

TITLE 28. INSURANCE

PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 133: GENERAL MEDICAL PROVISIONS Title 28 TAC §133.30

1. INTRODUCTION. The Texas Department of Insurance, Division of Workers' Compensation (division) adopts new 28 Texas Administrative Code (TAC) §133.30, *Telemedicine and Telehealth Services*. New §133.30 is adopted with changes to the proposed text published in the March 2, 2018, issue of the *Texas Register* (43 TexReg 1232). The public comment period closed on April 2, 2018, and the division received 11 written comments. In response to written comments, the division is making changes to the proposed text. The division is changing the proposed text by adding two new paragraphs to §133.30(b). The additional paragraphs in the rule will clarify the division's goals and mirror existing Texas regulations by adopting Occupations Code definitions of telemedicine health services and telehealth services by reference. An informal working draft of new §133.30 was published on the division's website on September 22, 2017.

In accordance with Government Code §2001.033, the division's reasoned justification for these rules is set out in this order, which includes the preamble. The following paragraphs set forth a detailed section-by-section description of, and reasoned justification for, all amendments to §133.30.

2. REASONED JUSTIFICATION. Labor Code §402.021, *Goals; Legislative Intent; General Workers' Compensation Mission of Department*, establishes the basic goals of the Texas workers' compensation system, which include ensuring that each injured

employee has access to prompt, high-quality medical care and that each injured employee receives services to facilitate the employee's return to employment as soon as it is considered safe and appropriate. In implementing these goals, the Legislature requires the workers' compensation system to take maximum advantage of technological advances to provide the highest levels of service possible. Telemedicine and telehealth services are currently authorized in the Texas workers' compensation system under 28 TAC §134.203, *Medical Fee Guideline for Professional Services*. Section 134.203 implements Labor Code §413.011, *Reimbursement Policies and Guidelines; Treatment Guidelines and Protocols*, by adopting the most current reimbursement methodologies, models, and values or weights used by the federal Centers for Medicare and Medicaid Services (CMS) specific to Medicare. This includes applicable Medicare payment policies related to coding, billing, and reporting, as well as 42 Code of Federal Regulations (CFR) §410.78, *Telehealth Services*, which authorize payment for telehealth office and other outpatient visits, consultations, examinations, services, etc. if certain conditions are met. These specified Medicare payment policy conditions restrict billing and reimbursement of telemedicine and telehealth services in the workers' compensation system to a specific set of designated services furnished to an injured employee at an originating site as defined by CMS. CMS payment policies further require that the originating site be located in a county outside of a Metropolitan Statistical Area (MSA) or in a rural health professional shortage area (HPSA) located in a rural census tract. Further, originating sites are limited to one of eight defined medical facilities, including a physician or practitioner office, critical access hospital, and a rural health clinic. Thus, pursuant to Medicare payment policies, telemedicine and telehealth

services in the workers' compensation system currently may only be billed and reimbursed when provided to an injured employee at a Medicare authorized originating site located in a HPSA or in a county outside of an MSA.

New §133.30 expands access to telemedicine and telehealth services within the Texas workers' compensation system by authorizing health care providers to bill and be reimbursed for telemedicine or telehealth services regardless of where an injured employee is located at the time services are provided. It creates an exception to Medicare payment policy restrictions requiring that telemedicine or telehealth services be furnished at an originating site and requiring that the originating site is located in a HPSA or county outside an MSA. Instead, under the new rule, a health care provider will be able to bill and be reimbursed for telemedicine or telehealth services provided within the workers' compensation system with no restriction on the geographic area or location of the injured employee at the time the services are provided. Medicare payment policies that restrict billing and reimbursement of telemedicine and telehealth services in the workers' compensation system to a specific set of services designated by CMS remain intact. New §133.30 furthers the legislative intent found in Labor Code §402.021 that the workers' compensation system must take maximum advantage of technological advances and to ensure that injured employees have access to prompt, high-quality medical care.

The division emphasizes that new §133.30 simply creates an exception to the current billing and reimbursement requirements for telemedicine and telehealth services. It does not change who may provide the services, which is established by the individual health care provider's regulatory or licensing board and state law. Health care

providers are encouraged to review their applicable board regulations for information on scope of practice and specific requirements for practicing telemedicine or telehealth.

The division emphasizes that telemedicine or telehealth services are an additional, voluntary option for injured employees and the new rule does not affect the employee's entitlement to initial choice of doctor, pursuant to Labor Code §408.022 or Insurance Code §1305.104. In addition, new §133.30 does not change any other portion of the current billing and reimbursement requirements for telemedicine or telehealth services. New §133.30 restates the existing billing and reimbursement framework for telemedicine and telehealth services and establishes an exception to help expand access to those services.

Section 133.30 addresses **Telemedicine and Telehealth Services**. New §133.30(a) establishes the applicability of new §133.30 by specifying that the section applies to medical billing and reimbursement for telemedicine and telehealth services provided on or after September 1, 2018, in the Texas workers' compensation system, including in workers' compensation health care networks established under Insurance Code Chapter 1305. This subsection is necessary to outline the applicability of new §133.30 in a clear and direct manner. It establishes a delayed applicability date to help allow for ease of implementation, while balancing the goal of new §133.30 to expand access to telemedicine and telehealth services. The applicability of new §133.30 mirrors existing requirements regarding billing and reimbursement for telemedicine and telehealth services found throughout the Labor Code, Insurance Code, and TAC. Labor Code §413.011, *Reimbursement Policies and Guidelines; Treatment Guidelines and Protocols*, requires the division to adopt health care reimbursement policies and

guidelines that reflect the standardized reimbursement structures found in other health care delivery systems with minimal modifications. In order to achieve the required standardization, §413.011 requires the division to adopt the most current reimbursement methodologies, models, and values or weights used by CMS. This includes applicable payment policies related to coding, billing, and reporting. Under §134.203, system participants are required to apply applicable Medicare payment policies for coding, billing, reporting, and reimbursement of professional medical services. "Medicare payment policies" is defined as reimbursement methodologies, models, and values or weights, including its coding, billing, and reporting payment policies set forth by CMS. Thus, CMS payment policies specific to Medicare, including those authorizing payment for telemedicine and telehealth services and providing the required billing, coding, and reporting guidelines for reimbursement of those services, are adopted by reference into the Texas workers' compensation system and system participants are required to bill and reimburse accordingly under §134.203.

New §133.30(a) applies the section's requirements to medical billing and reimbursement for telemedicine and telehealth services in the Texas workers' compensation system, including in health care networks under Insurance Code Chapter 1305. Section 134.203 applies to professional medical services provided in the system other than those provided through a workers' compensation health care network certified pursuant to Insurance Code Chapter 1305, except as provided in Insurance Code Chapter 1305. Thus, while all system participants with non-network claims must bill and reimburse according to CMS payment policies specific to Medicare, those same Medicare payment policies only apply to networks to the extent provided for under

Insurance Code Chapter 1305. Insurance Code §1305.153, *Provider Reimbursement*, states that billing by, and reimbursement to, providers is subject to the requirements of the Labor Code and applicable division rules that are consistent with Insurance Code Chapter 1305. These sections (Texas Administrative Code §134.203 and Insurance Code §1305.153) operate to create a conflict provision that applies Labor Code provisions and division rules regarding billing and reimbursement, such as the Medicare payment policies, to networks as long as they do not conflict with Insurance Code Chapter 1305.

Section 1305.153(a) states that the amount of reimbursement for services provided by a network provider is determined by the contract between the network and the provider or group. Section 1305.153(d) states that applicability of Labor Code provisions and division rules relating to billing and reimbursement of providers cannot be construed to require application of a rule regarding reimbursement if that application would negate the reimbursement amount negotiated by the network. These are express conflicts that negate the applicability §134.203 requirements addressing the reimbursement amount for medical services, including telemedicine and telehealth services. However, there are no similar conflicts regarding billing and reimbursement requirements for telemedicine and telehealth services. Therefore, CMS payment policies specific to Medicare addressing billing and reimbursement, but not the reimbursement amount, apply to networks under Insurance Code Chapter 1305.

In addition, §133.20(c), *Medical Bill Submission by Health Care Provider*, requires health care providers to include correct billing codes from applicable division fee guidelines when submitting medical bills. Section 133.1 applies Chapter 133 to

medical billing and processing for services provided to both injured employees in a network established under Insurance Code Chapter 1305 and those not in a network. As such, §133.30(a) establishes that the requirements of new §133.30 apply to medical billing and reimbursement for telemedicine and telehealth services across the Texas workers' compensation system, including in health care networks under Insurance Code Chapter 1305.

New §133.30(b) defines "telemedicine services" and "telehealth services" as those terms are defined in Occupations Code §111.001. New §133.30(b)(1) adds "'telemedicine services" as telemedicine medical services as defined in Occupations Code §111.001." New §133.30(b)(2) adds "'telehealth services" as telehealth services as defined by Occupations Code §111.001." These additions are being made in response to comments and the change is being made to provide clarity in the rule. Workers' compensation system participants include both physicians and other health care providers, and both telehealth services and telemedicine services may be provided within the system. See, for example, the definition of "health care provider" in Labor Code §401.011(22), *General Definitions*, which includes a health care facility and a health care practitioner. A health care practitioner is defined in §401.011(21) as an individual who is licensed to provide or render and provides or renders health care, or a non-licensed individual who provides or renders health care under the direction or supervision of a doctor. Instead of creating a new, unrecognized definition for telemedicine or telehealth services in the workers' compensation system, new §133.30(b)(1) and (2) mirror existing Texas regulations by adopting the Occupations Code definitions by reference. In addition, the definitions help capture the scope of

telemedicine/telehealth services authorized in Texas, which are then effectively limited through Medicare payment policies.

New §133.30(c) affirms the existing requirement that health care providers must bill for telemedicine and telehealth services according to applicable Medicare payment policies, as defined in §134.203, and the provisions of Chapter 133. As outlined above, telemedicine and telehealth services are currently authorized in the Texas workers' compensation system under §134.203, which implements Labor Code §413.011. Medical billing and reimbursement for telemedicine and telehealth services, including services by network providers under Chapter 1305, must be billed according to applicable requirements found in §134.203 and Chapter 133. New §133.30(c) also affirms the existing billing and reimbursement structure for telemedicine and telehealth services and is necessary to ensure the rule provides a clear and concise framework to system participants. The subsection is also necessary to provide essential context for the exception that follows in subsection (d).

New §133.30(d) establishes an exception to Medicare payment policies by allowing a health care provider to bill and be reimbursed for telemedicine or telehealth services regardless of where the injured employee is located at the time the telemedicine or telehealth services are provided. 42 CFR §410.78 defines "originating site" as the location of an eligible beneficiary at the time the service being furnished via a telecommunications system occurs. Under 42 CFR §410.78(b), Medicare authorizes payment for a specified set of services furnished by an interactive telecommunications system when the enumerated conditions are met, including that the services are furnished to a beneficiary at an authorized originating site and that the originating site is

located in a HPSA or in a county that is not included in an MSA. Authorized originating sites include: (1) the office of a physician or practitioner; (2) a critical access hospital; (3) a rural health clinic; (4) a federally qualified health center; (5) a hospital; (6) a hospital-based or critical access hospital-based renal dialysis center; (7) a skilled nursing facility; and (8) a community mental health center.

The effect of 42 CFR §410.78 is to restrict telemedicine and telehealth services to those provided in rural communities identified as HPSAs or in counties outside of an MSA and even then, only when the injured employee presents at an authorized location. The exception established in new §133.30(d) is necessary to remove this limitation and help expand access to telemedicine and telehealth services in the Texas workers' compensation system. As outlined above, Labor Code §413.011 requires the division to adopt health care reimbursement policies and guidelines that reflect the standardized reimbursement structures found in other health care delivery systems with minimal modifications. Section 134.203 implements Labor Code §413.011 by adopting Medicare payment policies, which include those payment policies relating to telemedicine and telehealth. The exception established in new §133.30(d) is a minimal modification to the adopted Medicare payment policies, and does not change any other portion of the current billing and reimbursement requirements for telemedicine and telehealth services. New §133.30(d) simply allows health care providers to bill and be reimbursed for telemedicine and telehealth services regardless of where an injured employee is located at the time the services are provided.

New §133.30(e) provides that, in the event of a conflict, §133.30 takes precedence over provisions adopted or utilized by CMS. The subsection mirrors similar

conflict provisions found throughout the Texas Administrative Code (see, for example, §134.203) and is necessary to express the division's intent that a conflict between the exception in (d) and Medicare requirements is resolved in favor of the exception. In other words, that health care providers may bill and be reimbursed for telemedicine and telehealth services regardless of the injured employee's location, despite the geographic requirements found in Medicare's payment policies.

3. SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Comment: Several commenters support the division's rule as proposed and are in agreement that the rule will expand access of telemedicine services to injured workers.

Division Response: The division appreciates the supportive comments.

Comment: Commenters support the division's rule as proposed and state that the rule does not change who may provide the services, which is established by the individual health care provider's regulatory or licensing board.

Division Response: The division appreciates the supportive comments and agrees that the division's rule does not address or affect a health care provider's scope of practice in Texas.

Comment: Commenters support the division's rule as proposed and request that the division monitor system participants to ensure that telemedicine is consistent with medical standards, quality of care requirements, and that documentation in medical record keeping is adequate for reimbursement of telemedicine services.

Division Response: The division appreciates the supportive comments. The division will continue to meet its statutory obligation to monitor system participants in accordance with Labor Code Chapters 413 and 414. All system participants play a role

in monitoring activity within the system and should report any potential violations of the Act or division rules to the division.

Comment: Commenter questions how a physical therapist would be able to use their educational tools of differential diagnosis to screen for appropriate medical referral.

Division Response: The division notes that the commenter is asking for guidance on how one might provide health care, which is outside the scope of the proposed rule. The division notes that health care provided in the workers' compensation system must meet applicable legal standards regardless of how the healthcare is provided. Also please note that the division has adopted Medicare payment policies by reference, which only authorize certain services to be delivered via telemedicine or telehealth.

Comment: Commenter expresses concern that by not also expanding the policy to cover other Telehealth Services provided by specialty providers such as Physical Therapists the division will not take advantage of technological advances or ensure that injured employees have access to prompt, high-quality medical care. Commenter strongly urges the addition of physical therapy to the code for Telehealth Services.

Division Response: The division declines to make the suggested change at this time. The division is making minimal modifications to Medicare reimbursement limitations to allow telemedicine and telehealth services to be provided and paid for regardless of where an injured employee is located at the time services are provided. Under §134.203, system participants are required to apply Medicare payment policies, which only authorize payment for certain services delivered via telemedicine or telehealth. The division may expand the types of telemedicine or telehealth services that are reimbursable at a future date.

Comment: Commenter seeks confirmation from the division that the division is only removing Medicare's originating site requirement that the service is only reimbursed if the patient is in an originating site located in a rural Health Professional Shortage Area and that the service is limited to established health care or medical site.

Division Response: The division confirms that goal is to remove the geographic location restrictions and established health care or medical site requirements imposed by Medicare payment policies.

Comment: Commenter is generally supportive of the goal to remove some of the originating site and geographic requirements from the Medicare payment policy requirements for telemedicine or telehealth services provided in the system.

Division Response: The division appreciates the supportive comment.

Comment: Commenter emphasizes the importance of clarity in rulemaking on the topic, as it is necessary to guide physicians and other practitioners in compliance efforts and to ensure patient care is paramount within system. Clarity is also necessary to aid physicians and other practitioners in determining which services are reimbursable within the system.

Division Response: The division agrees that clarity in rulemaking is necessary, thus, this preamble clearly state the division's goal to expand the availability of telemedicine and telehealth services in the workers' compensation system.

Comment: Commenter states that using the telehealth and telemedicine medical service definitions from the Occupations Code creates confusion because the terms are defined very differently from Medicare's use of telehealth/telemedicine service.

Division Response: The division agrees with the commenter and is making changes to the rule text to clarify the rule and to mirror existing Texas regulations by adopting the Occupations Code definitions for telemedicine health services and telehealth services.

Comment: Commenter requests clarification on whether the division's intentions are to follow the more restrictive Medicare perspective on telehealth and telemedicine prior to the passage of Senate Bill 1107 which commenter states was limited to services using only audio and a visual communications. Commenter states that historically Medicare did not reimburse for telephone services. Commenter expresses confusion on which approach the division is taking because subsection (e) appears to remove the more restrictive Medicare perspective.

Division Response: The division adopted Medicare payment policies in 28 TAC §134.203. These payment policies, including billing, coding, and reporting, apply to telemedicine and telehealth services in networks and non-networks. Per Medicare, as a condition of payment, health care providers must use an interactive audio and video telecommunications system that permits real-time communication between the health care provider, at the distant site, and the injured employee, at the originating site.

Comment: Commenter expresses concerns about combining the definition of telemedicine services and telehealth services because it removes the distinction between physicians and other health care providers. Additionally it makes subsection (d) more confusing – referring to “a health care provider” – because it makes it sound as though a health care provider could bill for a physician's telemedicine service even if they are not a physician. Commenter recommends separating the terms or making it clear that a health care provider may bill for an appropriate service.

Division Response: The division agrees that combining telemedicine services and telehealth services into one definition might cause confusion and is making a change to the rule text to clarify the definitions. The division disagrees that using “health care provider” in subsection (d) is confusing. “Health care provider” is a defined term in Labor Code §401.011(22) and means a health care facility or a health care practitioner. A health care practitioner is defined as an individual who is licensed to provide or render and provides or renders health care or a non-licensed individual who provides or renders health care under the direction or supervision of a doctor. In addition, rule §134.203 states in subsection (c) that a health care provider shall apply Medicare payment policies including Medicare coding and billing requirements. This provision accounts for the differences in billing between different health care providers.

Comment: Commenter recommends the Division address the use of *AMA Guides to the Evaluation of Permanent Impairment* and the *Official Disability Guidelines* in telemedicine exams. Commenter states that the use of approved medical guides in telemedicine exams will ensure injured employees obtain consistent medical care on par with on-site visits.

Division Response: The division appreciates the comment, but declines to make recommended changes to the rule text. The division notes that the *The AMA Guides for the Evaluation of Permanent Impairment* are used in the system by doctors to assign impairment ratings to injured employees once injured employees have reached Maximum Medical Improvement (MMI). The billing and reimbursement requirements for these MMI and impairment rating examinations can be found in Chapter 134, Subchapter C. The division notes that the billing codes for these examinations are not

included in the list of telemedicine or telehealth billing codes currently authorized by Medicare's payment policies. Therefore, doctors currently cannot be reimbursed for performing MMI and impairment rating examinations while using telemedicine or telehealth services.

The division also notes that the adopted rule does not change the applicability of the division's adopted treatment guidelines (the *Official Disability Guidelines Treatment in Workers' Comp*) for non-network claims or the certified health care network's adopted treatment guidelines for network claims and that these treatment guidelines should be used regardless of how the healthcare is provided.

Comment: Commenter expresses concern regarding the impact of telemedicine exams on the dispute resolution process. Commenter recommends the division address the use of subpoenas to obtain videos of telemedicine exams. Commenter states that the use of telemedicine exams in the dispute resolution process will help fulfill the legislative requirement found in Labor Code §402.021 that injured employees have access to a fair and accessible dispute resolution process.

Division Response: The division appreciates the comment. However, the comment raises matters outside the scope of the rule. The rule does not alter or expand current regulations relating to the introduction of evidence at a hearing conducted by the division.

4. NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For:

National Association of Mutual Insurance Companies, American Insurance Association, Concentra, Property Casualty Insurers Association of America, Texas Occupational

Therapy Association, Inc., Texas Mutual Insurance Company, Insurance Council of Texas.

For, with changes: Texas Medical Association, Office of Injured Employee Counsel.

Against: None.

Neither for nor against: One individual, Texas Physical Therapy Association.

5. STATUTORY AUTHORITY. New §133.30 is adopted under the authority of Labor Code §401.011, *General Definitions*; Labor Code §402.00111, *Relationship Between Commissioner of Insurance and Commissioner of Workers' Compensation, Separation of Authority, Rulemaking*; Labor Code §402.00116, *Chief Executive*; Labor Code §402.021, *Goals; Legislative Intent; General Workers' Compensation Mission of the Department*; Labor Code §402.061, *Adoption of Rules*; Labor Code §413.011, *Reimbursement Policies and Guidelines; Treatment Guidelines and Protocols*; Labor Code 413.0511, *Medical Advisor*; Insurance Code §1305.003, *Limitations on Applicability*; and, Insurance Code §1305.153, *Provider Reimbursement*.

Labor Code §401.011 defines a health care provider to include a health care facility and a health care practitioner, and defines a health care practitioner as an individual licensed to provide or render and provides or renders health care or a non-licensed individual under the direction or supervision of a doctor.

Labor Code §402.00111(a) states that, except as otherwise provided, the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code.

Labor Code §402.00116 establishes the commissioner of workers' compensation as the division's chief executive and administrative officer, and requires the commissioner to administer and enforce the Act.

Labor Code §402.021 states two basic goals of the Texas workers' compensation system are to ensure that each employee has access to prompt, high-quality medical care and receives services to facilitate the employee's return to employment as soon as it is safe and appropriate. In implementing these goals, the system must take maximum advantage of technological advances to provide the highest levels of service possible to system participants.

Labor Code §402.061 authorizes the commissioner to adopt rules as necessary for the implementation and enforcement of the Act.

Labor Code §413.011 requires the commissioner to adopt health care reimbursement policies and guidelines that reflect the standardized reimbursement structures found in other health care delivery systems with minimal modifications, and in order to achieve the required standardization, the commissioner must adopt the most current reimbursement methodologies, models, and values or weights, including those related to coding billing, and reporting, used by the federal Centers for Medicare and Medicaid Services.

Labor Code §413.0511 states that the medical advisor shall make recommendations regarding the adoption of rules and policies to develop, maintain, and review guidelines as provided by §413.011.

Insurance Code §1305.003 states that in the event of a conflict between the Act and Chapter 1305 under a number of circumstances, Chapter 1305 prevails.

Insurance Code §1305.153 states that billing by, and reimbursement to, contracted and out-of-network providers is subject to the requirements of the Act and applicable rules of the commissioner that are consistent with Chapter 1305.

6. TEXT.

§133.30. Telemedicine and Telehealth Services.

(a) This section applies to medical billing and reimbursement for telemedicine and telehealth services provided on or after September 1, 2018, to injured employees in the Texas workers' compensation system, including injured employees subject to a workers' compensation health care network established under Insurance Code Chapter 1305.

(b) For the purposes of this section:

(1) "telemedicine services" means telemedicine medical services as defined in Occupations Code §111.001; and

(2) "telehealth services" means telehealth services as defined in Occupations Code §111.001.

(c) Except as provided in subsection (d) of this section, a health care provider must bill for telemedicine and telehealth services according to applicable:

(1) Medicare payment policies, as defined in §134.203 of this title; and

(2) provisions of Chapter 133 of this title.

(d) A health care provider may bill and be reimbursed for telemedicine or telehealth services regardless of where the injured employee is located at the time the telemedicine or telehealth services are provided.

(e) The provisions of this section take precedence over any conflicting provisions adopted or utilized by the Centers for Medicare and Medicaid Services in administering the Medicare program.

CERTIFICATION. This agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas, on _____, 2018.

Nicholas Canaday III
General Counsel
Texas Department of Insurance,
Division of Workers' Compensation

The commissioner adopts new §133.30.

W. Ryan Brannan
Commissioner of Workers' Compensation

COMMISSIONER'S ORDER NO. _____

ATTEST:

X

Nicholas Canaday III
General Counsel
Texas Department of Insurance,
Division of Workers' Compensation

COMMISSIONER'S ORDER NO. _____