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New bill overhauls outdated and expensive workers' compensation system in Texas, including implementation of work search compliance standards, creation of health care networks and a system for assessing insurance carriers, establishment of the Injured Employee Public Counsel, and changes to the benefits process.

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Texas Edition

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Texas Reforms Its Workers' Compensation System

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On June 1, 2005, Governor Rick Perry signed House Bill 7 (HB7), which provides for sweeping changes to the workers' compensation system in the state of Texas. Prompted by an outdated, expensive system that did little to encourage injured employees to return to work, HB7 contains a number of major changes that will affect the way employee injuries are handled in Texas. Effective September 1, 2005, HB7 is designed to reduce costs, improve medical care, and pave the way for injured employees to return to work.

Historic Changes

It has been almost 14 years since Texas last made any major changes to its workers' compensation system. In 1991, motivated to reduce employer costs, the Texas legislature passed legislation that took workers' compensation claims out of the courts and into an administrative system designed to only handle workers' compensation claims. However, the old system still allowed the process to drag out and encouraged employees to "doctor shop" in hopes of finding healthcare providers most sympathetic to their injuries. The result was a system that over time has become expensive, burdensome, and overly bureaucratic. Since 1991, several other states have made changes to their workers' compensation systems and services, spurring the need for Texas to emulate the best practices of other states. Thus, in 2005, the Texas legislature passed HB7 which overhauled the workers' compensation system in Texas.

The most notable change is that the six-member Texas Workers' Compensation Commission has been eliminated, and its functions will be turned over to the newly-

created Division of Workers' Compensation within the Texas Department of Insurance. This new Division will be run by a single gubernatorial appointee, the Commissioner of Workers' Compensation. It is hoped that much of the bureaucratic in-fighting will be eliminated by having a single individual serve as the point person over the workers' compensation process.

Not surprisingly, the stated goal of the new legislation was to rein in employer costs. According to a study of 12 large states conducted annually by the Cambridge, Massachusetts-based Workers' Compensation Research Institute (WCRI), the average cost per claim in Texas, \$5,938, was 76 percent above the median. At \$3,301, medical payments per claim were the highest, and 21 percent higher than the second highest state, Illinois. The study found that one reason for the higher costs was greater use of medical care from non-hospital providers, with chiropractors at the top of the list.

Not everything about Texas's system was changed. Texas remains unique in that it is the only state that does not mandate employer participation in the state's workers' compensation system, with about 38% of eligible employers choosing to opt out. The number of doctors participating in the workers' compensation system has also been on the decline. According to WCRI, about 18,000 doctors are presently participating in the workers' compensation system, compared to 30,000 two years ago. It is hoped that the recently enacted reforms will prompt employer participation in workers' compensation as well as encourage more doctors to treat injured employees.

Work Search Compliance Standards

One of business' loudest complaints about the old workers' compensation system involved the term "good faith effort" in seeking employment. Many business leaders felt that the term was vague, and that it actually discouraged higher and faster return-to-work rates. The legislation provides that the Commissioner shall adopt compliance standards for supplemental income benefit recipients that require each recipient to demonstrate an active effort to find employment. To be eligible to receive supplemental income benefits under the new law, a recipient must provide evidence of: (1) active participation in a vocational rehabilitation program conducted by the State of Texas or a private vocational rehabilitation provider; (2) active participation in work search efforts conducted through the Texas Workforce Commission; or (3) active work search efforts documented by job applications submitted by the recipient.

Creation of Health Care Networks

The reform legislation authorizes the establishment of workers' compensation health care networks to provide workers' compensation medical benefits and requires those that wish to operate as a workers' compensation health care network to receive a certificate from the Commissioner of Workers' Compensation. Rulemaking begins in December 2005. Business leaders hailed the efforts to beat back an amendment that would have opened the networks to so-called "any willing providers" who kept within the program's cost guidelines.

The legislation requires an injured employee to select a physician from the list of all treating doctors under contract with the network in the service area. Some groups have criticized this provision, claiming that injured workers will lose their ability to choose any doctor, a procedure that was available under the old system. However, an employee who is dissatisfied with the initial choice of a treating doctor may select an alternate doctor once. Subsequent alternative doctors may be selected, but only if certain criteria are met. Patients are allowed to seek second opinions, but that does not count as seeking an alternate doctor.

An injured employee who receives health care services within the network may elect treatment with his or her current HMO

provider, as long as the provider agrees to abide by the terms of the network's contract. Services provided by such a doctor are considered to be network services.

Because employees have the opportunity to select their current primary care physicians as their workers' compensation providers, who may be more likely to be employee-friendly, it is important that employers carefully select the physicians that comprise the network and select doctors who will base their treatment decisions on accepted medical practices and not on sympathy for the employee. A single employee-biased physician could eliminate the advantages of participating in a network.

The health care networks will determine the specialties of doctors who may serve as treating doctors. HMOs and organizations of physicians and providers may also apply for certification as a workers' compensation health care network.

Performance of Insurance Carriers to Be Assessed

The new Division will examine overall compliance records, dispute resolution and complaint resolution practices to identify poor performing insurance carriers and health care providers. The stated goal is to identify carriers and providers who adversely impact the workers' compensation system. Regulatory oversight will now be focused on carriers and providers that are identified as poor performers. The legislation requires the Commissioner to develop incentives that promote greater overall compliance and performance. These incentives may include modified penalties, self-audits, or flexibility based on performance. As a bonus, high-performing entities are to be publicly recognized by the Division, and those entities will be allowed to use the "high performing" designation as a marketing tool.

Injured Employee Public Counsel

Labor groups lobbied for, and received, an advocate for injured employees. The Injured Employee Public Counsel (IEPC) is a gubernatorial appointee and also serves a two-year term. The legislation specifically provides that the governor may consider recommendations made by groups that represent wage earners. The IEPC will provide assistance to claimants, advocate on behalf of injured employees as a class regarding rulemaking, assist injured employees with

contacting licensing boards for complaints against providers, and provide assistance in contacting local, state, and federal social service providers. However, the Counsel's office is generally prohibited from appearing or intervening as a party before the Department of Insurance or the Department of Workers' Compensation.

Changes to the Process

The old administrative process of benefit review conferences and contested case hearings remain in the system. However, the number of benefit review conferences will be limited, and cases will proceed more quickly to the contested case hearing stage. Benefit review officers will have access to previous decisions in the form of a Precedent Manual in order to make rulings consistent with similar cases. It is hoped that this streamlined process will eliminate delays and speed up the claims process.

There are no changes to Chapter 451 of the Texas Labor Code. Chapter 451 protects eligible employees from discrimination (and retaliation) if they file workers' compensation claims or participate in the workers' compensation process. Participating employers should, therefore, remain cautious about administering discipline to employees who have filed workers' compensation claims. A participating employer should not take an adverse action against an employee who has filed a workers' compensation claim unless the employer has a legitimate, non-retaliatory reason for taking the action.

The text of HB7 can be found on-line at www.capitol.state.tx.us by entering the search term "HB7."

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