

TITLE 28. INSURANCE
PART 2. TEXAS DEPARTMENT OF INSURANCE,
DIVISION OF WORKERS' COMPENSATION
CHAPTER 133: GENERAL MEDICAL PROVISIONS
Title 28 TAC §133.30

INTRODUCTION. The Texas Department of Insurance, Division of Workers' Compensation (division), proposes new 28 Texas Administrative Code (TAC) §133.30, *Telemedicine Services*.

Labor Code §402.021, *Goals; Legislative Intent; General Workers' Compensation Mission of Department*, establishes the basic goals of the Texas workers' compensation system, which include ensuring that each injured employee has access to prompt, high-quality medical care and that each injured employee receives services to facilitate the employee's return to employment as soon as it is considered safe and appropriate. In implementing these 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.

Telemedicine services are currently authorized in the Texas workers' compensation system under 28 TAC §134.203, *Medical Fee Guideline for Professional Services*. Section 134.203 implements Labor Code §413.011, *Reimbursement Policies and Guidelines; Treatment Guidelines and Protocols*, by adopting the most current reimbursement methodologies, models, and values or weights used by the federal Centers for Medicare and Medicaid Services, specific to Medicare. This includes applicable Medicare payment policies related to coding, billing, and reporting, as well as

42 Code of Federal Regulations (CFR) §410.78, *Telehealth Services*, which authorizes payment for telehealth office and other outpatient visits, consultations, examinations, services, etc., if certain conditions are met. These specified conditions restrict billing and reimbursement of telemedicine services in the workers' compensation system by requiring that the services be furnished to an injured employee at an originating site, and further requiring that the originating site be located in a health professional shortage area (HPSA). Originating sites are limited to one of eight defined medical facilities, including a physician or practitioner office, critical access hospital, and a rural health clinic. Thus, pursuant to Medicare payment policies, telemedicine services in the workers' compensation system may currently only be billed and reimbursed when provided to an injured employee at a Medicare authorized originating site that is located in a HPSA.

New §133.30 is necessary to expand access to telemedicine services in the Texas workers' compensation system and allows health care providers to bill and be reimbursed for telemedicine services regardless of where an injured employee is located at the time the services are provided. It creates an exception to Medicare payment policy restrictions requiring that telemedicine services be furnished at an originating site and requiring that the originating site is located in a HPSA. Instead, under the new rule, a health care provider will be able to bill and be reimbursed for telemedicine services in the workers' compensation system with no restriction on the geographic area or location of the injured employee at the time the services are provided. New §133.30 helps to fulfill the legislative requirement found in Labor Code

§402.021 to take maximum advantage of technological advances and to ensure that injured employees have access to prompt, high-quality medical care.

The division emphasizes that new §133.30 simply creates an exception to the current billing and reimbursement requirements for telemedicine services. It does not change who may provide the services, which is established by the individual health care provider's regulatory or licensing board. Health care providers are encouraged to look at their applicable board regulations for information on scope of practice and specific requirements for practicing telemedicine. The division emphasizes that telemedicine services are an additional, voluntary option for injured employees and the new rule does not affect the employee's entitlement to initial choice of doctor, pursuant to Labor Code §408.022 or Insurance Code §1305.104. In addition, new §133.30 does not change any other portion of the current billing and reimbursement requirements for telemedicine services. New §133.30 simply reiterates the existing billing and reimbursement framework for telemedicine services and establishes an exception to help expand access to those services.

An informal working draft of new §133.30 was published on the division's website on September 22, 2017, and the division received 12 comments.

Section 133.30 addresses **Telemedicine Services**. New §133.30(a) establishes the applicability of new §133.30 by specifying that the section applies to medical billing and reimbursement for telemedicine services provided on or after September 1, 2018, in the Texas workers' compensation system, including in workers' compensation health care networks established under Insurance Code Chapter 1305. This subsection is necessary to outline the applicability of new §133.30 in a clear and direct manner. It

establishes a delayed applicability date to help allow for ease of implementation, while balancing the intent of new §133.30 to expand access to telemedicine services in the Texas workers' compensation system.

The applicability of new §133.30 mirrors existing requirements regarding billing and reimbursement for telemedicine services found throughout the Labor Code, Insurance Code, and TAC. Labor Code §413.011, *Reimbursement Policies and Guidelines; Treatment Guidelines and Protocols*, requires the division to adopt health care reimbursement policies and guidelines that reflect the standardized reimbursement structures found in other health care delivery systems with minimal modifications. In order to achieve the required standardization, §413.011 requires the division to adopt the most current reimbursement methodologies, models, and values or weights used by the federal Centers for Medicare and Medicaid Services (CMS). This includes applicable payment policies related to coding, billing, and reporting. Under §134.203, system participants are required to apply applicable Medicare payment policies for coding, billing, reporting, and reimbursement of professional medical services. "Medicare payment policies" is defined as reimbursement methodologies, models, and values or weights, including its coding, billing, and reporting payment policies set forth by CMS. Thus, CMS payment policies specific to Medicare, including those authorizing payment for telemedicine services and providing the required billing, coding, and reporting guidelines for reimbursement of those services, are adopted by reference into the Texas workers' compensation system and system participants are required to bill and reimburse accordingly under §134.203.

New §133.30(a) applies the section's requirements to medical billing and reimbursement for telemedicine services in the Texas workers' compensation system, including in health care networks under Insurance Code Chapter 1305. Section 134.203 applies to professional medical services provided in the system other than those provided through a workers' compensation health care network certified pursuant to Insurance Code Chapter 1305, except as provided in Insurance Code Chapter 1305. Thus, while all system participants in non-networks must bill and reimburse according to CMS payment policies specific to Medicare, those same Medicare payment policies only apply to networks to the extent provided for under Insurance Code Chapter 1305. Insurance Code §1305.153, *Provider Reimbursement*, states that billing by, and reimbursement to, providers is subject to the requirements of the Labor Code and applicable division rules that are consistent with Insurance Code Chapter 1305. These sections (Texas Administrative Code §134.203 and Insurance Code §1305.153) operate to create a conflict provision that applies Labor Code provisions and division rules regarding billing and reimbursement, such as the Medicare payment policies, to networks as long as they do not conflict with Insurance Code Chapter 1305.

Section 1305.153(a) states that the amount of reimbursement for services provided by a network provider is determined by the contract between the network and the provider or group. Section 1305.153(d) states that applicability of Labor Code provisions and division rules to billing and reimbursement of providers cannot be construed to require application of a rule regarding reimbursement if that application would negate the reimbursement amount negotiated by the network. These are express conflicts that negate the applicability of §134.203 requirements dealing with the

reimbursement amount for medical services, including telemedicine services. However, there are no similar conflicts regarding billing and the ability to be reimbursed for telemedicine services. Therefore, CMS payment policies specific to Medicare regarding billing and reimbursement, but not the reimbursement amount, apply to networks under Insurance Code Chapter 1305.

In addition, §133.20(c), *Medical Bill Submission by Health Care Provider*, requires health care providers to include correct billing codes from applicable division fee guidelines when submitting medical bills. Section 133.1 applies Chapter 133 to medical billing and processing for services provided to both injured employees in a network established under Insurance Code Chapter 1305 and those not in a network. As such, §133.30(a) emphasizes that the requirements of new §133.30 apply to medical billing and reimbursement for telemedicine services across the Texas workers' compensation system, including in health care networks under Insurance Code Chapter 1305.

New §133.30(b) defines "telemedicine services" to mean a telehealth service or a telemedicine medical service as defined in Occupations Code §111.001. A definition of "telemedicine services" is necessary to inform system participants what services are addressed under new §133.30. Occupations Code §111.001(3) defines a "telehealth service" as a health service, other than a telemedicine medical service, delivered by a health professional licensed, certified, or otherwise entitled to practice in this state and acting within the scope of their license, certification, or entitlement to a patient at a different physical location than the health professional using telecommunications or information technology. A "telemedicine medical service" is defined in Occupations

Code §111.001(4) as a health care service delivered by a physician licensed in this state, or a health professional acting under the delegation and supervision of a physician licensed in this state, and acting within the scope of their license to a patient at a different physical location than the physician (or health professional) using telecommunications or information technology.

Workers' compensation system participants include both physicians and health professionals, and both telehealth services and telemedicine medical services may occur within the system. See, for example, the definition of "health care provider" in Labor Code §401.011(22), *General Definitions*, which includes a health care facility and a health care practitioner. A health care practitioner is defined in §401.011(21) as an individual licensed to provide or render and provides or renders health care, or a non-licensed individual under the direction or supervision of a doctor. This existing definition reflects both definitions found in Occupations Code §111.001. New §133.30(b) combines the terms telehealth service and telemedicine medical service for ease of understanding, as both are billed and reimbursed according to Medicare requirements. Instead of creating a new, unrecognized definition for telemedicine services in the workers' compensation system, new §133.30(b) mirrors similar Texas regulations by adopting the Occupations Code definitions by reference. In addition, the definition helps capture the expansive telemedicine/telehealth services authorized in Texas, which are then limited through Medicare payment policies.

New §133.30(c) reiterates the existing requirement that health care providers must bill for telemedicine services according to applicable Medicare payment policies, as defined in §134.203, and the provisions of Chapter 133. As outlined above,

telemedicine services are currently authorized in the Texas workers' compensation system under §134.203, which implements Labor Code §413.011. Medical billing and reimbursement for telemedicine services, including within workers' compensation health care networks under Chapter 1305, must be billed according to applicable requirements found in §134.203 and Chapter 133. New §133.30(c) restates the existing billing and reimbursement structure for telemedicine services and is necessary to ensure the rule provides a clear and concise framework to system participants. The subsection is also necessary to provide essential context for the exception that follows in subsection (d).

New §133.30(d) establishes an exception to Medicare payment policies by allowing a health care provider to bill and be reimbursed for telemedicine services regardless of where the injured employee is located at the time the telemedicine services are provided. 42 CFR §410.78 defines "originating site" as the location of an eligible beneficiary at the time the service being furnished via a telecommunications system occurs. Under 42 CFR §410.78(b), Medicare authorizes payment for a specified set of services furnished by an interactive telecommunications system when the enumerated conditions are met, including that the services are furnished to a beneficiary at an authorized originating site and that the originating site is located in a HPSA or in a county that is not included in a Metropolitan Statistical Area. Authorized originating sites include: (1) the office of a physician or practitioner; (2) a critical access hospital; (3) a rural health clinic; (4) a federally qualified health center; (5) a hospital; (6) a hospital-based or critical access hospital-based renal dialysis center; (7) a skilled nursing facility; and (8) a community mental health center.

The effect of 42 CFR §410.78 is to restrict telemedicine services in the workers' compensation system to those provided in rural communities identified as HPSAs and even then, only when the injured employee presents at an authorized location. The exception established in new §133.30(d) is necessary to remove this limitation and help expand access to telemedicine services in the Texas workers' compensation system. As outlined above, Labor Code §413.011 requires the division to adopt health care reimbursement policies and guidelines that reflect the standardized reimbursement structures found in other health care delivery systems with minimal modifications. Section 134.203 implements Labor Code §413.011 by adopting Medicare payment policies, which include those payment policies relating to telemedicine. The exception established in new §133.30(d) is a minimal modification to the adopted Medicare payment policies, and does not change any other portion of the current billing and reimbursement requirements for telemedicine services. New §133.30(d) simply allows health care providers to bill and be reimbursed for telemedicine services regardless of where an injured employee is located at the time the services are provided.

New §133.30(e) provides that, in the event of a conflict, §133.30 takes precedence over provisions adopted or utilized by the Centers for Medicare and Medicaid Services. The subsection mirrors similar conflict provisions found throughout the Texas Administrative Code (see, for example, §134.203) and is necessary to emphasize the division's intent that a conflict between the exception in §133.30(d) and Medicare requirements is resolved in favor of the exception. In other words, that health care providers may bill and be reimbursed for telemedicine services regardless of the

injured employee's location, despite the requirements found in Medicare's payment policies.

FISCAL NOTE. Matt Zurek, Deputy Commissioner for Health Care Management, has determined that for each year of the first five years the new §133.30 is in effect, there will be no fiscal impact to state or local governments as a result of enforcing or administering the proposal. There will be no measurable effect on local employment or the local economy as a result of the proposal. Any economic costs to those state and local governments that provide workers' compensation coverage are discussed below.

PUBLIC BENEFIT. Mr. Zurek has also determined that for each of the first five years the new section is in effect there will be a number of public benefits. The public benefits anticipated as a result of new §133.30 include: (i) increasing access to telemedicine services in the Texas workers' compensation system; (ii) increasing access to care, including medical specialties that may not be readily available in the injured employee's location, and faster access to care, both of which lead to better outcomes; (iii) reducing the need to leave the workplace for medical care, leading to a decrease in costs to the injured employee in the form of travel and lost time and a reduction of loss of productivity for the employer; and, (iv) capitalizing on technological advances to provide highest level of service possible to system participants.

ANTICIPATED COSTS TO COMPLY WITH THE PROPOSAL. Mr. Zurek anticipates that, for each of the first five years new §133.30 is in effect, there will not be costs to

persons required to comply with the new section. The division's fee schedule is the same for services provided in person as for those provided through telemedicine, and the same workers' compensation system features relating to costs that are currently in place, such as treatment guidelines, pre-authorization, and utilization review, continue to apply. Thus, increased access to telemedicine as a result of new §133.30 should not lead to increased costs in the workers' compensation system.

Government Code §2001.0045 requires a state agency to offset any costs associated with a proposed rule by: (1) repealing a rule imposing a total cost that is equal to or greater than that of the proposed rule; or (2) amending a rule to decrease the total cost imposed by an amount that is equal to or greater than the cost of the proposed rule. As described above, the division has determined that the proposed new section will not impose a cost on system participants.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS.

Government Code §2006.002(c) provides that if a proposed rule may have an economic effect on small businesses, micro-businesses, or rural communities, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. Government Code §2006.001(2) defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit, is independently owned and operated, and has fewer than 100 employees or less than \$6 million in annual gross receipts. Government Code §2006.001(1) defines "micro

business” similarly to “small business” but specifies that such a business may not have more than 20 employees. Government Code §2005.001(1-a) defines a “rural community” as a municipality with a population of less than 25,000.

In accordance with Government Code §2006.002(c), the division has determined that the proposed new section will not have an adverse economic effect on small businesses, micro-businesses, or rural communities.

GOVERNMENT GROWTH IMPACT STATEMENT. Government Code §2001.0221 requires that a state agency prepare a government growth impact statement that reasonably describes the effects a proposed rule may have during the first five years it is in effect. The division has determined that the proposed new section will not create or eliminate a government program, and will not require an increase or decrease in fees paid to the division. Implementation of the proposal will not require the creation or elimination of employee positions, and will not require an increase or decrease in future legislative appropriations to the division.

The proposal does not create a new regulation, expand an existing regulation, or repeal an existing regulation. However, new §133.30 will limit an existing regulation by creating an exception that allows telemedicine services to be billed and reimbursed regardless of the injured employee’s location. Previously, the regulation restricted telemedicine services based on the injured employee’s location. The number of individuals subject to the new rule’s applicability is neither increased nor decreased by the proposal, and the proposal has no impact on the state’s economy.

TAKINGS IMPACT ASSESSMENT. The division has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action. Therefore, this proposal does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. If you want to comment on the proposal, submit your written comments by 5:00 p.m. CST on April 2, 2018. A request for a public hearing must be sent separately from your written comments. Send written comments or hearing requests by email to Rulecomments@tdi.texas.gov or by mail to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, Office of Workers' Compensation Counsel, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645. If a hearing is held, the division will consider written comments and public testimony presented at the hearing.

STATUTORY AUTHORITY. New §133.30 is proposed under the authority of Labor Code §401.011, *General Definitions*; Labor Code §402.00111, *Relationship Between Commissioner of Insurance and Commissioner of Workers' Compensation, Separation of Authority, Rulemaking*; Labor Code §402.00116, *Chief Executive*; Labor Code §402.021, *Goals; Legislative Intent; General Workers' Compensation Mission of the Department*; Labor Code §402.061, *Adoption of Rules*; Labor Code §413.011, *Reimbursement Policies and Guidelines; Treatment Guidelines and Protocols*;

Insurance Code §1305.003, *Limitations on Applicability*; and, Insurance Code §1305.153, *Provider Reimbursement*.

Labor Code §401.011 defines a health care provider to include a health care facility and a health care practitioner, and defines a health care practitioner as an individual licensed to provide or render and provides or renders health care or a non-licensed individual under the direction or supervision of a doctor.

Labor Code §402.00111(a) states that, except as otherwise provided, the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code.

Labor Code §402.00116 establishes the commissioner of workers' compensation as the division's chief executive and administrative officer, and requires the commissioner to administer and enforce the Act.

Labor Code §402.021 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 authorizes the commissioner to adopt rules as necessary for the implementation and enforcement of the Act.

Labor Code §413.011 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, and in

order to achieve the required standardization, the commissioner must adopt the most current reimbursement methodologies, models, and values or weights, including those related to coding billing, and reporting, used by the federal Centers for Medicare and Medicaid Services.

Insurance Code §1305.003 states that, in the event of a conflict between the Act and Chapter 1305 under a number of circumstances, Chapter 1305 prevails.

Insurance Code §1305.153 states that billing by, and reimbursement to, contracted and out-of-network providers is subject to the requirements of the Act and applicable rules of the commissioner that are consistent with Chapter 1305.

TEXT.

§133.30. Telemedicine Services.

(a) This section applies to medical billing and reimbursement for telemedicine services provided on or after September 1, 2018, to injured employees in the Texas workers' compensation system, including injured employees subject to a workers' compensation health care network established under Insurance Code Chapter 1305.

(b) For the purposes of this section, "telemedicine services" means a telehealth service or a telemedicine medical service as defined in Occupations Code §111.001.

(c) Except as provided in subsection (d) of this section, a health care provider must bill for telemedicine services according to applicable:

(1) Medicare payment policies, as defined in §134.203 of this title; and

(2) provisions of Chapter 133 of this title.

(d) A health care provider may bill and be reimbursed for telemedicine services regardless of where the injured employee is located at the time the telemedicine services are provided.

(e) The provisions of this section take precedence over any conflicting provisions adopted or utilized by the Centers for Medicare and Medicaid Services in administering the Medicare program.

CERTIFICATION.

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

Issued at Austin, Texas, on February ____, 2018.

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Texas Department of Insurance,
Division of Workers' Compensation