Patient Advocates of Texas

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Sunset Advisory Committee
May 18-21, 2004

The workers' compensation system in Texas is broken, and it must be fixed.

PAT Agenda
To protect and defend the rights and dignity of those we serve to the full extent of the law.

To seek to improve the care and condition of those we serve by increased public awareness and knowledge of requirements for care and the special needs of patients.

To serve as the catalyst to bring needed reform and creative solutions to the health care dilemma facing us all.

To create greater public awareness of the need for proactive positions in health care.

To advocate for patients and providers who are denied equal access to quality care or are unable to provide or obtain needed care because of coverage rules and/or inadequate reimbursement.

To strengthen the national effort for improvement of health care delivery and advancement through collective efforts.

To advocate for Patients Rights to healthcare regardless of the care setting or payer.

Proposed Reforms
PAT suggests the following reforms as a starting point during this process. PAT will likely have more suggestions as this process continues.

NETWORKS

NETWORKS can work if they are **PROPERLY CONSTRUCTED**, for example Oregon was in almost exactly the same situation as Texas in 1989. It had one of the highest costs and utilization rates in the nation. At that time, Oregon instituted reforms that has lead long-term, documented improvements, and many businesses are moving into the state as a result. Part of Oregon's success has been due to successful managed care networks; however these networks are regulated to assure network adequacy and have many other features worth emulating. The fee schedule is good and is for the most part equal to or above commercial pay rates. The cost per claim is average. A good network should include some of the following features, but these suggestions are not by any means every reform that should be considered. If instituted, networks should:

1. Be state regulated and not owned by the insurance companies.
2. Have the prompt pay provisions recently signed by the Governor in the last legislature.
3. Contain patient protection provisions.
4. Ensure competitive Medical Fee Schedule.
5. Have report cards based on Medical Treatment Guidelines that are nationally recognized, scientifically valid, and outcome based.
6. Utilize regional networks with utilization review conducted by the network by physicians in like specialty.

MEDICAL FEE GUIDELINE

The Medical Fee Guideline is seriously inadequate. For example, the surgery conversion factor on February 1, 1991 was $194.25. The surgery conversion factor on January 5, 2003 is $46.67. **THAT IS A 76% DECREASE!** During this same period of time there has been a steady increase in the Consumer Price Index and the cost of malpractice insurance!

There is clearly something wrong when our own state funded medical schools will not accept injured workers on an elective basis. The UT Southwestern Medical School Departments of Orthopedics and Neurosurgery do not accept any work comp referrals! If the professors at the medical center won't accept injured workers because of the hassle factors and inadequacy of reimbursement, how can we reasonably expect quality physicians in private practice to accept these patients?

The TWCC has repeatedly failed to follow the legislative intent. Specifically, section 413.021 "Medical Policy and Guideline Updates Required. The medical policies and fee guidelines **SHALL** be reviewed and revised at least every **TWO YEARS** to reflect fair and reasonable fees and to reflect medical treatment or ranges of treatment that are reasonable or necessary at the time the review and revision is conducted". Since the inception of Workers' Compensation in 1991 there have been only **TWO** Medical Fee Guideline revisions and they were on 04-01-1996 and 01-05-03. Both of these Fee Guidelines are being reviewed by the courts.

1996 MEDICAL FEE GUIDELINE
SUMMARY OF THE ARGUMENT

Patient Advocates of Texas and Dr. Allen Meril (PAT) challenged the Rule, including the 1996 MFG, on procedural and substantive grounds.

The MFG regulates what health care providers may charge in the workers compensation system and establishes a maximum allowable reimbursement (MAR). The adopted Rule and MFG, according to its preamble, reduces payment caps to providers for 165 of the most frequently needed services in the workers compensation system. PAT challenges, on substantive grounds, the rules promulgated by the TWCC to govern the process by which providers seek reimbursement for medical fees provided to injured workers.

Not Following the Legislature's Recipe for MFG

The Labor Code establishes the exclusive standards by which the medical fee guidelines are to be established. Yet, in its Preamble, the TWCC states that "prior to development of the new medical fee guideline," the TWCC "established overall policy objectives" to move Texas' workers' compensation fees to a "median cost position in comparison with other states…." The TWCC also adopted the "goal of establishing an expenditure neutral system," i.e, to not permit an overall rise in medical fee reimbursements to health care providers. PAT challenges the TWCC's authority to add these profoundly influential factors to the mix of statutory factors the TWCC considered in establishing the MFG.

The TWCC's Rule and MFG are not based on the standards required by the Labor Code. In essence, the Legislature gave the TWCC a recipe to follow for establishing the MFG, and the Legislature restricted the ingredients in that recipe. The Legislature did not say to the TWCC,

"Here is the recipe, add whatever additional ingredients you would like." The TWCC chose to add its own pungent, unauthorized ingredients to the MFG —"cost neutrality" and "national median"—which overwhelmed the influence that the statutory ingredients were supposed to have in the recipe. By adopting and *giving priority to* the TWCC's own "policy mandates and objectives" over the statutory standards, the TWCC effectively prejudiced its rulemaking process by capping the overall fee structure before the TWCC even began its flawed application of the statutory standards they should have used exclusively. The TWCC followed its "overall policy objective" of national median and the "goal of…expenditure neutral and said the TWCC "considered all relevant statutory *and policy mandates and objectives and designed this rule to achieve those mandates and objectives*."

Unauthorized Limits on Paying Doctors

In addition to its challenge to the MFG, PAT challenges the TWCC's authority to establish a statute of limitations for provider reimbursement, as found in TWCC Rule 133.305 as it existed at the time this lawsuit was filed. Rule 133.305 provides in pertinent part:

> (d) Requests for medical dispute resolution shall be filed timely with the Division. A requestor that fails to file a request for medical dispute resolution timely waives the right to medical dispute resolution. For the purpose of this section, a request is filed timely if it meets the time frames set forth below.
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> > (1) A party shall file a request for medical fee, medical necessity, or injured employee medical reimbursement dispute resolution with the Division not later than one year after the date(s) of service in dispute.
> >
> > (2) A health care provider shall file a request for a medical fee or medical necessity dispute with the Division no earlier than sixty days after the insurance carrier received the bill(s) for the disputed service(s), unless the insurance carrier has completed its audit of the disputed bill(s) earlier than 60 days from the date of receipt and has either denied or reduced payment to the health care provider.

This TWCC rule adds a restriction on the right of health care providers to be paid that appears nowhere in the Labor Code.

Allowing Insurance Carriers to Audit Doctors

The TWCC presumes to give, by rule only, authority to insurance carriers to conduct any desk audit or onsite audit of a doctor's office that the carrier desires. The TWCC contends that its rules, found at 28 T.A.C. sections 133.300-133.305 (hereafter "Carrier Audit Rules"), do not delegate TWCC authority but only "provide a rational framework for execution of the statutory authority provided to carriers by the Legislature."

On their face, however, the TWCC rules involve a delegation of enormous governmental authority. At issue is more than a "ministerial" authority to *review* bills from providers. The Carrier Audit Rules confer discretionary power to hundreds of insurance carriers to unilaterally determine which health care providers to audit, what to audit, how to audit, when to audit, and where to audit. More troubling, the rules confer on the carriers the authority to determine unilaterally, with no public disclosure, much less input, how much to agree to pay without audit to health care providers for their services in the workers' compensation system, both as to services for which there is no Maximum Allowable Reimbursement (MAR) and as to how much

of the MAR to pay when one is established in the *Medical Fee Guideline*. This is a delegation not just of audit authority, but of rule making authority.

At issue are (1) whether the Labor Code confers on the TWCC the power to directly audit health care providers in the first place, (2) whether, assuming the Labor Code authorizes this type of direct audit of health care providers, whether the TWCC must have express statutory authority to "sub-delegate" such powers, (3) whether, assuming express authority to sub-delegate is not required, the Labor Code implicitly authorizes the TWCC to sub-delegate such powers, and (4) whether, assuming the Labor Code authorizes the delegation, the TWCC has imposed sufficient standards to govern the exercise of delegated powers. **THE THIRD COURT OF APPEALS DETERMINED THAT THE TWCC'S DELEGATION OF THE AUTHORITY TO THE CARRIERS LACKS THE GUIDANCE AND CONTROLS NECESSARY TO MEET CONSTITUTIONAL STANDARDS.**

2002 MEDICAL FEE GUIDELINE SUMMARY OF THE ARGUMENT

TWCC Adopted Medicare Fees Despite the Legislative Prohibition

The 2002 Medical Fee Guideline (MFG) adopts the federal Medicare fee schedule except for the addition of a 125% multiplier to the conversion factor used by Medicare. In other words, the TWCC decided that doctors in Texas, treating injured workers, should only be paid an arbitrary 25% more than Medicare fees which are used for treating elderly people. TWCC did this despite the well-advised prohibition in Texas Labor Code § 413.011(b) against adopting the Medicare fee schedule. Without any involvement by TWCC, the fees paid in the Texas workers' compensation system change automatically with each annual change made by Medicare to its conversion factor. This delegation by TWCC to Federal CMS of the responsibility to, in essence, set the Texas MFG violates the express language of the statute under which the MFG was adopted. Surely, the Texas Legislature did not intend for the TWCC to delegate setting the MFG for Texas to the federal government, but that is was the TWCC has done.

The legislature mandated that TWCC develop its MFG so that (1) the fees will be "fair and reasonable" (2) access to quality medical care for injured workers will be ensured, and (3) effective cost control in the Texas workers' compensation system will be achieved. The federal CMS considers none of these factors when it makes annual adjustments in the Medicare conversion factor. Thus, the entity to which TWCC has delegated the power to set the Texas conversion factor (and thereby the fees paid) does not even consider the essential standards that the legislature mandated that TWCC consider. Further, CMS, by law, must adjust its conversion factor based on federal "budget neutrality" requirements, a consideration which is irrelevant to the Texas workers' compensation system. FOR THESE REASONS, THE 2002 MFG IS ARBITRARY AND CAPRICIOUS.

Should the Court find that the delegation by TWCC to federal CMS was allowed by the statute, then the delegation was unconstitutional because CMS fails to satisfy four of the eight criteria established by the Supreme Court in *Boll Weevil Eradication Foundation v. Lewellen*, and because delegations of authority to a public entity authorized by *Housing Authority of the City of Dallas v. Higginbotham* presuppose that the entity to which the authority has been delegated will consider the standards established by the legislature, and in this instance, CMS does not.

TWCC Ignored the Statutory Mandate to Consult its Medical Advisory Committee

TWCC had a statutory duty to consult with its Medical Advisory Committee in the development of the 2002 MFG and yet it wholly failed to do so, thereby violating a procedural requirement for the adoption of the MFG.

TWCC Provided no Adequate Explanation for its 25% Factor

TWCC's reasoned justification for the 2002 MFG did not substantially comply with Administrative Procedure Act requirements because the Order and original *Preamble* failed to explain how the 125% multiplier was developed (it was arbitrary and not based on any "credible evidence"), or why this multiplier satisfies the statutory criteria that the fees be "fair and reasonable" and ensure access to quality medical care.

When the 2002 MFG was remanded by the Trial Court, TWCC failed to adopt, revise or readopt the MFG "through established procedures" with adequate notice to and comment by the public. For all of these reasons, the 2002 MFG is invalid.

SUMMARY

1. The Legislative process for setting workers' compensation laws results in a balance of interests, but the TWCC ignores the statutory mandates and sets medical fee guidelines and policies that hurt injured workers and their health care providers.

2. TWCC has **NOT** revised the Medical Fee Guideline every 2 years as required by state law.

3. The Medical Fee Guideline is woefully inadequate with a 76% decrease in reimbursement for surgical fees.

4. The legality of the 1996 Medical Fee Guideline was argued before the Texas Supreme Court in November of 2003 and a decision is expected at any time.

5. The legality of the 2003 Medical Fee Guideline was argued before the 3rd Court of Appeals on April 14, 2004 and a decision is pending.

It should be clear that the TWCC has repeatedly failed to follow the legislative intent and is woefully inadequate in performing its mandated functions. Therefore the TWCC should be Sunseted and its functions moved to the Texas Department of Insurance or in the alternative the six member part time commission should be replaced with a single full time commissioner as recommended by the Sunset Advisory Commission in their Staff Report April 2004 page 121.

C. M. Schade, MD, Ph.D., a Dallas Fort Worth metroplex pain medicine physician, is a spokesperson for FIX TWCC. Dr. Schade has been practicing pain medicine in Texas for 25 years. He has taken care of hundreds of injured workers.

Dr. Schade is the immediate past president of the Texas Pain Society. The Texas Pain Society advocates for improvements in pain medicine, physician reimbursement, and promotes educational programs.

Dr. Schade is a TMA delegate and represents the Texas Pain Society on the TMA Interspecialty Society Committee and the TMA TWCC Task Force.

Dr. Schade is a founder and the president of Patient Advocates of Texas (PAT). PAT has filed multiple lawsuits against TWCC on behalf of injured workers, businesses, and physicians. PAT's allegation of the TWCC's illegal delegation of authority to insurance companies was upheld by the third court of appeals and was argued before the Texas Supreme Court in November of 2003. A Supreme Court ruling is expected in the near future.