



# QUARTERLY REVIEW

Spring 2013 (Issue 29)



## LETTER FROM THE PUBLIC COUNSEL

*When two elephants fight only the ants and the grass are destroyed." - Swahili proverb*

Dear Friends:

The competing interests in the workers' compensation system seem to have an intensity that becomes greater each year. We are seeing decisions that impose a more onerous standard on injured employees than ever before. One Hearing Officer has stated that the evidentiary standard for causation evidence must meet the "stringent standards imposed by *Merrill v. Havner*." Of course, that is a strict liability in tort decision with no connection to workers' compensation. The Supreme Court in *Garcia and Ruttiger*, among others, has stated that the purpose of workers' compensation is to provide benefits for injured employees without the delays and costs of pursuing remedies in the tort system. Employers also benefit from a no-fault workers' compensation structure that protects them from costly litigation.

It is our hope at the Office of Injured Employee Counsel (OIEC) that the stakeholders will take a deep breath, step back, and reconsider the traditional trade-offs that were incorporated into the process that began about one-hundred years ago. For the most part it has worked well as tweaking was required to make adjustments to the changing economic conditions. Hopefully, a hundred years from now our professional successors will be able to say the same.

Sincerely,

Norman Darwin, Public Counsel



# Public Counsel Reappointed



Governor Rick Perry reappointed Norman Darwin as Public Counsel of OIEC for a term to expire February 1, 2015. His appointment was confirmed by the Texas Senate on March 20, 2013.

Mr. Darwin received his bachelor's degree from Texas Christian University and his law degree from The University of Texas School of Law. He is a member of the State Bar of Texas and Tarrant County Bar Association. Mr. Darwin has led OIEC as Public Counsel since the agency's inception in 2006.

## Proposed Legislation Referred to Committees

Each of OIEC's five legislative recommendations was introduced as a bill in the 83rd Texas Legislature. House bills were referred to the House Committee on Business and Industry and Senate bills were referred to the Senate Committee on State Affairs. These recommendations would protect the interests of injured employees in the workers' compensation system.

**Liability for Attorney's Fees in Medical Necessity Disputes on Judicial Review.** This recommendation would make the insurance carrier liable for the injured employee's attorney's fees when the insurance carrier appeals a medical necessity case into district court and the injured employee prevails.

- **House Bill (HB) 2787 by Representative Smithee.** The bill was considered in a formal meeting on April 11, and the Committee report was sent to the Calendars Committee on April 16.
- **Senate (SB) 1550 by Senator Lucio.** The bill is currently in Committee.

**Time Frame to Dispute Compensability of an Injury to a Part of the Body.** This recommendation would require an insurance carrier to dispute the compensability of an injury to a part of the body within 60 days of receiving written notification that the injury extends to that body part.

- **HB 2630 by Representative Zedler.** The bill is currently in Committee.

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### **Dispute of First Certification of Maximum Medical Improvement and Impairment Rating.**

This recommendation would establish that a party could file a written notice of a dispute of maximum medical improvement (MMI) and impairment rating within the 90-day statutory time frame without constituting a request for a benefit review conference (BRC). This would prevent an injured employee from being required to prematurely enter the dispute resolution system in order to avoid finality of the first certification of MMI or impairment rating.

- **HB 2726 by Representative Oliveira.** The bill was considered in a public hearing on April 2 and left pending in Committee.

### **Change to Impairment Rating Calculation or Supplemental Income Benefits Criteria.**

This recommendation would provide for the use of the range-of-motion model incorporated into the *4th Edition of the Guides to the Evaluation of Permanent Impairment (AMA Guides)* to determine the impairment rating of the lumbar spine, or in the alternative, that the criteria for supplemental income benefits be lowered to a 10 percent impairment rating.

- **HB 2629 by Representative Zedler.** This bill was considered in a public hearing on April 16 and reported favorably as substituted.
- **SB 1051 by Senator Van de Putte.** This bill is currently in Committee.

### **Consistency in Venue for Benefit Disputes.**

This recommendation would allow a party to appeal administrative medical necessity, medical fee, and indemnity dispute decisions in the same district court venue.

- **HB 2727 by Representative Oliveira.** This bill was considered in a public hearing on April 2 and left pending in Committee.
- **SB 1149 by Senator Hinojosa.** This bill is currently in Committee.

OIEC monitors legislation that pertains to the workers' compensation system and to OIEC employees. For more information regarding bills that OIEC is tracking, visit OIEC's legislature webpage at [www.oiec.texas.gov/resources/leg\\_session\\_page12.html](http://www.oiec.texas.gov/resources/leg_session_page12.html) and click on "workers' compensation-related bills tracking sheet."

## **Amendment Proposed to Rule 276.5 and Employer's Notice Requirement of OIEC's Ombudsman Program**

Texas Administrative Code Rule 276.5, Employer's Notification of Ombudsman Program to Employees, requires employers participating in the workers' compensation system to publicly post the notice of the OIEC Ombudsman Program.

Amendments were made to the rule and the notice in order to update the agency's email address and



website domain and to clarify the services offered to injured employees by the Ombudsman Program.

OIEC held a stakeholder meeting on April 12, 2013, regarding the proposed amendment. The comment period will close at 5 p.m. on June 3, 2013. The amendment will be adopted early this summer and will become effective September 1, 2013.

## Docketing Division Created to Improve Efficiency

OIEC has implemented a centralized docketing system by creating the Customer Service Program Docketing Division. Ombudsmen assist injured employees with dispute resolution which may be accomplished informally without the need for a proceeding, but sometimes a benefit review conference or contested case hearing (CCH) is necessary. In all cases it is important that the Ombudsman meet with the injured employee to discuss the details of his or her claim and to gather documentation. Scheduling these preparation appointments can be complicated, and the Docketing Division will be able to increase docketing efficiency and create better early intervention results.

The Docketing Division currently includes the Director of the Customer Service Program, the Docketing Supervisor, and three Customer Service Representatives (CSRs). The OIEC docketing staff will work with the Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC) docketing staff's requests for proceedings. Initially, the OIEC docketing staff will set case development and preparation appointments for all Ombudsmen in the Austin, Fort Worth, and Houston West field offices. Several more docketing positions are in the process of being hired so that all 20 OIEC field offices will have docketing accomplished from the central office. This will provide CSRs in the field offices (who currently schedule these appointments) more time to assist customers with resolving their workers' compensation disputes before a formal proceeding.

## Survey Results Indicate High Customer Satisfaction

The results of OIEC's 2012 Customer Satisfaction Survey indicate the agency is meeting its goal of providing excellent customer service. As required by Texas Government Code Section 2114.002 "Customer Service Input," the agency gathered information in fiscal year (FY) 2012 from customers who had contact with OIEC by telephone, in person,

or through the website. The results show improvements over the previous fiscal year in nearly every category of customer satisfaction.

The survey was completed by 637 OIEC customers between September 1, 2011, and August 31, 2012. OIEC's primary customers are the injured employees of Texas but also include the families of injured employees, employers, insurance carriers, legislators, and others with an interest in the workers' compensation system. Of the respondents, 89 percent were either injured employees or a family member. Of the responses, 85 percent were submitted in English and 15 percent in Spanish.



Overall, 92 percent of the respondents were satisfied with the services received from OIEC, and 91 percent reported that they would continue to receive services from OIEC even if they could obtain these services from another agency. This is an increase from the previous year of 91 percent and 86 percent respectively. General results within the survey's eight categories included:

**Assistance:** 50 percent (decreased from 52 percent in 2011) contacted OIEC by telephone between one and four times in the past 12 months while 44 percent of the respondents contacted OIEC even more often (increased from 40 percent in 2011).

**Website:** 67 percent of the respondents (the same percentage as in 2011) reported that they were able to obtain information about services that were available to them by using the internet. However, 77 percent of the respondents indicated they did not have internet access or had not accessed the OIEC website from home. Of those that did access the website, most were researching general information or preparing for a BRC, CCH, or an appeal. (Continued on page 5.)

**Facilities:** 89 percent (increased from 79 percent) reported that the public transportation, distance to the facilities, and parking were convenient. Also, 89 percent (increased from 85 percent) of the respondents reported that the facilities were clean and orderly and that it was easy to find their way through the building.

**Staff:** 95 percent (increased from 92 percent) of the respondents reported that the staff was able to answer their questions, and equally as many noted that staff members were knowledgeable and helpful.

**Communication:** 95 percent (increased from 93 percent) of the respondents received the information they needed to obtain services, and 94 percent received clear explanations about available services.

**Complaint Handling Process:** 78 percent (decreased from 81 percent) of the respondents reported that they knew how to handle complaints regarding the services received from OIEC, and 85 percent felt that if a complaint was filed against OIEC it would be addressed in a reasonable manner.

**Timeliness:** 92 percent (increased from 90 percent) of the respondents reported that the time for their inquiries to be answered and the time that they had to wait to receive services was reasonable.

**Printed Information:** 96 percent (increased from 89 percent) of the respondents received printed information regarding the services that were available to them, and 94 percent reported that the information included was clear and understandable.

By completing the annual survey, customers help OIEC gather critical information that will be used for planning agency initiatives and continuing to provide excellent customer service. The current year's survey can be completed at [http://www.oiec.texas.gov/resources/oiec\\_cs\\_survey.html](http://www.oiec.texas.gov/resources/oiec_cs_survey.html).

## Question of the Quarter

**Question:** I have received an impairment rating for my injury, but I don't agree with it. I am not sure if I should request a designated doctor or a BRC. What should I do?

**Answer:** The answer depends on the type of doctor that assigned the impairment rating you are disputing. If the impairment rating was assigned by a designated doctor then the form DWC045, *Request to Schedule, Reschedule, or Cancel a Benefit Review Conference (BRC)*, would be the correct way to dispute the impairment rating or maximum medical improvement date. Sometimes these issues can be resolved without a proceeding, but please note that in all cases **the first impairment rating (regardless of the type of doctor) must be disputed within 90 days, or it becomes final.** You must have a preponderance of medical evidence to overcome a designated doctor's opinion.

When the first certification of maximum medical improvement and impairment rating is from a doctor other than the designated doctor, the 90-day clock will typically be stopped by filing a form DWC032, *Request for Designated Doctor Examination*. (The exception is when a designated doctor has already been appointed to address maximum medical improvement and impairment rating. In that case, the 90-day clock is stopped by filing a DWC045 to request a BRC and only a complete DWC045 will stop the 90-day clock. To be complete, the DWC045 must include documentation of efforts to resolve the disputed issues.)

OIEC can assist you with any questions you have regarding impairment rating disputes. Please call 1-866-EZE-OIEC (1-866-393-6432) to speak with an OIEC representative.



# Case Study

## The “Special Mission” Exception

The claimant worked as a welder at a drilling site in Odessa, Texas. On the morning of the injury, the claimant and a crew of other workers checked out of their hotel in Odessa and reported to the drilling site where they worked until 11:30 a.m. After completing their work, they packed up their equipment and began the drive back to Waco in an employer-owned vehicle. Approximately one hour later, the driver of the vehicle lost control of the truck, resulting in a rollover accident. The claimant was asleep in the front passenger seat at the time of the accident. The claimant was evacuated by helicopter to a trauma center and treated for cranial lacerations. A drug test performed on the claimant at the hospital came back positive for marijuana in the amount of 235 ng/mL.



A CCH was held to determine whether: 1) the claimant sustained a compensable injury; 2) the insurance carrier was relieved of liability because the claimant was intoxicated; and 3) what, if any, periods of disability resulted from the injury. The injured employee was assisted by Nancy Gonzales, an Ombudsman in San Antonio.

Generally, transportation to and from a place of employment is not an activity that would be covered under the course and scope of employment; however, there are three distinct

exceptions to this rule (Texas Labor Code Section 401.011(12)(A)(i-iii)):

- The transportation is furnished as a part of the contract of employment or is paid for by the employer;
- The means of the transportation are under the control of the employer; or
- The employee is directed in the employee’s employment to proceed from one place to another place.

In his decision, the Hearing Officer agreed that the transportation was provided by the employer but also noted that the claimant’s time was not compensated. In his testimony, the claimant noted that he was not being paid for his travel; however, the driver of the vehicle (also a welder) was being paid for his travel time. The Hearing Officer concluded that the claimant was not furthering the affairs or business of the employer and was therefore not subject to the exceptions listed above.

Regarding the issue of intoxication, the claimant testified to voluntary consumption of marijuana three weeks prior to the accident. At the CCH, the claimant testified that he worked more than six hours on the morning of the accident—performing complicated and hazardous tasks. The Hearing Officer found that the claimant’s testimony was sufficient to establish that he had the normal use of his faculties at the time he sustained his injury.

In preparing the appeal of the CCH, Nancy Gonzales was assisted by Samuel Peralez—also an Ombudsman in San Antonio. The appeal centered on the argument that the Hearing Officer’s evaluation of the three exclusion criteria listed above was incomplete and that it lacked sufficient explanation as to why the claimant’s injury did not occur in the course and scope of his employment. The Appeals Panel, while not commenting directly on whether the claimant was removed from course and scope because he was not getting paid for travel, did specifically cite the Hearing Officer’s failure to address exception iii—sometimes referred to as the “special mission” exception. (Continued on page 7.)

# Communications Corner

## Outreach Events

Over the next few months, OIEC will participate in several events to educate its customers about the agency and the Texas workers' compensation system.

San Antonio: TexMed 2013 – Texas Medical Association's annual event (May 17-18, 2013).

Irving: Texas AFL-CIO convention (July 18-20, 2013).

If you would like to request an OIEC representative to speak to your organization, please contact Associate Director for Communications and Development at (512) 804-4170.

## Field Office Presentations

The next presentations will be offered from noon to 1 p.m. on May 31 and June 28 on "Tips to Navigate Your Claim." Please check [www.oiec.texas.gov/resources/public\\_outreach.html](http://www.oiec.texas.gov/resources/public_outreach.html) for the closest OIEC field office location.

## Customer Satisfaction Survey

Thank you for giving OIEC the opportunity to serve you. We are committed to continuously assessing and improving our level and quality of services. To assist us in this commitment, please take a few minutes to tell us about the quality of service you received. You can access the survey at <http://oiec2013css.questionpro.com/>.



The Appeals Panel expounded on this by remarking that, "Generally, an employee on a special mission does not go into and out of the course and scope of employment while on that special mission." Furthermore, the Appeals Panel wrote that, "the claimant was clearly on his way home at the time of the motor vehicle accident."

The Appeals Panel overturned the decision of the Hearing Officer and found that, at the very least, the injured employee was in the course and scope of his employment at the time of the accident because he had satisfied exception iii—the "special mission" exception. The Appeals Panel also affirmed the decision of the Hearing Officer that the injured employee had shown that he had the normal use of his mental and physical faculties at the time of the accident.

## Items to Note

### Compact with Texans Updated to Reflect Services Offered

The Texas Government Code requires each State agency to create a Compact with Texans to explain customer service standards and principles. OIEC recently revised its Compact with Texans to include the agency's policy regarding social media, access plan for non-English speakers, and new agency website and email addresses. The updated OIEC Compact with Texans will be available after June 1, 2013 on the agency website at [www.oiec.texas.gov](http://www.oiec.texas.gov).

### Events and Closures

May 27, 2013 – OIEC closed for Memorial Day.

May 31, 2013 – Field office educational presentation on "Tips to Navigate Your Claim."

June 12-14, 2013 – OIEC closed for annual training conference.

June 28, 2013 – Field office educational presentation on "Tips to Navigate Your Claim."

# Employee Spotlight

## Samuel Peralez, Ombudsman



For a recent OIEC educational video project, Samuel (Sam) Peralez volunteered at the last minute to fill in for the lead actor. He was under a lot of pressure during the course of the day. The script was long, the room was shaking from building construction taking place outside, and there was a microphone only a few feet from his face. But Sam kept calm. In some of the behind-the-scenes moments, Sam dropped a word or phrase that belied his intellect.

Sam, the youngest of three brothers, was born and raised in San Antonio. His father was a mental health counselor for 35 years before passing away in October 2012. Sam described his father as a man of high moral and ethical character. He kept his counseling practice open long after his own financial and physical health had been compromised. Sam described the obligation his

father felt toward his patients, and how deeply it had impressed him. He is very close to his mother who he sees many times each week.

Before completing high school, Sam left and began working in a restaurant. This led to Sam attending culinary school in San Antonio. Around the age of 24 he knew he did not want to be a chef for the rest of his life. He earned his GED and enrolled at The University of Texas at San Antonio where he double-majored in history and political science and subsequently enrolled in graduate school to study public administration. Sam has an intellectual groundwork that helps him serve as an Ombudsman. And without a doubt, there is a motivation to selflessly serve.

### In his own words...

**If I could go anywhere in the world tomorrow, I would go to:** Belize.

**I would rather be (happy or right):** Happy. Sometimes being right brings unhappiness.

**Last book read:** *Machiavelli* for school and a collection of plays by Henrik Ibsen for himself.

**If I only had time to save one thing (excluding pets) from my home it would be:** A framed article about my father. He was profiled for his work with low-income Hispanics in San Antonio.

**People place too much importance on:** Individualism.

**People place too little importance on:** Greater Good.

**My personal hero is:** My dad.

**Good/Fast/Cheap:** If I could only pick two, I would want something that is good and fast.

**The proudest moment of my career thus far has been:** Helping an injured employee who really needed OIEC's help to prevail at a CCH.

**If I could do anything else in life, I would:** Be a professional student.

### CONTACT US

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