

BILL ANALYSIS

C.S.S.B. 5
By: Staples
Business & Industry
Committee Report (Substituted)

BACKGROUND AND PURPOSE

The Texas Workers' Compensation Commission (TWCC) was created in 1990 as part of a broad effort to reform the workers' compensation system in Texas. Workers' compensation provides for no-fault income-replacement benefits and medical care for workers who are injured on the job. TWCC administers key parts of the system including overseeing delivery of medical and income benefits to injured workers, resolving disputes, and providing workplace safety services to employers.

TWCC is subject to the Sunset Act and will be abolished September 1, 2005 unless continued by the Legislature. The Sunset Commission found that the basic regulatory structure for workers' compensation in Texas has not proven effective for injured workers, or efficient for employers and insurance carriers providing services to Texas businesses. The workers' compensation system has produced rapidly rising medical costs that are higher than the national average, slow and expensive health-care services, and a lack of success in returning injured workers to gainful employment. As a result of its review, the Sunset Advisory Commission recommended abolishment of the agency, transfer of its functions to other agencies, streamlining the workers' compensation system and other statutory modifications that are contained in this legislation.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Commissioner of Insurance, the Department of Insurance, and the Injured Employee Public Counsel of the Office of Injured Employee Assistance in Articles 1 through 4 of this bill. In addition, under the general rulemaking authority already granted to these officials and policymaking bodies, rules may be developed to implement other new provisions found in this bill.

Rulemaking authority is expressly granted to the Commissioner of Insurance in SECTION 1.002, SECTION 1.003, SECTION 1.004, SECTION 1.006, SECTION 1.016, SECTION 1.023, SECTION 1.024, SECTION 1.029, SECTION 1.030, SECTION 1.031, SECTION 1.032, SECTION 1.033, SECTION 1.034, SECTION 1.035, SECTION 1.038, SECTION 1.049, SECTION 1.056, SECTION 1.061, SECTION 1.073, SECTION 1.081, SECTION 1.082, SECTION 1.085, SECTION 1.086, SECTION 1.087, SECTION 1.092, SECTION 1.093, SECTION 1.094, SECTION 1.095, SECTION 1.108, SECTION 1.110, SECTION 1.124, SECTION 1.127, SECTION 1.155, SECTION 1.157, SECTION 1.160, SECTION 1.165, SECTION 1.167, SECTION 1.201, SECTION 1.202, SECTION 1.251, SECTION 1.252, SECTION 1.304, SECTION 1.305, SECTION 1.310, SECTION 1.312, SECTION 1.314, SECTION 1.354, SECTION 1.356, SECTION 1.357, SECTION 1.360, SECTION 1.366, SECTION 1.371, SECTION 1.375, SECTION 1.377, SECTION 1.378, SECTION 1.380, SECTION 1.416, SECTION 1.451, SECTION 1.503, SECTION 1.505, SECTION 1.506, SECTION 1.508, SECTION 1.509, SECTION 1.510, SECTION 1.511, SECTION 1.512, SECTION 1.514, SECTION 1.515, SECTION 1.516, SECTION 1.517, SECTION 1.519, SECTION 1.522, SECTION 1.527, SECTION 1.528, SECTION 1.530, SECTION 1.552, SECTION 1.553, SECTION 1.555, SECTION 1.601, SECTION 1.602, SECTION 1.603, SECTION 1.604, SECTION 1.607, SECTION 1.608, SECTION 1.751, SECTION 2.154, SECTION 2.205, SECTION 2.210, SECTION 2A.002, SECTION 3.056, SECTION 3.062, SECTION 3.064, SECTION 3.066, SECTION 3.073, SECTION 3.074, SECTION 3.075, and SECTION 4.005.

Rulemaking authority is expressly granted to the Department of Insurance in SECTION 1.029, SECTION 1.031, SECTION 1.049, and SECTION 1.402.

Rulemaking authority is expressly granted to the Injured Employee Public Counsel in SECTION 1.061, SECTION 1.062, SECTION 4.002, and SECTION 4.005.

ANALYSIS

C.S.S.B. 5 contains provisions to change the way workers' compensation is structured, managed, and regulated in Texas. The substitute streamlines the resolution of disputes related to the proper provision of medical care, as well as disputes over the compensability and amount of income benefits. The substitute also increases certain benefits for injured workers and provides an agency dedicated to assisting injured workers deal with the workers' compensation system.

The purpose of this legislation is to improve the provision of benefits to injured workers in Texas, reducing costs for Texas businesses, and streamlining the workers' compensation system for all parties.

Workers' Compensation Functions at the Department of Insurance

C.S.S.B. 5 abolishes the Texas Workers' Compensation Commission (TWCC) on March 1, 2006 and transfers workers' compensation regulatory, dispute resolution, customer assistance and records and information management functions and associated rulemaking authority to the Texas Department of Insurance (Department) no later than February 28, 2006.

Transferred regulatory oversight responsibilities and associated functions include workers' compensation insurance coverage; self-insurance regulation; income and medical benefits, including medical services regulation, cost containment and quality control functions including the Medical Quality Review Panel; claims procedures; compliance and enforcement of the Workers' Compensation Act and Rules; fraud investigation; and regulation of carrier-provided accident prevention services. Authorizes the Commissioner of Insurance to appoint a Medical Advisor. The Department is to provide customer assistance for workers' compensation policyholders, and conduct workers' compensation records and information management functions.

C.S.S.B. 5 also transfers the federal Occupational Safety and Health Consultation Program, workplace accident data collection, and the education function that disseminate best practices information to employers on return to work programs and workplace safety to the Department no later than February 28, 2006. The Department is required to adopt rules to recognize exemplary return to work programs and to allow insurance carriers to offer incentives to employers to offer exemplary return to work programs. All programs and functions transferred to the Department will continue to receive their funding through the assessment of a maintenance tax collected annually from all workers' compensation insurance carriers.

C.S.S.B. 5 establishes the Workers' Compensation Research and Evaluation Group within the Department to serve as a resource for the Commissioner on workers' compensation issues. The substitute requires the Group to conduct studies and research related to workers' compensation. The group shall prepare a research agenda adopted by the Commissioner after input at a public hearing.

C.S.S.B. 5 transfers oversight responsibility for workers' compensation medical disputes to the Department, and simplifies the dispute resolution process. Specifically, the substitute requires medical disputes to go through an initial informal dispute resolution process and provides for an Independent Review Organization (IRO) to decide any unresolved disputes. The substitute removes the State Office of Administrative Hearings from the appeal process, but either party may appeal an IRO decision to district court.

The substitute requires every IRO decision to include specific information elements for use in an appeal and for quality evaluation of IRO decisions by the Department. The substitute authorizes the Department to monitor IROs to ensure compliance with Commissioner rules, and requires the Department to evaluate IRO compliance with medical policies, fee guidelines, and impairment ratings, as well as the quality and timeliness of decisions.

C.S.S.B. 5 makes the Department responsible for overseeing and managing a streamlined dispute process for income benefits. The substitute authorizes the Commissioner to determine staffing levels and location of regional offices necessary to continue having hearing sites available across the state.

The substitute requires injured workers, employers, and carriers involved in an income benefit dispute to demonstrate a good faith effort to resolve the dispute themselves before filing a dispute at the Department. The Commissioner of Insurance is authorized to adopt rules to ensure documentation of the initial attempt to resolve the dispute.

If the parties cannot resolve the dispute themselves, the substitute authorizes the claimant to file with the Department a request for arbitration or a formal contested case hearing. The substitute allows the Commissioner to issue an interlocutory order for the payment of benefits during the pendency of the dispute. If a formal contested case hearing is requested, the Department must hold a pre-hearing conference, replacing the current Benefit Review Conference, to identify contested issues for the formal contested case hearing. Allows pre-hearing conferences to occur by teleconference on agreement of all parties.

C.S.S.B. 5 abolishes the current Benefit Review Conferences February 28, 2006. Any Benefit Review Conferences in progress after that date must file agreements with TWCC no later than April 1, 2006. A claimant whose claim is not heard in a Benefit Review Conference before February 27, 2006 is entitled to a contested case hearing or arbitration.

The substitute requires the Department to provide participants with a list of information that participants may need at the formal contested case hearing to ensure they have the most useful information to help resolve the dispute.

The substitute allows parties to appeal the formal contested case hearing decision directly to district court, eliminating the need for the Appeals Panel which is abolished by April 1, 2006. The substitute provides that the records of a prehearing conference or contested case hearing are admissible in court. The substitute provides that the department will not accept any new appeals on or after February 28, 2006. Appeals filed before the effective date of this substitute are governed by the law in effect on the date the appeal was filed. The Department is also required to create a precedent manual for income benefit disputes.

C.S.S.B. 5 specifies that the goals of the Workers' Compensation Act are to ensure that every injured worker:

- is treated with dignity and respect when injured on the job;
- has access to a fair and accessible dispute resolution process;
- has access to prompt, quality medical care within the framework established by the State; and
- receives services to facilitate return to work as soon as it is deemed safe and appropriate by his or her medical provider
- receives services to facilitate return to work as soon as it is deemed safe and appropriate by his or her medical provider.

The substitute also adds explicit language to the workers' compensation statute detailing nine systemwide goals and clarifies that the Department may adopt any rules necessary and appropriate to implement its powers and duties under the Workers' Compensation Act. The Department must assess its effectiveness in meeting the statutory goals and identify and report all internal policy and statutory changes needed to address deficiencies. Requires the Department to report results of this assessment, along with recommended statutory changes, to the Legislature by December 1, 2006.

C.S.S.B. 5 requires the Department to regularly assess the performance of carriers and medical providers against key regulatory goals to identify entities needing enhanced regulatory oversight. The Department must create regulatory incentives to promote greater overall compliance and reward performance. The substitute authorizes the Department to conduct audits of carriers' accident prevention services based on the risk assessment, rather than every two years.

C.S.S.B. 5 expands the Commissioner's authority to issue sanctions against any individual or entity the Department monitors or regulates in the workers' compensation system, including health-care providers and insurance carriers and recommendation of sanctions against utilization review agents. Requires the Commissioner to, by rule, establish criteria for recommending or imposing sanctions. Also prohibits the misuse of the Department name, logo or seals as they relate to workers' compensation.

The substitute requires the Department to establish rules that govern the filing of a complaint against a regulated entity and make that information available on its Web site. In addition, the Department is required to prioritize its investigations of complaints using risk-based criteria.

New Office of Injured Employee Counsel

C.S.S.B. 5 creates a new Office of Injured Employee Counsel to provide constituent service for injured workers, including through the Ombudsman program currently operated by TWCC. OIEC is led by the injured employee public counsel, appointed by the Governor and confirmed by the Senate. OIEC shall receive its administrative services, such as human and information resources, from the Department of Insurance.

C.S.S.B. 5 authorizes OIEC to provide representation for certain injured workers, with cases for representation accepted or rejected according to standards set by Department policy. OIEC may represent injured employees either through attorney representation or through an ombudsman supervised by an attorney. The substitute requires OIEC's Ombudsman program to begin providing services by March 1, 2006. Staff from the Ombudsman program shall coordinate OIEC services with the Department of Assistive and Rehabilitative Services (DARS). OIEC also is to provide public advocacy on the Department's workers' compensation rulemaking.

OIEC is to monitor the performance and operation of the workers' compensation system, with a focus on the system's effect on the return to work of injured employees. The substitute mandates a legislative report from OIEC, including a description of the activities of the Office, identification of any problems in the workers' compensation system and recommendations for legislative solutions, and an analysis of the effectiveness and efficiency of the workers' compensation system.

The substitute directs OIEC to coordinate with the Texas Workforce Commission and local workforce development boards to develop a workplace literacy and basic skills curriculum that bridges the skills gap between workers and current and emerging jobs.

Elimination of Programs

C.S.S.B. 5 abolishes the Medical Advisory Committee and provides that the Medical Advisor shall advise the Commissioner on the establishment of a medical quality review panel to assist the Medical Advisor.

C.S.S.B. 5 abolishes the Approved Doctor List, the Field Safety Representative Program, the Hazardous Employer Program, TWCC's role in the Rejected Risk Program, the Approved Professional Source Program, and the Drug Free Workplace Program.

Workers' Compensation Health-Care Networks

C.S.S.B. 5 authorizes workers' compensation health-care networks and aligns their regulations and operations more closely with group health insurance than the current system allows. The substitute allows insurance carriers, under Department supervision, to establish networks similar to those found in group health insurance. Pharmacy services are specifically exempted from networks. Employees are required to use the network if they live within the service area of the network their employer has contracted with, and must choose a network primary care provider to coordinate all medical care. There are exceptions for preexisting relationships in the event of an acute condition or terminal illness or for a primary care provider from an group health network. Providers and carriers are required to use electronic substituting procedures.

The substitute adds numerous definitions relating to workers' compensation health-care networks, including provider networks and related contracts and entities such as utilization review agents, independent review organizations, and treating doctor.

The substitute establishes a network system based on contractual relationships, rather than State intervention, between system participants. The Department oversees these arrangements by setting standards, collecting and maintaining data, and monitoring compliance. Key elements of the networks include a requirement that all services be ordered by a primary care provider; placing limits on the retrospective review of medical necessity of care; and applying prompt payment procedures based on those used in group health insurance to workers' compensation networks. In addition, the networks are required to establish a broad choice of medical providers within the network structure where feasible, as well as ensuring geographic accessibility of medical providers. The Commissioner shall identify and adopt alternative standards for underserved areas, both in and out of the networks.

C.S.S.B. 5 requires all public sector entities to use networks for their employees' workers' compensation medical care if networks are available in their area.

C.S.S.B. 5 requires the Commissioner of Insurance to adopt new fee guidelines, including one specifically for pharmaceutical services with and set multiple conversion factors for most medical practices for out-of-network services. For areas not covered by networks, the Department is also required to set standards and guidelines for treatment, preauthorization, devices, injured employee return to work, and pharmacy benefit protocols. The substitute requires the Commissioner to replace the current set of fee guidelines adopted by TWCC.

C.S.S.B. 5 requires the Workers' Compensation Research and Evaluation Group to prepare report cards on quality, costs, provider availability, and other factors of workers' compensation networks. The substitute also requires the group to objectively evaluate the impact of workers' compensation health-care networks on the cost and quality of medical care provided to injured employees, and to report the findings.

Incentives and Other Provisions to Contain Costs

C.S.S.B. 5 authorizes group health insurance carriers to offer workers' compensation coverage to employers to expand purchasing options and increase competition.

C.S.S.B. 5 requires system participants to report fraud, with penalties for failure to report. The substitute also allows the Department to use appropriated funds collected from the annual assessment of a maintenance tax on all workers' compensation insurance carriers to fund fraud prosecution efforts.

C.S.S.B. 5 requires carriers to file with the Department the percentage discounts used for return to work and safety programs to provide the Department with information on the type and amount of discounts being offered to Texas employers. The Department must examine whether to mandate any of these discounts.

Income Benefits

C.S.S.B. 5 increases the existing cap on certain income benefits from 100 percent to 130 percent of the State Average Weekly Wage, currently set in statute at \$539, and increases the existing cap on additional income benefits from 70 percent to 100 percent of the SAWW. The substitute removes the statutory SAWW designation, eliminating the need for the Legislature to update it in statute every two years, and ties the SAWW calculation to the standard formula used by the Texas Workforce Commission. The substitute also reduces the amount of time that injured employees must lose from work to receive payment for the first week of temporary income benefits, from 28 to 14 days.

Service Delivery

C.S.S.B. 5 requires carriers to evaluate a compensable injury in which the injured employee sustains an injury that could result in lost time from employment as early as is practicable after six weeks for lost time disability cases to determine if skilled case management is necessary to help ensure better coordination of health care and other services needed to facilitate an injured worker's return to work in a safe, timely, and appropriate manner. C.S.S.B. 5 requires carriers, where necessary, to use case managers who are appropriately licensed to practice in Texas and prohibits claims adjuster from providing case management services. The substitute also encourages use of single points of contact for injured workers at the Department, OIEC, and the carrier.

C.S.S.B. 5 79(R)

Return to Work

C.S.S.B. 5 requires the Department of Insurance to promote and help ensure the safe and timely return of injured employees to productive roles in the workforce. The substitute requires TDI to provide employers with information and best practices on methods to enhance return to work communication and services; and provide plain language information to injured workers on the benefits of early return to work, and making informed medical decisions.

C.S.S.B. 5 requires the Department to establish protocols for injured workers receiving supplemental income benefits (SIBs) to obtain workforce and occupational training where appropriate. The substitute improves access to existing state resources at TWC and the Department of Assistive and Rehabilitative Services (DARS) to better assist SIB recipients to return to the workforce. The substitute provides for the Department, where appropriate, to work with TWC, DARS, and private vocational rehabilitation programs to identify and attempt to remove barriers to successful employment of SIB recipients; ensure information and outcome data is tracked between appropriate agencies and carriers; establish a referral mechanism to TWC and local workforce centers; and create a method to promote employment success that includes post-referral contact by the Department with SIB recipients.

C.S.S.B. 5 sets compliance standards for SIB recipients work search requirements to replace the current standard of “good faith effort.” The substitute provides for SIB recipients to actively participate with TWC, DARS or private vocational rehabilitation programs, or actively search for work documented by the number of job applications. The Department must establish rules to define the level of activity required to meet these standards, including defining the number of job applications necessary to meet the requirements.

C.S.S.B. 5 requires the Department, by rule, to ensure all workers’ compensation forms and explanatory materials are prepared in plain language and in Spanish where appropriate to ensure that all system participants have the information they need regarding the workers’ compensation system.

Budget Authority

C.S.S.B. 5 provides that the Legislative Budget Board may adopt an order affecting any portion of the total appropriation of the Department if necessary to implement the provisions of the substitute.

The substitute also changes the nature of the Subsequent Injury Fund from a general revenue account in the state treasury to a dedicated account in the general revenue fund, and provides that the SIF is not subject to any provision of law that makes dedicated revenue available for general governmental purposes.

Pilot Program for Alternative Compensation

C.S.S.B. 5 requires the Department to develop and operate a pilot program by which a subscribing employer could divide their workers’ compensation coverage between a group health insurance policy and an indemnity policy, if the combined benefits offered equaled those under a single workers’ compensation insurance policy. The pilot program would be open to subscribing employers only and all exclusive remedy provisions would still apply to employees covered under the program. The pilot program would expire September 1, 2009.

EFFECTIVE DATE

September 1, 2005.

COMPARISON OF ORIGINAL TO SUBSTITUTE

C.S.S.B. 5 differs from the original in that it abolishes the Texas Workers’ Compensation Commission and transfers the functions to the Texas Department of Insurance, rather than renaming the commission and restructuring the commission board.

C.S.S.B. 5 79(R)

C.S.S.B. 5 eliminates the following provisions which were in the original: a return to work pilot program for small employers; authorize the agency to adopt disability management planning process for out-of-network services; accreditation of pain management programs; requirements that carriers submit their underwriting guidelines to the regulatory agency; a rebuttable presumption for intoxication for injured employees; restrictions on non-subscribing employers use of post-injury waivers.

C.S.S.B. 5 further streamlines the dispute resolution process requiring attempts at informal dispute before a party can appeal to the state process and eliminating the benefit review conference and appeals panels.

C.S.S.B. 5 requires the Department to regularly assess the performance of carriers and medical providers against key regulatory goals to identify entities needing enhanced regulatory oversight. The Department must create regulatory incentives to promote greater overall compliance and reward performance. The substitute authorizes the Department to conduct audits of carriers' accident prevention services based on the risk assessment, rather than every two years.

The substitute requires the Department to establish rules that govern the filing of a complaint against a regulated entity and make that information available on its Web site. In addition, the Department is required to prioritize its investigations of complaints using risk-based criteria.

C.S.S.B. 5 requires the Office of Injured Employee Counsel to hire and utilize attorneys to supplement the Ombudsmen program in representing injured workers in front of the Department during administrative dispute resolution.

C.S.S.B. 5 abolishes the Medical Advisory Committee and provides that the Medical Advisor shall advise the Commissioner on the establishment of a medical quality review panel to assist the Medical Advisor.

C.S.S.B. 5 abolishes the Approved Doctor List, the Field Safety Representative Program, the Hazardous Employer Program, TWCC's role in the Rejected Risk Program, the Approved Professional Source Program, and the Drug Free Workplace Program.

C.S.S.B. 5 does not require Department approval of network management contracts. It does exclude pharmacy from the networks and allows the Department to designate underserved areas.

C.S.S.B. 5 requires the Commissioner of Insurance to adopt new fee guidelines, including one specifically for pharmaceutical services with and set multiple conversion factors for most medical practices for out-of-network services. For areas not covered by networks, the Department is also required to set standards and guidelines for treatment, preauthorization, devices, injured employee return to work, and pharmacy benefit protocols. The substitute requires the Commissioner to replace the current set of fee guidelines adopted by TWCC.

C.S.S.B.5 applies requirements for notice to healthcare providers of compensability disputes to both in-network and out-of-network providers, rather than just in-network providers. In addition, it places a limit on the carrier's liability for services provided before a notice of compensability to \$7,000. The substitute also provides for a post-injury exam to define the injury.

C.S.S.B. 5 establishes the Workers' Compensation Research and Evaluation Group.

C.S.S.B. 5 requires system participants to report fraud, with penalties for failure to report. The substitute also allows the Department to use appropriated funds collected from the annual assessment of a maintenance tax on all workers' compensation insurance carriers to fund fraud prosecution efforts. Also prohibits the misuse of the Department name, logo or seals as they relate to workers' compensation.

C.S.S.B. 5 requires carriers to file with the Department the percentage discounts used for return to work and safety programs to provide the Department with information on the type and amount of discounts being offered to Texas employers. The Department must examine whether to mandate any of these discounts.

C.S.S.B. 5 increases the existing cap on certain income benefits from 100 percent to 130 percent of the State Average Weekly Wage, currently set in statute at \$539, and increases the existing cap on additional income benefits from 70 percent to 100 percent of the SAWW.

C.S.S.B. 5 requires carriers to evaluate a compensable injury as early as is practicable after six weeks for lost time disability cases to determine if skilled case management is necessary to help ensure better coordination of health care and other services needed to facilitate an injured worker's return to work in a safe, timely, and appropriate manner. The substitute also encourages use of single points of contact for injured workers at the Department, OIEC, and the carrier.

C.S.S.B. 5 requires the Department of Insurance to promote and help ensure the safe and timely return of injured employees to productive roles in the workforce. The substitute requires TDI to provide employers with information and best practices on methods to enhance return to work communication and services; and provide plain language information to injured workers on the benefits of early return to work, and making informed medical decisions.

C.S.S.B. 5 requires the Department to establish protocols for injured workers receiving supplemental income benefits (SIBs) to obtain workforce and occupational training where appropriate. The substitute improves access to existing state resources at TWC and the Department of Assistive and Rehabilitative Services (DARS) to better assist SIB recipients to return to the workforce. The substitute provides for the Department, where appropriate, to work with TWC, DARS, and private vocational rehabilitation programs to identify and attempt to remove barriers to successful employment of SIB recipients; ensure information and outcome data is tracked between appropriate agencies and carriers; establish a referral mechanism to TWC and local workforce centers; and create a method to promote employment success that includes post-referral contact by the Department with SIB recipients.

C.S.S.B. 5 sets compliance standards for SIB recipients work search requirements to replace the current standard of "good faith effort." The substitute provides for SIB recipients to actively participate with TWC, DARS or private vocational rehabilitation programs, or actively search for work documented by the number of job applications. The Department must establish rules to define the level of activity required to meet these standards, including defining the number of job applications necessary to meet the requirements.

C.S.S.B. 5 requires the Department, by rule, to ensure all workers' compensation forms and explanatory materials are prepared in plain language and in Spanish where appropriate to ensure that all system participants have the information they need regarding the workers' compensation system.

The substitute also changes the nature of the Subsequent Injury Fund from a general revenue account in the state treasury to a dedicated account in the general revenue fund, and provides that the SIF is not subject to any provision of law that makes dedicated revenue available for general governmental purposes.

C.S.S.B. 5 requires the Department to develop and operate a pilot program by which a subscribing employer could divide their workers' compensation coverage between a group health insurance policy and an indemnity policy, if the combined benefits offered equaled those under a single workers' compensation insurance policy. The pilot program would be open to subscribing employers only and all exclusive remedy provisions would still apply to employees covered under the program. The pilot program would expire September 1, 2009.