

**ADVISORY NO. 424**

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**TOPIC: MDR RULES ANNOUNCED**

The Insurance Council of Texas has credited public testimony by Flahive, Ogden & Latson Managing Shareholder Steve Tipton and others with influencing the Commissioner's decision to modify proposed rules relating to medical dispute resolution. Following Mr. Tipton's testimony, the Commissioner stripped the proposed rules of language that would otherwise have limited the nature of evidence that could be admitted in a hearing.

The Commissioner adopted the new rules yesterday and they will take effect before the end of the month. Please see the Insurance Council's notice, outlined below.

Workers' Compensation Commissioner Albert Betts has adopted the new medical dispute resolution (MDR) rules that implement statutory provisions of House Bill (HB) 724, HB 1003, and HB 2004 enacted by the 80<sup>th</sup> Legislature, Regular Session, effective September 1, 2007; and to clarify provisions of and ensure compliance with fee payment to independent review organizations (IROs).

The new rule will become effective on May 25, 2008.

The amendments incorporate administrative-level hearings into the Division's MDR process as a step between MDR or IRO review and judicial review in resolution of medical fee and medical necessity disputes. The amendments also address licensing and professional specialty requirements for doctors performing reviews for IROs.

Changes to the Texas Labor Code by House Bill (HB) 724 introduced the State Office of Administrative Hearings (SOAH) and the Division's contested case hearing process into the MDR process as a level of appeal that occurs after MDR or IRO review and prior to judicial review. Changes to the Texas Labor Code by HB 1003 require IROs that use doctors to perform reviews of health care services provided under the Texas Workers' Compensation Act to only use doctors licensed to practice in Texas to perform the reviews. Changes to the Texas Labor Code by HB 2004 require a doctor performing an independent review of a health care service provided to an injured employee, including a retrospective review, who reviews a specific workers' compensation case, to hold a professional certification in a health care specialty appropriate to the type of health care that the injured employee is receiving.

FLAHIVE, OGDEN & LATSON

## **Rules Implement New Statutory Provisions that Provide for Two Different Post-MDR Appeals Pathways**

Under Section 413.0311 of the Texas Labor Code, a party is entitled to a contested case hearing conducted by a Division of Workers' Compensation hearings officer in the appropriate field office for any dispute that remains unresolved after medical fee dispute resolution or a medical necessity review by an independent review organization if the amount sought as reimbursement in the medical payment dispute does not exceed \$2,000, the party is appealing an independent review organization (IRO) decision regarding determination of the retrospective medical necessity for a health care service for which the amount billed does not exceed \$3,000, or a party is appealing an IRO decision regarding the determination of the concurrent or prospective medical necessity for a health care service.

The DWC's field office contested case hearings are also responsible for the adjudication of spinal surgery disputes as provided for by Section 413.031(l) of the Texas Labor Code.

Section 413.031(k), (k-1), and (k-2) of the Texas Labor Code provides that a party is entitled to a hearing before the State Office of Administrative Hearings (SOAH) for any dispute that remains unresolved after MDR or IRO review in medical fee dispute resolution cases that exceed \$2,000 or when the party is appealing an independent review organization (IRO) decision regarding determination of the retrospective medical necessity for a health care service for which the amount billed exceeds \$3,000.

## **Language Restricting Evidence and Prohibiting New Evidence At Hearing Level Removed at Request of AIA, ICT, PCI and Other Stakeholders**

Prior to adopting the new MDR rules, Workers' Compensation Commissioner Albert Betts directed staff to remove language in Rules 133.307 and 133.308 that would have limited evidence and witnesses in contest case hearings to the documents filed by the disputing parties during the filing phase of the medical dispute resolution process.

The following is the language from the rule adoption preamble that addressed the evidence/witness restriction language and the comments of the Insurance Council of Texas (ICT), American Insurance Association (AIA), Property Casualty Insurers Association of America (PCI), and law professor Ron Beal of the Baylor University School of Law:

“In regard to §133.307(f)(2)(D) and §133.308(t)(1)(B)(v) (both provisions relating to the admission of evidence and witness testimony in Division contested case hearings), several commenters expressed concern that limiting admissible evidence to information presented during the MDR or IRO process goes against public policy in that it prevents parties from presenting

complete claims and defenses. The commenters also indicated a concern that due process issues may arise if parties have insufficient time to investigate and respond to allegations which arise during a supplemental evidence exchange. The Division agrees that in order to eliminate due process challenges to the Division hearing process, the proposed sections should be revised and the first sentence of §133.307(f)(2)(D) and the entirety of §133.308(t)(1)(B)(v) as proposed were removed. In addition, limitations on documentary evidence admissible at a contested case hearing or limitations on witnesses who had not been disclosed during the MDR or IRO processes were not included in the adopted sections. As a result of not adopting proposed §133.308(t)(1)(B)(v), proposed §133.308(t)(1)(B)(vi) and (vii) have been renumbered in the adopted text as §133.308(t)(1)(B)(v) and (vi).”

ICT wishes to express its appreciation to Jane Stone of Stone Loughlin & Swanson, Steve Tipton of Flahive Ogden and Latson, and John Pringle of Pringle & Gallagher for testifying on issues related to the evidence/witness limitation issue. The legal analysis prepared by Ron Beal, J.D., a law professor at Baylor University School of Law, was very instrumental in the language that would have limited evidence/witnesses in contested case hearings being removed from the rules.

ICT is pleased that Commissioner Betts adopted the rules without the language that would have limited the evidence and witnesses disputing parties can present during contested case hearings conducted by the Division of Workers’ Compensation when medical dispute resolution decisions are appealed. The removal of the language that would have limited evidence and witnesses in contest case hearings to the documents filed by the disputing parties during the filing phase of the medical dispute resolution process is a major victory for injured employees, health care providers, and insurers as the commissioner’s decision to not include the language protects the due process and constitutional rights of these stakeholders.

### **New MDR Rules Available on TDI Website and Professor Beal’s Written Comments on New Evidence Issue Attached**

The new MDR rules can be found at:

<http://www.tdi.state.tx.us/wc/rules/adopted/documents/aordermdr0508.pdf>.

Professor Beal’s written comments on the proposed limitation of evidence/witnesses issue are attached.

### **ICT to Prepare and Publish Analysis of New MDR Rules**

ICT will be preparing and publishing an analysis of the new rules in the near future.