

## **BILL ANALYSIS**

C.S.H.B. 2605

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State Affairs

Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

The 79th Legislature made sweeping changes to the workers' compensation system including abolishing the standing regulatory agency and creating the Division of Workers' Compensation (Division) within the Texas Department of Insurance (TDI) to regulate and administer the workers' compensation system in Texas. The Division's regulation of the workers' compensation system aims to accomplish four basic goals established by the Legislature, including ensuring that each employee: 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, high-quality medical care; and returns to employment as soon as considered safe and appropriate.

The Division regulates the workers' compensation system in Texas primarily by administering a dispute resolution process for income benefits, medical care, and payment for medical treatment; establishing fee and treatment guidelines for medical services; providing safety resources, education services, and training for system participants; certifying employers who choose to self-insure; and enforcing compliance with statutes and rules.

The Division has a separate Sunset date from TDI, and will be abolished on September 1, 2011, unless continued by the Legislature. The Sunset Commission found Texas has a continuing need for the Division's functions. However, the Division is still in transition and several operational areas of the Division showed flaws that need statutory repair to fairly and equitably treat injured workers and other system participants.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that rulemaking authority is expressly granted to the Commissioner of Workers' Compensation in SECTION 11, SECTION 12, SECTION 13, SECTION 15, SECTION 16, SECTION 18, SECTION 25, SECTION 26, SECTION 35, SECTION 37, and SECTION 53 of this bill.

### **ANALYSIS**

*Continues the Division of Workers' Compensation for six years.*

C.S.H.B. 2605 changes the Division's Sunset review date to 2017 to continue it, as a division within TDI, for six years.

*Establishes an administrative appeal mechanism for network medical necessity disputes.*

C.S.H.B. 2605 augments the current appeal process for network medical necessity disputes by restructuring appeals of Independent Review Organization (IRO) determinations to include a Contested Case Hearing (CCH) before the Division, instead of a direct appeal to district court. The substitute provides that CCHs held on network medical necessity disputes conform to the same procedures outlined in the Labor Code as those CCHs conducted on appeals of non-network medical necessity disputes. The substitute also requires Division Hearing Officers to weigh a network's adopted evidence-based treatment guidelines in adjudicating the appeal. C.S.H.B. 2605 authorizes appeal of a network medical necessity contested case decision to district court and specifies that such appeals are subject to a substantial evidence review. The

substitute provides that these changes apply only to a medical dispute based on a review by an Independent Review Organization decision that occurs on or after September 1, 2011.

***Streamlines the process for resolving medical disputes, requiring the Division to conduct all medical necessity Contested Case Hearings and SOAH to conduct all medical fee Contested Case Hearings.***

C.S.H.B. 2605 removes the State Office of Administrative Hearings' jurisdiction in performing Contested Case Hearings for workers' compensation medical necessity disputes. The substitute, instead, gives the Division the authority to conduct all Contested Case Hearings (CCH) for medical necessity cases. The substitute provides that appeals of medical necessity CCH decisions, including those decisions related to spinal surgery cases, would not be subject to the Division's Appeals Panel review, and could be appealed directly to district court.

C.S.H.B. 2605 removes the Division's authority to conduct medical fee Contested Case Hearings, transferring that authority to SOAH. The substitute also provides parties to a medical fee dispute the option of continuing from Benefit Review Conference to arbitration or a Contested Case Hearing, if the issues remain unresolved after the Conference. The substitute requires that the losing party appealing the medical fee dispute to SOAH pay all associated Contested Case Hearing costs.

The substitute would allow the Commissioner or the Division to intervene in Contested Case Hearings conducted at SOAH that involve issues of fee guideline interpretation. The substitute also provides that, under this provision, the Division would not be considered a party to the case. The substitute provides that these changes apply only to appeals of medical fee dispute Division decisions that occur on or after September 1, 2011.

***Requires parties to a non-network medical fee dispute to attempt a low-level mediation, through a Benefit Review Conference, before appealing to the Contested Case Hearing level.***

The substitute requires parties to a non-network medical fee dispute to participate in a Benefit Review Conference administered by DWC as a prerequisite to filing an appeal for a Contested Case Hearing. The substitute also prohibits parties to the dispute from negotiating fees outside of the Division's adopted fee guidelines.

***Requires parties to a dispute to prove preparedness as a prerequisite to a Benefit Review Conference.***

C.S.H.B. 2605 requires the Commissioner of Workers' Compensation to adopt guidelines, via rule, regarding the type of information needed to document efforts made to resolve disputes before requesting a Benefit Review Conference. The substitute also requires the Commissioner to establish a process, by rule, to evaluate the sufficiency of such documentation. The substitute also authorizes the Division to deny a request for a Benefit Review Conference, if the requesting party does not provide information deemed sufficient by the Division.

C.S.H.B. 2605 also requires parties to Benefit Review Conference who requests the conference be rescheduled to submit the request in the same manner as the initial request. The substitute requires the Commissioner to adopt rules to define good cause for rescheduling a Conference and deadlines for requesting that a Conference be rescheduled. The substitute provides that failure to abide by the Division-approved system for rescheduling would result in forfeiting the right to attend a Benefit Review Conference, unless the Benefit Review Officer is authorized to schedule another conference. The substitute provides that the changes in proving preparedness and rescheduling a BRC apply only to a request for a BRC submitted on or after September 1, 2011.

***Authorizes the Division's Appeals Panel to issue written affirmations in limited circumstances.***

The substitute allows the Division's Appeals Panel to issue written decisions affirming Contested Case Hearing decisions in limited circumstances. The substitute provides that the Appeals Panel may only issue a written decision in a case in which the panel affirms the decision of the Hearing Officer and the case is a case of first impression; involves a recent change in law; or involves errors which require correction but which do not affect the outcome of the dispute, including: findings of fact for which there is insufficient evidence; incorrect conclusions of law; findings of

fact or conclusions of law which were not properly before the Hearing Officer; and other legal errors.

***Requires the Division to develop standard procedures for documenting complaints and for tracking and analyzing complaint data.***

C.S.H.B. 2605 requires the Division to adopt a policy outlining its complaint process from the receipt of initial complaint to its final disposition. The substitute specifies that such procedures apply to all complaints made to the Division. The substitute requires the Division to compile statistics, including the number, source, type, length of resolution time, and disposition of complaints. The substitute also requires the Division to further analyze such complaint information by field office and by program, and report all analysis to the Commissioner of Workers' Compensation on a regular basis.

***Removes outdated and confusing enforcement provisions in the Labor Code.***

The substitute removes outdated language referencing specific classes of violations or penalty amounts. C.S.H.B. 2605 also removes language relating to notice requirements for subsequent violations under the Labor Code that may conflict with the Commissioner of Workers' Compensation's broader administrative penalty authority. The substitute also clarifies that the full range of administrative sanctions are for all participants in the workers' compensation system, and moves such provisions to the same piece of statute, to ensure that system participants are aware of the Division's complete enforcement authority. The substitute provides that any updates in the Division's enforcement authority apply only to those administrative violations that occur on or after September 1, 2011.

***Clarifies that the Division can conduct announced and unannounced inspections.***

The substitute authorizes the Division to review, including unannounced on-site visits, the operations of any person regulated by the Division, including an agent of the person performing functions regulated by the Division. The substitute requires a person subject to inspection to provide all records relating to their participation in the workers' compensation system available to the Division. The substitute requires the Commissioner to specify, by rule, the procedures to be used for both announced and unannounced visits, including specifying the records subject to inspection. The substitute provides that these provisions apply only to an investigation or review conducted on or after September 1, 2011.

***Authorizes the Commissioner of Workers' Compensation to issue emergency cease-and-desist orders.***

C.S.H.B. 2605 authorizes the Commissioner of Workers' Compensation to issue cease-and-desist orders in emergency situations, including in situations where the Commissioner believes a system participant's actions are in violation of law, rule, or order; and will result in harm to the health, safety, or welfare of another person. The substitute requires the Commissioner to serve the affected person with notice of the charges; and provides detailed provisions to ensure the affected person's opportunity for an expedited hearing. The substitute provides for an order to continue in effect pending a hearing, unless stayed by the Commissioner. The substitute also authorizes the Commissioner to sanction, and assess administrative penalties against, persons violating cease-and-desist orders.

***Specifies that the judicial review standard for appeals of DWC enforcement cases is substantial evidence.***

The substitute adds language to the Labor Code specifying that any judicial review of a Commissioner enforcement order is subject to the substantial evidence rule. The substitute provides that this provision apply only to a Commissioner's order issued on or after September 1, 2011.

***Authorizes the Commissioner of Workers' Compensation to make final decisions on enforcement cases involving monetary penalties.***

C.S.H.B. 2605 removes final decision authority from the State Office of Administrative Hearings (SOAH) in enforcement cases involving monetary penalties, and requires the Commissioner of Workers' Compensation to enter final orders upon consideration of a proposal for decision from SOAH. The substitute provides that, based on the findings of fact, conclusions of law, and proposal for decision, the Commissioner may determine that a violation occurred and impose an administrative penalty, or determine that a violation did not occur. C.S.H.B. 2605 also requires the Commissioner to adhere to provisions in the Administrative Procedures Act governing how an agency may consider, adopt, or change proposals for decision. The substitute provides that these changes only apply to administrative hearings that are conducted on or after September 1, 2011.

***Deposits all administrative penalties collected by the Division of Workers' Compensation in the General Revenue Fund, instead of the Texas Department of Insurance operating account.***

The substitute amends the Labor Code to require that all administrative penalties collected by the Division under the subtitle be deposited into the General Revenue Fund.

***Modifies the Designated Doctor matrix selection process to be based on diagnosis and injury area, instead of a treatment-based selection process.***

The substitute provides that medical examinations performed by a certified Designated Doctor be assigned based on the next available doctor on the Division's list of certified doctors, except as provided by Section 408.1225(f), whose credentials are appropriate to the area of the body affected by the employee's injury and diagnosis. C.S.H.B. 2605 clarifies that Designated Doctors, other than chiropractors, are subject to professional specialty certification requirements, and that chiropractors who serve as Designated Doctors are subject to certain requirements under Section 408.0045 of the Labor Code, unless these provisions conflict with the updated selection process requirements. The substitute provides that the changes in selection process for Designated Doctor examinations apply only to those examinations that occur on or after June 1, 2013.

***Requires the Commissioner to develop qualification requirements for Designated Doctors.***

C.S.H.B. 2605 requires the Commissioner of Workers' Compensation to develop a certification process, in rule, that evaluates a Designated Doctor's qualification, including educational experience, previous training, and demonstrated ability to perform specific duties. The substitute also requires the Division to develop standard curriculum, course materials, and testing criteria. C.S.H.B. 2605 requires the Division to develop and implement a procedure to periodically review and update such guidelines. The substitute authorizes the Division to rely on an outside training and testing provider. The substitute requires the Commissioner to adopt rules regarding the certification of Designated Doctors no later than January 1, 2013. The substitute also specifies that Designated Doctors are not required to seek certification under this new process before January 1, 2013.

***Authorizes the Commissioner of Workers' Compensation to refuse to renew Designated Doctor certifications.***

The substitute clarifies the Division's authority to deny renewal of a Designated Doctor's biennial certification, as well as revoke a Designated Doctor's certification. The substitute provides that doctors disagreeing with the Division's decision to refuse to renew would be entitled to a hearing at the State Office of Administrative Hearings. The substitute provides that the Division's ability to refuse to renew a Designated Doctor's certification only apply to a disciplinary action taken on or after January 1, 2013.

***Directs the Commissioner of Workers' Compensation to adopt rules requiring Designated Doctors remain with case assignments, unless otherwise authorized.***

C.S.H.B. 2605 requires a Designated Doctor to continue providing services related to an assigned case, including performing subsequent examinations or acting as a resource for the Division in adjudicating disputes, unless authorized by the Division. The substitute requires the

Commissioner of Workers' Compensation to develop, by rule, certain circumstances permissible for a Designated Doctor to discontinue service, including the doctor's decision to stop practicing in the workers' compensation system or relocation.

***Transfers the responsibility for certain claims decisions from DWC to insurance carriers.***

C.S.H.B. 2605 removes the Division and the Commissioner from making decisions on certain individual claims, transferring responsibility for these decisions to insurance carriers. The substitute transfers the following types of claims decisions: Acceleration of Impairment Income Benefits; Advancement of Income Benefits; Initial Determination of Supplemental Income Benefits; Change of Treating Doctor; and Maximum Medical Improvement Extension After Spinal Surgery. The substitute provides that disputes arising from claims decisions made by insurance carriers would be resolved through the Division's existing dispute resolution process. The substitute also requires the Division to amend its current rules regarding these claims decisions to reflect these changes. The substitute provides that changes to these claim decision processes apply only to those requests filed on or after September 1, 2011. The substitute also requires the Commissioner to adopt rules governing this new process as soon as practicable.

***Requires the Division to work with health licensing boards to expand the pool of Medical Quality Review Panel members.***

The substitute requires agencies that regulate health professionals who are engaged in the workers' compensation system to develop lists of providers to help the Division's Medical Advisor appoint members of the Medical Quality Review Panel (MQRP). The substitute extends this requirement to other licensing boards instead of relying solely on the Texas Medical Board and Texas Board of Chiropractic Examiners. The substitute also requires the Medical Advisor to increase the pool of specialists available to serve on the Medical Quality Review Panel.

C.S.H.B. 2605 requires the Medical Advisor to notify the Division if it is no longer necessary for the MQRP to include a member that practices in a particular health care specialty or field, or if there is a need for the panel to include a member that practices in a particular specialty field not represented on the panel.

***Requires the Division to develop guidelines to strengthen the medical quality review process.***

The substitute requires the Division to develop and the Commissioner to adopt criteria to further improve the medical quality review process. The substitute requires the Division and Commissioner to consult with the Medical Advisor and seek input from key stakeholders, including health care providers and insurance carriers. The substitute outlines certain processes that must be included in the adopted criteria, including a process for handling complaint-based medical case reviews; and the selection process of health care providers and other entities for audit or review. The substitute also requires the Division to make the adopted process available on its website.

***Establishes the Quality Assurance Panel in statute.***

C.S.H.B. 2605 requires the Medical Advisor to establish a Quality Assurance Panel (QAP) as a subset of the Medical Quality Review Panel (MQRP) to provide an additional level of evaluation in medical case reviews, and to assist the medical advisor in performing certain duties. The substitute also requires the QAP to evaluate medical care and recommend enforcement actions to the Medical Advisor. C.S.H.B. 2605 also requires the QAP to meet periodically to discuss medical case reviews and recommend enforcement action to the MQRP and the Medical Advisor.

***Requires the Division to develop additional qualification and training requirements for Medical Quality Review Panel members.***

The substitute requires the Commissioner, in consultation with the Medical Advisor, to adopt rules concerning the Medical Quality Review Panel (MQRP), including the qualifications necessary for a health care provider to serve on the MQRP and the composition of the MQRP. The substitute also requires that such rules include the amount of time a health care provider may serve on the MQRP and a policy defining situations that constitute a conflict of interest for a MQRP member. C.S.H.B. 2605 also requires the Commissioner, in consultation with the

Medical Advisor, to adopt rules to govern the process of removing a MQRP member, including a member that is repeatedly delinquent, as well as a procedure through which MQRP members are notified concerning the status of enforcement cases resulting from the medical quality review process.

C.S.H.B. 2605 requires the Commissioner to adopt rules regarding the training requirements for MQRP members to ensure that Panel members are fully aware of any requirements imposed by the Labor Code concerning medical quality reviews and the Division's goals in conducting medical quality reviews. The substitute also specifies that training may include a variety of topics, but must include information in the following areas: administrative violations affecting the delivery of appropriate medical care; confidentiality of the review process and the qualified immunity from suit granted to MQRP members under the Labor Code; and medical quality review process guidelines adopted under Section 413.05115.

***Clarifies what constitutes misuse of the Division's name or symbols.***

C.S.H.B. 2605 adds language to define what constitutes acting in a "deceptive manner" and clarifies that a person may not use the Division's name or symbols in a deceptive manner.

***Updates language to reflect previous changes in law.***

The substitute updates certain sections of the Act and corrects incorrect citations, including references to the former Workers' Compensation Commission.

***The substitute repeals the following statutory provisions.***

Labor Code, §413.031(1)

Labor Code, §415.0035 (c), (d), and (f)

Labor Code, §415.0036 (c)

Labor Code, §415.004

Labor Code, §415.008 (b)

Labor Code, §415.022

**EFFECTIVE DATE**

September 1, 2011

**COMPARISON OF ORIGINAL TO SUBSTITUTE**

The Substitute makes a number of clarifying changes to more correctly implement the Sunset Commission's decisions contained in the Introduced version of the bill, and to correct drafting errors. The substitute also extends the effective date for several provisions contained in the Introduced version of the bill, including provisions related to Designated Doctors and the transfer of certain claim actions to insurance carriers, to January 1, 2013.

C.S.H.B. 2605 adds a provision to define what constitutes acting in a "deceptive manner" and clarifies that a person may not use the Division's name or symbols in a deceptive manner.

The substitute updates certain sections of the Act and corrects incorrect citations, including references to the former Workers' Compensation Commission.