



OIEC QUARTERLY REVIEW

January - March 2009 (Issue 13)

Letter from the Public Counsel

Dear Friends:



I would like to begin with a note of recognition for the Chair of the agency's Ethics Committee, Elaine Chaney. She and her committee have done a magnificent job of putting practical ethical applications to the everyday issues of our workplace.

We began talking about ethical considerations in the workplace over a year ago not because we were lax about ethical matters but because it is imperative that we elevate those perspectives into all of the serious decisions that we must make every day. They are reflected in our relationships with our fellow workers, our agency, the injured employees that we assist on a daily basis, and the employees of the other stakeholders with whom we must connect.

As we enter the midpoint of the Legislative session and the stresses of late night committee meetings and the clashes of strong personalities begin to take their toll on frayed nerves, it is easy to lose your grip on the broader view. We must define our values to serve the greater good and pursue them aggressively. Doing so respectfully and in a straight forward manner will assure those with whom we interact that we can be trusted partners in the quest to make the Texas workers' compensation system the best in the nation.

I would like to thank the Central Office staff for their hard work and support for our legislative efforts. Your commitment has contributed significantly to the preparation and presentation of our vision for the Office of Injured Employee Counsel (OIEC).

Sincerely,

Norman Darwin
Public Counsel

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OIEC Celebrates its Three-Year Anniversary

March 1, 2009 marked three years that OIEC has been in operation. It is a young agency which has already achieved results and many deliverables which have had a positive impact on the injured employees of Texas.



STATISTICS

Over the past three years (as of February 28, 2009) OIEC has:

- Notified approximately 505,000 injured employees about their Rights and Responsibilities in the workers' compensation system;
- Educated over 349,000 injured employees by telephone;
- Serviced over 16,650 injured employees in person;
- Assisted approximately 18,550 injured employees through the administrative dispute resolution process with the Ombudsman Program; and
- Referred over 5,250 injured employees to the Department of Assistive and Rehabilitative Services, Texas Workforce Commission, Texas Department of Insurance, or other social or regulatory services, such as the Health and Human Services Commission or licensing boards.

ORGANIZATION

Enhanced Ombudsman Program. The Texas Legislature enhanced OIEC's Ombudsman Program through the transfer of 25 employees from the Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC). This addition resulted in a single-point-of-contact business model whereby a specific Ombudsman is assigned to an injured employee throughout a dispute. This model has resulted in large efficiencies and has proved to be a good use of State resources.

New Customer Service Program. OIEC established a Customer Service Program based on appropriations from the 80th Legislature, 2007. This addition allowed the agency to provide "one-stop-shop" convenience to injured employees who may have limited understanding of the complex workers' compensation system. This enhancement has given the agency the opportunity to serve as an employee advocate earlier in the workers' compensation claim process and has contributed to the significant decrease in the amount of workers' compensation disputes in the State.

Regional Staff Attorneys (RSAs). RSAs were hired to: conduct legal research, assist Ombudsmen with questions, assist Ombudsmen with identifying legal issues and developing legal strategies, develop model discovery and case development tools, and help with preparation for informal and formal proceedings and appeals. Additionally they provide hands-on Practical Skills Training for the Ombudsmen.

ADMINISTRATION AND PROCESSES

Amicus curiae briefs. OIEC advocates on behalf of injured employees as a class through the filing of *amicus curiae* briefs in Texas Courts. These actions are taken to protect the rights of injured employees.

Business Plan. The agency established a Business Plan in FY08 to provide an operation roadmap for achieving agency goals, which is consistent with its enabling statute, mission, strategic planning goals, and strategies.

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OIEC Celebrates its Three-Year Anniversary (Continued)

Compact with Texas. OIEC completed its “Compact with Texas” and placed it on the agency website in May, 2008. The “Compact with Texas” sets out the principals and standards OIEC follows to deliver quality service to customers.

Complaint Procedure. OIEC established a complaint procedure which provides that the complaint will be addressed in writing within 30 working days of receiving an OIEC complaint form regarding OIEC staff. This process has been recently revised to ensure customer issues and needs are addressed in a timely manner.

Early intervention/case development. OIEC established an early intervention/case development program as a part of its dispute resolution process. The goal is to attempt to resolve issues before they enter the workers’ compensation proceeding process.

Injured Employee Rights and Responsibilities. OIEC developed the “Injured Employee Rights and Responsibilities” to be distributed by TDI-DWC upon first report of injury. It is available in both English and Spanish. OIEC determined that the number of injured employees educated about their rights and responsibilities totaled 196,078 in FY 2007 and 211,173 in FY 08.

Increased Customer Satisfaction. In the spring 2008, OIEC conducted a Customer Satisfaction Survey. The results indicated that in the last 10 years the level of satisfaction of injured employees regarding the Ombudsman Program has increased 6%. OIEC anticipates this trend will continue.

IMPACT ON LAW AND RULES

Legislative recommendations passed. The following legislation was recommended by OIEC and passed during the 80th Legislative Session:



- OIEC’s Ombudsmen provided access to medical records of injured employees that they are assisting free of charge;
- Interlocutory orders may be requested and issued at a Benefit Review Conference;
- Peer reviews required to be performed by health care providers licensed to practice medicine in Texas; and
- Small Employer Return-to-Work Pilot Program modified precertification of workplace modifications to allow an employer to obtain up to \$2,500 in reimbursement for modifications costs before incurring that expense.

New OIEC Rules. OIEC has adopted the following rules in the Texas Administrative Code to provide guidance to workers’ compensation system participants and agency employees:

- §276.1 Definitions;
- §276.2 The Mission of the Office of Injured Employee Counsel;
- §276.3 Rulemaking Petition;
- §276.5 Employer’s Notification of Ombudsman Program to Employees;
- §276.10 Ombudsman Training Program and Continuing Education;
- §276.11 Access to Injured Employee Medical Documentation; and
- §276.12 Procedures for Private Meetings with Unrepresented Injured Employees Prior to a Workers’ Compensation Proceeding.

Rule comments. OIEC has served as the voice of injured employees through providing rule comments on TDI-DWC rules. In FY08, OIEC’s advocacy efforts resulted in approximately 60% of rules being changed for the benefit of injured employees as a class.

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OIEC Celebrates its Three-Year Anniversary (Continued)

TRAINING AND EDUCATION

Annual OIEC Conference. An annual conference is held for OIEC staff where specialized training is provided to enhance work performance. Topics discussed include: policies and procedures, legislative updates, ethics, processes, and workers' compensation laws and rules.

Enhanced website and agency publications. The agency has an extensive, user-friendly website that offers the latest information for OIEC's customers and other workers' compensation system participants. OIEC has also developed printed publications which are available to help guide and educate its customers.

Public service announcement. In 2008, OIEC developed and launched its public service announcement statewide (in English and Spanish), which introduces Texans to Governor Perry's workers' compensation reform and promotes the agency's toll-free telephone line.

Public outreach initiatives. OIEC has performed over 100 public presentations to Texas' employers, health care provider groups, and other workers' compensation system participants to educate them about the agency's services and the basics of workers' compensation.

COMMITTEES

Ethics Committee. An Ethics Committee was established to provide guidance and assistance to OIEC staff with regard to ethical issues. Committee members are appointed by Brian White, Deputy Public Counsel, and serve rotating terms.

Policy Development Committee. The Policy Development Committee reviews suggestions made by employees to provide business solutions or new agency policies for adoption.

Training Committee. A Training Committee was established to enhance and focus the agency's long-term training efforts and resources. Agency training includes new employee training, Practical Skills Training (for Ombudsman), monthly teleconferences and an annual conference.

OIEC is proud of its past accomplishments and will continue to work diligently on behalf of the injured employees of Texas in the future.

OIEC Customers Provide Helpful Feedback



At the beginning of the year, OIEC enlarged the scope of the agency's Customer Satisfaction survey. Originally the survey was available to all customers through the agency's website, but additional information was needed from a larger number of customers. OIEC updated its customer satisfaction survey to include questions about internet usage, purpose of visit to OIEC, and quality of the service and information provided.

The survey, available in both English and Spanish, is provided to customers who visit the field offices. It is also still available on the OIEC website. Customers who have completed the survey have helped OIEC gather critical information which will help plan agency initiatives and evaluate the services it provides.



Amicus Curiae Brief Filed



In February, OIEC filed an *amicus curiae* brief with the Supreme Court of Texas on behalf of injured employees as a class and in opposition to a petition for review filed by the State Office of Risk Management (SORM). (An *amicus curiae* brief is a brief filed with the court by someone that is not a party to the case who believes that the court's decision may affect its interest.)

In that case, an injured employee had sustained an injury to her left knee which became compensable under Texas Labor Code § 409.021(c) because the insurance carrier did not contest compensability within the required 60-day period. Following the initial report of injury and within the waiver period, the injured employee underwent an MRI that revealed degenerative conditions in the left knee. This report was received by the insurance carrier approximately three weeks after it received its first written notice of the injury. The insurance carrier contested the extent of injury to the left knee two months after the 60-day deadline had expired. At the Contested Case Hearing, the insurance carrier did not dispute that the injured employee had sustained a compensable injury; the insurance carrier was only contesting whether the compensable injury included degenerative changes in the left knee. The Hearing Officer found that the insurance carrier waived its right to contest the degenerative changes to the left-knee injury by reason of waiver. In so finding, the Hearing Officer relied on a long-standing Appeals Panel precedent that the nature of the injury that becomes compensable by virtue of waiver is defined by the information that could have been reasonably discovered during the insurance carrier's investigation prior to the expiration of the waiver period. This decision was affirmed by the Appeals Panel.

OIEC's "principle argument" in the amicus brief was that the Court of Appeals' decision gave the intended meaning to Texas Labor Code § 409.021(c) and Texas Administrative Code § 124.3, and the nature of the injury created by the waiver is defined by the statute and the rules and not by what the insurance carrier is willing to accept as compensable.

Director of Legal Services, Elaine Chaney, presented oral argument before the Supreme Court. Ms. Chaney emphasized the possible effect on injured employees if the decision of the Court of Appeals were reversed; namely, that the waiver provision of Texas Labor Code § 409.021(c) would be read out of existence and insurance carriers would be permitted to accept only the lowest form or least expensive kind of injury in those instances where they failed to timely contest compensation under Texas Labor Code § 409.021(c).

The State Office of Risk Management (SORM) pursued judicial review and the district court ruled in favor of the injured employee. On appeal, the Tenth Court of Appeals in Waco adopted the Appeals Panel's analysis of § 409.021(c) and determined that the degenerative changes in the left knee were compensable. SORM filed a petition for review of the Court of Appeals' Decision with the Supreme Court of Texas and the Court granted the petition. The decision of the Supreme Court of Texas is still pending as of the date of this publication.

Question of the Quarter

Q: I want to request a designated doctor but wanted to know where I can find more information about this process and what form I should be using? Can you tell me where to look?

A: A designated doctor is a doctor selected by TDI-DWC to make a recommendation about an injured employee's medical condition or to resolve a dispute about a work-related injury or occupational illness. There is additional information about this process on the TDI-DWC website at www.tdi.state.tx.us/wc/hc_provider/dd.html. It is important to know that the Request for Designated Doctor (DWC Form-032) was revised in November 2008 and is now the mandatory version of the form to be used.

All requests for a designated doctor must be sent to the TDI-DWC Central Office. The form must be sent by mail to: Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, MS-603, Austin, TX 78744-1609. The form may also be submitted by fax to (512) 804-4121.



Early Intervention Successes

As the level of experience of the Customer Service Representatives increases, so does their ability to resolve disputes prior to a Benefit Review Conference (BRC) through diligent early intervention. A few examples of disputes successfully resolved through early intervention:



In Fort Worth, Customer Service Representative Tanya Malone provided information and relevant portions of the law to an insurance carrier to prove that they had not properly disputed the injured employee's initial impairment rating, had only paid one week of Impairment Income Benefits, and had waived its right to dispute the extent-of-injury issue. After reviewing Tanya's information, the adjuster paid the remaining Impairment Income Benefits for the original impairment rating and discontinued its pursuit of the extent-of-injury dispute.

In San Antonio, Customer Service Representative Sheri Carter assisted an injured employee to overcome a denial of Supplemental Income Benefits. She performed extensive research to determine which of the five maximum medical improvement and impairment rating assessments was the correct assessment. She then coordinated with the TDI-DWC to correct the error. The corrected assessment also changed the deadline for submission of the initial Supplemental Income Benefits application, which the injured employee will submit by the recalculated future due date.

In Tyler, Customer Service Representative Pattie Ayling discovered that the injured employee's first certification of maximum medical improvement/impairment rating, with which he did not agree, was invalid. Pattie was very instrumental in getting the treating doctor to submit written confirmation that he did not refer the injured employee for the maximum medical improvement/impairment rating. With this information, TDI-DWC determined that it was invalid and Temporary Income Benefits were resumed.

In El Paso, Customer Service Representative Ana Covarrubias was able to assist an injured employee in obtaining medical treatment. She educated the treating doctor to submit a rebuttal to the insurance carrier's peer review report (which did not support the requested treatment). Upon reviewing the doctor's rebuttal report, the insurance carrier adjuster agreed to authorize the additional medical treatment.

These are just a few of the ways that OIEC's Customer Service Program is able to make a meaningful impact on the injured employees it assists.

OIEC Customer Service Representatives are located throughout the state to assist customers. They can be reached two ways:

- Call the OIEC Customer Service Helpline and ask to speak with an OIEC Customer Service Representative. The toll-free telephone number is 1-866-EZE-OIEC (1-866-393-6432).
- Call or visit the OIEC local field office handling the claim and ask to speak with an OIEC Customer Service Representative. OIEC local field offices are co-located with TDI-DWC.



Case Study

Finality of First and Valid Certification of Maximum Medical Improvement and Impairment Rating – Network Considerations



The following case concerns an injured employee who's treating doctor, Dr. E, issued the first certification of maximum medical improvement and impairment rating for a back and left wrist injury. It was undisputed that the insurance carrier did not dispute the certification within the 90-day period provided for doing so. As a result, the certification would become final under Texas Labor Code § 408.123(e) and 28 Tex. Admin. Code §130.12 (Rule 130.12), unless it was not a valid certification. Under Rule 130.1(a)(1), only a treating doctor, a referral doctor from the treating doctor, a designated doctor, or a required medical examination doctor are authorized to certify maximum medical improvement and impairment rating.

The insurance carrier maintained that the certification was invalid because Dr. E was no longer the injured employee's treating doctor at the time of the certification. Specifically, the insurance carrier argued that the injured employee was subject to a workers' compensation health care network at the time and Dr. E could not be the treating doctor because he was not a participating doctor in the network. The injured employee countered that the certification was valid because she was not subject to network requirements at the time of the certification and, as a result, Dr. E was still her treating doctor when he certified maximum medical improvement and assigned an impairment rating. The injured employee argued that she was not subject to network requirements at that time because her employer had failed to give her the required notice that her health care services were going to be provided through a health care network.

At the original Contested Case Hearing, the Hearing Officer found that the injured employee was subject to the network rules at the time of the first certification and that, as a result, the first certification was invalid and did not become final. The injured employee filed an appeal with the assistance of Beaumont Field Office Ombudsman, Sabrina Alfaro, arguing that the employer failed to give the required notice to the injured employee that she was in the network and that, therefore, Dr. E was still her treating doctor at the time of the certification. In APD 080416-s, TDI-DWC's Appeals Panel held that the Hearing Officer did not have jurisdiction to determine whether the injured employee had received "proper notification" of network care health services. The Appeals Panel reversed and remanded the decision of the Hearing Officer and determined that the issue of when the employee received proper notice of network requirements under §1305.005 was a matter to be resolved by either the healthcare network or the Health and Workers' Compensation Network Division at TDI.

Following the remand instructions in APD 080416-s, the injured employee sought a determination from TDI's Health and Workers' Compensation Network Division on the issue of when she received notice that she was in the network. TDI's Health and Workers' Compensation Network Division concluded that the injured employee had not been notified of the network change and was not bound by network requirements on the date that the first certification was issued.

In her decision on remand, the Hearing Officer adopted the opinion of TDI's Health and Workers' Compensation Network Division and determined that the first certification of maximum medical improvement and impairment rating became final because Dr. E was still the treating doctor at the time of the certification and in that role, he could issue a valid certification of maximum medical improvement and impairment rating.

Although the injured employee ultimately prevailed, it proved difficult for her to seek a resolution of the network notice issue outside TDI-DWC's dispute resolution process. Based on this case, OIEC made a legislative recommendation that TDI-DWC's dispute resolution system is the appropriate venue to adjudicate network notice issues. Representative Helen Giddings D-Dallas, is sponsoring House Bill 2815 which follows that recommendation.



OIEC Houston Offices Receive Award



Last Fall, OIEC employees raised money during the State Employee Charitable Campaign (SECC). The SECC is one of the largest state employee campaigns in the nation, and OIEC's employees embraced the opportunity to raise money for a worthy cause.

It was during the SECC fundraising drive (which runs from September 1st – October 31st) that Houston and its surrounding areas were devastated by Hurricane Ike. Fueled by this real need for help in their own “backyard,” the Houston area OIEC field offices (Missouri City, Houston East and Houston West) were particularly successful in their fundraising efforts.

The Houston area OIEC field offices' success was honored by a recent award from the United Way for “Total Increase in Contribution for a Traditional State Agency.” Customer Service Representative Iantha McBride-Brinkley attended the awards presentation on behalf of OIEC where she received a plaque for SECC contributions totaling \$3,077.95. OIEC will continue to support employee involvement in the SECC this year and hopefully it will have another award-winning fundraising effort!

Employee Spotlight

Elaine Chaney, Director of Legal Services

When you start working in a large, blank building with a lot of people you don't know, you tend to identify people as “that guy who . . .” or “the . . . woman.” If you had never met Elaine Chaney, you might refer to her as “the fast walking woman.” She does not wear heels for this reason. If you were introduced to her, you would find that she begins sentences quickly and, often times loudly. She keeps her office around 66° F—a fact which prompted Associate Director, Barton Levy to comment that, “Laney's got energy. She's a thinker, and thinkers need to stay cool.”

Elaine was born and raised in Indianapolis, Indiana and attended law school at Indiana University-Indianapolis. Following law school, she worked as a law clerk for a federal district judge and then became a staff attorney for the United States Court of Appeals for the 7th Circuit. In many ways, Elaine fits the typical profile of someone with a mentality for social justice. Before working for the State of Texas, she worked as a trial attorney in the Chicago District Office of the Equal Employment Opportunity Commission. In Austin, she is actively involved with *Meals on Wheels* and *Feed My People*.

Recently, Elaine filed an *amicus curiae* brief with the Supreme Court of Texas on behalf of the injured employees of Texas. Elaine was also able to present oral argument before the Supreme Court, making her the first OIEC employee to do so. Her day-to-day role as Director of Legal Services requires her to assist the seven staff attorneys and to establish OIEC procedures in collaboration with Brian White, Deputy Public Counsel. In addition to her role as Director, Elaine serves as both the Chair of the Ethics Committee and as OIEC's Employee Relations Representative.

Outside of OIEC, Elaine spends her spare time reading and contributing to her book club (last book was *Dreams From My Father*). She also enjoys gardening. In her office, you will find a collection of Scottish terrier pictures and objects—which she collects in admiration of her dog, MacGregor.

