

SUBCHAPTER D. Treatment Planning
28 TAC §137.300

1. INTRODUCTION. The Commissioner of Workers' Compensation, Texas Department of Insurance, Division of Workers' Compensation (Division), adopts the repeal of §137.300, concerning required treatment planning. The repeal is adopted without changes to the proposal as published in the June 29, 2007, issue of the *Texas Register* (32 TexReg 3966).

2. REASONED JUSTIFICATION. Since publication of the adopted disability management rules in Chapter 137, Disability Management, which included §§137.1, 137.10, 137.100, and 137.300, workers' compensation system participants, including insurance carriers, health care providers, and associations, have expressed the need for additional time to establish systems and processes to appropriately address required treatment planning and to communicate and develop treatment planning parameters that are effective, efficient, and workable.

The Division selected the most current edition of the Official Disability Guidelines-Treatment in Workers' Comp (ODG) published by the Work Loss Data Institute (WLDI), as the Division's treatment guidelines. Section 137.300 was adopted and applicable to health care provided on or after May 1, 2007. Subsequently, the Division adopted a rule amendment on an emergency basis to change the applicability dates for required treatment planning from health care provided on or after May 1, 2007 to health care provided on or after September 1,

2007. The emergency rule amendment was renewed and adopted to change the applicability date for required treatment planning from health care provided on or after May 1, 2007 to health care provided on or after October 1, 2007.

System participants have expressed ongoing concerns regarding the processes for required treatment plans, and urged delaying implementation of required treatment planning until a more methodical approach can be developed. Concerns expressed included the three day timeframe for issuing adverse determinations required by Texas Insurance Code, §4201.304(2). System participants asserted that three days is an insufficient amount of time to review a treatment plan, especially for treatment plans involving proposed treatment from multiple health care providers. In addition, stakeholders have concerns that the Independent Review Organization fee structure does not contemplate assignment of multiple reviewers, which may be needed for medical necessity review of treatment plans that address multiple types of services. Health care providers expressed concern regarding lack of a specific reimbursement structure for preparing and submitting treatment plans.

Therefore, in order to address these concerns and the concern that system participants would not be able to initiate the treatment planning requirements without some lapses in care for the injured employees, the Division repeals §137.300. Repeal of this section will allow the Division time to address concerns raised by system participants, and the opportunity to work further with system participants to develop required treatment planning guidelines that effectively

achieve the goals and intent of the Legislature as defined in Labor Code §413.011.

Treatment planning is an integral part of disability management and the Division has determined that working with system participants in a voluntary pilot treatment planning program would be a unique and useful tool in the development of effective parameters for required treatment planning. The Division intends to implement such a pilot project soon.

3. HOW THE SECTION WILL FUNCTION. While the other disability management rules (§§137.1, 137.10, and 137.100) will continue in effect, the repeal of §137.300 removes the requirement that treating doctors develop and preauthorize treatment plans. Voluntary treatment planning remains an available option for health care providers when providing treatment and services in accordance with the treatment guidelines.

4. SUMMARY OF COMMENTS AND AGENCY RESPONSE.

COMMENT: Commenter states that adherence to the ODG before treatment takes away the ability of the carriers to retrospectively review treatment that does not conform to the standards. Commenter stated that it should not be the responsibility of the carriers to ensure that health care providers conform to the ODG. Commenter is concerned that some preauthorization treatments are exceeding what is requested and that initial treatment that corresponds to the ODG will later vary off track and the carrier will not have the ability to correct this until it receives notice months later.

Commenter recommends leaving preauthorization and retrospective review in place instead of enacting adherence to ODG treatment before the fact through the preauthorization process.

AGENCY RESPONSE: The Division notes this rulemaking activity addresses the repeal of §137.300, relating to Required Treatment Planning, and does not encompass concerns regarding other rule provisions, which are beyond the scope of this rule repeal. The proposed repeal of the treatment planning requirement is a result of expressed concerns that system participants would not be able to initiate the treatment planning requirements without some lapses in care for injured employees. The Division acknowledges that without the treatment planning rule, adhering to the ODG will create an increase in preauthorization requests; however, the repeal does not change the preauthorization process as established in §134.600, relating to Preauthorization, Concurrent Review, and Voluntary Certification of Health Care. To better address all of the concerns regarding preauthorization requests and treatment planning, the Division is working with stakeholders to initiate a treatment planning pilot project with specific parameters, time frames and outcome measures. The pilot project will be voluntary and is planned to be consistent with the voluntary certification statutory and regulatory requirements. Concurrent with the pilot project, the Division will form a working group interested in providing input on a “packet” of rules, including a new treatment planning rule, a revised preauthorization rule and a case management rule.

COMMENT: Commenter objects to the repeal of the treatment planning rule prior to adoption of a new treatment planning rule stating that this will result in ineffective and piecemeal medical care due to miscommunication. Commenter thinks that the large increase in services undergoing preauthorization will result in an increase in administrative burdens for health care providers and medical disputes that will only further compound delays in delivery of necessary medical care. Commenter urges the adoption of all five parts of disability management at one time with an extended effective date (treatment planning, treatment guidelines, return to work guidelines, treatment protocols, and case management rules) so that system participants will be able to make business process improvements to fully implement disability management. Commenter believes this will allow system participants to provide more informed feedback.

AGENCY RESPONSE: The Division disagrees with not repealing the treatment planning rule prior to adoption of a new treatment planning rule, and further disagrees with adopting all the rules associated with disability management at one time. System participants have expressed ongoing concerns regarding the processes for required treatment plans, and urged delaying implementation until a more methodical approach is demonstrated through a pilot project. Concerns expressed include the three-day timeframe for issuing adverse determinations required by Insurance Code, §4201.304(2). System participants stated that three days is an insufficient amount of time to review a treatment plan, especially for treatment plans involving proposed treatment from multiple health care providers. In

addition, the Independent Review Organization fee structure does not contemplate assignment of multiple reviewers which may be needed for medical necessity review of treatment plans that address multiple types of services. Health care providers expressed concern regarding lack of a specific reimbursement structure for preparing and submitting treatment plans. Although repeal of this rule will result in an interim period of increased preauthorization requests, the Division agrees with the recommendations made by system participants to further explore the treatment planning process prior to future rule making. While the Division works with system participants on the pilot project and a review of current preauthorization rule requirements, focus will include education to minimize confusion and miscommunication.

COMMENT: Commenter asserts that §137.300 would reduce carrier costs significantly (due to allowing bundling of many services in a single preauthorization request) and a treatment planning rule is vital to the efficient working of the system. Commenter believes that due to the 2007 legislative changes providing for reviews of IRO denials to be reviewed locally, it will be more convenient for claimants to participate, thus increasing disputes and adding more costs to the system. Commenter asserts that for relatively inexpensive services that are inconsistent with the treatment guidelines, the carriers will expend huge sums to ensure that the claimant receives only treatment that is appropriate to the injury and the sums will likely exceed the cost of the treatment. Commenter agrees with those that contend

that preauthorization of a treatment plan will take more than three days to complete and recommends any future rule provide an expanded period of time to allow for negotiation of services, review of records, and require that the requestor ensure that the utilization review agent has all the relevant records. Commenter supports the repeal of this rule if a process is quickly implemented that addresses these concerns. Commenter provides a number of suggestions for development of a new treatment planning process.

AGENCY RESPONSE: The Division agrees that there are numerous reasons why a treatment planning rule is vital for a successful, efficient, and cost effective system. However, system participants have expressed ongoing concerns regarding the processes for required treatment plans, and have urged delaying the current rule's implementation until a more methodical approach is demonstrated through a pilot project. Although repeal of this rule will result in an interim period of increased preauthorization requests and associated costs, the Division agrees with the recommendations made by system participants to further explore the treatment planning process prior to future treatment planning rulemaking, and welcomes further input. The Division notes that voluntary treatment planning is always available to system participants who wish to avoid multiple preauthorization requests. Insurance Code, §4201.304(2) states that notification of adverse determination shall be provided by the utilization review agent "within three working days in writing to the provider of record and the patient." This time frame cannot be lengthened by rule and therefore must be considered in developing workable

treatment planning provisions. Further development of the treatment planning process and a review of the current preauthorization rule requirements will begin and progress as Division resources allow.

COMMENT: Commenter states that the repeal of the treatment planning rule will provide time for a treatment planning pilot project to allow the Division's Medical Advisor and staff to identify opportunities for improved communication and efficient delivery of appropriate medical care. Commenter requests that the Division post on the website an overview of the treatment planning pilot project that includes the dates the pilot project will be undertaken, and that the meetings on treatment planning and the pilot project be announced and open to the public.

AGENCY RESPONSE: The Division agrees that repeal of §137.300 will allow time to implement a pilot project that will result in an improved, permanent rule for treatment planning. The Division agrees that system participants will benefit from posted information on the Division's website pertinent to the pilot project, and intends to make such information available.

COMMENT: Commenter opposes repeal of §137.300, but recommends delay of implementation of the rule to May 1, 2008, while working out the logistical issues. Commenter suggests initiating a treatment planning pilot project on September 1, 2007, to acquire data to be used in refining key components of the rule and in the interim implementing treatment planning under a voluntary certification model.

AGENCY RESPONSE: The Division disagrees with commenter's recommendation to delay implementation of §137.300 until May 1, 2008. The Division agrees with commenter's suggestion of implementing a treatment planning pilot program and will use the knowledge gained from that pilot program to redraft a permanent treatment planning rule that would be proposed at a later date. Concurrent with the pilot project, the Division will form a working group interested in providing input on a "packet" of rules, including a new treatment planning rule, a revised preauthorization rule and a case management rule. Time is needed to initiate a pilot project and to obtain data from the program before establishing a future permanent treatment planning rule adoption date.

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

For: Insurance Counsel of Texas.

For, with changes: Flahive, Ogden & Latson, Attorneys at Law.

Against: Cambridge Integrated Services Telephonic Case Managers, Office of Injured Employee Counsel, and Somi Healthlink, LLC.

6. STATUTORY AUTHORITY. The repeal is adopted pursuant to Labor Code §§413.011(e), 413.011(g), 401.011, 413.021, 409.005, 408.023, 408.025, 413.017, 413.018, 413.013, 408.021, 402.00111, and 402.061. Section 413.011(e) provides that the Commissioner by rule shall adopt treatment guidelines and return-to-work guidelines and may adopt individual treatment protocols. Section 413.011(g)

provides that the Commissioner may adopt rules relating to disability management that are designed to promote appropriate health care at the earliest opportunity after the injury to maximize injury healing and improve stay-at-work and return-to-work outcomes through appropriate management of work-related injuries or conditions. Section 401.011 contains definitions used in the Texas workers' compensation system (in particular, §401.011(18-a), the definition of "evidence-based medicine," §401.011(22-a), the definition of "health care reasonably required" and §401.011(42), the definition of "treating doctor"). Section 413.021 requires an insurance carrier, with the agreement of a participating employer, to provide the employer with return-to-work coordination services as necessary to facilitate an employee's return to employment. Section 409.005 provides the procedure for filing a report of injury, the format to be used, authorizes the adoption of rules regarding the information that must be included in the report, and requires the employer to notify the employee, the treating doctor, and the insurance carrier of the existence or absence of opportunities for modified duty or a modified duty return-to-work program available through the employer. Section 408.023(m) authorizes the Commissioner to adopt rules to define the role of the treating doctor and to specify outcome information to be collected for a treating doctor. Section 408.025(a) authorizes the Commissioner by rule to adopt requirements for reports and records that are required to be filed with the Division or provided to the injured employee, and subsection (c) provides that the treating doctor is responsible for maintaining efficient utilization of health care. Section 413.017 provides that certain medical

services are presumed reasonable. Section 413.018(a) states that the Commissioner by rule shall provide for the periodic review of medical care provided in claims in which guidelines for expected or average return to work time frames are exceeded and subsection (b) states that the Division shall review the medical treatment provided in a claim that exceeds the guidelines and may take appropriate action to ensure that necessary and reasonable care is provided. Section 413.013 authorizes the Commissioner by rule to establish programs for prospective, concurrent, and retrospective review and resolution of disputes regarding health care treatments or services, for the systematic monitoring of the necessity of treatments administered and fees charged and paid for medical treatments to ensure that the medical policies or guidelines are not exceeded, to detect practices and patterns by insurance carriers, and to increase the intensity of review for compliance with the medical policies or fee guidelines. Section 408.021(a) and (a)(3) state that an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed which specifically includes health care that enhances the ability of the employee to return to or retain employment and subsection (c) states that, except in an emergency, all health care must be approved or recommended by the employee's treating doctor. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under Labor Code Title 5. Section 402.061 states that the Commissioner of Workers' Compensation

shall adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

7. TEXT.

SUBCHAPTER D. TREATMENT PLANNING

§137.300. Required Treatment Planning.

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

Issued at Austin, Texas, on _____, 2007.

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 §137.300, concerning required treatment planning, is adopted.

AND IT IS SO ORDERED.

ALBERT BETTS
COMMISSIONER OF WORKERS' COMPENSATION

ATTEST:

Norma Garcia
General Counsel

COMMISSIONER'S ORDER NO. _____