



QUARTERLY REVIEW

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LETTER FROM THE PUBLIC COUNSEL

Dear Friends:

The continually evolving nature of workers' compensation law makes it important for internal training at the Office of Injured Employee Counsel (OIEC) to reflect the current state of the law from the appeals panels and courts. To address these changes, I developed a new training program and personally trained the Ombudsman Supervisors and Regional Staff Attorneys who will in turn deliver the training to our employees in the field. I will sit in on those training sessions as they occur with each team across the State.

The manner in which this training will be delivered gives me the opportunity to evaluate the skill levels of those delivering the training and to evaluate our agency's training effectiveness. I have been impressed by the knowledge demonstrated by the Ombudsman Supervisors and Regional Staff Attorneys, and I am confident that I will be equally impressed by our Ombudsmen.

We will continue to seek feedback from Hearing Officers, Benefit Review Officers, and insurance carrier representatives regarding the performance of our Ombudsmen. I appreciate their generosity in providing constructive comments. Our hope is that with this new training and ongoing feedback, our agency will continue to provide its customers with effective, quality assistance.

I wish all of you a happy New Year.

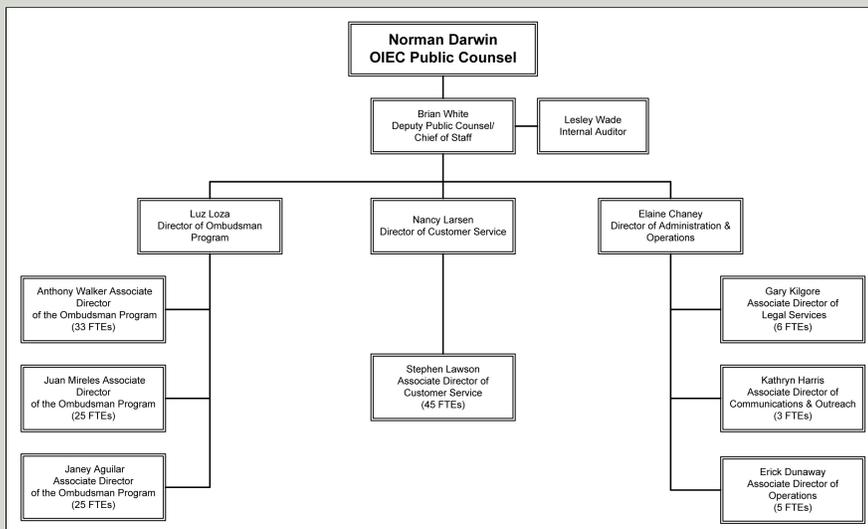
Norman Darwin, Public Counsel



Organizational Changes Prepare OIEC for the Future

OIEC has conducted extensive research on succession planning. The process of succession planning (a component of the agency's strategic and workforce plans required by the Legislature) prepares the agency for the risks associated with employees leaving the agency due to retirement or other reasons and the resulting loss of their critical knowledge and experience. By identifying, developing, and transferring knowledge to employees, they become highly qualified and capable of filling key positions. This puts OIEC in a better position to minimize this risk.

As part of the succession planning process, development opportunities were identified that resulted in a reorganization that specifically impacts the agency's Central Office. Elaine Chaney, formerly serving as the Director of Legal Services, is now serving in the newly created position of Director of Administration and Operations. The Legal Services program was merged into the Administration and Operations program, which also includes the Operations and Communications and Outreach sections.



This change creates a more consistent leadership structure within each of the agency's programs. This new structure will facilitate communication and ensure that appropriate employees have the knowledge and cross-training opportunities to achieve the agency's succession planning goals.



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Safeguarding Confidential Claimant Information: A Top Priority

Assisting injured employees or their beneficiaries is at the heart of OIEC's mission. Effective assistance requires OIEC employees to review claim information. Because OIEC is administratively attached to the Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC), the agencies share a computer system, which OIEC uses to fulfill its mission.



Texas Labor Code §402.083(a) provides that an injured employee's claim file information is confidential and may not be disclosed by TDI-DWC except as provided by that subtitle or other law. Further, §402.086(a) provides that information relating to a claim that is confidential under that

subtitle remains confidential when released to any person, except when used in court for the purposes of an appeal.

In October, TDI-DWC and OIEC formalized their processes to ensure OIEC employees only access confidential claim information for customers who have requested the agency's assistance. The agencies entered into a Memorandum of Understanding Concerning Confidential Claim Information, which details the circumstances in which OIEC employees may access confidential claim information. All OIEC employees signed an acknowledgement that they understand and will follow these processes. OIEC will continue to protect the confidential claim information entrusted to it by injured employees.

Notice of Injured Employee Rights and Responsibilities Amended

On December 28, 2011, OIEC adopted amendments to Texas Administrative Code §276.6 concerning the "Notice of Injured Employee Rights and Responsibilities in the Texas Workers' Compensation System (Notice)." The amended Notice reflects changes in the workers' compensation system as a result of the Sunset Advisory Commission's comprehensive review of the workers' compensation system and changes in the Workers' Compensation Act as a result of the 82nd Texas Legislature, Regular Session, 2011. A minor change was made to the rule text to reflect OIEC's and TDI-DWC's new website addresses and the physical location of both agencies.

The effective date of the amended rule and notice is June 1, 2012. This timeframe allows system participants adequate time to prepare for the changes resulting from the amended Notice and coincides with the effective date of key Sunset Advisory Commission legislation. The amended Notice can be accessed at <http://www.oiec.texas.gov/resources/proposedrules.html>.

Business Plan Provides Framework for Agency Initiatives

OIEC uses a business-planning process, known as the Agency Business Plan, to detail the agency's most critical objectives, the date by which the objectives must be met, and the parties responsible for completing them. The Business Plan is detailed and includes many internal tasks that OIEC must perform in support of the agency's mission to assist, educate, and advocate on behalf of the injured employees of Texas. It demonstrates OIEC's commitment to completing tasks in a timely and effective manner as well as the agency's commitment to open government. The Business Plan is updated monthly, and the current plan is available on the OIEC Publications webpage at http://www.oiec.texas.gov/documents/pub_busplanoiec.pdf.



OIEC Staff Certified as Mental Health First Aiders

Knowledge and skills serve us well in navigating an emergency situation. Mental Health First Aid (MHFA) aims to teach proper response in a mental health emergency and the best ways to offer support to someone who appears to be in emotional distress.

A person with a workers' compensation injury faces possible physical and financial difficulties—some of



life's most stressful events. OIEC has made it a priority to provide all of its employees with MHFA training so they will have the knowledge and skills to assist customers who may be in emotional or mental distress.

MHFA is a public education program, coordinated by the National Council for Community Behavioral Healthcare, which introduces participants to risk factors and warning signs of distress, builds understanding of their impact, and provides overviews of common treatments. It is a 12-hour course which uses role-playing and simulations to demonstrate how to assess an emergency situation, select interventions and provide initial help, and connect people to professional, peer, social, and self-help care.

The program uses a five-step action plan:

- Assess for risk
- Listen non-judgmentally
- Give reassurance and information
- Encourage appropriate professional help
- Encourage self-help and other support strategies

OIEC's Deputy Public Counsel/Chief of Staff Brian White and Associate Director of Communications and Outreach Kathryn Harris attended a comprehensive class to become certified instructors to teach the MHFA course to all OIEC employees.

Half of the agency has been trained as Mental Health First Aiders and the remaining agency employees will be trained in 2012.

Brian White Participates in Employees Retirement System Workforce Forum

Employees determine the true value of an agency. Dedicated, knowledgeable, experienced employees are essential for success. Therefore, it is critical that OIEC employees have the incentive to maintain their State employment. Employee benefits such as health insurance and retirement are important factors in employee retention.

In November, Brian White, Deputy Public Counsel/Chief of Staff, attended the "Future of Benefits" Employees Retirement System (ERS) Workforce Forum. ERS manages state employee benefits, and this was the third in a series of educational forums to explore the future of retirement, insurance, and the new state workforce.

Mr. White represented both OIEC and the Mid-Size Agency Coordinating Council (MACC) on the panel discussion. He brought forward the following issues for the employees:

- Employees could benefit from additional options of healthcare coverage, including the option to receive reimbursement for insurance coverage that is not needed by the State employee.
- Employees have expressed interest in gym memberships as a benefit. This might be accomplished through a State employee gym system or reduced rate/free memberships to existing gyms.

OIEC remains actively involved in opportunities to improve employee benefits whenever possible.



Harris Chosen for Board of Directors Position

Executive Women in Texas Government (EWTG) is an organization with the vision to develop leaders who create positive results in Texas state government. Its programs foster professional development, networking, and peer support. All OIEC Directors (who are all women) are members of EWTG.



In December 2011, Kathryn Harris, Associate Director of Communications and Outreach, was sworn in to the EWTG Board of Directors. She will serve as its Communications Director until December 31, 2012. Her responsibilities include publishing the EWTG monthly newsletter and managing its website.

Brian White, OIEC Deputy Public Counsel/Chief of Staff said, "In an agency that is comprised primarily of women, Ms. Harris is setting an excellent example of leadership. I think it is inspirational to have such great leaders who happen to be females."

Question of the Quarter

Q: I am confused by the term "disability" when it comes to my workers' compensation benefits. What does it mean and how does it impact my benefits?

A: Generally, you think of disability in terms of a physical limitation. However, in Texas, workers' compensation disability refers to the ability to earn an income. Disability exists if an injured employee is not able to work as a result of the injury or has returned to work but is making less than pre-injury wages because of the injury. An injured employee may be entitled to Temporary Income Benefits if there is disability, until he or she reaches Maximum Medical Improvement.

Quick Notes

New Benefit Review Conference Form

TDI-DWC has revised the DWC Form-045, Request to Schedule, Reschedule, or Cancel a Benefit Review Conference (BRC). The revised form is available for download from the Forms and Notices page on the TDI website at <http://www.tdi.texas.gov/forms/form20.html>. The revised DWC Form-045 was required as of December 1, 2011.

Together We Care

OIEC had another successful year participating in the State Employee Charitable Campaign (SECC) that ran from September 1 – October 31, 2011. Statewide, OIEC employees contributed more than \$7,500. Their contributions will help their chosen charitable organizations, but primarily Goodwill Industries in its mission to return employees back to work.

A Look Ahead

January 27, February 24, and March 30, 2012
Educational presentations in each OIEC Field Office.

February 20, 2012

Federal holiday, all OIEC offices closed in honor of President's Day.

Case Study: Toxic Exposure and Repetitive Trauma Injury

Ms. A was an assembly worker on a wave soldering machine. The process of wave soldering involves running liquid solder over a printed circuit board to attach metal components that create an electrical circuit. The machine Ms. A operated used a form of solder consisting of about 50 percent tin and 50 percent lead. Ms. A experienced dizziness, nausea, and other symptoms and went to a medical facility where she was treated by Dr. R. About a week later, Dr. R diagnosed her with hazardous substance exposure including high serum levels of lead. (Continued on Page 6)



Dr. R stated that:

“In [her] professional opinion, and with a reasonable degree of medical probability, the diagnosis is/are causally related to the work-related injury. The mechanism of injury and the description of the incident are temporally related and consistent, and it is more likely than not that the diagnosis (sic) are the result of the work-related injury.”

Ms. A was also diagnosed by Drs. B and H, who both found elevated levels of lead in her urine. Both opined that her elevated levels of lead were due to exposure resulting from her work.

In addition, she claimed an injury to her right arm and shoulder as a result of carrying heavy soldering waste in a bucket at arm’s length. The soldering waste came from the daily process of de-drossing (cleaning the excess solder) the wave soldering machine, collecting the lead dust in a bucket, and disposing of that dust in a receptacle. In the process of de-drossing, she also inhaled the fumes trapped in the machine. Ms. A also noted that she was not given protective gear that would have prevented her from coming into physical contact with the lead dust.



Ms. A stopped working after her diagnosis and, with the exception of a two-week period, has not worked since. The carrier denied both of Ms. A’s claims. Ms. A saw a designated doctor, Dr. W, who found that Ms. A’s symptomology was related to hazardous substance exposure

and that the right arm strain was due to lifting heavy objects at work.

The cause and existence of an illness due to lead exposure is a matter beyond common experience, and medical evidence needs to be submitted that establishes the causal connection as a matter of reasonable medical probability. In Ms. A’s case, four separate doctors, including a designated doctor, believed that that her lead exposure and right arm injury were both work related. In addition, Texas Labor Code § 408.0041(e) states that the designated

doctor’s report has presumptive weight unless the preponderance of the evidence is to the contrary. Nevertheless, the Hearing Officer in Ms. A’s case ruled that her condition was not work related, and she therefore did not sustain a compensable injury. The Hearing Officer noted that while the doctors found that Ms. A’s symptoms were consistent with heavy metal poisoning and that her job put her in close proximity with those heavy metals, the doctors did not establish convincingly how her job was causally connected to her injury beyond a mere temporal relationship. It would appear that the Hearing Officer felt that a highly detailed explanation of the mechanism of injury was not provided. This high standard was addressed by the Texas Supreme Court in *Western Casualty and Surety Company v. Gonzalez* when the Court stated:

This Court has never required that the medical expert explain or even understand the precise biochemistry or mechanism by which the initial trauma affects the health or organs of the injured party. [. . .] If every episode in the chain of degeneration within the body of a person had to be established in medical probability, the available expert witnesses, of either rare expertise or dishonesty, would be so few that injured persons would seldom make that proof.

The Hearing Officer also cited Occupational Safety and Health Administration (OSHA) and Health, Safety, and Environmental Services inspection reports. The OSHA report did not note any airborne contaminants. The other report noted only slightly elevated levels of lead in a workbench, which presented only a minor risk of lead poisoning. There was a significant flaw in the OSHA inspection report in that it did not indicate the specific areas where air samples were taken. There is no indication that they sampled the air inside the wave soldering machine —the air which Ms. A was forced to breathe when de-drossing the machine.

Ultimately, the Hearing Officer did not find that Ms. A met her burden of proof in establishing that her lead poisoning was work related. Ms. A has requested a review of her case with the assistance of Debra McIntyre as her Ombudsman. At this time, her request is still pending before the Appeals Panel.



Employee Spotlight: Betty Troyer, Ombudsman Program



Over the course of her life, Ombudsman Supervisor Betty Troyer has been involved with at least four different sports. In high school—in Denver City, Texas, where she was born and raised—she played volleyball, but she didn't become adventurous about physical exercise until her early 30s. It

was then she started running and before long entered a 5K race, which she won for her age category. She entered that race without any expectations beyond having fun and came away with instant confidence in what she could do physically. Over the next 20 years, running led to weight lifting, which led to the recent gym sport sensation known as CrossFit.

Ms. Troyer describes her upbringing as a sheltered one without many material possessions. Her father was a preacher and her mother was a sweet, quiet woman with a positive outlook on life—a trait which Ms. Troyer has in abundance. Together, her parents provided a dedicated environment of values in which to raise Ms. Troyer and her six siblings. Today, her parents are both in their 80s and in good health.

While on vacation in Miami, Ms. Troyer met her future husband, and they had four children together. They lived in Pennsylvania, Minnesota, and West Texas before they moved to Tyler, Texas.

Ms. Troyer's work history began with the Texas Employment Commission where she worked as a part-time employee in the unemployment insurance section. About five years later she began working as an Ombudsman with the Texas Workers' Compensation Commission (TWCC) in Tyler.

In the summer of 2005, Ms. Troyer went to work in the Dallas Field Office as an Ombudsman Supervisor, and less than a year later, she started with OIEC as a result of House Bill 7. (House Bill 7 transferred the Ombudsman Program from TWCC to

OIEC.) She has since moved back to Tyler where she supervises the Ombudsman Program in the Denton, Lufkin, Tyler, Bryan, and Beaumont Field Offices. She also spends a significant amount of time on the road training incoming Ombudsmen.

Ms. Troyer was introduced to CrossFit through a coworker, and she now plans her weeks around her CrossFit sessions. She loves the complete confidence that physical training provides and discovering that she can accomplish more than she realized.

She described a typical workout in which she performs 10 different exercises at 50 repetitions each. Some of the exercises include box jumps (literally jumping onto a box that is about two feet off the ground), walking lunges, knee-to-elbow pull-ups, dead-lifts (at 230 pounds), and six other equally fatiguing exercises. She hopes to start competing in local CrossFit competitions.

It's not surprising that CrossFit has given Ms. Troyer the stamina to perform her work. The Director of the Ombudsman Program, Luz Loza, describes Ms. Troyer as "tenacious and dedicated" and as someone who "doesn't complain about difficult assignments."

Ms. Troyer's work does not end in the office or the gym. She has also found her missionary work in Honduras and Costa Rica very rewarding. She traveled to prisons, orphanages, and hospitals to provide help to those in need or shut away from society. Ms. Troyer is clearly a hard-working, charitable person with her mother's positive outlook on life, and OIEC is lucky to have her on the team.

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