



# QUARTERLY REVIEW

Winter 2012/2013 (Issue 28)

## LETTER FROM THE PUBLIC COUNSEL

*"A vision without action is a daydream. Action without a vision is a nightmare." – Japanese Proverb*

Dear Friends:

Another sentence could be added to the proverb quoted above and that would be: "A vision with action is a plan for success." The Texas Legislature has entrusted the Office of Injured Employee Counsel (OIEC) with the duty to advocate for the legitimate interests of injured employees, and that fact is central to the agency's priorities and actions. The agency's management shares this common vision and with it the agency's role in the implementation of the workers' compensation process.

It is not necessary to agree on all implementation details, but it is the "house divided against itself" that must be avoided. Our creativity will be challenged, our stamina will be tested, and the limits of traditional problem-solving will be stretched. No one said that it would be easy—and it is not. The competing dynamics of the other stakeholders' interests challenge us daily, and that is as it should be.

We look forward to the remainder of the legislative session and the opportunity to present our recommendations for improvements in the workers' compensation system. We will continue to advocate for action on behalf of injured employees consistent with our vision and statutory mandate.

Sincerely,

Norman Darwin, Public Counsel



# Agency Leaders Hopeful the 83rd Texas Legislature Will Address Workers' Compensation Issues

OIEC leaders have been spending time at the Capitol since the 83rd Texas Legislature began on January 20, 2013. They have focused on explaining the agency's role in the workers' compensation system and its legislative recommendations. OIEC's five legislative recommendations are intended to make the system fairer for injured employees.

**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 injured employee prevails in a medical necessity case on judicial review. This recommendation addresses a gap in the workers' compensation law that has resulted in the loss of medical benefits for seriously injured employees.

**Timeframe 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 part of the body. Such notification would be required to be in written form and specifically identify the body part in question.

**Dispute of First Certification of Maximum Medical Improvement and Impairment Rating.** This recommendation would cause a party's written notice to contest maximum medical improvement (MMI) and impairment rating to suspend the 90-day statutory time frame without constituting a request for a benefit review conference. 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. It would prevent a party from being forced to enter the administrative dispute resolution process unprepared as it would provide the additional time necessary to obtain the evidence required to pursue the dispute.

**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.

**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. (Continue on page 3.)



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[www.oiec.texas.gov](http://www.oiec.texas.gov)



OIEC monitors legislation that pertains to the workers' compensation system and OIEC employees. For more information regarding OIEC's legislative recommendations and other bills that OIEC is tracking, visit OIEC's webpage, 83rd Texas Legislature, at [www.oiec.texas.gov/resources/leg\\_session\\_page12.html](http://www.oiec.texas.gov/resources/leg_session_page12.html).

## OIEC Holds Stakeholder Meeting

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



OIEC is in the process of amending §276.5 concerning the employer's notice requirement of OIEC's Ombudsman Program. Amended §276.5 provides for the Public Counsel to adopt by reference the amended Employer's Notification of Ombudsman Program to Employees (Notice).

OIEC invites you to participate in this rulemaking initiative by attending a stakeholder meeting to be held on Friday, April 12, 2013 at 9:00 a.m. The meeting location will be 7551 Metro Center Drive, Austin, Texas, Room 4402 (Tippy Foster Room). Parking is available in the lot on the hill next to Metro Center building, and a shuttle will drop guests at the front door of the building if needed. You are also welcome to attend the meeting via audio conference. Please dial toll-free (877) 226-9790, and enter access code 3429542 to join the meeting.

You may submit written comment by 5:00 p.m. on Friday, April 12, 2013 to Brian White, Deputy Public

Counsel/Chief of Staff, Office of Injured Employee Counsel, 7551 Metro Center Drive, Suite 100, Mail Stop 50, Austin, TX 78744. Your input to this rule is of great value to the agency and will have a positive influence on the adoption of this rule.

## Dispute Resolution Videos Available on the Internet

State agencies' use of social media is an emerging area of study. Many State agencies have produced videos of impressive production quality and published them on YouTube and Facebook. The need to create a social media presence has also had the effect of requiring State agencies to update old video material for both content and appearance. This, combined with the relatively inexpensive availability of professional filming and editing tools and the rising familiarity with video production, has created an entirely new outlet for State agencies.

OIEC is very much a part of this revolution and has recently created two videos explaining the dispute resolution process. The videos are scripted re-enactments of a benefit review conference (BRC) and a contested case hearing (CCH). Along with providing information, the videos allow OIEC's customers to get a sense of what to expect if they attend one of these proceedings. The videos can be accessed from the home page of the OIEC website, or at the following direct links:

BRC video -

<http://www.youtube.com/watch?v=W4dRvP1hpw>.

CCH video -

<http://www.youtube.com/watch?v=6t7wl-Fyju>.



## Question of the Quarter

**Question: I hurt my back when I lifted a box at my job that was heavier than I expected it to be. The insurance carrier is disputing that my back injury is work-related. A friend told me I should ask for a hearing. What should I expect?**

**Answer:** Unfortunately, there will be times when disputes arise between the parties in a workers' compensation claim. Fortunately, there is a process to help resolve indemnity, or income, disputes (medical disputes are generally handled through a different process). Before requesting a hearing, the parties must make reasonable attempts to resolve the disputed issues.

During the dispute resolution process, you may be required to attend one or more proceedings at the local Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC) office. If the disputed issues are not resolved at one level then the dispute may progress to the next level as follows:

**Benefit Review Conference (BRC):** This initial meeting of the parties allows them to discuss the disputed issues in an informal setting. If the issues are not resolved, the issues may be elevated to either (1) arbitration or (2) a CCH.

**Contested Case Hearing (CCH):** The more common step of dispute resolution following a BRC is a CCH. The CCH is more formal than a BRC and is presided over by a TDI-DWC hearing officer. The hearing officer will issue a written decision. If the hearing officer's decision is not timely appealed, it becomes the final decision of TDI-DWC.

**Arbitration:** This option is rarely ever chosen; however, the parties may agree to resolve the dispute through arbitration instead of a contested case hearing. The arbitrator's decision is final and cannot be appealed.

**Appeals Panel review:** The Appeals Panel reviews the hearing officer's decision and the record of the hearing based on the appeal and response filed by the parties. The Appeals Panel decision is the final TDI-DWC decision on the dispute.

**Judicial review:** If you are not satisfied with the final decision of TDI-DWC, you may request judicial review. The petition must be filed with the appropriate district court or county court at law. OIEC is unable to help you at this level because it is outside the TDI-DWC administrative process.

An OIEC ombudsman can assist you free of charge through each step of the dispute resolution process at TDI-DWC, or you may hire an attorney to represent you in your claim. (Any attorney's fees will be deducted from your income benefit payments as ordered by TDI-DWC.) Please call 1-866-EZE-OIEC (1-866-393-6432) for assistance.

## Communications Corner

**Outreach Events.** OIEC was one of 1,100 employers who participated in the Texas Workforce Commission's "Hiring Red, White & You" job fairs for veterans and military spouses in November. OIEC employees staffed booths at the events in Austin, San Antonio, and Houston, providing information about the agency and possible job openings to about 750 attendees.

Regional Staff Attorney Veronica Boulden gave an overview of OIEC at the Hodges Bend Middle School Career Day in the Houston area in January.

OIEC's Associate Director of Communications and Development Kathryn Harris staffed a booth in February at the Texas Orthopaedic Association Socioeconomic Summit in Austin.

In May, OIEC will have a booth at TexMed 2013, the Texas Medical Association's annual event in San Antonio.

**Field Office Presentations.** No presentation will be given at the field offices in March due to the Good Friday holiday. The next presentations will be given from noon to 1 p.m. April 26 and May 31 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.



# Austin-Area OIEC Customers Learn Mental Health First Aid

Job loss, physical pain, and income reduction are some of the most stressful life events and are commonplace among OIEC customers. To help address the mental health issues that may arise from workplace injuries, OIEC and Austin Travis County Integral Care (ATCIC) collaborated in March on a pilot project to train OIEC customers or a family member to recognize and cope with mental health problems.



The Mental Health First Aid training offered to Austin-area injured employees by OIEC and ATCIC is a highly interactive, 12-hour course managed by the National Council for Behavioral Healthcare. It teaches participants key skills to help someone developing a mental health problem or crisis.

“Studies show that participants (in Mental Health First Aid training) gain a better understanding of mental disorders and treatments and more confidence in helping others and themselves,” said Kathryn Harris, OIEC Associate Director for Communications and Development. “You can think of this course as CPR training for mental health.”

In this pilot project, certified Mental Health First Aid USA instructors at ATCIC taught the course to OIEC customers or a family member who responded to

OIEC’s invitation to participate. OIEC paid the \$30-per-person fee for the class, which was limited to 25 participants. Depending on the feedback from participants, OIEC will consider expanding the program to other areas of the State as well as offering more classes in the Austin-Travis County area.

OIEC anticipates that the training will produce better return-to-work results, which will benefit employees and employers. “Physical pain can easily lead to emotional pain or depression affecting all areas of life, including the ability to return to work,” Ms. Harris explained. “It is important for injured employees to take care of mental health needs as well as physical ones.”

Participants learn:

- How to help someone showing signs of mental illness or a mental health crisis.
- Potential warning signs and risk factors for depression, anxiety disorders, substance abuse disorders, and other health issues.
- A five-step action plan to help an individual in crisis connect to professional or self-help care.
- Resources to help someone with a mental health problem.

President Obama endorsed Mental Health First Aid in January as part of his plan to help reduce gun violence in the United States. Although his statement was focused specifically on training teachers and school staff, overall interest in the program has grown.

“We’re doubling our number of instructors to meet the demand,” said Kathleen Casey, ATCIC coordinator for disaster mental health preparedness and response and a certified Mental Health First Aid instructor.

ATCIC is the community agency that provides behavioral health and developmental disabilities services in Austin and the rest of Travis County. It operates using federal, state, and local funds.

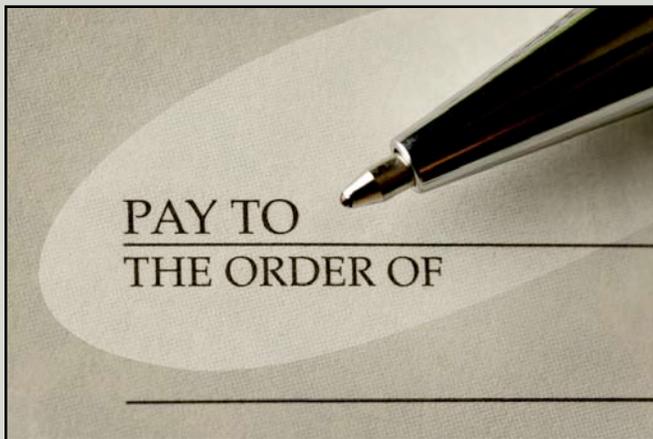
Learn more about Mental Health First Aid at [www.mentalhealthfirstaid.org](http://www.mentalhealthfirstaid.org).



# Ombudsman Helps Injured Employee Recover Over \$34,000 in Benefits Due

Waco Ombudsman Monica Pierce began assisting an injured employee, Ms. W, in December 2011. Ms. W had worked at an employer where she sustained injuries to her shoulder and wrist while performing a takedown on an inmate during an altercation. The insurance carrier accepted the injury to her shoulder but disputed the hand and wrist injury.

The case was set for a BRC, and when the issue was not resolved it was elevated to a CCH. Ms. W also saw a designated doctor who believed her hand and wrist injuries were compensable and that she had not reached maximum medical improvement (MMI) before her statutory MMI date. Statutory MMI is the later of: (1) the end of the 104th week after the date that temporary income benefits began to accrue or (2) the date to which MMI was extended by TDI-DWC pursuant to Texas Labor Code Section 408.104.



There were four CCHs set in this case. Before the last hearing, Ms. Pierce was able to get the insurance carrier to agree that the hand and wrist were part of the original injury and that Ms. W had not reached MMI before her statutory MMI date. The insurance carrier paid all disputed temporary benefits due in a lump sum totaling \$27,800 and also issued a payment of accrued impairment income benefits from the day after MMI to present totaling \$5,500. The injured employee told Ms. Pierce that the money will help save her home.

## Items to Note

### 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/>.

### Events and Closures

- March 29, 2013 – OIEC closed for Good Friday.
- April 12, 2013 – Stakeholder meeting regarding proposed amendment to §276.5 and Notice.
- April 26, 2013 – Field office educational presentation on “Tips to Navigate Your Claim.”
- 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.

### New location for Houston West Field Office

350 North Sam Houston Parkway East, Suite 110  
Houston, Texas 77060-3318  
Phone: 281-260-3035



# Case Study

## Definition of Intoxication



The claimant was injured in a motor vehicle accident in December 2011 when he lost control of an employer-owned vehicle and collided with another vehicle. He sustained injuries to his right leg that were eventually complicated by a blood clot and an

infection. On the instructions of his treating doctor, he was kept from working until February 2012. Two days after the accident, the claimant was given a drug test to determine whether he was intoxicated at the time of the accident. Rather than giving a blood or urine sample, the claimant was asked to provide a hair sample and tested positive for cocaine. In addition, a doctor of osteopathy (Dr. M) reviewed the claimant's results and issued an opinion that the claimant's tested levels of cocaine were consistent with nearly constant use of cocaine.

In the CCH of May 2012, the claimant testified to having never used cocaine. In addition, the claimant's supervisor provided a written statement that the claimant showed no behavior the day of the accident that would indicate that he was under the influence of drugs or that he was impaired in any way; however, the supervisor did concede that he did not have a lot of interaction with the claimant on the day of the accident. The hearing officer ruled that the claimant did not provide sufficient evidence to overcome the presumption that he was intoxicated at the time of the accident. The hearing officer ruled that the claimant did not sustain a compensable injury.

Section 401.013(c) of the Texas Labor Code states:

*On the voluntary introduction into the body of any substance listed under Subsection (a)(2)(B), based on a blood test or urinalysis, it is a rebuttable presumption that a person is intoxicated and does not have the normal use of mental or physical faculties.*

The claimant's argument on appeal centered on the question of whether a hair sample test was an acceptable method of drug testing for the purposes

of workers' compensation cases. The Texas Labor Code mentions only blood testing or urinalysis. Therefore, the claimant contended that the hair sample results were not enough to raise the presumption of intoxication.

The process for drug testing based on a hair sample is widely held to be an accurate assessment of whether someone has taken drugs, but there are important distinctions that must be drawn in this technique as compared to blood and urine testing. A hair follicle sample can provide evidence of drug use as far back as three months; however, the results do not show when the drugs were taken over that period. This fact alone would necessitate a complete exclusion of hair testing for the purposes of workers' compensation claims where the time of intoxication must be convincingly shown to coincide with the time of an injury. In addition, Dr. Kelaher—the author of the book *Drug Testing and the Workplace*—that “[hair tests] are interesting from a technology point of view, but accuracy and interpretation are not standardized.”

In his request for review, the claimant also argued that he had been hospitalized for a significant amount of time for a cardiac problem and that the medications given to him during that hospital stay could have shown up as false positives on the hair analysis test.

Ultimately, the Appeals Panel found that the central question in the case was whether a hair test could be used to raise the presumption of intoxication. The Appeals Panel ruled that while the hair test was sufficient to raise the issue of intoxication [under Texas Labor Code, Section 401.013(a)(2)(B)], it was not enough to raise the rebuttable presumption of intoxication. In other words, in the absence of a blood or urine sample—as specifically cited under Section 401.013(c)—the insurance carrier still has the burden of proof to show that the claimant was intoxicated at the time of the injury. Therefore, the Appeals Panel ruled that the hearing officer applied the wrong standard to determine whether or not the claimant was intoxicated at the time the injury occurred. The case was reversed and remanded. In the decision and order on remand, the hearing officer ruled in favor of the claimant. This was due in no small part to the diligence of the claimant's OIEC ombudsman, Judy Tyson, and Ann Reeves, an OIEC regional staff attorney.



# Employee Spotlight

## Elizabeth Aguirre, Customer Service Representative



Elizabeth has nearly 19 years of experience in workers' compensation. She has worked in a number of positions—from temporary employee with the Texas Workers' Compensation Commission, to case manager, and finally as a customer service representative with OIEC. Elizabeth currently serves as the customer service trainer for the southern region of Texas.

Elizabeth was born and raised in Laredo, Texas. Her parents were working-class people who raised Elizabeth, her five brothers, and two sisters. When she goes back to Laredo now, she's reminded how traditional it has remained. Of her time there growing up, she remembers most the heat and what it was like growing up in a large family without a lot of money.

At 23, Elizabeth moved to Houston, where she has lived for the past 20 years. She has two biological children and two stepsons, both attorneys. Her son lives in Bryan and her daughter lives with her and attends the University of Houston. Elizabeth is also a proud grandmother. As far as hobbies go, Elizabeth is a huge fan of the Houston Texans. She also collects antiques, mostly furniture. Elizabeth loves to dance, as long as it's not country-western dancing.

Among her coworkers, Elizabeth is known as a thorough person who knows the workers' compensation law inside and out. She is also known for the music she listens to—70s rock and roll. She was selected as the employee spotlight for her years of service and dedication to helping injured employees.

### In her own words...

**The most important thing in life is...**to have faith in God, be happy, and enjoy life to its fullest.

**My favorite quote is...**Do unto others as you would have them do unto you.

**If I could go anywhere tomorrow, it would be...**a vacation to Spain. My stepsons have taken several trips there and have shown me beautiful pictures and talk about all the wonderful meals and delicious wines they sampled.

**My personal hero is...**my husband, Mario. He has taught me to be a strong individual through any adversities and/or hardships.

**My coworkers would be most surprised to know that I...**do not know how to country-western dance. I love dancing to all sorts of music but country-western is not my friend.

**If I could only bring one album with me to a desert island, it would be...**"Hotel California."

**My proudest career moment was when...**I was able to assist an older gentleman with his very difficult compensation case when I was a case manager at an attorney's office. He was very appreciative and had his whole family call me to thank me for assisting him. I patted myself on the shoulder and the attorney appreciated that I had gone the extra mile.

**If I had to choose, I'd rather be (happy or right)...**happy, always happy.

### CONTACT US

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