

CHAPTER 180: MONITORING AND ENFORCEMENT

28 TAC §180.1

INTRODUCTION. The Texas Department of Insurance, Division of Workers' Compensation (DWC) proposes an amendment to §180.1, Definitions. The purpose of this amendment is to align the rule with Texas Labor Code §408.0043, Professional Specialty Certification Required for Certain Review, as amended by Senate Bill (SB) 1742, 86th Legislature, Regular Session (2019), effective September 1, 2019. The Legislature added subparagraph (c) to §408.0043 to require that when a health care service is requested, ordered, provided, or to be provided by a physician, a physician performing a peer review, utilization review, or independent review must be of the same or a similar specialty as that physician.

EXPLANATION. Amended §180.1(4) adds to the definition of appropriate credentials the language from Labor Code §408.0043(c) that requires a physician who performs a peer review, utilization review, or independent review of health care services to have the same or similar specialty as the physician that requests or performs the health care services. Amended §180.1(4) cites the credential requirements for dentists under Labor Code §408.0044 and chiropractors under Labor Code §408.0045. An insurance carrier, independent review organization, or utilization review agent must determine on a case-by-case basis whether a physician reviewer's credentials are consistent with the specialty of the physician who requested or performed the health care service under review and the type of health care service that is under review. The required comparison of the requesting physician's credentials to the reviewing physician's credentials is consistent with existing Texas Department of Insurance (TDI) requirements in 28 Texas Administrative

Code §12.202 for independent review and 28 TAC §19.1706 for utilization review of group health services.

The amendment is limited to certain reviews of physician-requested or physician-provided health care services by physicians performing utilization review, independent review, or peer reviews. The amendment does not alter the appropriate credentials for utilization review, independent review, or peer review of health care services requested or provided by other types of health care providers. In these situations, existing DWC and TDI rules governing medical necessity disputes (28 TAC §133.308), peer reviewers (28 TAC §180.22(g)), and utilization review personnel (28 TAC §19.2006) continue to apply. In these situations, the reviewer must continue to have the appropriate credentials, including the "certifications, education, training, and experience to provide the health care that an injured employee is receiving or is requesting to receive." In addition, this amendment does not alter the appropriate credentials for designated doctors, doctors performing required medical examinations, or doctors serving as members of the medical quality review panel.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Deputy Commissioner of Health & Safety, Matthew Zurek, has determined that, for each year of the first five years the amended rules will be in effect, there will be no measurable fiscal impact to state and local governments as a result of enforcement or administration of the amendment. There will be no measurable effect on local employment or the local economy because of the amendment.

The amendment to §180.1 reflects the statutory changes SB 1742 made to Labor Code §408.0043 and does not impose any additional requirements that could produce a fiscal impact.

PUBLIC BENEFIT AND COST NOTE. For each year of the first five years the proposed amendment is in effect, Deputy Commissioner Zurek expects that it will have the public benefit of improved matching of reviewers with the same or similar credentials as the requesting physician, which may result in fewer disputes about the approval or denial of health care services.

ANTICIPATED COSTS TO COMPLY WITH THE PROPOSAL. Deputy Commissioner Zurek anticipates that, for each of the first five years the proposed amendment is in effect, there will be indeterminate costs to those required to comply with the proposal. Any costs resulting from the proposed amendment would be a direct result of the statutory change.

Government Code §2001.0045 requires a state agency to offset any costs on regulated individuals associated with a proposed rule. However, DWC has determined that this proposed rule will impose indeterminate costs on system participants as a result of the statutory change. Under §2001.045(c)(9), this requirement does not apply to a rule necessary to implement legislation.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. Under Government Code §2006.002(c), if a proposed rule may have an adverse 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. DWC has determined that the proposed amendment will not have an adverse economic effect on small or micro businesses or rural communities because it simply implements statutory requirements. Therefore, DWC is not required to prepare a regulatory flexibility analysis.

GOVERNMENT GROWTH IMPACT STATEMENT. DWC has determined that for each of the first five years that the proposed amendment is in effect, the proposed rule will not:

- create or eliminate a government program;
- require the creation of new employee positions or the elimination of existing employee positions;
- require an increase or decrease in future legislative appropriations to DWC;
- require an increase or decrease in fees paid to DWC;
- create a new regulation;
- limit or repeal an existing regulation; or
- positively or adversely affect the Texas economy.

TAKINGS IMPACT ASSESSMENT. DWC has determined that no private real property interests are affected by this proposal. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. If you would like to comment on the proposal or request a public hearing, you must submit your comments or hearing request by 5 p.m., Central time, on December 28, 2020. Email your comments or hearing requests to RuleComments@tdi.texas.gov or mail them to Cynthia Guillen, Texas Department of Insurance, Division of Workers' Compensation, DWC Legal Services, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645. If DWC holds a hearing, DWC will consider written comments and public testimony presented at the hearing.

STATUTORY AUTHORITY. DWC proposes amended §180.1 under the following statutory authority:

Labor Code §401.011 provides general definitions of the Texas Workers' Compensation Act.

Labor Code §402.00111 provides that the commissioner of workers' compensation will exercise all executive authority, including rulemaking authority under Title 5 of the Labor Code.

Labor Code §402.00116 provides that the commissioner will administer and enforce this title, other workers' compensation laws of this state, and other laws granting jurisdiction to or applicable to DWC or the commissioner.

Labor Code §402.061 provides that the commissioner of workers' compensation will adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

Labor Code §408.021 provides that the injured employee is entitled to all health care reasonably required by the injury that cures or relieves the effects naturally resulting from the compensable injury, promotes recovery, or enhances the injured employee's ability to return to or retain employment.

Labor Code §408.027 provides how the health care provider must submit a claim for payment and how the carrier must pay, reduce, deny, or determine to audit the health care provider's requests for health care services.

Labor Code §408.0043 outlines the professional specialty certification requirements of doctors, other than chiropractors or dentists, to perform health care services, including utilization reviews, independent reviews, or peer reviews.

Insurance Code §4201.054 provides that the commissioner of workers' compensation regulates all persons who perform utilization review of medical benefits

and has rulemaking authority to implement such regulation under Title 5 of the Labor Code.

CROSS-REFERENCE TO STATUTE. Section 180.1 affects Labor Code §§402.061 and 414.002-414.007.

TEXT.

§180.1. Definitions.

The following words and terms, when used in this chapter, will [~~shall~~] have the following meanings:

(1) Act--The Texas Workers' Compensation Act, Labor Code, Title 5, Subtitle A.

(2) Administrative violation--A violation, failure to comply with, or refusal to comply with the Act, or a rule, order, or decision of the commissioner. This term is synonymous with the terms "violation" or "violate."

(3) Agent--A person who [~~with whom~~] a system participant uses [~~utilizes~~] or contracts with for the purpose of providing claims service or fulfilling duties under the Labor Code Title 5 and rules. The system participant who uses [~~utilizes~~] or contracts with the agent may also be responsible for the administrative violations of that agent.

(4) Appropriate credentials--The certifications [~~certification(s)~~], education, training, and experience to provide the health care that an injured employee is receiving or is requesting to receive. Under Texas Labor Code §408.0043, a physician who performs a peer review, utilization review, or independent review of health care services requested, ordered, provided, or to be provided by a physician must be of the same or similar specialty as the physician who requested, ordered, provided, or will provide the health care service. A dentist must meet the requirements of Texas Labor Code §408.0044. A chiropractor must meet the requirements of Texas Labor Code §408.0045.

(5) Commissioner--The commissioner of workers' compensation.

(6) Complaint--A written submission to the division alleging a violation of the Act or rules by a system participant.

(7) Compliance Audit (also Performance Review)--An official examination of compliance with one or more duties under the Act and rules. A compliance audit does not include monitoring or review activities involving the Medical Advisor or the Medical Quality Review Panel.

(8) Conviction or convicted--

(A) A system participant is considered to have been convicted when:

(i) a judgment of conviction has been entered against the system participant in a federal, state, or local court;

(ii) the system participant has been found guilty in a federal, state, or local court;

(iii) the system participant has entered a plea of guilty or nolo contendere (no contest) that has been accepted by a federal, state, or local court;

(iv) the system participant has entered a first offender or other program and judgment of conviction has been withheld; or

(v) the system participant has received probation or community supervision, including deferred adjudication.

(B) A conviction is still a conviction until and unless overturned on appeal even if:

(i) it is stayed, deferred, or probated;

(ii) an appeal is pending; or

(iii) the system participant has been discharged from probation or community supervision, including deferred adjudication.

(9) Department--Texas Department of Insurance.

(10) Division--Texas Department of Insurance, Division of Workers' Compensation.

(11) Emergency--As defined in §133.2 of this title (relating to Definitions). This definition does not apply to "emergency" as used in the term "ex parte emergency cease and desist orders."

(12) Frivolous--That which does not have a basis in fact or is not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

(13) Frivolous complaint--A complaint that does not have a basis in fact or is not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

(14) Immediate post-injury medical care--That health care provided on the date that the injured employee first seeks medical attention for the workers' compensation injury.

(15) Notice of Violation (NOV)--A notice issued to a system participant by the division when the division has found that the system participant has committed an administrative violation and the division seeks to impose a sanction in accordance with Labor Code, Title 5 or division rules.

(16) Peer Review--An administrative review by a health care provider performed at the insurance carrier's request without a physical examination of the injured employee.

(17) Remuneration--Any payment or other benefit made directly or indirectly, overtly or covertly, in cash or in kind, including, but not limited to, forgiveness of debt.

(18) Rules--The division's rules adopted under Labor Code, Title 5.

(19) Sanction--A penalty or other punitive action or remedy imposed by the commissioner on an insurance carrier, representative, injured employee, employer, or health care provider, or any other person regulated by the division under the Act, for an administrative violation.

(20) SOAH--The State Office of Administrative Hearings.

(21) System Participant--A person or their agent subject to the Act or a rule, order, or decision of the commissioner.

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

Issued at Austin, Texas, on November 10, 2020.



Kara Mace
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Texas Department of Insurance,
Division of Workers' Compensation