necessary, to be performed solely by case managers who are certified, and if the legislature intended this, it could have done so. Another commenter opines that the proposed rule exceeds the statutory authority to regulate certain case management activity as provided in Labor Code §413.021. Another commenter states that there is no statutory authority to require that all case management services be performed by a certified case manager. Section 413.021 and Senate Bill 1814 only specify that the insurance carrier's evaluation "to determine if skilled case management is necessary..." shall be performed by appropriately certified case managers, as necessary, and the statute does not specify any other case management service that must be performed by a "certified" case manager, and further does not specify that a "certified" case manager must perform this evaluation in all claims. The commenter further opines that there is no statutory authority for the requirement that skilled case managers become certified

case managers within 18 months, and consequently suggests the proposed rule conflicts with the statute.

Agency Response: The Division disagrees that the adopted rule exceeds the Commissioner's rulemaking authority. As noted in the preamble, the Legislative goal for the workers' compensation system is that the injured employee will receive return-to-work services as appropriate. In reaching that goal, the Legislature's intent is for the workers' compensation system to encourage the safe and timely return of injured employees to work. The Legislature has given the Commissioner broad rulemaking authority to promulgate rules. If there is ambiguity in the statutory language, as there seems to be based on the interpretations proposed by the various commenters, the Commissioner has rulemaking authority to promulgate rules as long as the rule is in harmony with the statutory objectives. One of the general objectives of the workers' compensation statutes is to return injured employees back to work quickly and safely.

Currently, certified case managers are required to be used to provide medical case management services that are treated by workers' compensation health care networks certified by the Department. Insurance carriers are also required by statute to use case managers who are appropriately certified to conduct evaluations regarding the need for case management services for non-network claims. With the agreement of participating employers, insurance carriers are also required to provide employers with return-to-work coordination services to assist in an employee's return-to-work. Part of return-to-work coordination services consists of vocational case management.

In response to comments received for the proposed rule and as part of its determination that the Division wants the best return-to-work outcome for the injured employee, the Division has determined that requiring appropriately certified case managers when providing all case management activities is consistent with the Legislative intent to provide quality case management for all injured employees. That determination is also consistent with the cost-effective medical treatment and return-to-work principles established by using certified case managers for claims being treated in certified workers' compensation networks. Using appropriately certified case managers in all settings will better harmonize health care management and return-to-work services for injured employees within both the certified network and non-network systems. This rule will simplify and streamline regulatory oversight of the case management process. It will also further the implementation of the primary objective of the Workers' Compensation Act, which is returning injured employees to work. Under the adopted rule, insurance carriers will no longer be permitted to make determinations on a case-by-case basis of when to utilize a case manager who is either certified or not certified for a particular claim. That type of ad hoc assessment would essentially allow insurance carriers and their agents to circumvent the requirement for certified case management through random determination or through contract.

The Division has determined that a phase-in process, using skilled, non-certified case managers under the direct supervision of appropriately certified case managers as an interim step, which will allow the skilled, non-certified case managers the opportunity

to accumulate sufficient work experience to sit for an appropriate certification examination.

The change from the proposed 18-month period to achieve certification to an aggregate total of 24-months, beginning with the month the individual first performs case management related services after the effective date of the rule that is incorporated in the adopted rule is to allow those individuals now working as non-certified case managers to gain the work experience necessary to pursue certification if they desire to perform case management functions within the workers' compensation system.

The Division also disagrees that requiring the certification of case managers for all case management functions would decrease the pool of competent and trained individuals who could perform case management. The requirement to set certification standards for case managers was implemented in the certified workers' compensation health care network rules, 28 TAC Chapter 10, and has not resulted in a shortage of competent and trained individuals who perform case management functions within these certified networks. The Division anticipates a similar result in the present case. Additionally, by allowing an aggregate 24-month period for skilled, non-certified case managers to gain the work experience necessary to sit for an appropriate certification examination, the pool of competent, trained, and certified individuals would continue to grow. The adopted rule also clarifies that unless a case manager is certified in accordance with Division rules, the case manager is not permitted to provide any case

management services unless those services are provided under the direct supervision of an appropriately certified case manager.

General: A commenter opines that the proposed rule does not apply to the State Office of Risk Management (SORM) since Labor Code §412.0125(b)(4) authorizes SORM to implement any appropriate services otherwise contemplated by Labor Code §413.021. If implemented as proposed, SORM anticipates increased costs for compliance.

Agency Response: The Division disagrees in part. Pursuant to Labor Code §§412.041(i), 412.0125(b)(4), 413.021(a) and 501.002(a) this rule is applicable to the SORM. Labor Code §412.0125 provides that as part of return-to-work coordination services, the SORM shall implement any other services provided under Labor Code §413.021 that will facilitate the reintegration of an injured employee. Labor Code §412.041(i) provides that the director of the SORM is subject to the rules, orders and decisions of the Commissioner of Workers' Compensation in the same manner as a private employer, insurer, or association. Labor Code §501.002(a) provides that specific chapters of the Labor Code apply and are included with regards to workers' compensation insurance coverage for state employees. Labor Code §402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rule making authority, under Labor Code Title 5. Labor Code §402.061 provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act. The application of the rule to injured employees covered by SORM

standardizes the case management services provided to injured state employees serviced by SORM with those of other injured employees, including injured state employees serviced by the other State of Texas insurance carriers, such as the Texas Department of Transportation, the University of Texas System and the Texas A&M University System. The Division agrees that as a regulated entity, SORM may encounter additional costs as a result of complying with the requirements of §137.5. The overall costs are dependent on the specific business practices currently utilized by SORM.

General: A commenter recommends that the Division withdraw the proposed rule. In the alternative, the commenter recommends the rule require that all case management be performed by either certified case managers or by persons under the direct supervision of a certified case manager.

Agency Response: The Division declines to withdraw the proposed rule and declines to make the recommended changes. The rule as proposed and adopted clarifies the appropriate certification requirements for case managers in their delivery of services for non-network claims, and consequently the Division declines to withdraw this rule which implements the certification requirements of Labor Code §413.021(a). As noted in Labor Code §413.021(a), as necessary, case managers who are appropriately certified shall be used when conducting evaluations to determine if case management services are required. Section 413.021(a) does not provide for evaluations to be conducted under the direct supervision of a certified case manager, and for this reason the

evaluations may not be performed by a non-certified case manager. In addition, the Division interprets Labor Code §413.021(a) to mean that insurance carriers are required to utilize certified case managers to perform all case management functions. This interpretation harmonizes with the general objectives of the statute, which, in this circumstance, would be returning more injured employees back to work and having better return-to-work outcomes for injured employees through the use of case management services.

General: Some commenters assert there are fewer nurses available, both generally and more specifically, to provide workers' compensation case management services. The increased demand and dwindling pool of such case managers will result in increased workers' compensation expenses in the administration of the claim.

Agency Response: The Division disagrees. There is no requirement to utilize only nurse case managers for case management services. There are several case manager certifications recognized by adoption of these rules. The choice to utilize a case manager with a particular certification is the choice of the insurance carrier as is the reimbursement for the case manager. These costs are subject to a wide variety of factors which are unique to each situation. Additionally, the rule allows an extended implementation period to allow non-certified case managers time to obtain the necessary work experience to meet all the prerequisites in sitting for a case manager certification examination.

General: A commenter seeks clarification as to the existing number of certified case managers in the state since it appears to be that only a fraction are qualified.

Agency Response: The Division clarifies that the number of existing case managers who are certified, as reflected in totals gathered as a result of the Division surveying the certifying entities, is approximately 3,700.

General: A commenter asks if the Division can produce a guideline and train health providers as the Division does with fee guidelines, required medical examinations, designated doctor training and other seminars.

Agency Response: The Division notes that a specific case management guideline is not necessary at this time. However, the Division will integrate training concerning the implementation and application of this new adopted rule into its routine education and outreach efforts.

General: A commenter asks why there is no provision that the injured employees and treating doctors should comply and work with the case nurse. The commenter further states that injured employees or doctors will not meet with the case nurse.

Agency Response: The Division clarifies that the treating doctor is primarily responsible for the employee's health care for an injury and, except in an emergency, all health care must be approved or recommended by the employee's treating doctor. Additionally, the treating doctor is responsible for maintaining efficient utilization of health care. Although there is no specified requirement to facilitate communication, the

Division expects system participants to act in the best interest of the injured employee in order to facilitate the injured employee's recovery and appropriate return to work. The Division further clarifies that complaints about system participants can be filed with the Division.

§137.5(a): A commenter opposes the proposed effective date, indicating that the legislative requirement passed in 2005 was that case managers be appropriately licensed. Consequently, the commenter questions how either case managers or insurance carriers can claim to have needed six years to comply with the legislative requirement, and suggests that in those instances where the insurance carrier determines that skilled case management is necessary, the insurance carrier should not be permitted to delay compliance with a statutory requirement created in 2005. The commenter recommends January 1, 2011 as a more reasonable effective date.

Agency Response: The Division disagrees with the recommendation of January 1, 2011 as the implementation date. Although a legislative requirement was enacted in 2005, that requirement was changed during the 2007 legislative session. Additionally, when proposed in December 2009, system participants requested that the then-proposed case management certification rules be withdrawn and additional system participant input be gathered prior to the posting of a subsequent rule proposal. Input from system participants led to revisions of the initial December 2009 rule proposal, including the proposed implementation date and phase-in period for currently non-certified case managers to obtain required work experience in order to sit for the case

management certification examinations. Additionally, this measured approach allows for an orderly transition to the requirements of the adopted rule.

§137.5(b)(3): A commenter requests that the rule include a provision that employers and insurance carriers may continue to use licensed physicians for case management when acting on the request of the employer or insurance carrier, and recommends a revision to subsection(b)(3) to read: “provided by a licensed health care physician.”

Agency Response: The Division disagrees. The requirements of Labor Code §413.021 allow the insurance carrier to select an individual with suitable qualifications to evaluate the injured employee’s claim so long as that individual is appropriately certified as a case manager. In the adopted new §137.5, as in the certification requirements in certified workers’ compensation networks under §10.81(f), there is no specific exception for physicians from the certification requirements. The provisions of §10.81(f) have never been read to require certification of licensed health care providers working within the scope of practice for their license and the Division anticipates that §137.5 will be read in the same manner.

§137.5(d): A commenter requests subsection (d) be modified to require that all case management services be provided by a case manager certified in accordance §137.5(c). The commenter further requests that proposed subsections (d) through (h) be removed as these provisions are inconsistent with the statute.

Agency Response: The Division disagrees that only case managers appropriately certified be allowed to provide case management services upon the adoption of the rule. System participants have noted the need to allow for a transition period so non-certified case managers may obtain required work experience in order to sit for the case manager certification examinations. Additionally, this measured approach allows for an orderly transition to the requirements of the adopted rule. By allowing this period of time, the Division declines to delete subsections (d) through (h) of this section.

§137.5(d): A commenter believes the proposed requirement of §137.5(d), which is to utilize only case managers who are certified in accordance with subsection (c), is unnecessary and counter-productive. Further, the commenter states it would be more reasonable and efficient to allow such evaluations to be performed by skilled and competent personnel who are working under the direct supervision of a certified case manager since the statute requires such evaluations to be performed by certified case managers “as necessary.” Another commenter suggests that a non-certified case manager, nurse case manager, or other similarly experienced or educated individual be allowed to assess the claim and determine if case management services would assist an injured employee.

Agency Response: The Division disagrees. The statute specifically requires that only case managers that are appropriately certified be used to make evaluations of the need for case management. The language of the statute would not be satisfied by using non-

certified personnel acting under the supervision of a certified case manager to perform these evaluations.

§137.5(d) and (e): A commenter states that case management should only be performed by specialty trained nurses without exception.

Agency Response: The Division disagrees. The statute specifically requires that only case managers that are appropriately certified be used to make evaluations of the need for case management. An appropriately certified registered nurse could act as case manager; however, the statute does not require that a certified case manager be limited to registered nurses.

§137.5(e): A commenter opines that it is not the best practice to have the actual delivery of case management services to injured employees being provided by non-certified case managers.

Agency Response: The Division agrees in part. The Division notes that on or after September 1, 2011, all case managers providing case management services in the Texas workers' compensation system will be required to be certified in accordance with subsection (c). Non-certified case managers will be allowed to provide case management services under the direct supervision of a case manager appropriately certified for an aggregate total of 24 months after the non-certified individual first begins providing case management related services in order to accrue the necessary work experience to sit for a certification examination.

§137.5(e): A commenter states there is nothing in the amendments that appear to show any intent to require "certified" case managers to perform any function in the Texas workers' compensation system other than this "initial evaluation" for the possibility of providing return-to-work services. Use of the term "skilled" clearly implies that non-certified case managers may provide all case management services, except with respect to the "screening" of claims with the potential for lost time. While "skilled" is not a defined term, the use implies something other than "certified."

Agency Response: The Division agrees that there is no statutory definition of "skilled." However, in the statutory language and in the adopted rule, the term "skilled" is linked with the term "non-certified case manager." This suggests that a skilled, non-certified case manager possesses the skills and qualifications of certified case managers, other than the necessary work experience, to sit for a certification examination for case managers. It does not equate certified and non-certified case managers.

As for the requirement that appropriately certified case managers be used for all case management services and as noted in the preamble, the Commissioner has taken into consideration the expressed goals and intent of the Legislature for the Workers' Compensation Act to include returning more injured employees back to work and having better return-to-work outcomes for injured employees through the use of case management and comments received for the proposed rule and has promulgated rules that are harmonized to the general objectives of the statute. The Commissioner has also taken into consideration the general trend in the workers' compensation system to utilize appropriately certified case manager to provide case management to injured

employees as seen in the workers' compensation health care networks and Labor Code §413.021(a).

The Division has determined that requiring appropriately certified case managers when providing all case management activities is consistent with the legislative intent and also is consistent with the cost-effective treatment and return-to-work principles established by using certified case managers in the workers' compensation network. Providing an indefinite exception for the ongoing use of skilled, non-certified case managers would not meet the statutory goals of the Legislature in providing cost-effective and necessary medical care to injured employees, because an indefinite exception would, by definition, not actually determine when to utilize certified case managers. Under the adopted rule, insurance carriers will not be permitted to make case-by-case determinations on when to utilize a case manager who is certified or not certified for a particular claim. The ad hoc assessment of when to utilize a certified case manager would essentially allow insurance carriers and their agents to circumvent the requirement for certified case management through random determination or contract. The requirements for using appropriately certified case managers in all settings will better harmonize health care management and return-to-work services for injured employees within both the network and non-network systems. The adopted rules will simplify and streamline regulatory oversight of the case management process while further implementing the primary objective of the Workers' Compensation Act which is returning injured employees to work.

§137.5(f): A commenter asks how the certification requirements apply to a non-certified LVN employee that is hired to perform case management duties for the employer.

Agency Response: The Division clarifies that upon implementation of the new rule, all case managers providing case management services in the Texas workers' compensation system will require certification in accordance with subsection (c). Under the adopted rule, skilled, non-certified case managers will be allowed to provide case management services under the direct supervision of a case manager appropriately certified for an aggregate total of 24 months after the non-certified individual first begins providing case management related services in order to accrue the necessary work experience to sit for a certification examination.

§137.5(f): A commenter asks what defines "skilled," and also seeks clarification if it is to be left to the discretion of the insurance carrier.

Agency Response: The Division notes that there is no stated definition of "skilled;" however, in the context of the proposed and adopted rule, the term "skilled" is linked with non-certified case manager. This suggests that a skilled, non-certified case manager possesses the skills and qualifications, other than the necessary work experience, to sit for a certification examination for case managers.

§137.5(f)(1) and (2): A commenter appreciates both the inclusion of rule provisions that provide for a time period for skilled, non-certified case managers to obtain the work experience required by the national certifying organizations that is a prerequisite to

being eligible to apply to be certified, as well as mandates that non-certified case managers must work under the direct supervision of a certified case manager until such time the non-certified case manager becomes certified.

Agency Response: The Division appreciates the supportive comment.

§137.5(g): Two commenters note the potential loophole in proposed subsection (g) that does not prohibit insurance carriers from repeated replacements and use of non-certified individuals to perform skilled case management. A commenter inquires how the Division will know when a particular case manager began their apprenticeship under a credentialed case manager and suggests that the proposed language of subsection (g) leaves room for an individual to “hop over to another mentor for 24 or 36 more months.” The commenter asks how the Division will enforce the 24 or 36 month rule. Another commenter also observes that an insurance carrier could circumvent the requirement by using a series of non-certified case managers for consecutive 18-month periods since there is no proposed prohibition against an insurance carrier continuously replacing a non-certified individual whose 18 months have expired.

Agency Response: The Division clarifies that the 24-month period as adopted in the rule is an aggregate period of time consisting of the actual time that an individual spends performing case management related services under the supervision of a case manager appropriately certified. The 24 months are not required to be contiguous. A period of employment where the individual does not provide case management related services does not count toward the 24 month aggregate total. The 24-month period

does not restart if the individual changes employers or supervisors. The Division retains the authority to audit parties subject to the rule, including insurance carriers and case managers to ensure compliance with Division rules.

§137.5(g): Commenters observe that the 18-month limitation on employment of skilled, non-certified case managers is too short, which will not allow the necessary time to gain the work experience for the appropriate examination that in some cases is only offered twice a year, and will reduce the number of qualified persons available to provide services. One commenter further opines that due to the arbitrary designation of the 18 month deadline, some injured employees will have case management services terminated prematurely or transferred to a practitioner who is not familiar with the case and does not have a working relationship with the injured employee.

Agency Response: The Division agrees, in part. After review of the certification requirements of the categories listed in subsection (c) of this section and the comments submitted, the Division has determined that 24 months is adequate time to meet the work experience requirements necessary to sit for a case management certification examination and the adopted rule has been revised accordingly. The Division disagrees, however, that injured employees will have case manager services terminated or transferred to a practitioner who is not familiar with the case since the skilled, non-certified case manager and the case are to be directly supervised by the appropriately certified case manager, which is a requirement of subsection (f)(2) of this section.

§137.5(g): A commenter requests the Division consider the cost of obtaining a certification plus the additional educational time and failure to pass on the first examination when adopting this subsection with time limitations to acquire a certification.

Agency Response: The Division clarifies that numerous considerations have been taken into account as a result of system participant input since the Division's initial case manager certification rule proposal of December 2009. Allowing an extended implementation period to permit skilled, non-certified case managers time to obtain the necessary work experience, under the direct supervision of an appropriately certified case manager, in order to meet all the prerequisites in sitting for a certification examination is one example of such factors the Division considered and adopted as part of this rule. However, consideration for the potential failure to pass a certification examination is not a factor the Division must accommodate for purposes of implementing the legislative requirements that case managers be appropriately certified. While the requirements to become certified as a case manager may have some affiliated costs, these requirements and their consequential costs are mandated by statute, not the adopted rule. New §137.5 implements the legislative goal of requiring appropriately certified case managers so injured employees receive appropriate case management services.

§137.5(g): A commenter recommends that case managers with tenure should be grandfathered, and also recommends a preparatory class covering key workers' compensation issues.

Response: The Division declines to make the recommended change and notes that accommodations are already included in the proposed and adopted new rule for those case managers who are skilled and eligible to provide case management services if they meet all of the requirements to sit for a case manager certification examination, with the exception of work experience. To the extent that "tenured" case managers might have the work experience necessary to take one or more of the case manager certification examinations, they would only be qualified in part and would still be required to take and pass the certification exam after an aggregate 24-month period of performing case management services after the effective date of the rule. Concerning the commenter's suggestion that a preparatory class covering the key workers' compensation issues be made available, the Division notes that there are numerous educational resources available on the Division's website that will facilitate learning the laws and rules of the Texas workers' compensation system (<http://www.tdi.state.tx.us/wc/indexwc.html>).

§137.5(g): Commenters state subsection (g) of the proposed rule act to limit services to the injured employees of Texas. Some commenters recommend the inclusion of language in subsection (g) that allows for: "working under the supervision of a qualified and credentialed case manager" for a period of 48 months so that qualified case

managers can gain the experience needed to sit for the exams. In the alternative, some commenters advise the minimal acceptable time frame is 24 months if it is not feasible to add the provision of 48 months. Another commenter suggests subsection rule language be based on URAC standards, which is 24 months if employed full time, and 36 months if employed part-time. The commenter expresses concern for the part-time individual who will not meet the 18-month limitation.

Response: The Division agrees in part. The Division notes that input from system participants led to revisions of the initial December 2009 rule proposal, including the proposed implementation date and phase-in period for currently non-certified case managers to obtain required work experience in order to sit for the case management certification examinations. After further review of the certification requirements of the categories listed in subsection (c) of this section and the comments received, the Division has determined that employment as a skilled non-certified case manager under the supervision of a certified case manager for an aggregate 24-month period, beginning with the month in which the individual first performs case management related services after the effective date of the rule is adequate time to meet the work experience requirements necessary to sit for a case manager certification examination. This measured approach allows for a sufficient period of time and an orderly transition to the requirements of the adopted rule.

§137.5(h): Commenters oppose the requirement imposed on insurance carriers to verify and document the compliance requirements of the rule for those case managers

employed by a vendor, as well as independent case managers who are not directly employed by the insurance carrier. Some insurance carriers do not have ready access to the licensing and certification status of such skilled and certified case managers, and do not have managerial control over these individuals. Commenters suggest this is a burden and risk placed on the insurance carriers, which is not good for the injured employees as it may delay case management services. Some of the commenters offer alternative recommended language for subsection (g): "Insurance carriers shall provide verification and documentation information for case managers employed by the carrier. Independent case managers and case management vendor companies contracted by insurance carriers shall provide this verification and documentation information to the division, upon request. An independent case manager and/or case management vendor company contracted by insurance carriers who fails to comply with subsections (d), (e), and (f) of this section may be subject to all appropriate sanctions and penalties provided for by the Texas Labor Code."

Response: The Division disagrees that obtaining the certification status of case managers is unduly burdensome or risky for the insurance carrier. The Division notes that a requirement of insurance carriers to verify the licensure of its agents, adjusters, third party administrators or utilization review agents, for example, is one of the basic tenants of claims services, and further notes that each insurance carrier has the discretion to hire their own case managers or make a business decision to utilize a vendor or independent case manager to provide case management services. If an insurance carrier chooses the latter, the insurance carrier, as a general business

practice, has the latitude to require verification proof of certification from that vendor or independent case manager the same way it does for the other types of licensed or certified entities listed previously.

§137.5(k): A commenter recommends substitute language for subsection (k) as follows: "If the requirements of this section are not met for case managers employed by the carrier, the insurance carrier may be held liable for administrative violations in accordance with Labor Code provisions and division rules. If the requirements of this section are not met by independent case managers contracted by insurance carriers, the independent case manager or company employing the independent case manager may be liable for sanctions in accordance with Labor Code §402.072 and administrative violations in accordance with Labor Code §415.021 and division rules."

Response: The Division declines to make the recommended change as requiring verification and proof of case manager certification, as previously noted, is determined by the Division to be the responsibility of each insurance carrier that chooses to contract with a vendor of case management services or an independent case manager.

5. NAMES OF THOSE COMMENTING FOR AND AGAINST THE SECTIONS.

For: Commission for Case Manager Certification

For, with changes: American Insurance Association, GENEX Services, Insurance Council of Texas

Against: Office of Injured Employee Counsel

Neither for or Against: City of Laredo, Kinetic Clinic, Parker & Associates, Property Casualty Insurers Association of America, State Office of Risk Management, TARPPS, and VIA Metropolitan Transit

6. STATUTORY AUTHORITY. The new section is adopted under Labor Code §§413.021, 401.011(5-a), 413.011(e) and (g), 412.0125, 412.041(i), 501.002(a), 402.00111, and 402.061.

Pursuant to Labor Code §413.021, an insurance carrier shall evaluate a compensable injury in which the injured employee sustains an injury that could potentially result in lost time from employment as early as practicable to determine if skilled case management is necessary for the injured employee's case. As necessary, case managers who are appropriately certified shall be used to perform these evaluations. Additionally, a claims adjuster may not be used as a case manager. Labor Code §401.011(5-a) defines case management as a "collaborative process of assessment, planning, facilitation, and advocacy for options and services to meet an individual's health needs through communication and application of available resources to promote quality, cost-effective outcomes." Pursuant to Labor Code §413.011(e) and (g), the Commissioner may adopt rules relating to return-to-work guidelines and disability management that are designed to improve return-to-work outcomes through appropriate management of work-related injuries or conditions. The Commissioner by rule may identify claims in which application of disability management activities is required and prescribe at what point in the claim process a treatment plan is required.

The determination may be based on any factor considered relevant by the Commissioner. Labor Code §412.0125 provides that as part of return-to-work coordination services, SORM shall implement any other services provided under Labor Code §413.021 that will facilitate the reintegration of an injured employee. Labor Code §412.041(i) provides that the director of SORM is subject to the rules, orders and decisions of the Commissioner of Workers' Compensation in the same manner as a private employer, insurer, or association. Labor Code §501.002(a) provides that specific chapters of the Labor Code apply and are included with regards to workers' compensation insurance coverage for state employees. Labor Code §402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rule making authority, under Labor Code Title 5. Labor Code §402.061 provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act.

7. TEXT.

§137.5. Case Manager Certification.

(a) This section applies to all case management services as defined by Labor Code §401.011(5-a) that are provided under Labor Code Title 5 to injured employees by an insurance carrier on or after September 1, 2011.

(b) This section does not apply to case management services:

(1) subject to Insurance Code Chapter 1305;

(2) subject to Labor Code §504.053(b)(2); or

(3) of a health care provider subject to §134.204 of this title (relating to Medical Fee Guideline for Workers' Compensation Specific Services).

(c) Case managers who are certified must be certified by an established accredited organization including the National Commission for Certifying Agencies, the American Board of Nursing Specialties, or other national accrediting agencies with similar standards for case management certification. Case managers must be certified in one or more of the following areas:

- (1) case management;
- (2) case management administration;
- (3) continuity of care;
- (4) disability management;
- (5) occupational health; or
- (6) rehabilitation case management.

(d) When conducting evaluations to determine if case management services are required, insurance carriers shall utilize case managers who are certified in accordance with subsection (c) of this section.

(e) When providing case management services other than those specified in subsection (d) of this section, an insurance carrier shall utilize case managers who are:

(1) appropriately certified in accordance with subsection (c) of this section; or

(2) skilled, non-certified case managers as specified in subsection (f) of this section.

(f) Skilled, non-certified case managers are eligible to provide services other than those identified in subsection (d) of this section if:

(1) they meet all of the requirements of subsection (c) to sit for a case management certification examination, with the exception of work experience; and

(2) they are working under the direct supervision of an identified case manager that is certified in accordance with subsection (c) of this section in order to meet the experience requirements to sit for a case management certification examination.

(g) Individuals may only be employed or contracted as skilled, non-certified case managers as specified in subsection (f) of this section for an aggregate total of 24 months, beginning with the first month in which the individual first performs case management related services that occurs after the effective date outlined in subsection (a) of this section. After accrual of the 24 months, these individuals shall not conduct case management services until a certification is obtained in accordance with subsection (c) of this section.

(h) Insurance carriers shall be responsible for verifying and documenting in writing compliance with the requirements of subsections (d), (e) and (f) of this section. Insurance carriers shall provide this verification and documentation information to the division upon request.

(i) Claims adjusters shall not be used as case managers. This does not prohibit claims adjusters from performing claims services that are within the scope of licensure in accordance with the Insurance Code Chapter 4101.

(j) Reimbursement policies and maximum allowable reimbursement rates set forth in the adopted fee guidelines under §134.204 of this title between the treating doctor and other health care providers does not apply to the reimbursement of case managers employed or contracted by insurance carriers under this section.

(k) If the requirements of this section are not met, the insurance carrier may be held liable for administrative violations in accordance with Labor Code provisions and division rules.

8. CERTIFICATION. This agency hereby certifies that the adopted new §137.5 has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas on _____, 2010.

Dirk Johnson
General Counsel
Texas Department of Insurance,
Division of Workers' Compensation

IT IS THEREFORE THE ORDER of the Commissioner of Workers' Compensation that §137.5 specified herein, concerning **Case Manager Certification**, are adopted.

AND IT IS SO ORDERED

ROD BORDELON
COMMISSIONER OF WORKERS' COMPENSATION

ATTEST:

Dirk Johnson
General Counsel

COMMISSIONER'S ORDER NO.