QUARTERLY REVIEW

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LETTER FROM THE PUBLIC COUNSEL

Dear Friends:

An exciting event is approaching as the Office of Injured Employee Counsel (OIEC) makes the final preparations for our annual conference in June. Employees will be reunited with colleagues from around the State and educated by presenters who give generously of their time.

This year we will have a special guest who will make this conference a special occasion. I am pleased to have this guest (whose identity will remain undisclosed for now) for my last annual conference. My own presentation will focus on a causation case and the legal strategies needed to prevail in similar claims. Although I will retire as Public Counsel on August 31st, OIEC has excellent senior management to continue the agency's mission with the new Public Counsel.

I am looking forward to meeting our new employees and "fellowshipping" with my old friends who have done so much to make this experience a milestone of my life.

Sincerely,

Norman Darwin, Public Counsel

OIEC Prepares Customers for Designated Doctor Examinations

OIEC management has taken a proactive approach to ensure designated doctors have a complete file before examining an injured employee based on an excellent recommendation from the Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC). Lack of medical records or an incomplete Form DWC032, Request for Designated Doctor Examination, could result in inaccurate ratings, disputes, letters of clarification, or re-examinations.

When TDI-DWC or the insurance carrier requests a designated doctor examination on a claim where OIEC has assisted the injured employee, an OIEC customer service representative reviews the claim file. If medical records are available, a case development appointment between the injured employee and ombudsman is scheduled within five working days.

The case development appointment ensures that the injured employee understands the reason for the examination and that all available medical records are provided to the designated doctor. Additionally, the ombudsman reviews the Form DWC032, Request for Designated Doctor Examination, to verify the information including the body parts and diagnoses of the injury. If necessary, the injured employee and ombudsman will complete and submit a new Form DWC032. These steps make it more likely that the designated doctor has all of the information needed at the time of the injured employee's examination to rate the entire injury and provide an accurate medical opinion.

This initiative does create additional appointments that would not have occurred if OIEC were not proactively involved. At a time that workload is increasing it is difficult for the agency to add one more task, but this step does reduce the likelihood of designated doctor disputes based on incomplete information. Ultimately OIEC believes this initiative is supported by the agency's mission to assist, educate, and advocate on behalf of the injured employee's of Texas.

In This Issue

Page 1 Letter from the Public Counsel
Page 2 Records to Designated Doctors
Page 3 Difficulties in Proving Causation
Page 4 New Telephone System
Page 4 Question of the Quarter
Page 4 Communications Corner
Page 5 Case Study: Pulmonary Embolism
Page 7 Employee Spotlight: Ismenia Garcia

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Difficulties Continue in Proving Causation

At the 2013 Advanced Personal Injury Continuing Legal Education Course, Regional Staff Attorney Veronica Boulden discovered that plaintiffs have an uphill battle when it comes to proving causation in both personal injury and workers' compensation cases.

The causal relationship between the incident at work and claimed injury is a dispute that occurs frequently in workers' compensation claims. The claimants are often unsuccessful in proving this causal relationship due to the increased requirement for medical evidence and medical expert testimony. Similarly, the Texas Supreme Court has ruled against claimants/plaintiffs in defect cases, expert cases, mental health cases, car wreck cases, and third-party criminal conduct cases.

Since its ruling in *Union Pump Co. v. Allbritton*, 898 S.W. 2d 773, 775 (Tex. 1995), the Texas Supreme Court has issued 31 major causation opinions with only four ruling in favor of the claimant/plaintiff. In *Allbritton*, the plaintiff brought suit following an injury that occurred after a pump caught fire at work. The plaintiff tripped over some pipes while trying to turn off a valve and alleged the pump manufacturer had negligence, gross negligence, and strict liability. The outcome of the suit was that the Texas Supreme Court did not find a causative link between the defective pump and the plaintiff's injuries as the circumstances surrounding the injury were not connected closely enough with the pump or the manufacturer's conduct to constitute a legal cause for her injuries.

Since *Allbritton*, the Texas Supreme Court has taken a significant number of cases that addressed sufficiency of the evidence with respect to causation. The Texas Supreme Court has been very active in the sufficiency of expert testimony regarding causation, and an overwhelming majority of these resulted in jury verdicts being reversed and judgments being rendered in favor of the insurance carriers/defendants. The Texas Supreme Court has found often that expert testimony on causation was too unreliable to be admissible or that, if admissible, it was too unreliable to constitute legally sufficient evidence to sustain a verdict or survive summary judgment.

Some argument might be made that where an expert's testimony regarding causation is undisputedly admissible that it should be legally sufficient to support a verdict. (The question of admissibility with regard to expert evidence necessarily involves a substantive review of the evidence for reliability.) However, the Texas Supreme Court has rejected that notion. *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W. 2d 706, 730 (Tex. 1997) makes clear that admissibility does not equal sufficiency. However, the Texas Supreme Court did rule in *Guevara v. Ferrer*, 247 S.W. 3d 662 (Tex. 2007) that non-expert evidence could be sufficient to establish causation only where the causal connections "are within a layperson's general experience and common sense." The Texas Supreme Court held that injuries which manifested themselves immediately after the accident in question were sufficiently within the scope of a layperson's general experience and common sense to sustain a verdict for the plaintiff, but that the same could not be said regarding injuries that were diagnosed later in time.

The sheer number of causation cases heard by the Texas Supreme Court since *Allbritton* is remarkable. The Texas Supreme Court and the Texas Courts of Appeals continue to favor defendants when deciding causation. How can the pendulum swing to the side of the claimant?

OIEC asserts that the sufficiency of evidence with respect to causation must be addressed and the claimant's expert witnesses must be on board. The injured employee has the burden of proof in regard to causation. The evidence must establish producing cause by:

- history of the injury or accident;
- causal connection between the mechanism of injury and diagnosis (an explanation of how the injury was caused by the work-related event);
- medical records noting complaints; and
- causation opinions from the health care providers.

OIEC continues to provide its staff with comprehensive training on causation. In fact, Public Counsel Norman Darwin's annual conference presentation will focus on legal strategies. Through their training and with the help of the regional staff attorneys, OIEC employees will try to gather the information needed to best assist injured employees with these difficult disputes.

Preparations Under Way for New Telephone System

Later this year OIEC will transition to a telephone system that will provide the agency with more efficient and cost-effective communications. The internet-based telephone system will utilize a computer, headset, and the internet to place and receive most calls instead of the traditional telephone handset and line. The long-distance charges incurred will be limited, causing a decrease in that expense.

What does this mean for OIEC's customers? Customers will continue to contact OIEC at 1-866-EZE-OIEC (1-866-393-6432) for assistance before and after the transition. OIEC will continue to update its customers about what to expect, such as the implementation of a new, user-friendly menu, as the transition date gets closer.

Question of the Quarter

Question: At what point does OIEC get involved with a workers' compensation claim?

Answer: OIEC can become involved in a workers' compensation claim at any time. OIEC customer service representatives and ombudsmen provide free assistance to unrepresented injured employees upon request. They have the knowledge and experience to answer questions, attempt to resolve disputes, and assist with proceedings if disputes cannot be resolved informally. Dispute resolution proceedings include Benefit Review Conferences, Contested Case Hearings and reviews by the Appeals Panel.

OIEC is prohibited by law from assisting when a party is dissatisfied with an Appeals Panel decision and requests Judicial Review because at that time the case moves into the Texas court system. OIEC can only assist in the Texas workers' compensation system dispute resolution process.

If you would like OIEC assistance, please call 1-866-EZE-OIEC (1-866-393-6432) to speak with an OIEC representative. You will be asked to complete a Form OMB-02, *Request for OIEC Assistance.* This document allows OIEC to access your confidential claim information and explains the role of OIEC and the Ombudsman Program.

Communications Corner

OIEC continues its educational efforts through public outreach and monthly educational presentations. If you would like to request an OIEC representative to speak to your organization, please contact Kathryn Harris, Associate Director for Communications and Development, at (512) 804-4170.

RECENT PUBLIC OUTREACH

Texas Medical Association's TexMed Event in Fort Worth May 2 and 3. Regional Staff Attorneys Brandon Manus and Stephen Gossett hosted the OIEC booth at this educational showcase and expo of the Texas Medical Association. Over 1,700 Texas physicians, medical students, and medical office staff

attended the event, many of whom were unfamiliar with OIEC. The regional staff attorneys explained OIEC's services and how they can benefit the doctors' workers' compensation patients.

Brandon Manus provides outreach materials to attendees of the 2014 TexMed event in Fort Worth.

TDI-DWC Texas Safety Summit in Austin May 7 and 8. Regional Staff Attorney Gina McCauley and communications staff hosted the OIEC booth at this annual workplace safety and health conference. Approximately 250 people who have a role in safeguarding Texas employees attended the event. Due to the nature of the conference, many attendees were familiar with OIEC and had questions about specific workers' compensation situations they had encountered. Several human resources personnel requested OIEC's educational folders to give to their employees. Most attendees were very proactive about taking care of injured employees and offering return-to-work opportunities.

MONTHLY EDUCATIONAL PRESENTATIONS

The remaining 2014 dates for the monthly educational presentations are: May 30, June 27, July 25, August 29, September 26, and October 31. Additional information is available on the OIEC website at http://www.oiec.texas.gov/resources/public_outreach.html.

Case Study: Death Claim Pulmonary Embolism from Overseas Flight

At the time of his death, Decedent was a 34-year-old product engineer who traveled extensively for work. The terms of his employment required him to travel overseas multiple times per year and in February 2011, he flew to Spain for a marketing opportunity. Upon arrival in Barcelona, he experienced shortness of breath which became severe enough that he departed early and returned to Texas for treatment. During the return flight, he required oxygen. He was admitted into the emergency room where his heart rate increased to 178 beats per minute. Shortly thereafter he suffered a cardiac arrest and diagnostic tests revealed that he died as a result of a pulmonary embolism.

A pulmonary embolism is an event in which one or more of the arteries of the lungs become physically blocked by a blood clot (embolus). The resulting lack of blood flow leads to shortness of breath, lack of oxygenation to vital organs, and if not immediately treated, may result in death or permanent impairment. The most common type of blood clot is one that is formed in the lower extremities, typically during long periods of immobility such as overseas flights. This type of blood clot is known as deep vein thrombosis (DVT). During periods of immobility, restricted blood flow to the extremities allows a clot to form. Eventually the clot dislodges from its source and travels through the body. If the clot is large enough it can impede the flow of blood and the resulting lack of oxygenation to the surrounding tissue can cause life threatening events, especially heart attacks.

Decedent was in excellent physical shape. His medical records note that he ran approximately 20 miles per week, ate healthily, and did not smoke or over-indulge in alcohol. The records also note that his mother died in her early 40s of a pulmonary embolism. Decedent was survived by his wife and

three minor children. A claimant beneficiary who is entitled to death benefits receives 75% of the decedent's average weekly wage (up to a maximum) per week for life, or for two years after the date he or she remarries.

Decedent's widow (Claimant Beneficiary) filed a workers' compensation claim for death benefits, claiming that her husband's pulmonary embolism was the result of his work-related travel. The insurance carrier denied her claim, stating that "[t]he information available does not establish his death was the result of a work incident or activities. His death certificate indicates his cause of death was natural." Claimant Beneficiary was assisted by OIEC at the contested case hearing (CCH).

At the CCH, each party presented medical reports to support their claim. Claimant Beneficiary relied on the report of Dr. G to establish that the pulmonary embolism was the direct result of the overseas flight. Dr. G provided supporting medical research on the subject of long distance flights and the resulting risks of deep vein thrombosis. In addition, Dr. G gave live testimony at the CCH. The insurance carrier provided a report from Dr. N who concluded that the overseas flight was not a substantial factor in bringing about Decedent's death. She based her conclusion largely on the fact that the Decedent had complained of shortness of breath prior to the trip to Spain. She also raised the fact that Decedent had a family history of pulmonary conditions. She did not comment on the risks of a pulmonary embolism or deep vein thrombosis associated with prolonged immobility—especially in the case of overseas flights.

OIEC argued that despite Decedent's medical history and family medical history it was the flight that precipitated the pulmonary event, and had it not been for the flight, Decedent would not have suffered the pulmonary event. Dr. G supported this claim by stating in her report:

Sedentary travel on an airplane for long flights is a well-known and well-documented substantial factor causing increased risk of deep vein thrombosis, which can lead to pulmonary thromboembolism. Decedent's presentation for pulmonary thromboembolism is a medically classic presentation. Within reasonable medical probability, without the long time sitting and traveling on the hours before his death, Decedent would likely not have developed a pulmonary thromboembolism.

The hearing officer found that the Claimant Beneficiary did not sustain a compensable injury that resulted in his death. Furthermore, he stated that the medical evidence presented by the Claimant Beneficiary was not sufficient to establish that the overseas flight caused Decedent's death. Death benefits were not granted. Claimant Beneficiary appealed this decision; however, she was also unsuccessful at the appeals panel level. At this time, it is unknown whether or not Claimant Beneficiary pursued her case in the District Court of Travis County.

The mechanism of injury associated with a pulmonary embolism is very complicated when compared, for example, to a fall resulting in a broken arm. The "proof" will come down to whether the events surrounding the pulmonary embolism are classic, substantial factors in causing the pulmonary embolism, and that those factors are accepted by the medical community as substantial. In addition, the insurance carrier may counter, as in this case, that the Decedent's medical history presupposes that a pulmonary embolism would just as likely have developed outside of work as it would during work. Ultimately, the decision will come down to the hearing officer's finding of whether or not a claimant has met the standard of proof.

Employee Spotlight: Ismenia "Izzy" Garcia

Izzy was born and raised in Borger, a small town 50 miles from Amarillo on the Canadian River. Her father, Francisco, worked for Conoco-Phillips and her mother, Rosy, was a stay-at-home mom. She has a younger brother, Francisco, Jr., who also works in the oil and gas industry. In high school Izzy played volleyball, basketball, and ran track. She was nominated "most friendly" in her class and graduated in 2003.

After high school, Izzy attended West Texas A&M University to study education. She has about 40 hours left to complete her bachelor's degree—a future goal of hers. During that time, she also worked part-time at FirstBank Southwest in Amarillo. Following the death of her grandmother in 2009, Izzy took time off to help her family. She returned to work in September 2012 as a customer service representative at OIEC.

Izzy has been in a relationship with her fiancé, John Johnson, for five years. Their 3-year-old son, J.P., loves Hot Wheels, dancing, and classic cars. Izzy's own love for classic cars goes back a long way. She and her fiancé visit car shows together to admire the classic Mustangs and Camaros. Her fiancé is restoring his 69' Cutlass Supreme—the very car that he owned in high school, sold, and then found again years later. In addition to classic cars, Izzy professes her love of the "country life." She enjoys riding ATVs, target shooting, and spending time on the river.

About OIEC, Izzy said that learning the workers' compensation law was a real challenge but helping injured employees is very rewarding.

IN HER OWN WORDS:

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

I would rather be (happy or right): Happy.

Last book read: *Heaven is for Real*.

If I only had time to save one thing from my house/apartment, it would be my (not counting animals): Computer.

People place too much importance on: Material things.

People place too little importance on: The wonderful journey of life.

People might be surprised to know that: I love classic cars.

My personal hero is: God.

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

The proudest moment of my career thus far has been: Being able to overcome the different challenges.

If I could do anything else in life, I would: Teach elementary students.

I'd rather have (a great view or a great memory): A great view. I like to enjoy life for the present not the past.

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