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## November 2015 Workers' Compensation Law Update

**DWC News, Part I: Pilot Takes Off**

In May 2015, Deputy Commissioner of Hearings Kerry Sullivan initiated a limited and voluntary pilot project that introduced a bifurcated approach to resolving cases where the resolution of an MMI/IR issue is dependent on an active extent of injury dispute. Upon agreement of the parties during a BRC, the issues could be split between two hearings, the first addressing extent of injury and then, following an interlocutory alerting the parties to the expected outcome of that issue, a second hearing to resolve MMI and IR in light of the Hearing Officer's findings. At the time it was announced, the pilot project was limited to proceedings conducted in the Division's Weslaco field office, and the success of the program was to be monitored before expanding statewide. The Division appears to be satisfied with the results of the pilot project; in November, the Division broadened their bifurcation project to include the Dallas Field Office. As of November 5, 2015, the option to split the extent and MMI/IR issues between two hearings became available at the BRC level.

**DWC News, Part II: The Great Divide**

On November 17, 2015, the Division announced that its Hearings section staff had been divided into two regional docketing workgroups, North Western , comprising field offices located north and west of Austin, and South Coastal, which includes the Austin Field Office and all points south and east. The stated goal for the divide is to improve formal and informal dispute proceedings, docket scheduling, and management. The staff assigned to the new workgroups schedule or reschedule dispute proceedings, assist with docket management, and communicate scheduled proceedings and pending actions to system participants. The reorganization establishes a single point of contact for proceedings management in each field office. Rebecca Allen and Misty Haygood have been designated as Program Specialists, who act as docketing team leads and oversee the staff for the North Western and South Coastal regions, respectively.

**DWC News, Part III: Have Gavel, Will Travel**

The Division has hired Mayson Pearson as the new traveling Hearing Officer in the central Austin office. Her employment with the Division commenced in November. Ms. Pearson graduated from the University of Texas School of Law and has been licensed to practice law in Texas since November of 2012.

**Patches & Dispatches**

Matt Zurek, Deputy Commissioner for Health Care Management and System Monitoring, urges insurance carriers to identify all injured employees who have been prescribed Fentanyl Transdermal Patches and/or MS-Contin, which will both require preauthorization beginning on February 1, 2016. Mr. Zurek advises sending written notification to the injured employee, prescribing doctor, and pharmacy informing them of the need for preauthorization to allow adequate time to discuss ongoing treatment if Fentanyl Transdermal Patches or MS-Contin are currently being prescribed. Sample notification letters for use by insurance carriers are available through the TDI-DWC website at https://www.tdi.state.tx.us/WC/pharmacy/index.html.

**No. B-0029-15 with a Bulletin**

On November 19, 2015, this new bulletin was posted to alert workers' compensation participants of the annual change to the Medical Fee Guideline conversion factors. For 2016, the MEI reflects a 1.1% increase. A table of conversion factors can be found on the TDI website.

**Physician Monitions**

Jerry Franz, M.D. was fined $2,000.00 for failing to meet the standard of care for chronic pain management for five patients.

Francisco Batlle, M.D. of Dallas has been ordered by the Division to complete additional medical education after failing to complete a fair and reasonable evaluation of an injured employee.

By Official Order of the Texas Commissioner of Workers' Compensation dated October 28, 2015, Dr. Patrick Chidi Obasi, M.D., of Marshall, TX is prohibited from re-applying for DD or MMI/IR certifications in the Texas workers' compensation system for two years.

**Performance Anxiety**

The DWC, in its regulatory capacity, is required under Section 402.075 of the Texas Labor Code to assess the performance of insurance carriers at least biennially. For their 2016 Performance Based Oversight (PBO) assessment, announced publicly in November, the Division will select carriers based on the volume of initial payment of Temporary Income Benefit transactions between January1, 2015 and June 30, 2015. Timely payment of TIBs, timely processing of initial medical bills or request for reconsideration of medical bills, and timely submission of initial payment and medical bill processing data are the criteria that comprise the 2016 PBO assessment. Incentives for insurance carriers to achieve high performance include limited audits, modified or reduced penalties, and access to the High Performer Logo as a marketing tool.

**Rule Retool**

Rule 132.7 – Death Benefits

In accordance with HB 1094, the DWC published an informal draft rule that amends Rule 132.7 to provide that a remarried former spouse of a first responder killed on the job is entitled to receive death benefits for life. Formal proposal of the amended rule is anticipated before the end of 2015.

Rule 132.13 – Burial Benefits

An informal draft rule proposes to amend Rule 132.13 to raise the burial benefits for an injured employee killed on the job to $10,000.00. The rule amendment is required to implement SB 653 and is expected to be formally proposed by the end of 2015.

Rule 127.130 – Designated Doctor Qualifications

The DWC is considering amendments to the qualification criteria for designated doctors to ensure that the best-qualified doctor is selected for examinations. The working draft of the rule is expected to be published on the DWC website prior to year's end.

**"Just In" Cases**

Hey, Speaking of Rule 127.130... – The claimant suffered an eye injury in January 2011, which he alleged aggravated his pre-existing glaucoma. The designated doctor assigned to examine his eye condition was a plastic surgeon, not an ophthalmologist, and the claimant argued that as such he lacked the experience and qualifications necessary to evaluate an eye condition. To support his argument, the claimant relied on Rule 127.130(b)(6), which states, "To examine injuries and diagnoses relating to the eyes, including the eye and adnexal structures of the eye, a designated doctor must be a licensed medical doctor, doctor of osteopathy, or doctor of optometry." The Court of Appeals held that Rule 127.130(b)(6) did not apply in this case because that provision pertains only to injuries sustained on or after January 1, 2013. However, the Court clarified that even if Rule 127.130(b)(6) did apply, the designated doctor, as a licensed medical doctor, would not be automatically precluded from evaluating an eye injury merely because of his specialty as a plastic surgeon. *Joe Ballard v. Arch Insurance Company and Transforce, Inc.*, Houston Court of Appeals – 14th Dist. 2015 WL 6560531.

Errant Errand – The injured worker died as a result of injuries sustained in a motor vehicle accident while out of town on a business trip. For the duration of his trip, he was under "continuous coverage", which provides round the clock coverage for employees sent out of town overnight on business by an employer. After work one night, the decedent and his son agreed to meet for dinner, but the pair chose a restaurant twelve miles from the employee's Dallas hotel. The worker was injured in a motor vehicle accident occurred on the way to the restaurant. The Hearing Officer and the Appeals Panel concurred that the decedent remained in the course and scope of his employment under the continuous coverage doctrine and had not substantially deviated from the business purpose of the trip. The trial court granted the carrier's motion for summary judgment that the worker was not in the course and scope of his employment at the time of injury, and the Court of Appeals

affirmed the trial court's judgment, stating that the travel at the time of the accident was to accommodate a personal visit and represented a distinct departure from the course and scope of his employment for a personal errand. *Barbara Pinkus v. Hartford Casualty Insurance Company,* Dallas Court of Appeals – 2015 WL 6751059.

Appointment With Disappointment– A claimant followed her attorney's (terrible) advice not to appear for a designated doctor appointment on June 3, 2014. The Hearing Officer determined that such counsel constituted good cause for her failure to attend. The Appeals Panel reversed, stating that "bad advice received from one's own attorney is not an excuse for the failure to comply with Division requirements." The designated doctor examination was reset to October 7, 2014, then rescheduled upon request of the designated doctor to November 4, 2014 with a different doctor. The claimant attended that exam. The claimant then argued that the insurance carrier should begin payment of TIBs as of the date of the first scheduled DD exam, October 7, 2014 since it was not her fault the exam was delayed until November 4, 2014. However, the Appeals Panel clarified that Rule 127.25(a) requires actual attendance at the designated doctor examination and does not allow for the suspension of TIBs based on a delay in the subsequent appointment of a designated doctor examination. Therefore, the carrier was permitted to suspend TIBs through November 4, 2014, the date the claimant actually submitted to her designated doctor exam. Appeal No. 151718

**Risky Business ! We Hope Texas is Next**

Eight medical professionals and their associates have been charged in federal grand jury indictments involving a workers' compensation kickback scheme in Southern California. The bribery plot resulted in $25 million in improper claims for medical services and devices that were billed to California Workers' Compensation insurance companies. Three federal indictments were announced by the U.S. Attorney's office, San Diego District Attorney's office, FBI, and the California Department of Insurance against the purported conspirators. The indictments allege that the defendants, which include a chiropractor, a radiologist, a medical equipment provider, a medical clinic administrator, and a medical marketer, plus six corporations with which they did business, paid or received tens of thousands of dollars for referrals of workers' compensation patients to therapy companies and a medical equipment provider, who, in turn, paid for every patient referral. The chiropractors prescribed medical equipment, referred patients for MRIs and X-Rays, and ordered specialized treatments such as Shockwave therapy, which ostensibly uses low energy sound waves to initiate tissue repair. U.S. Attorney Laura Duffy called the indictments "the first wave of charges in what we believe is rampant corruption on the part of some physicians and chiropractors." Although the amount pocketed by the medical professionals for any given referral could appear somewhat de minimis (ranging between $50 and $100), in the aggregate the bills submitted by the defendants to insurers totaled tens of millions of dollars. The Commissioner of the California Department of Insurance, Dave Jones, called the practice "insurance fraud, which adds crippling costs to California's workers' compensation system." He elaborated, "When medical providers defraud insurers, those costs are passed on to California businesses and consumers