

WORK COMP REPORTER

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Clarification of the Clarification of the New Designated Doctor Rules

This past December, the Division of Workers Compensation adopted a repeal of old Rule 126.7 of the Texas Administrative Code and implemented new (or slightly different) procedures for requesting designated doctors. According to the Division, the new rules were adopted "to ensure clarity and efficiency the regulation of the designated doctor process.

The primary thrust of the changes dealt with 5 broad categories: 1) new requirements for the parties requesting a DD, 2) clarification of the rights and responsibilities of the parties, 3) clarification of the DD's responsibilities, 4) order and designation of doctors and 5) clarification for the new letter of clarification process.

New Requirements for Requesting Parties

The newly adopted rules require any party requesting a DD to provide information related to the following scenarios:

1. When a party is requesting a DD when one has previously been performed based on a claim of a change in condition, the party must provide an explanation of the change in condition warranting the new examination.
 - a. This is not limited to claimants. Carriers can do the same in attempts at getting more accurate impairment ratings based on information that the claimant has improved. Evidence such as surveillance or post DD RME reports showing increased range of motion, for example, may provide the carrier with the information needed to have a DD reevaluate the claimant.

Automobile Mileage Rate Change

Effective January 1, 2011

51 cents per mile



2. Every DD request requires the party requesting to provide a list of all compensable injuries.
 - a. It is imperative for the carriers to be unequivocally clear in listing the compensable injuries. The list should not include terms like “low back” or “lumbar”. It should be diagnostically specific and narrow based upon the medical records. So, instead, it should read L3-L4 facet syndrome or lumbar spine sprain without radiculopathy.
3. The requesting party is now required to sign the request attesting to the accuracy and completeness of the information provided.
 - a. This goes for claimants and carriers alike. If the claimant’s attorney is the one requesting the DD, the DWC-32 should be reviewed extremely critically to ensure accuracy in the description of the injury. On the other hand, carriers when requesting, must ensure that they have been conclusive of all of the compensable injuries.
4. Requesting parties must provide good cause when requesting a DD within 60 days of the prior DD examination.
 - a. Likely, this will be newly discovered evidence, such as surveillance or a post DD report indicating the need for a reevaluation. The rule provides that if the party requesting the DD exam is the same one that requested the previous one, less than 60 days before, then that party must show that the reason for the next DD exam is for questions that could not have been submitted the first time, that a DD examination is necessary to resolve the new questions, and that it will have an effect on entitlement to benefits.
 - b. However, in the event the new DD examination request is not from the party that requested the first one, the party must show that a new DD examination is reasonably necessary to resolve the submitted questions and that the examination will effect entitlement to benefits.

The new rules provide for a new DWC-32 which has new fields added so that parties can provide the information. The use of the new DWC-32 is predicated on the when the exam is requested, not the date of injury. The new DWC-32 is REQUIRED as of February 1, 2011.

The Parties’ Rights and Responsibilities

Disputing a DD Request or Approval

The parties now have an avenue to dispute the Division’s approval or denial of a request for a DD by way of an expedited CCH. In the event it is a dispute of an approval, the examination is stayed until the CCH decision is rendered. Carriers should utilize this avenue in situations where it is readily perceived that a claimant is alleging a change in condition or trying to have a disputed body part rated for impairment. Under this process, if a party wants to dispute the DD request approval or denial, it must do so within three (3) days of receiving the order for the designated doctor examination.

Doctor Designation and Order

The new rules no longer require that a DD examination must occur later than 14 days after the date of the order for examination has been issued. In other words, it can occur in less than two weeks from the date of the order.

This gets rid of a somewhat arbitrary rule and allows for more expeditious scheduling and prevents the carrier from automatically being on the hook for at least two more weeks of TIBs while the parties wait for the examination scheduling.

The new rules also provide that a DD is available to perform the examination at any address which she has filed with the Division if that doctor does not have disqualifying associations, has credentials appropriate to the issue in question, the claimant's specific medical condition and as otherwise required by the Labor Code, is on the DD approved list, and has not treated or examined the claimant in a non-DD capacity within the prior 12 months or treated the claimant for the condition in question in a non-DD capacity.

The rules also make it very clear that the DD is required to perform the examination at the address listed on the order. Evidently, this was a problem before... Further, when a DD, who was previously assigned to the claim and again meets the general DD requirements, the Division may use the DD again. Any subsequent examination must also be performed at the same address where the previous examination took place. That means that a DD could be required to perform the examination at the same address, even if he has moved out of the geographical region. If there is an examination location change, the Division must pre-approve it, even if all parties agree to it. Even when the parties agree to the change, they must still show the Division good cause for doing so.

The Designated Doctor's Responsibilities Under the New Rules

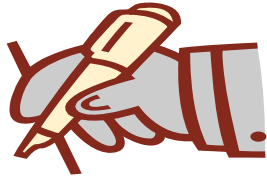
The new rules provide that all testing and all reports associated with and generated by the DD examination must be completed within fifteen (15) days of the DD's physical examination of the claimant. Moreover, any work status reports (DWC-73) and narrative reports must be filed within seven (7) working days of the examination as opposed to the previous seven (7) calendar days

The Division lays out specific requirements and the minimum elements that must be included in a DD's report. The narrative must, at a minimum, include the following information:

1. Identification of the questions addressed (MMI/IR, disability, extent of injury);
2. General information on the parties' identities;
3. Date and address where examination took place;
4. Summary of additional testing, including the identity of any referral doctor, and the nature and types of testing that took place, and the dates the testing took place;
5. Narrative description of the physical examination and the medical records and other documents and information reviewed;
6. Explanations of findings and conclusions in connection with the questions addressed;
7. A statement by the DD that she is not aware of any disqualifying associations and a certification by the DD of the date that the report was sent to the interested parties and in the manner prescribed.

The rules also provide that the presumptive weight afforded DD's opinions will only attach to those issues upon which the DD was appointed to address. In other words, there will be no presumption that any extraneous statements the DD may make has presumptive weight.

Letters of Clarification



As a prior newsletter pointed out, Letters of Clarification (LOC) are only being sent to DD after approval by the Division. Without going into the reasons why the Division is serving this new, heightened level of gatekeeping, suffice to say that the new rules clarify that the parties may only request clarification of issues that have already been addressed by the DD in his report, or on issues that the DD was supposed to address but failed to do. The rules also list the requirements for all requests for clarification and they are as follows:

1. The DD's name, reason for examination, date of examination and the name and signature of the requestor;
2. A clear explanation of why the clarification is necessary and appropriate to resolve a pending or future dispute.

If the Division allows the clarification to be sent, the DD is required to provide a response to the request for clarification within five (5) working days of its receipt of the same. If the DD determines that a new examination is required, he must say so in its response to the clarification. In that event, the new examination must be conducted within 21 days from the date the order for the examination is issued. The response from the DD is due within seven (7) working days of the reexamination. Bear in mind, the carrier is required to continue paying benefits throughout this process, pursuant to the DD report in place.

The new rules provide some much needed clarification, but also install more hoops through which system participants must jump in order to obtain relief from the myriad problems with which they are faced. The most significant impact of these rules, we believe, will be the restrictions placed on Letters of Clarification. As we previously stated, the DD Analysis will likely be your most readily available shot at voicing your concerns to the DD prior to their rendering their report. So, compliance with the DD analysis rules will be paramount. The Division will likely limit LOCs to those situations in which a clear error has been made by the DD, rather than situations of mere differences of opinions.

Please note that Pappas & Suchma, P.C., among its many services to its clients in the workers' compensation arena, regularly drafts comprehensive analyses to be sent to Designated Doctors. As can be seen with the ever evolving Designated Doctor process and what appears to be a focus by the Division to limit parties' access to the doctors, these analyses are gaining more and more importance. We can help you in the process which will save you time and money.

The attorneys at Pappas & Suchma, P.C. have been and will continue to be your ally in navigating the ever changing landscape of Texas Workers' Compensation law. If you have any questions, please do not hesitate to contact Dean, Jane, Tommy or Jerry at any time.



“the achievements of an organization are the result of the combined efforts of each individual”