



OIEC QUARTERLY REVIEW

October - December 2010 (Issue 20)

Letter from the Public Counsel

"History is filled with unforeseeable situations that call for some flexibility of action." – Winston Churchill in a letter to Franklin D. Roosevelt, 1935.

Dear Friends:

Our Legislature and Governor face daunting tasks in this legislative session. Budget issues, redistricting, and the usual conflicts over favored legislation by interested stakeholders will require their day to be heard.

The Office of Injured Employee Counsel (OIEC) is committed to supporting the leaders of Texas government as they address each of these issues. However, it is our hope that the welfare of the approximate 200,000 employees injured each year is not overlooked in the face of the other issues with which the Legislature must deal.



Proper medical care, the ability to have legal counsel when disputed issues go to court, and adequate indemnity benefits to compensate for the inability to work or for permanent physical impairment are critical issues that will test the underlying social intent of workers' compensation insurance. We look forward to discussing these issues with our elected representatives in committee or more informally in their offices. You can read OIEC's legislative recommendations that address these issues in the 2010 Legislative Report, which is described next in this newsletter. It is our primary statutory mission to

educate the Legislature about important issues, advocate on behalf of injured employees as a class, and to assist injured employees as they navigate the complex world of workers' compensation insurance.

I quoted Winston Churchill in a letter to President Roosevelt above. Another letter from Churchill to Roosevelt, sent in 1941, states:

"Put your confidence in us. Give us your faith and your blessings and under Providence all will be well. We shall not fail or falter; we shall not weaken or tire...Give us the tools and we will finish the job."

OIEC has made great strides in fulfilling its statutory mission, but there is more to be done. We look forward to working with all interested parties in crafting a system that respects the legitimate interests of all stakeholders in the workers' compensation system.

Sincerely,

Norman Darwin, Public Counsel

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Contact Us

Office of Injured Employee Counsel

7551 Metro Center Drive
Suite 100, MS 50
Austin, TX 78744-1609

Phone: (512) 804-4170
Fax: (512) 804-4181

Injured Employee Toll-free
Number 1-866-393-6432
www.oiec.state.tx.us

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OIEC Submits Legislative Report to Lawmakers

Recommends legislation to improve workers' compensation system



In accordance with Texas Labor Code §404.106, OIEC submitted its 2010 Legislative Report on December 1, 2010. Copies were sent to the Governor, Lieutenant Governor, Speaker of the House of Representatives, and the Chairs of particular legislative committees.

The first section informs the reader about the organization of the agency, its budget, performance measure results, and the Sunset Advisory Commission review. It also details agency activities, including early intervention successes, Ombudsman assistance in proceedings, injured employee referrals to social and regulatory agencies, outreach initiatives, participation in court proceedings and filing *amicus curiae* briefs on behalf of injured employees, and rulemaking initiatives.

The second section provides an analysis of the workers' compensation system's ability to provide adequate, equitable, and timely benefits to injured employees at a reasonable cost to employers. Some key findings include:

- Employers participating in the Texas workers' compensation system: 68 percent.
- Employees covered by workers' compensation in Texas: 83 percent.
- Injuries required to be reported to the Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC): decreased approximately 22 percent over the past five years.
- Injured employees returning to work within six months: increased from 70 percent in 2001 to 80 percent in 2009.
- Average workers' compensation premium cost for Texas employers per \$100 payroll: decreased 50 percent since 2003.
- Temporary income benefits for the highest wage earners (with \$2,000 or more in weekly earnings): replace only 44 percent (approximately \$880) of pre-injury wages.
- Supplemental income benefits recipients who are capped at the maximum benefit amount: 30 percent.
- Disputes resolved at a Benefit Review Conference: decreased 28 percent since fiscal year (FY) 2006 (43 percent in FY 2006 to 28 percent in FY 2010).
- Injured employees requesting Ombudsman assistance in medical dispute resolution proceedings: 60 percent.

The third section identifies problems in the workers' compensation system along with the agency's recommendations for regulatory and legislative action.

OIEC's regulatory recommendations include changes to:

- Benefit Review Conference rules;
- Confidentiality of Independent Review Organizations (IROs); and
- Letters of clarification to the IRO.

OIEC's legislative recommendations include changes to:

- Designated doctor process;
- Judicial review;
- Medical dispute resolution appeals to district court;
- The computation for temporary income benefits paid to low-income injured employees;
- The supplemental income benefits threshold;
- The agency's authority to seek and accept grant funding; and
- The agency's legislative report submission date.

The 2010 Legislative Report can be found on the agency's website at: www.oiec.state.tx.us/documents/pub_legrept2010_.pdf.



OIEC Funding

OIEC is administratively attached to the Texas Department of Insurance (TDI) and is not funded for consumables, facilities, or other items due to its administrative attachment. The Texas Legislature appropriates funds from a general revenue dedicated account to agencies that participate in or contribute to the regulation of insurance, prevention of insurance loss, and administration of workers' compensation. OIEC is funded by this dedicated account within the same operating account as TDI. Both the Texas Insurance Code and Texas Labor Code require that maintenance taxes levied against insurance companies be set with the intention of collecting the revenue needed to fund authorized expenditures from this account. Recently, the Texas Legislature has requested that every State agency reduce its budget. However, a reduction in OIEC's funding would not save the State of Texas any money; rather, it would reduce the maintenance tax levied on workers' compensation insurance companies.

Rule Petition Concerns Employee's Right to Dispute



In November 2010, OIEC petitioned TDI-DWC to amend 28 Texas Administrative Code § 130.12 (b) (1). The current language of Rule 130.12 prescribes only two methods to stop the 90-day clock to dispute the first certification of maximum medical improvement or impairment rating:

to request a Benefit Review Conference or to request a designated doctor examination if the first certification was made outside of the designated doctor process. By seeking an amendment to Rule 130.12, OIEC primarily intended to address instances where a Benefit Review Conference is sought to stop the 90-day clock when a designated doctor has already been appointed, and more specifically, instances where injured employees are not prepared to proceed to a Benefit Review Conference but must request one as the sole method to stop the 90-day clock.

OIEC and the Sunset Advisory Commission share the goal of ensuring that parties are fully prepared to proceed with a dispute of first certification of maximum medical improvement or impairment rating before a Benefit Review Conference is requested. Unfortunately, there are many instances where injured employees come to OIEC close to the expiration of the 90-day period, and the only mechanism available to preserve the injured employee's right to dispute their first certification is to request a Benefit Review Conference. OIEC has addressed the problem by requesting TDI-DWC to amend Rule 130.12 to read that parties "may dispute a first certification of MMI or IR by filing a written dispute in the form and manner required by the Division." OIEC feels that this simple fix would spare TDI-DWC any premature use of the administrative hearings process, satisfy the Sunset Advisory Commission's recommendation that parties not proceed to Benefit Review Conferences unprepared, and would ensure the injured employee's right to dispute the first certification of maximum medical improvement or impairment rating.

On January 12, 2011, TDI-DWC declined to initiate rulemaking to make the proposed change. Its rationale was that the requested amendment, in effect, would seem to allow for a unilateral waiver of dispute resolution under the "90-day rule" for an indefinite period by allowing the party to file a notice of dispute with TDI-DWC without actually requiring the disputing party to request formal resolution of the dispute by TDI-DWC.

Amicus Curiae Briefs: Crump and Bell

In November 2010, OIEC filed two *amicus curiae* briefs before the Supreme Court of Texas, both in support of Motions for Rehearing. In the first case, *Transcontinental Insurance Co. v. Joyce Crump*, the Supreme Court previously ruled in a manner that OIEC believes is detrimental to injured employees as a class. The court's ruling centers on the definition of producing cause and whether the Supreme Court's definition of producing cause will place a higher burden on injured employees seeking benefits. The Supreme Court, in defining producing cause, drew from a products liability case (*Ford Motor Company v. Ledesma*) in which producing cause was defined as a "substantial factor in bringing about an injury or death." This definition



creates a greater burden for injured employees to overcome and, arguably, relieves a carrier's burden to prove that a past, compensable injury was the sole cause of a newly claimed injury when denying a claim. In a broader sense, the more stringent definition of producing cause clashes with the concept that workers' compensation is a no-fault system. The aspects of producing cause defined in *Ledesma* also differ with the long-standing foundation of workers' compensation as "limited benefits, liberally applied." For these reasons, OIEC was compelled to file an *amicus curiae* brief asking the Supreme Court to rehear the case. The ultimate goal would be to remove the language "substantial factor" from the definition of producing cause.

The second *amicus curiae* brief filed by OIEC was in the case of *Bettie Bell v. Zurich American Insurance Company*. In Ms. Bell's case, it was undisputed that she sustained a compensable low-back injury. She underwent spinal surgery and a year later was certified at maximum medical improvement by her designated doctor (Dr. S) with a 20 percent impairment rating. The insurance carrier appealed the rating, but a Hearing Officer at TDI-DWC affirmed the 20 percent rating. The insurance carrier sought judicial review but failed to notify TDI-DWC. The District Court ruled that no valid impairment rating existed and that the designated doctor should be allowed to render an appropriate rating. Ms. Bell appealed pro se, and the insurance carrier responded. The Fifth Court of Appeals ruled that the 10 percent impairment rating made by a treating doctor following Ms. Bell's surgery was the correct rating.

OIEC's *amicus curiae* brief in support of Ms. Bell's motion for rehearing was made because the decision of the Fifth Court of Appeals creates two adverse consequences for injured employees. First, injured employees will be deprived of their statutory right to have TDI-DWC consider whether to intervene in their cases. Second, injured employees could effectively be deprived of their right to have their impairment ratings assessed only after they have reached maximum medical improvement.

Texas Labor Code §410.258 indicates that parties initiating a proceeding must notify the TDI-DWC for a 30-day waiting period and failure to do so would render any decision of the court void. In Ms. Bell's case, both parties agreed to the date of maximum medical improvement made by Dr. S, and therefore no previous assessment date or impairment rating could be adopted as a matter of law. If TDI-DWC were properly notified, they would have been able to intervene in Ms. Bell's case and point out the correct

state of the law — that the 10 percent impairment rating made by the Fifth Court of Appeals could not be the correct rating because it was assigned before the agreed-upon date of maximum medical improvement [a violation of Texas Labor Code §408.123(a)].

OIEC asks the Supreme Court of Texas to grant Ms. Bell's Motion for Rehearing and find that the judgment of the trial court was void because Texas Labor Code §410.258 was not followed.



AMICUS CURIAE UPDATE: On July 1, 2009, OIEC filed an *amicus* brief on behalf of Liana Leordeanu (see *Quarterly Review* 15). On December 3, 2010, the Texas Supreme Court ruled 8-1 in favor of Ms. Leordeanu. This decision will likely have a positive effect on employees who are injured while traveling for work or for injured employees who work remotely.

OIEC to Propose New Rules on Ethics

OIEC will soon propose three new rules regarding ethics:

- Proposed §276.7 will address the agency's ethics statement and employee requirements.
- Proposed §276.8 will be address OIEC's ethics committee.
- Proposed §276.13 will address the Ombudsman Program ethics code of conduct.

The proposed rules will be posted on the OIEC internet for public comment once they are submitted to the Texas Register.



Legal Services Conference Trains Staff Attorneys

In early November 2010, the Legal Services Division met in Galveston for a three-day Legal Services Conference that provided valuable legal-specific training. The first day was dedicated to discussing the October Practical Skills Training and to developing additional training on causation.

On day two, Dr. Michael Sheppard delivered extensive training on the 4th edition of the American Medical Association (AMA) Guides. He also provided insight into the process of a designated doctor evaluating an injured employee's impairment. His presentation concluded with a question-and-answer session in which the Regional Staff Attorneys (RSAs) were able to relay many of the questions from their assigned Ombudsmen. Dr. Sheppard presented in a truly level-headed manner some of the more controversial techniques in evaluating injured employees and did so without alienating his audience, who are charged with advocating for injured employees.

The second half of the day was dedicated to LexisNexis training. The training provided by Cheryl Carter helped the RSAs improve their ability to conduct legal research.

The final day began with Deputy Public Counsel/Chief of Staff Brian White's presentation on OIEC's financial state and performance measures. To conclude the conference, Legal Services Director Elaine Chaney opened up the floor to discussion. During that time, the RSAs discussed a variety of topics, from Ombudsmen observations to outreach initiatives.

Monthly Educational Presentations Scheduled

Once a month, every OIEC field office holds a presentation to educate its customers on a given topic. The topic for this quarter is "What to Expect at Your Designated Doctor Examination." It provides an overview of the designated doctor examination, what information the treating doctor should provide, and what to expect after the examination has occurred.

Additional information on this topic is available in brochure format. These brochures are available at your local OIEC field office or on the OIEC Internet:

English:

www.oiec.state.tx.us/documents/448.10e_dd_appt.pdf

Spanish:

www.oiec.state.tx.us/documents/448.10s_dd_appt.pdf

The hour-long, monthly educational presentations for this year are scheduled to begin at noon on the following dates:

January 28 (except in Houston East and Houston West who will hold the presentation January 21), February 25, March 25, April 29, May 20, June 24, July 29, August 26, September 30, October 28, November 18, and December 16.

Please check the OIEC website at www.oiec.state.tx.us/resources/public_outreach.html for the most current information about these presentations.

Question of the Quarter

Q: Has there been a recent change to the DWC Form-069, Report of Medical Evaluation?

A: Yes, TDI-DWC has revised the DWC Form-069, Report of Medical Evaluation, which must be used by doctors selected by TDI-DWC, insurance carriers, or treating doctors when evaluating permanent impairment or maximum medical improvement of injured employees. Additionally, treating doctors may agree or disagree with the other doctors' findings on this form.

On or after March 1, 2011, system participants will be required to use the new DWC Form-069. They will also be required to file the DWC Form-069 and associated narratives with TDI-DWC by faxing them to (512) 490-1047.

The DWC Form-069 and the Sample Notice for Health Care Providers (the written notice required to be sent by health care providers to injured employees with the completed DWC Form-069) can be downloaded from the TDI website at www.tdi.state.tx.us/forms/form20.html.



Customer Service's Early Intervention Succeeds



OIEC Customer Service has experienced a significant increase in the number of injured employees requesting assistance with obtaining workers' compensation benefits. The Customer Service Representatives (CSRs) have undergone training to enhance their ability to provide

exceptional customer service to the growing customer base.

Recently, a customer called a Fort Worth CSR because her benefits had been stopped. The insurance carrier's adjuster had scheduled a Required Medical Examination (RME) for the injured employee but had failed to notify her of the appointment. When the RME doctor notified the adjuster that the injured employee had not attended the examination, the adjuster stopped the benefits. The adjuster was unable to provide proof that she had sent the required written notification of the appointment to the injured employee. The CSR spoke with the adjuster and her supervisor, directed them to pertinent sections of the law, and provided them with relevant medical information. After lengthy discussions, the CSR was able to convince the adjuster that the benefits should be reinstated.

In another claim, an injured employee notified a Victoria CSR that his attorney had withdrawn from representation without getting the insurance carrier to resume temporary income benefits. He had been without income for two months and would lose his vehicle if he was unable to make a payment soon. The Victoria CSR contacted the treating doctor and located medical reports that indicated the injured employee was unable to return to work. One of the reports was from the carrier-selected RME doctor. The CSR provided this information to the adjuster, and five days later the injured employee received a direct deposit into his bank account for 10 weeks of income benefits. He and his wife were ecstatic and extremely thankful for OIEC's help.

As the number of customers needing OIEC's help increases, the CSRs are committed to providing each injured employee with excellent and thorough customer service.

Customer Satisfaction Survey Reminder

If you have had contact with OIEC in the past 12 months, please complete the FY 2011 Customer Satisfaction Survey so OIEC can use this information to continue improving its services. The survey is available on the OIEC website at www.oiec.state.tx.us, or can be accessed through the direct link oiec2011css.questionpro.com. A paper copy can be obtained at any OIEC field office if a customer does not have Internet access.

OIEC Charitable Giving

Charitable Campaign Sparks Creativity

Each year OIEC employees enthusiastically participate in the State Employee Charitable Campaign (SECC). This charitable event begins September 1st and ends October 31st. During this time, field offices organize creative fundraising events to raise money.

One of the most creative contests this year was held in the Fort Worth Field Office, where they have many fundraising events during the campaign. This year they had a hula hoop contest to see who could hula hoop the longest. The winner was Customer Service Director Nancy Larsen! All that hula hooping must have paid off as the Fort Worth Field Office raised \$2,054.45 this year, the most of any office.

Employees Give to Helping Hands Home

Helping Hands Home is a non-profit organization that provides residential treatment services, adoption services, foster care, and an on-site charter school for emotionally disturbed, neglected, and abused children. Instead of exchanging gifts during the holidays, OIEC's Central Office decorates a giant box with wrapping paper and those who want to participate can help fill it with items from the Helping Hands Home wish list. The items are delivered before the holidays and the children are always appreciative. OIEC employees enjoy giving back to the community with such a worthwhile cause.



Case Study: Marijuana Intoxication

Ms. E testified that she was injured in March 2010 when she was driving a bus and had to swerve sharply to the left and then to the right to avoid a motor vehicle. She sustained a sprain to her left arm. The following day, she went to a company doctor and tested positive for marijuana. A retest also yielded a positive result for marijuana. The claimant was terminated from her employment and was under doctor's restrictions until May 2010, at which time she sought unemployment benefits and began to look for work.

As with all cases involving illegal drugs, there is no set limit which establishes intoxication under workers' compensation law. In this case, the claimant was right at the federal cutoff concentration level so it was difficult to attack the reliability of the first drug report. To rebut the presumption that she was intoxicated at the time of the accident, the injured employee testified that she drove her bus the entire morning shift, spoke to her supervisor and other coworkers without difficulty, drove 18 miles from her home to work, and had begun the second shift when the accident occurred. Ultimately, it is the Hearing Officer who is the sole judge of the weight and credibility of the evidence presented. Furthermore, the 1989 Act does not require that the presumption of intoxication can only be overcome by expert scientific or medical evidence. Therefore, Ms. E satisfied her burden to prove that she was not intoxicated at the time of the accident and was given a compensable injury to her left, upper arm, including disability.

For the past 10 years, marijuana use in Texas has typically fallen between 10 and 11 percent of the population. It supersedes all other drugs in frequency of identified, illegal substances in failed drug screenings. In the case of Ms. E, she testified that her positive screening for marijuana was the result of second-hand smoke. She also testified that she knew she was subject to random drug testing as a bus driver and that she hadn't voluntarily ingested or inhaled marijuana for at least 10 years. When developing cases such as this one, certain tests may provide scientific evidence to refute the presumption of intoxication. For example, a hair sample test provides accurate, long-term evidence of whether or not a person has voluntarily inhaled or ingested marijuana. There is also the option to examine the chain of custody and make the argument that the wrong test results have been attributed to the injured employee.

Ultimately, the strongest argument an Ombudsman can make in the absence of scientific or medical evidence contradicting the presumption of intoxication is to gather as much testimony as possible from coworkers or from peers that indicates the claimant was in the full and normal use of his or her faculties at the time of the accident. It would also be useful to examine personnel records, where possible, which show that an injured employee has exhibited no history of intoxication while on the job.

Employee Spotlight: Cindy Nava



Cindy Nava was born in Lubbock and has lived there along with her four older siblings for her entire life. She attended Lubbock High School and describes herself during those years as a quiet student who loved American History and English. She still loves to read,

citing "The Firm" by John Grisham as her favorite book. After graduating, she had three children, each about three years apart. The youngest plays select soccer and dreams of playing for the University of Texas one day. Her two oldest boys both want to pursue degrees in criminal justice and law. When she met her husband five years ago, he was playing in a Tejano band from Austin. They have been married for three years.

Until recently, Cindy was a CSR. She is now training to be an Ombudsman. Yolanda Garcia, her team lead, describes her as a team player who has a strong interest and desire to assist in any way possible. In addition to training as an Ombudsman, she is attending night school at Wayland Baptist University to get her bachelor's degree in business management. Part of her reason for pursuing her degree, she said, was that the people in the Lubbock Field Office inspired her to excel and to further her education.