SUBJECT: Revising the workers' compensation system

COMMITTEE: Business and Industry — committee substitute recommended

VOTE: 8 ayes — Giddings, Elkins, Bailey, Bohac, Solomons, Taylor, Vo, Zedler

0 nays

1 absent — Martinez

SENATE VOTE: On final passage, March 15 — 29-0

WITNESSES: No public hearing

BACKGROUND: Workers' compensation is a no-fault, state-supervised system established under the Workers' Compensation Act (Labor Code, Title 5, subtitle A) to pay the medical expenses of employees who are injured on the job and to compensate them for lost earnings. Texas does not require employers to carry workers' compensation insurance. However, employers who carry workers' compensation insurance get protection from unlimited legal liability for employees' on-the-job injuries, and workers receive timely compensation without having to sue their employers. (For more information on the current system, see House Research Organization Focus Report Number 79-3, *Proposals to Change Workers' Compensation*, January 21, 2005.)

The Texas Workers' Compensation Commission is the state agency that oversees much of the workers' compensation system. The agency maintains the list of approved doctors who can treat workers' compensation injuries, sets the rates for medical care reimbursement, and manages the income and medical dispute resolution process for employers, patients, providers, and insurance carriers.

Under the current system, an injured employee who wishes to file a claim must select a primary care provider (also known as a "treating doctor") from TWCC's Approved Doctors List (ADL). Once the worker has chosen a treating doctor, however, changing doctors requires approval

from the commission. Under an approved claim, medical benefits include all treatment deemed reasonable and necessary by the patient's doctor and the insurance carrier.

Injured workers also may be eligible for income benefits. Income benefits are broken into four categories by TWCC:

- Temporary Income Benefits (TIBs) are paid during a period of temporary disability (i.e., time away from work) while the worker recovers from an on-the-job injury. TIBs are paid at a rate equal to 70 percent of the difference between a worker's average weekly wage before the injury and the worker's average weekly wage after the injury;
- Impairment Income Benefits (IIBs), which equal 70 percent of the worker's average weekly wage, are available if the worker has a permanent impairment;
- Supplemental Income Benefits (SIBs) are available if the worker's injury is more serious and the worker is unable to return fully to work. SIBs equal 80 percent of the difference between 80 percent of the worker's average weekly wage and the weekly wage after the injury; and
- Lifetime income benefits equal 75 percent of the worker's average weekly wage, with a 3 percent increase each year.

Benefits accrue at different rates and continue for a certain duration.

TWCC establishes medical fee guidelines, which set the rates that insurers pay for medical benefits related to treatment for a compensable injury. Under current statute, these fee guidelines must follow the reimbursement methodology and billing requirements of the federal Medicare system.

The agency also mediates disputes between parties in the system. Medical fee and medical necessity disputes may be appealed to TWCC, an Independent Review Organization (IRO), the State Office of Administrative Hearings (SOAH), and district court. A dispute over income benefits, disability, compensability, or wages could be appealed in a benefits review conference, a contested case hearing, and an appeals panel at TWCC, then in district court.

While TWCC administers the workers' compensation system, the Texas Department of Insurance (TDI) regulates the solvency and premium rates of insurance carriers. TWCC certifies individual self-insurers, and TDI approves group self-insurers.

The Subsequent Injury Fund is a treasury account containing workers' compensation death benefits for which no beneficiary exists. Two types of payments are made from the fund: payments to injured workers with subsequent on-the-job injuries who qualify for Lifetime Income Benefits and reimbursements to carriers for overpayment of benefits.

DIGEST:

CSSB 5 would make various changes to the state's workers' compensation system including:

- regulation of the workers' compensation system, including abolishing TWCC and transferring its duties to TDI, establishing an Office of Injured Employee Counsel, and authorizing changes in rate setting;
- delivery of medical care, including establishing networks of providers and standards for carriers not employing a network; and
- income benefits, including increasing the maximum benefits and changing the indemnity dispute resolution process.

The bill would take effect September 1, 2005.

REGULATION

CSSB 5 would abolish the Texas Workers' Compensation Commission (TWCC) and transfer its duties to the Texas Department of Insurance (TDI) on March 1, 2006. The bill includes transitional provisions for transferring TWCC to TDI. The bill also would repeal the sunset date of September 1, 2005, for TWCC and establish a new sunset date for the workers' compensation activities at TDI of September 1, 2019.

TDI would review the rules, policies, and practices of the workers' compensation system, evaluate its effectiveness, and identify any statutory barriers to implementing CSSB 5. Initial rules would be required by December 1, 2005, and TDI would have to report to the Legislature by December 1, 2006. The bill also would abolish the Health Care Network Advisory Committee.

Assessment and enforcement. TDI would be required to develop ongoing evaluation methods and a strategic management plan to determine internal compliance with the statute. The plan also would modify the structure of the department as needed to address any shortfalls in the performance of the workers' compensation system in Texas. TDI would be charged with investigating fraud, and CSSB 5 would make failure to report fraud a class B administrative violation (punishable by an administrative penalty of up to $5,000).

At least biennially, TDI would have to evaluate the performance of insurance carriers, provider networks, and health care providers in meeting key regulatory goals. The department would be required to adopt incentives for compliance and methods for publicly recognizing high-performing entities, including permitting them to use that designation in their marketing materials. TDI would establish a two-tier regulatory system and focus its oversight on poor performers. The department could offer carriers incentives for less regulation based on the carriers' comprehensive risk assessment performance determined as part of the department's accident prevention service audits.

Office of Injured Employee Counsel (OIEC). CSSB 5 would establish an office administratively attached to, but independent of, TDI to represent the interests of injured employees. OIEC would represent individual claimants, advocate on behalf of injured employees as a class, and operate an ombudsman program.

For individuals, OIEC would assist injured employees in resolving complaints within the workers' compensation system. It could help with complaints with other state regulatory agencies and referrals for help from social service programs. The office would establish rules for deciding whether to accept or reject specific cases and whether to involve an attorney or an ombudsman, but it would be required to help injured employees who requested assistance and who did not have private counsel or whose dispute involved compensability or the extent of an injury. It could contract with other legal assistance entities to provide part of its services.

As a public advocate, OIEC could assess the impact of workers' compensation policies on injured workers and intervene in rule-making, rate-setting, or judicial processes for matters in which the office had been

involved. The office would monitor the performance and operation of the system concerning return-to-work outcomes. It could advocate for positions the office determined would affect a large number of injured workers, except enforcement or parens patriae proceedings brought by the attorney general.

The injured employee public counsel, appointed by the governor by October 1, 2005, with Senate approval, would serve two-year terms expiring February 1 of each odd-numbered year. In making the appointment, the governor would consider recommendations made by groups that represent wage earners. To be eligible for the position, a candidate would have to be licensed to practice law in Texas, have management experience, and have other experience relevant to workers' compensation and public representation. The bill would restrict the business interests, trade associations, lobbying activities, and employment following the position of public counsel.

OIEC would have injury information collected by TDI and would have access to the same information as a party to a dispute. The office could not represent an employee in an informal dispute resolution, a judicial review, or a hearing about alleged administrative violations or fraud. It also could not intervene in matters involving an insurance carrier's license, certificate of authority, financial qualifications, or other business matters. The office would be required to adopt initial rules by March 1, 2006, report on its activities to the Legislature by December 31 of each even-numbered year and would have a Sunset date of September 1, 2019.

Rates. The TDI commissioner would have to conduct a public rate review hearing by December 1, 2008. Within 30 days following the hearing, each workers' compensation insurance carrier would be required to file its rates and supporting information with TDI. The commissioner would use this information to determine any impact CSSB 5 would have had on rates. If the commissioner found the rates excessive, a mandated rate reduction would be implemented. By January 1, 2009, the commissioner would report findings to the Legislature.

Report cards. The Research and Oversight Council on Workers' Compensation would remain at TDI and be renamed the Workers' Compensation Research and Evaluation Group. In addition to research, the group would be charged with issuing an annual report card, first due by

September 1, 2008, that compared workers' compensation provider networks. The report card would include employee access to care, return-to-work outcomes, health-related outcomes, employee satisfaction with care, and health care costs and utilization.

Complaints and investigations. TDI would have to define in rules what constituted a complaint and a frivolous complaint. It would develop and post on the Internet a standard form for filing a complaint and information about the complaint process.

TDI would have to prioritize complaint investigations based on risk, including such factors as the severity of the claimed violation, whether willful noncompliance were alleged, and if it involved a commissioner order.

Education and safety. TDI would provide education on best practices for return-to-work programs and workplace safety, funded through the existing carrier maintenance tax, and could conduct inspections to determine the adequacy of accident prevention services provided by carriers. It also would be required to inform employers of best practices for return-to-work programs and inform employees of the benefits of timely return to work, to adopt rules to recognize exemplary return-to-work programs, and to permit insurers to offer incentives to employers that offered exemplary return-to-work programs.

Carriers would have to disclose to TDI any premium discounts offered to employers for return-to-work programs and employee safety programs. TDI would use this information to determine whether mandatory programs would improve the operation of the workers' compensation system.

The bill would require carriers who used networks for medical care to inform employees about those networks. TDI would have to ensure that all forms, letters, and brochures were readable and easy to understand and were available in both English and Spanish.

TDI would work with TWC and local workforce development boards to develop a literacy and skills curriculum to bridge the gap between employees and emerging jobs.

Employee information. CSSB 5 would permit employers who carry workers' compensation insurance to obtain from TDI an employee's history of injuries if the request were made prospectively or within 30 days of hire. TDI could not limit the number of requests for information it filled per employer and would include information about workers who had any reports, not just those who had more than two. Information obtained by an employer could not be used in a manner that violated the federal Americans with Disabilities Act.

Confidentiality. Information obtained by TDI as part of a fraud investigation against a carrier would not be available to injured employees, the Office of Injured Employee Counsel, or in other cases where information collected by the department in relation to workers' compensation would be disclosed.

Misuse of department name. CSSB 5 would prohibit misuse of terms such as "Texas Department of Insurance" and "Texas Workers' Compensation" and require TDI to adopt rules about their use. Violation could be penalized with up to a $5,000 fine for each violation. TDI or the Attorney General's Office also could bring an action in Travis County to restrain a violation or threatened violation.

Transfer of dispute duties. Benefit review conferences would be abolished February 28, 2006. Ongoing reviews on that date would be terminated, and a written agreement would be required by April 1, 2006. If a claim were not heard by February 28, the claimant would be entitled to arbitration or a contested case hearing without the informal dispute resolution. The TWCC appeals panels would be abolished April 1, 2006, and any case before them at that time could go before judicial review. SOAH hearings would end on or before February 28, 2006. SOAH would be prohibited from accepting new disputes after September 1, 2005.

Subsequent injury fund. The bill would make the Subsequent Injury Fund a dedicated fund and prohibit its use for general governmental purposes or inclusion in certification of the state budget.

Pilot program. The bill would establish a pilot program for employers to offer an alternative benefit plan under which the employer would pay for health insurance and all associated costs and separately purchase an income benefit plan. The pilot would expire September 1, 2009.

Miscellaneous changes, CSSB 5 also would:

- change the board of directors' structure for the Texas Self Insurer Guaranty Association by adding a certified self-insurer and replacing the two TWCC members with the TDI commissioner;
- require a carrier to evaluate a compensable injury that resulted in more than six weeks away from the job to determine if skilled case management was needed;
- change the state prescription drug formulary for workers' compensation from an open to a closed formulary;
- establish a fee schedule for pharmaceuticals; and
- require TDI to develop rules requiring electronic billing, including submission policies and criteria for granting exceptions to carriers, and rules regarding the doctors who may perform peer review.

MEDICAL CARE

CSSB 5 would permit workers' compensation insurance carriers to arrange medical care for injured workers through a network of providers. An injured employee would have to obtain medical care through the network if the employee lived or worked within the network's service area, except for emergencies or out-of-network referrals. A network doctor who had treated an employee would not be able to serve as the designated doctor for determining compensability. Any insurer authorized to write group health insurance in Texas could write workers' compensation insurance.

If a carrier chose to use a network, all claims after September 1, 2005, would be governed by CSSB 5.

Network adequacy. CSSB 5 would establish the requirements for a network to be certified by TDI, including having a broad choice of health care providers, a sufficient number of providers with admitting procedures at local hospitals, 24-hour daily hospital service, emergency care, business hours telephone customer service access, an advisory panel, and fee-for-service payment arrangements. A carrier would have to arrange for services, including referrals, within 10 days of a request. Specific referrals from a treating doctor would require action within seven days and could be appealed to an Independent Review Organization (IRO). A network would be composed of providers within 30 miles of an employee's home in a non-rural area or within 60 miles in a rural area. If the network failed

to meet that standard, it could file an access plan with TDI. The carrier could arrange for services outside the network if a certain specialty or other type of care were not available within the network's geographic area. Treating doctors in the network would be required to participate in the medical case management process as required by a carrier, including return-to-work planning.

Certification. A carrier could employ only a certified network, a designation that would be bestowed by TDI. A carrier would apply to TDI and include a description and map of providers in the service area, other information about the availability of care under the network, and a description of the carrier's complaint system, and would pay a nonrefundable fee. The TDI commissioner would have 60 days to evaluate and either approve or deny the application. Carriers could appeal a decision through a contested case hearing under the Administrative Procedure Act (Government Code, ch. 2001). The certificate would remain in effect until revoked or suspended by TDI. At any time TDI could review the operations of a provider network to evaluate compliance, including with on-site visits.

Treating doctor. If an employee were injured on the job, the employee would have to select a treating doctor from a list of providers in the carrier's network and sign a form stating that all health care and specialist referrals would be obtained through the treating doctor. The employee would receive information about the complaint process and other pertinent information about workers' compensation. The employee could choose an existing primary care physician or preferred provider under the employee's group health plan as the treating doctor, provided the physician agreed to abide by the terms of the network's contract. If the carrier established networks after the date of the injury and notified the employee, the employee would have to select a network treating doctor within 30 days, except in certain cases where concerns about continuity of care would advise against changing providers, including a terminal illness or acute condition.

If a dispute arose from a decision made by a non-participating doctor an employee had retained as treating doctor, it would be resolved first by the carrier's internal reconsideration process, then by an Independent Review Organization (IRO), if needed.

With the network medical director's permission, an employee with chronic pain or a life-threatening illness could choose a specialist as the treating doctor.

An employee could change treating doctors to another in the network, and the carrier could not deny the change. If the employee wanted to change again, the network could grant permission taking into account whether treatment by that provider had been medically appropriate, if there were conflicts threatening the doctor-patient relationship, and other factors. An employee could appeal a denial.

If an employee had to have an examination to determine compensability, the designated doctor would have to be a provider within the network.

Preauthorization. A network could require preauthorization for any services except emergency care. A carrier would be required to respond to a request for preauthorization within three days. If the request pertained to concurrent hospital care, a response would be required within 24 hours, and if it pertained to post-stabilization treatment of an emergency, one hour. All services by a non-participating provider would be subject to preauthorization and could not be reviewed retrospectively.

Utilization and retrospective reviews. The bill would establish general standards for utilization review, including requiring a list of services that need preauthorization, notification policies, qualifications for providers that perform utilization reviews, and confidentiality. Retrospective review policies would be required to use screening criteria established and updated with physician input. An adverse determination of a review would require notification of the employee or representative and would include the reasons for the determination and procedures for reconsideration, including the availability of an independent review if the case involved a life-threatening condition.

The bill also would establish provisions for reconsidering an adverse determination, including prohibiting the original provider from performing the reconsideration, a 30-day window for an employee to request reconsideration, and timelines for documentation. The reconsideration would be complete within one business day upon receipt of all pertinent information.

Personnel performing utilization and retrospective review would receive training and meet licensing or other experience requirements and could not have incentives to produce specific outcomes.

Contracts. CSSB 5 would establish requirements for contracts between carriers and networks, including a provision that the carrier could not transfer risk by contract and provisions relating to delegated third parties who could work as utilization review agents. It also would set out elements for contracts between networks and providers, including the ability to terminate without cause only after 90 days' written notice, an appeals process for terminations, and a hold harmless clause preventing providers from collecting from employees who had compensable injuries. The bill also would require carriers to have a quality improvement program and monitoring plan to evaluate and oversee the network.

Compensability. Insurance carriers would have to notify TDI, the injured employee, any representative of the injured employee, and any treating doctor of a compensability dispute. Carriers could not deny payment on the grounds of compensability before notifying all parties. A carrier's maximum liability for payments if it successfully contested compensability would be $7,000. For injuries not covered by workers' compensation, the provider or workers' compensation carrier could recover from the employee's group health insurance, if any existed. A group health insurance carrier also could recover from a workers' compensation carrier if an injury later were found to be compensable.

Prompt pay. The provider would be required to submit a claim within 95 days, which the carrier would have to review within 65 days of receipt. If additional clarifying information were required, the provider would have to submit it within 15 days of the carrier's request. Carriers could change procedure codes based on documentation from the provider. The carrier would have to pay, reduce, deny, or choose to audit a claim within 65 days of receipt. An audit would have to be completed within 160 days of the receipt of the claim. If a carrier audited a claim, the carrier would pay 85 percent of the claim at the time of determination. That percentage would be based on the TDI fee guidelines or the network contracted rate. At the end of the audit, the remaining 15 percent would be paid if the service were deemed appropriate, or the carrier would request a refund to be paid within 65 days. Failure to act by the 65th day would constitute a class C administrative violation (punishable by an administrative penalty not to

exceed $1,000). A provider could appeal a carrier's action within 45 days after the carriers' request for a refund, and the carrier would act on the appeal within 45 days after the appeal.

Fee disputes. CSSB 5 would require networks to establish a system by which fee disputes would be resolved. The network would be required to permit providers to file a dispute within 90 days of service. The network would be required to acknowledge the dispute within seven days of receipt and resolve the complaint within 30 days of receipt. The bill also would require an appeal and notification process and a method for recording disputes.

State agencies and local subdivisions. The bill would require state agencies, including institutions in the University of Texas and Texas A&M systems, and political subdivisions to offer workers' compensation medical care through networks if the practicality of doing so were affirmed by the commissioner of TDI. State employees could elect to exhaust sick and annual leave before receiving income benefits.

Prohibited practices. CSSB 5 would prohibit:

- inducements for providers to limit medical services to injured employees;
- carriers transferring liability from one party to another;
- carriers requiring providers to indemnify the carrier;
- limiting providers discussing injured employees' conditions and care; and
- employers or carriers distributing erroneous or misleading information.

Disciplinary actions. A violation of the network provisions would be determined in a contested case under the Administrative Procedure Act (Government Code, ch. 2001) and could result in suspension or revocation of a carrier's license, sanctions, administrative penalties, or a cease and desist order.

Carriers not employing a network. An employee who was injured and whose company's carrier did not employ a network would choose a treating doctor and notify the carrier of that choice either on the date the employee notified the employer of an injury or the date of the first non-

emergency visit. TDI could establish rules defining the roles of a treating doctor. This provider would be responsible for the efficient management of the injured employee's medical care.

An injured employee would be required by a carrier to submit to a single medical examination by the treating doctor to determine compensability. Any treatment not accepted by the carrier as related to a compensable injury would require preauthorization, and an adverse decision of preauthorization could be disputed under an extent of injury dispute. Preauthorized services would not be retrospectively reviewed. Treatment for an injury that was determined compensable could be reviewed only for medical necessity.

Fees for services would be determined by TDI, and disputes would be governed by existing statute and TDI rule. The bill would require that parties engage in an informal dispute resolution process at the carrier before bringing a dispute to TDI. If a dispute could not be resolved, an IRO would review the case and that decision could be appealed under judicial review or in district court. TDI also would be charged with establishing an alternate dispute process for claims involving less money than an IRO review would cost.

Providers who were removed from the approved doctor list compiled by TWCC would not be eligible to provide workers' compensation medical services.

INCOME BENEFITS

State average weekly wage. CSSB 5 would amend the calculation for determining income and death benefits in the workers' compensation system. It would peg the average weekly wage to the one calculated by the Texas Workforce Commission (TWC) to determine unemployment benefits. The bill also would increase maximum benefits to: 130 percent of the state average weekly wage for temporary income benefits; 100 percent for impairment income benefits; 100 percent for supplemental income benefits; 130 percent for death benefits; and 130 percent for lifetime income benefits.

Computing benefits. The bill would reduce from four weeks to 14 days the amount of time a disability would have to continue for compensation to be calculated from the date of disability.

Supplemental income benefits and work. TDI would require supplemental income benefit recipients to demonstrate active efforts to obtain work in order to receive those benefits. An active effort would be defined by a specific number of job applications and other measures appropriate to employment availability. The department also would be responsible for assisting employees with return-to-work efforts, including referring them to TWC and local workforce development boards.

Dispute process. Before filing a dispute with TDI, all parties would be required to show a good faith effort to resolve the matter among themselves, defined as including standards by which a carrier would be required to reconsider a decision and documentation of the effort. An employee would file notice of a dispute, and the carrier would be required to acknowledge the dispute within five business days and resolve it within 15 days.

If the dispute were not resolved informally, the employee could request a contested case hearing within 90 days or longer with a good-cause exemption. The parties would be required to meet in a pre-hearing conference within 30 days to establish disputed issues. The location of a pre-hearing conference would be chosen by the employee. The TDI commissioner could order payment of benefits while the claim was contested. The contested case hearing would be scheduled within 60 days of the receipt of the request for the hearing. A decision in a contested base hearing would be final unless a party sought a judicial review of the matter and would require compliance within 21 days. TDI or a claimant could bring suit to enforce an order or decision and seek costs or penalties related to the suit. Records from the pre-hearing conference or contested case hearing would be admissible.

TDI would have to publish a list of information most helpful in a pre-hearing conference and make it available to all parties. TDI also would have to publish a precedent manual to standardize decision-making in the dispute resolution processes.

SUPPORTERS SAY:

The Texas workers' compensation system is broken: return-to-work rates are too low; utilization is too high; physicians are leaving the system; and premiums are rising. The regulatory structure under TWCC has little strategic direction, inefficient management, and no accountability. Nothing short of a complete overhaul of workers' compensation in Texas will give injured employees the assistance they deserve.

Injured employees bear the brunt of this inefficient system. Compared to other states, Texas workers are off work longer, and fewer return to work within two years. After two years, one-third of injured workers in Texas have not returned to their jobs, and 15 percent never go back. It also is more difficult for Texas workers to find doctors to treat them. According to physician groups, the number of doctors who will treat workers' compensation patients has declined by 50 percent over the last two years.

The regulatory structure is to blame for many of the problems in the workers' compensation system. Two of the most significant hurdles the regulatory structure creates are the time it takes to resolve complaints and an inability to implement measures to stem rising costs of medical care. Applying new fixes over the existing regulatory structure would doom any reform.

TWCC should be abolished because the agency has a long history of failing adequately to manage the workers’ compensation system. The agency is burdened by layers of administration and history, as attempts to reform the workers' compensation system over the years have created a Byzantine administrative structure. For example, the policy goal in the 1980s of moving dispute resolution out of the courts created a duplicative and never-ending dispute resolution and appeal process at TWCC. Also, the six-commissioner structure leads more often to gridlock than to efficient administration.

TDI, with a single commissioner and experience in other insurance products, would be the best place for the new workers' compensation system. A single commissioner is responsive and accountable, and the department has demonstrated efficient regulation of the insurance industry for years. Because the medical side of workers' compensation would be modeled after group health, TDI is the logical place to put the new regulatory structure.

The new Office of Injured Employee Counsel (OIEC) would improve employees' access to information and assistance. Even though workers' compensation would not be under a stand-alone agency, employees actually would have better access because the OIEC would serve as a single point of contact for assistance in obtaining benefits, sorting through disputes with carriers, receiving information about return-to-work, and even helping navigate services at other state agencies. Workers also would have legal counsel provided by the state, something they do not have today.

The bill would do much to improve and encourage better return-to-work outcomes, but mandatory return-to-work would not be practicable for Texas. With such a wide array of jobs and industries that participate in workers' compensation in the state, requiring all employers to bring back injured workers would not be possible. Instead, CSSB 5 would encourage employers by ensuring that patients got the most appropriate medical care and by providing education materials both to workers and employers about the benefits of return to work.

Networks of providers would fix many of the problems in the system. Because networks use primary care doctors to ensure appropriate utilization, injured employees would be treated more efficiently and appropriately. No longer would they be seen for weeks or months on end by a practitioner whose motivation was continued payment by the workers' compensation carrier. There would be no need to require evidence-based medicine or other practice guidelines because networks require their physicians to use best practices and have checks on use, such as preauthorization.

Providers would be better off under a network structure as well. The current system requires retrospective review and can make payment very slow because the carrier has little assurance that the medical service is appropriate. Also, providers are paid a fixed rate under the current system, whereas networks base their negotiations on market rates, so the providers more appropriately can be compensated. TDI would have flexibility in setting rates for non-network services.

Because workers' compensation networks would look like group health networks, the dispute resolution for medical necessity and fee disputes would be removed from the state regulator to the well established and

universally agreed-upon system of independent review and contract agreements. In addition, the bill would offer an alternative to independent review for claims that were too small to justify the cost.

What constitutes an adequate network is clearly defined in this bill and would ensure that all workers in Texas, no matter how remote, had access to care. Requiring the availability of a broad range of medical services within a 30-mile radius in urban areas and 60 miles in rural areas would keep medical care nearby. In areas of the state without sufficient medical resources, the bill would include procedures for out-of-network care. It would be difficult for networks to permit injured employees to leave the network, making the network concept less complete and possibly causing higher utilization or costs.

The bill would include prompt pay protection for providers and carriers to ensure that bills were submitted and paid in a timely manner. The issue of compensability, unique to workers' compensation, would be addressed by requiring carriers to pay for services until the compensability issue was identified by the carrier, but limiting their exposure to $7,000. This would ensure that patients got the timely treatment they needed and that providers would not be left with unpaid bills.

The state should not designate a single accreditation as a mark of approval for providers to treat workers' compensation patients. Insurers who build the networks have their own accreditation requirements that ensure the network is populated with quality providers. There are many accrediting organizations other than URAC, and the state should not endorse one over the others.

There is no need for the state to require that workers receive an insurance card like those issued under group health. Routine health care transactions occur with some frequency for most adults, whereas the convenience of carrying a card with all personal insurance information diminishes for employees who are unlikely to have even a single workers' compensation claim in a year.

In addition to improving the medical side of workers' compensation, CSSB 5 would increase the income benefits that injured workers received. The basis for wages currently used to calculate income benefits lags behind the market and leaves workers under-compensated. The bill would

tie it to the basis used for unemployment, which is higher and tracks the market. The bill would raise benefits by 30 to 40 percent.

CSSB 5 would offer a valuable tool to ensure that businesses benefited from workers' compensation reform. Almost 85 percent of the market is controlled by 15 carriers, which makes it less responsive to market forces. By requiring the TDI commissioner to take a look at rates in the next three years, businesses would be assured that reductions that accrued from the improvements in the system would be passed on through lower premiums. In addition, if the commissioner determined that the market was not working, a mandated rate rollback could be implemented.

This package of changes would represent a new era in workers' compensation for Texas and could lay the groundwork for more participation by employers. The current system is so fraught with problems that many employers choose to go without workers' compensation insurance or to purchase policies outside the system that offer neither employer nor employee significant protections. Making workers' compensation mandatory would not be feasible from an economic development perspective, but making the system better so that more companies join would be.

If the state implemented a "cooling off" requirement before workers signed waivers of liability, workers could go without care. Some companies that do not have workers' compensation insurance still carry an insurance product that would give injured workers some benefits and often ask the worker to sign a waiver of future liability in exchange for access to the benefits. Companies are not required to carry any insurance, and requiring a cooling off period might cause them to withhold medical treatment until the waiver was signed.

Unions' collective bargaining should not be endorsed by this bill by including special provisions concerning the construction industry. An alternative agreement process, such as used in the California construction industry, would not be limited to workers' compensation and could cause employers to be forced into difficult situations. There is some concern as to how well this provision even has worked for some industries in California. Texas should not adopt a provision that would bind the hands of industry or constitute a special carve-out for very few workers.

OPPONENTS SAY:

CSSB 5 would not produce all of the promised improvements in the workers' compensation system. Moving workers' compensation to TDI would be a mistake. Workers' compensation is not an insurance product like property or health insurance. Workers' compensation is a way to manage the relationship between employers and injured workers without involving the courts. Without a dedicated, stand-alone agency, workers would not have adequate influence in the rules governing the system and could be treated unfairly without legal recourse. A better approach would be to take the elements that work at TDI – a single commissioner, streamlined review processes, and an office that represents individuals – and apply them to TWCC.

TDI could have a conflict of interest if workers' compensation were moved under its purview. The agency regulates the carriers who write workers' compensation policies. It should not also administer dispute resolutions between carriers and providers or employees.

The workers' compensation insurance rates review by TDI and the option for mandatory rate-setting are simply not needed in this market. The file-and-use system has worked well since its adoption in the early 1990s, in part because workers' compensation insurance in Texas is a highly competitive market with more than 250 participants. Further, businesses, the customers in this market, are savvy in shopping for lower rates, as opposed to homeowners who may choose an insurance company and stick with it for life. Businesses go where the lower price is when a variety of quality products are offered, as is the case with workers' compensation.

The bill should have more stringent return-to-work requirements. The problem with injured employees returning often is not with the employee, but rather with the employer. Even if the worker is ready to come back at light or modified duty, some employers are reluctant to allow to do so because of fears of subsequent injury or low productivity. The longer an employee stays off work, the less likely the employee is to go back, and that person may end up on permanent disability or public assistance. Texas should seriously encourage employee re-integration with work by requiring employers to accept employees when they were ready to return.

CSSB 5 also would fail to address the suitability of work for injured employees trying to comply with the requirement that they look for work in order to receive Supplemental Income Benefits. The requirement would

be a step in the right direction, but injured employees should not be forced into taking jobs that are far below their skill levels in order to avoid sanctions. The Texas Unemployment Compensation Act and Texas Workforce Commission rules address this issue for unemployed workers because the goal is to get workers back into sustainable, appropriate jobs or careers, which also should be the goal for workers' compensation.

The provision in CSSB 5 that would permit employers to request information about past injuries likely would be pre-empted by the federal Americans With Disabilities Act and should be removed. A 1992 attorney general's opinion (DM-124) determined that the current statute, which pertains to pre-employment inquiries, was pre-empted by the ADA. Even though employers are permitted to ask employees for medical information post-offer, they must ask it of all employees in the same job category, and any exclusion based on the information can be used only for a business necessity, meaning that the job could not be performed or would be threatening to the worker's health or safety and that reasonable accommodation could not be made. It could not be used to disqualify a person out of a fear of future workers' compensation costs.

The clean claims provisions in this bill would not be sufficient to address the issues that come up between carriers and providers in a network arrangement. The definition of what constitutes a "clean claim" and the coordination of payment provisions were negotiated in the process of developing prompt pay laws for group health. Workers' compensation legislation should pick up the same language.

Compensability is a difficult issue to reconcile with prompt pay, and this bill would not completely solve the problem. Although a $7,000 limit on carrier liability would pay for some services, it would not come close to covering spinal surgery or multiple bone scans, for example. A higher limit would be more appropriate, particularly one that floats with the market because any fixed amount could be outpaced by new technology and higher costs within a few years.

Another issue related to compensability would be the ease with which carriers could contest it. Under CSSB 5, carriers would be likely to send a notice of disputed compensability each time they received a claim so that they would not be required to pay more than $7,000 until compensability was resolved. This would leave patients in limbo. They could not use their

group health insurance, and providers would be prohibited from billing the patient, so patients would receive no health care. Carriers should have to show valid reasons for disputing compensability so that the practice would be limited to cases in which a legitimate question existed.

Any review of doctors' treatment decisions should explicitly be conducted by other physicians in the same specialty and with comparable qualifications. Utilization review of an orthopedic surgeon's treatment decisions by a primary care doctor would be meaningless. This bill should ensure reasonable reviews by physicians' peers.

The networks in CSSB 5 have a good basis for adequacy but should go further in defining the skill level or other conditions required when a patient was referred out of the network. This would reduce the likelihood of disputes between out-of-network providers and carriers.

Ownership of the networks by insurers would not be in the best interests of injured employees or employers. Insurers have an overriding goal to maximize profit by reducing costs, which could be in conflict with the injured employee and the employer's interest in appropriate and timely return to work.

Any doctor accredited through URAC, an independent, nonprofit, national organization with accreditation and certification programs for physicians, should be eligible to treat workers' compensation patients, whether or not the provider is in a network. This would give patients meaningful choice in providers and ensure quality treatment.

Because networks are designed to reduce costs and improve treatment outcomes, which should translate into reduced workers' compensation premiums, the bill should ensure that all employers can participate. Carriers might offer network access only to large employers because their business is more valuable. Small employers have experienced similar discrimination in group health where it has been difficult for them to obtain affordable health coverage for their employees.

Any reform of the system should require providers to use evidence-based medicine, as California did in a major overhaul of its system. This system uses guidelines that recommend certain treatment patterns based on the clinical outcomes observed during studies of different practices. It is

similar to the provisions in Texas' Medicaid and community mental health programs that require physicians to follow evidence-based protocols in treating patients. California named a particular treatment guideline in its statute – the American College of Occupational and Environmental Medicine – and authorized the California Workers' Compensation Agency director to add to this guideline or substitute it. The California statute also

linked its definition of what constitutes "reasonable and necessary" medical care to this guideline.

As part of the education and information effort in CSSB 5, the state should require carriers to issue insurance cards with all pertinent workers' compensation information on them. Workers often are unaware of their workers' compensation policy details – or even if their company carries it – which could lead to confusion when they present at a doctor's office for treatment. Just like in group health, the card would reduce administrative burden and errors.

The state should not be in the business of setting reimbursement rates for services but should let the market be the guide. Even though most rates would be negotiated under the network approach, some providers still would be reimbursed directly by carriers that did not use a network or certain specialists. TDI should obtain fair market value information and set a fee schedule that reflects the market. The TDI fee schedule then should be a floor for payment, and providers and carriers should be able to negotiate rates above it, such as cases involving very specialized services.

The bill should include a cooling-off period for employees who are asked immediately to sign a waiver giving up their rights to future recovery in exchange for benefits available from a company that does not carry workers' compensation insurance. Some companies that do not carry workers' compensation insurance provide some benefits to employees if they are injured but require the workers to waive the right to sue. Workers need some time to evaluate their situations before signing releases from liability so that they can make informed decisions.

The bill also should include a provision, similar to those used successfully in California for many years, for alternative agreements for parties in collective bargaining arrangements in the construction industry. It would provide employers and labor a simpler and more streamlined dispute

resolution on matters of mutual interest. In the case of workers' compensation, the employers and workers could use the process to agree on terms, such as what "light work" would mean. A voluntary reporting mechanism should be included so that the state could evaluate whether this alternative agreement arrangement should be expanded to other industries, as California has done recently. The concern that such a provision would be a way for unions to hold something over employers or that it would even affect other industries is a red herring.

OTHER OPPONENTS SAY:

A single-commissioner approach could have negative consequences. Because the workers' compensation system mediates between employers and workers outside the court system, special care is required to guard against bias, which can be accomplished best through joint leadership by both stakeholder groups. Even though workers would have some representation through the Office of Injured Employee Counsel, these types of consumer-voice agencies have no real power. Instead of moving to a single commissioner, the state should return to a three-commissioner panel, which existed in the past under the Industrial Accident Board (the predecessor agency to TWCC). The smaller panel might be more agile in decision making, yet able fairly to represent the diverse interests within the system. It also would resemble TWC's structure, which has three members representing employers, labor, and the public in matters of unemployment insurance and benefits.

NOTES:

As substituted by the House Business and Industry Committee, CSSB 5 is the same as HB 7 by Solomons, which the House passed on March 31 and was reported favorably, as substituted, by the Senate State Affairs Committee on May 6.

The most significant ways in which the Senate-passed version of SB 5 differs from the House committee substitute version are that the Senate version would establish a new stand-alone agency with a single commissioner to administer the workers' compensation system and income benefits would be computed based on 85 percent of the TWC average weekly wage.