**TITLE 28. INSURANCE**

**PART 2. TEXAS DEPARTMENT OF INSURANCE,**

**DIVISION OF WORKERS' COMPENSATION**

**CHAPTER 126. GENERAL PROVISIONS APPLICABLE TO ALL BENEFITS**

**NEW: 28 TAC §126.17**

**ADOPTION**

The Commissioner of Workers' Compensation (Commissioner) of the Texas Department of Insurance (Department), Division of Workers' Compensation (Division) adopts new §126.17 concerning Guidelines for Examination by a Treating Doctor or Referral Doctor After a Designated Doctor Examination to Address Issues Other Than Certification of Maximum Medical Improvement and the Evaluation of Permanent Impairment with changes to the proposed text as published in the October 5, 2012, issue of the *Texas Register* (37 TexReg 7868).

The Division published an informal draft of the proposed section on the Division's website from August 2, 2012, until August 23, 2012, and received seven informal comments on the informal draft rule. Subsequent changes to the rule text were made based on the informal comments. The new section was proposed in the October 5, 2012, issue of the *Texas Register* (37 TexReg 7868). A public hearing on the proposal was heard on October 15, 2012. The public comment period closed on November 5, 2012. The Division received 12 public comments.

Proposed §126.17(a) is being adopted with a change to subsection (a) in response to public comment. The adopted change, however, does not materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice. The change is described below.

Based on public comment received, the Division has revised the text of §127.17(a) for clarity. The revised text clarifies that an examination by the injured employee's treating doctor or another doctor to whom the injured employee is referred by the treating doctor to determine any issue other than certification of maximum medical improvement and evaluation of permanent impairment may be appropriate after a designated doctor examination under the circumstances prescribed in §126.17(a)(1) - (3). As explained in the Division's response to comment §126.17(a) below, the Division addressed the commenter's concern with clarifying language because Labor Code §408.0041(f-2) governs post-designated doctor examinations on maximum medical improvement and impairment rating while Labor Code §408.0041(f-4) governs post-designated doctor examinations on issues other than certification of maximum medical improvement and the evaluation of permanent impairment.

In accordance with Government Code §2001.033(a)(1), the Division's reasoned justification for this rule is set out in this order, which includes the preamble. The preamble contains a summary of the factual basis of the rule, a summary of comments received from interested parties, the names of entities who commented and whether they were in support of or in opposition to the adoption of the rule, and the reasons why the Division agrees or disagrees with the comments and recommendations.

This new section is adopted to implement statutory amendments in House Bill 2605, enacted by the 82nd Legislature, Regular Session, effective September 1, 2011, (HB 2605) which codify into the Texas Workers' Compensation Act (Act) the ability of an injured employee who is required to be examined by a designated doctor to request an examination by the injured employee's treating doctor or a referral doctor to determine the issue(s) decided by the designated doctor.

Specifically, HB 2605 amended Labor Code §408.0041 by adding subsections (f-2) and (f-4). Under Labor Code §408.0041(f-2), an injured employee required to be examined by a designated doctor may request a medical examination to determine maximum medical improvement and the injured employee's impairment rating from the injured employee's treating doctor or another doctor to whom the injured employee is referred by the treating doctor if the designated doctor's opinion is the injured employee's first evaluation of maximum medical improvement and impairment rating and the injured employee is not satisfied with the designated doctor's report. Labor Code §408.0041(f-4) requires the Commissioner by rule to adopt guidelines prescribing the circumstances under which an examination by the injured employee's treating doctor or another doctor to whom the injured employee is referred by the treating doctor to determine any issue under Labor Code §408.0041(a), other than an examination under Labor Code §408.0041(f-2), may be appropriate.

Whereas Labor Code §408.0041(f-2) governs post-designated doctor examinations on maximum medical improvement and impairment rating, the rules required by Labor Code §408.0041(f-4) govern post-designated doctor examinations on issues other than certification of maximum medical improvement and the evaluation of permanent impairment. This adopted new section implements the requirements of Labor Code §408.0041(f-4).

**Adopted New §126.17**

Adopted new §126.17 sets forth guidelines prescribing the circumstances under which an examination by a treating doctor or referral doctor to determine any issue other than certification of maximum medical improvement and the evaluation of impairment rating, may be appropriate. This new rule is necessary in order to implement Labor Code §408.0041(f-4) which requires the Commissioner by rule to adopt such guidelines.

**Adopted New §126.17(a)**

Adopted new §126.17(a) provides that an examination by the injured employee's treating doctor or another doctor to whom the injured employee is referred by the treating doctor to determine any issue other than certification of maximum medical improvement and the evaluation of permanent impairment may be appropriate after a designated doctor examination if: (1) the designated doctor issued an opinion on the issue; (2) the injured employee is not satisfied with the designated doctor's opinion; and (3) the treating doctor or a referral doctor has not already provided the injured employee with a written report that meets the standard described by subsection (b) of this new section on the issue addressed by the designated doctor. These prescribed circumstances are necessary in order to allow the injured employee to seek a second opinion of the designated doctor's report only when a dispute with the designated doctor report exists. The prescribed circumstances therefore are designed to allow a treating doctor or referral doctor examination after a designated doctor examination only when the injured employee is not satisfied with the designated doctor's decision on the issue and the treating doctor or a referral doctor has not already provided the injured employee with a written report that can be used to dispute the designated doctor's report. Additionally, the prescribed circumstances are necessary in order to prevent duplicative examinations by the treating doctor or a referral doctor on the issue(s) addressed by the designated doctor which could impose unnecessary costs on the workers' compensation system.

**Adopted New §126.17(b)**

Adopted new §126.17(b) provides that the treating or the referral doctor shall complete a narrative report. The report should include objective findings of the examination and an analysis that explains how the objective findings lead to the conclusion reached by the doctor in order to be useful to and assist the injured employee in dispute resolution. This report must be filed with the

insurance carrier, the injured employee, and the injured employee's representative. Notwithstanding §129.5 of this title (relating to Work Status Reports), if the treating doctor or the referral doctor examines the injured employee to address an issue relating to return to work, the doctor must also file a Work Status Report. A narrative report is necessary because it documents the doctor's findings. The direction of what this report should contain is necessary in order to ensure that the report is of sufficient quality to be useful in the dispute resolution process if the injured employee is not satisfied with the designated doctor's opinion, which, by statute, has presumptive weight. Additionally, this subsection is necessary in order to ensure that all parties have notice of the treating or referral doctor's opinion on the issue(s) that was the subject of the examination.

**Adopted New §126.17(c)**

Adopted new §126.17(c) provides that the insurance carrier shall reimburse the injured employee reasonable travel expenses incurred as specified in Chapter 134, Subchapter B of this title (relating to Miscellaneous Reimbursement) in attending an appropriate medical examination. This adopted subsection is necessary to clarify that existing Division rules in Chapter 134, Subchapter B of this title that govern reimbursement of travel expenses will apply as specified in those rules when an injured employee attends an examination that is appropriate under this adopted new section.

**Adopted New §126.17(d)**

Adopted new §126.17(d) provides that nothing in §126.17 is construed to limit or prohibit the injured employee from obtaining reasonable and necessary medical care for the compensable injury or from obtaining a written report from a treating doctor or a referral doctor on any issue under Labor Code §408.0041(a)(3) – (6) prior to a designated doctor examination. This adopted new subsection is necessary in order to provide clarity and to prevent anyone from construing this

section in a manner that would prevent an injured employee from obtaining any medical benefit or written report the injured employee is entitled to under Labor Code Title 5 and Division rules. This adopted new subsection also clarifies that §126.17 does not limit an injured employee's ability to obtain a written report from a treating or referral doctor prior to a designated doctor examination since adopted new §126.17 provides guidelines for the appropriateness of these examinations after a designated doctor examination.

**SUMMARY OF COMMENTS AND AGENCY RESPONSES.**

**General:** Commenters appreciates the hard work of Division staff on the proposed rule. Commenters support the adoption of the new rule as it is currently proposed and does not see a need for any changes to the rule as the rule tracks the intent of the Texas Legislature as expressed in Labor Code §408.0041(f-2) and (f-4). A commenter notes that the Division made numerous changes after publication of the informal draft proposal which provide greater clarity to the rule.

**Agency Response:** The Division appreciates the support.

**General:** Commenters generally question the wisdom of allowing treating doctors and referral doctors making these opinions without safeguards that would ensure their impartiality when making their opinions. For example, the commenters recommend the rule contain provisions similar to those for designated doctors and required medical examiners which would prohibit the doctor conducting this examination from being in the treating doctor's Certified Workers' Compensation Healthcare Network (certified network) or having other disqualifying associations in order to provide a fair and unbiased opinion and avoid any potential adverse actions for the injured employee. The commenters believe this kind of necessary independence is essential to provide

and maintain a fair and unbiased opinion of the evaluating doctor similar to that of a designated doctor.

**Agency Response:**

The Division disagrees with the comment and recommendation. This rule implements the provisions of Labor Code §408.0041(f-4) which requires the Commissioner by rule to adopt guidelines prescribing the circumstances under which an examination by the injured employee's treating doctor or another doctor to whom the injured employee is referred by the treating doctor to determine any issue under Labor Code §408.0041(a), other than maximum medical improvement and impairment rating, may be appropriate. This statute codifies into the Act examinations that were already being performed in the workers' compensation system and this rule prescribes guidelines under which these examinations may be appropriate as required by statute. Labor Code §408.0041(f-4) specifies the examination be conducted by the injured employee's treating doctor or a referral doctor and the statute does not include the limitations requested by the commenter in which the treating doctor or referral doctor may perform the examination. For claims that are in a network certified under Insurance Code Chapter 1305, the Division expects treating doctors to make their referrals to other network doctors as required by Insurance Code Chapter 1305. Requirements similar to those for designated doctors and required medical examiners, including prohibiting certified network or other affiliations to the treating doctor, do not make any sense in this context.

**General:** Commenters recommend that the doctor performing the evaluation be certified by the Division, properly trained and currently eligible and qualified to perform impairment rating evaluations.

**Agency Response:** The Division disagrees. The examination in this rule is not for maximum medical improvement and impairment rating, therefore there are no eligibility and certification requirements requested by commenters for examinations in §126.17(a).

**General:** Commenters object to the reimbursement level being referenced to that of an established patient office visit. The commenters believe the appropriate allowable reimbursement should be tied to the level of work as that of a designated doctor because the level of service would essentially be equivalent to that of a designated doctor and should have the same reimbursement level of a designated doctor as provided in the applicable Division rules.

**Agency Response:** The Division disagrees. This comment pertains to reimbursement levels which are governed by Division rules in Chapter 134 of this title. This comment is therefore outside the scope of this rule which implements Labor Code §408.0041(f-4). As stated in the proposal, the Division anticipates treating and referral doctors who conduct these examinations under this rule will bill for these examinations using existing evaluation and management codes indicating that an office visit occurred, which is consistent with the manner that health care providers currently use to bill for these examinations.

**General:** Commenters recommend a provision requiring and allowing the evaluating doctor to review all of the medical records prior to rendering a decision disputing a designated doctor who has a similar requirement.

**Agency Response:** The Division disagrees. A provision in this rule requiring and allowing the evaluating doctor to review all of the medical records prior to rendering a decision disputing a designated doctor is not necessary because, as a practical matter, the treating doctor generates

most of the injured employee's medical records. Further, under the adopted §126.17(b) requirements, the treating doctor or a referral doctor shall complete a narrative report which should include objective findings of the examination and an analysis that explains how the objective findings lead to the conclusion reached by the doctor. Preparing a narrative report requirement will necessarily involve the treating doctor or referral doctor to review appropriate medical records. Finally, unlike designated doctor examinations, the treating doctor or referral doctor examinations are not ordered by the Division.

**General:** A commenter suggests providing or referencing a mechanism to permit a designated doctor to clarify any issues per Division-initiated or carrier-requested Letter of Clarification (LOC) once the injured employee requests a post-designated treating doctor examination. LOCs may avoid the necessity of post-designated treating doctor examinations in appropriate circumstances and lower system expense.

**Agency Response:** The Division disagrees and clarifies that requesting an LOC regarding designated doctor reports is addressed by §127.20 of this title (relating to Requesting a Letter of Clarification Regarding Designated Doctor Reports). As such, there is already a mechanism that can be utilized as suggested by the commenter and nothing in this rule prohibits that use. Furthermore, Labor Code §408.0041(f-4) requires the Commissioner by rule to adopt guidelines for these examinations by a treating or referral doctor after a designated doctor examination.

**General:** A commenter states that the rule does not provide for consequences of a no-show for the examination, the commenter also suggests that the Division may wish to emphasize the

necessity of follow-through, limit availability in situations of abuse, or provide that no-shows do not create liability under §130.2(b)(3) or (c).

**Agency Response:** The Division disagrees and clarifies that the examination which is the subject of this rule is not a Division-ordered examination. The natural consequence of a "no show" is the injured employee's inability to get the second opinion that could be used in the dispute resolution process. The Division is not clear as to what liability under §130.2(b)(3) or (c) the commenter is referring to as those subdivisions do not exist in the rule; however, assuming commenter is referring to liability for reimbursement, the Division clarifies there should be no bill for service that is not rendered.

**General:** A commenter disapproves of the rule proposal and expresses concern with some doctors gaming the system. The commenter also believes the proposed rule has a potential for abuse by workers' compensation attorneys who commenter says have their own list of consulting designated doctors. The commenter opines that the proposed rule makes it easier to challenge sound designated doctor evaluations and recommends ensuring challenges are backed with facts, references to contemporary medical literature, applied anatomy and physiology, the laws of physics, causation, MDA, ODG and objective evidence. The commenter recommends that subjective complaints used to validate a challenge should automatically invalidate the challenge, insurance carriers have the ability to withhold payment if a treating doctor report is suspect and that such opposing reports go to the Medical Qualify Review Panel (MQRP) to settle the differences. The commenter also opines that the proposed rule makes it easier to obtain a second opinion from treating doctors and will cost insurance premiums to rise. To avoid potential problems, commenter recommends a system wherein if an injured employee desires a second

designated doctor opinion, the Division would randomly assign a designated doctor from a designated doctor list prepared by the Division.

**Agency Response:** The Division disagrees. First, as stated, this rule is necessary because Labor Code §408.0041(f-4) requires the Commissioner by rule to prescribe the circumstances under which these treating doctor and referral doctor examinations may be appropriate. Next, the Division notes that this statute codifies into the Act examinations that were already being performed in the workers' compensation system and this adopted rule prescribes guidelines under which these examinations may be appropriate as required by statute.

The Division disagrees with rule modifications in response to commenter's statements that challenges to a designated doctor report should be backed up with facts, objective evidence, and references to relevant medical authority; subjective complaint's used to validate a challenge should automatically invalidate the challenge; insurance carriers have the ability to withhold payment if a treating doctor report is suspect; and that such opposing reports go to the Medical Qualify Review Panel (MQRP) to settle the differences. Any changes to the rule are unnecessary because commenter's concerns are already adequately addressed by the adopted rule and other Division processes. First, the adopted rule provides that the required narrative report from the treating or referral doctor should include objective findings of the examination and an analysis that explains how the objective findings lead to the conclusion reached by the doctor. Second, should an examination result in a report in opposition to the designated doctor's opinion and that report be used to dispute the designated doctor's opinion, what weight to give the opposing report is best determined by an impartial hearings officer in the Division's dispute resolution process who will be able to examine the opposing reports, hear arguments from both sides to the dispute, and

determine what weight each report is due considering all of the facts and circumstances and applicable legal principles.

Regarding easier second opinions and rising insurance premiums, §126.17(a) prescribes the circumstances under which these treating doctor and referral doctor examinations may be appropriate. The prescribed circumstances prevent duplicative examinations by the treating doctor or a referral doctor on the issue(s) decided by the designated doctor and prevent unnecessary costs on the workers' compensation system.

Finally, the Division disagrees with commenter's alternative system that would involve the random assignment of a designated doctor from a Division list. The recommended action is outside the scope of the rule which is to implement Labor Code §408.0041(f-4) and is not necessary in prescribing guidelines for examination by a treating doctor or referral doctor after a designated doctor examination to address issues other than certification of maximum medical improvement and the evaluation of permanent impairment.

**§126.17(a):** A commenter expresses concern that proposed §126.17(a) could be interpreted as authorizing a treating doctor or another doctor to examine an injured employee to determine issues similar to (1) the impairment caused by the compensable injury or (2) the attainment of maximum medical improvement, which is contrary to the language in Labor Code §408.0041(f-2) and (f-4). The commenter recommends clarifying rule language.

**Agency Response**: The Division disagrees. Labor Code §408.0041(f-2) governs post-designated doctor examinations by treating doctors and referral doctors to determine impairment rating and maximum medical improvement, issues set out in Labor Code §408.0041(a)(1) and (2), respectively. Labor Code 408.0041(f-4) governs post-designated doctor examinations by treating

doctors and referral doctors on any issue under Labor Code 408.0041(a), other than an examination under Labor Code §408.0041(f-2) which as stated only governs examinations to determine impairment rating and maximum medical improvement. Nothing in the plain language of Labor Code §408.0041(f-2) indicates that it is intended to govern similar issues under Labor Code §408.0041(a)(6). Thus, a fair interpretation of these statutes is that similar issues under Labor Code §408.0041(a)(6) are governed by Labor Code §408.0041(f-4) and this rule adopted in accordance with Labor Code §408.0041(f-4).

Although the Division disagrees with the commenter's recommended language because it is not consistent with the statutory provisions under Labor Code §408.0041(a)(3) - (6) which describe the issue(s) the examination may address, the Division revised the text for clarity (see underlined) with no substantive changes. The text of § 126.17(a) now reads: (a) An examination by the injured employee's treating doctor or another doctor to whom the injured employee is referred by the treating doctor to determine any issue other than certification of maximum medical improvement and the evaluation of permanent impairment may be appropriate after a designated doctor examination if: (1) the designated doctor issued an opinion on the issue; (2) the injured employee is not satisfied with the designated doctor's opinion; and (3) the treating doctor or the referral doctor has not already provided the injured employee with a written report that meets the standard described by subsection (b) of this section on the issue addressed by the designated doctor.

**§126.17(a):** A commenter opines that the Division's proposed three requirements for a subsequent examination are much too lenient. The first two proposed conditions, that the designated doctor issued an opinion and that the injured employee is not satisfied with the opinion,

are really not standards at all because they are self-evident. Thus, the only actual proposed requirement to obtain a subsequent examination is that the treating doctor originally failed to provide a written report including objective findings and an analysis of how the objective findings lead to the doctor's conclusion. This sole requirement seems more like an invitation for treating doctors not to complete a thorough objective narrative report making it an inadequate safeguard to protect against unnecessary, costly and time-delaying requests for subsequent medical examinations. Lack of meaningful standards means both costs and delays will multiply during the dispute resolution process, frustrating the goals of the designated doctor process, increasing costs for Texas employers who participate in the workers' compensation system with no ultimate benefit for the injured employee. The proposed rule should be modified to set more appropriate standards. The commenter recommends mirroring the requirement under Labor Code §408.0041(f-2) where a subsequent evaluation is only permitted when the designated doctor's opinion is the first evaluation received by the injured employee on the issue and the injured employee is not satisfied with the opinion. To save costs and avoid delay, the treating doctor or the injured employee's representative should set forth valid objective, evidence-based medical reasons for disputing the designated doctor's opinion to justify the expense and time.

**Agency Response**: The Division disagrees that the guidelines for examination by a treating doctor or referral doctor after a designated doctor examination to address issues other than the certification of maximum medical improvement and the evaluation of impairment rating are too lenient and that they are inconsistent with the legislative purpose of the designated doctor system.

The rule implements Labor Code §408.0041(f-4) which requires the Commissioner by rule to adopt guidelines prescribing the circumstances under which an examination by the injured employee's treating doctor, or another doctor to whom the injured employee is referred by the

treating doctor to determine any issue under Labor Code §408.0041(a), other than an examination under Labor Code §408.0041(f-2), may be appropriate. The guidelines adopted under Labor Code §408.0041(f-4) are tailored to achieve the legislative objective of this legislation in that it provides that these examinations may be appropriate when the designated doctor issued an opinion on the issue; the injured employee is not satisfied with the designated doctor's opinion; and the treating doctor or the referral doctor has not already provided the injured employee with a written report that meets the required standard which should include objective findings of the examination and an analysis that explains how the objective findings lead to the conclusion reached by the doctor. Additionally, a narrative report is necessary in order for there to be documentation of the doctor's findings that can be used in the dispute resolution process. More stringent standards would not have achieved the legislative objective.

In enacting Labor Code §408.0041(f-4), the Legislature codified into the Act post-designated doctor examinations by treating doctors and referral doctors that were already occurring in the workers' compensation system. Prior to the adoption of this rule, there was no guidance as to when these treating doctor examinations post-designated doctor examination were appropriate. This rule establishes reasonable circumstances under which these examinations may be appropriate as required by statute. This rule is not intended to allow for reimbursement to treating doctors and referral doctors who engage in gaming the system that result in unnecessary, costly and time-delaying requests for subsequent examinations. The Division will monitor the implementation of this rule and should abusive activities occur, the Division will revisit this rule and make necessary changes.

The Division disagrees with commenter's suggestion that the rule mirror the first evaluation requirement under Labor Code §408.0041(f-2). This rule provides parity regarding required

medical examinations for injured employees. Whereas §126.6 of this title (relating to Required Medical Examination) provides an insurance carrier the ability to request a Division-ordered examination, this rule provides a similar mechanism for an injured employee to potentially get a second opinion to be used in the Division's dispute resolution process, the outcome of which will be decided in the Division's dispute resolution process. Additionally, Labor Code §408.0041(f-4) issues have less sense of finality than the issues covered by Labor Code §408.0041(f-2) therefore there may be more than one designated doctor examination to address these issues over the life of the claim and as a result, there may be more than one treating doctor examination. The Division also disagrees with commenter's second suggested requirement that would require the treating doctor or the injured employee's representative setting forth valid objective, evidence-based medical reasons for disputing the designated doctor's opinion to justify the expense and time as it may be too strict of a standard because such evidence may be unavailable or nonexistent. In fact, the purpose of Labor Code §408.0041(f-4) and this rule is to provide a mechanism for the injured employee to obtain such medical evidence.

**§126.17(a)(3):** A commenter is concerned the term "issue" is too broad. It appears that this provision may unnecessarily limit the ability of the treating doctor or a referral doctor to address some questions that a designated doctor addresses simply because the doctor has addressed a similar issue in the past. The commenter recommends clarification that the treating doctor's or a referral doctor's written report on an issue in one period will not prevent the doctor from addressing similar questions for a different period. The commenter recommends revising the subsection by adding "precise" before "issue" to clarify.

**Agency Response:** The Division disagrees that the term issue is too broad and declines to revise the subsection because it is not necessary. The "issue" in question is the issue the designated doctor was assigned by the Division to address as opposed to the issue in general. The Division may order a designated doctor to address an issue under Labor Code §408.0041(a) such as different quarters and qualifying periods for supplemental income benefits, different periods of return to work or different activity restrictions.

**§126.17(b):** A commenter recommends striking language that the narrative report "includes objective findings of the examination and an analysis that explains how the objective findings lead to the conclusion reached by the doctor." The report from the treating doctor or a referral doctor is designed to function in exactly the same way as the report from the post- designated doctor required medical examination (RME) doctor. The commenter notes that §126.6(h), the subsection requiring that the RME file a narrative report, does not contain the same requirements of the narrative report. It is unclear why the report from the treating doctor or referral doctor should be held to a standard not required of the RME's report. The commenter also notes the purpose of this provision is primarily to facilitate payment to the treating or referral doctor when a report is needed by the injured employee to challenge a designated doctor report and believes this provision introduces subjectivity on the adequacy of the report and arguably calls into question payment for the report, the primary purpose of this rule.

**Agency Response:** The Division disagrees that the rule language as proposed should be stricken. Objective findings of the examination and an analysis that explains how the objective findings lead to the conclusion reached by the doctor are necessary because they document the doctor's findings sufficiently. The direction of what this report should contain is necessary in order

to ensure that the report is of sufficient quality to be useful in the dispute resolution process if the injured employee is not satisfied with the designated doctor's opinion, which, by statute, has presumptive weight. The quality of the report provides evidence to assist in a prompt and fair dispute resolution process, one of the basic goals of the workers' compensation system under Labor Code §402.021. Contrary to the commenter's assertion, "includes objective findings of the examination and an analysis that explains how the objective findings lead to the conclusion reached by the doctor" is consistent with §126.6(e) of this title (relating to Required Medical Examination). Because the narrative report should include objective findings of the examination and an analysis that explains how the objective findings lead to the conclusion reached by the doctor, it does not introduce subjectivity on the issue of adequacy of the report. The Division disagrees that the purpose of this provision is primarily to facilitate payment to the treating or referral doctor when a report is needed by the injured employee to challenge a designated doctor report. The purpose of the rule is to implement Labor Code §408.0041(f-4).

**§126.17(b)** A commenter suggests Office of Injured Employee (OIEC) Ombudsmen should be included as lay representatives when the report is required to be filed with the insurance carrier, the injured employee and the employee's representative. The commenter believes the addition of "including ombudsman" in the third sentence is necessary because injured employees often forget to bring documents to the Ombudsmen or misplace documents sent to them. If Ombudsmen have the information necessary to assist injured employees, the system operates more smoothly and effectively.

**Agency Response:** The Division disagrees. This subsection properly limits the parties to representatives because lay representatives, pursuant to §150.3 of this title (relating to

Representatives: Written Authorization Required), must submit written verification to the Division that the person is representing an injured employee. The Division may not have notice, however, of when an OIEC ombudsman is participating on the claim, making it difficult to determine if a particular ombudsman is appropriately included in this subsection for a particular claim. Additionally, whether OIEC ombudsmen should qualify as lay representatives under §150.3 of this title is outside the scope this rule.

**§126.17(c):** A commenter seeks clarification regarding travel reimbursement. Commenter suggests that proposed subsection (c) lends itself to an argument that the insurance carrier must reimburse the injured employee if they travel more than 30 miles to attend the "appropriate medical examination" rather than predicating the entitlement to the availability of medical treatment and provides an example. The commenter recommends deleting this subsection and allowing the provisions of §134.110 of this title (relating to Reimbursement of Injured Employee for Travel Expenses Incurred) to control the manner in which injured employees are reimbursed for necessary travel. In the alternative, commenter recommends modifying the subsection as proposed to state: "The insurance carrier shall reimburse the injured employee for all reasonable travel expenses related to attending an appropriate medical examination under this section subject the entitlement and reimbursement provisions specified in Chapter 134, Subchapter B of this title (relating to Miscellaneous Reimbursement).

**Agency Response:** This Division disagrees with deleting this subsection because it is necessary to clarify that rules in Chapter 134, Subchapter B of this title that govern travel reimbursement for injured employees will apply as provided in those rules to an injured employee who attends an appropriate examination. When read together with Division rules in Chapter 134 that govern travel

reimbursement, this adopted rule makes travel expenses incurred in attending an appropriate examination a reimbursable expense, and the rules in Chapter 134 will govern when these travel expenses will be reimbursed to the injured employee. The Division also disagrees with commenter's suggested text because the adopted rule is sufficiently clear that the rules in Chapter 134, which include the availability provisions in §134.110, will apply in determining whether travel reimbursement is due to an injured employee for attending an appropriate medical examination under the adopted rule. Specifically, the adopted rule states that the "insurance carrier shall reimburse the injured employee for all reasonable travel expenses *as specified in Chapter 134, Subchapter B of this title (relating to Miscellaneous Reimbursement)* for attending an appropriate medical examination." (italics added)

**NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL**

**For:** Insurance Council of Texas and Property Casualty Insurers Association of America

**For, with changes:** American Insurance Association, Integrated Health Services, LLC, Office of Injured Employee Counsel, State Office of Risk Management, Texas Mutual Insurance Company, and two individuals

**Against:** An individual

**Neither for or Against:** Texas Department of Transportation.

This new rule is adopted under the Labor Code §408.0041, and under the general authority of §§402.00111, 402.0128, and 402.061. In relevant part, Labor Code §408.0041 sets forth that the Commissioner by rule shall adopt guidelines prescribing the circumstances under which an examination by the injured employee's treating doctor or another doctor to whom the injured employee is referred by the treating doctor to determine any issue under Labor Code §408.0041(a), other than an examination under Labor Code §408.0041(f-2), may be appropriate.

Labor Code §402.00111 provides that the Commissioner shall exercise all executive authority, including rulemaking authority, under Title 5, Labor Code.

Labor Code §402.00128 lists the general powers of the Commissioner including the power to hold hearings and the authority to assess and enforce penalties as authorized by Title 5, Labor Code.

Labor Code §402.061 provides the Commissioner the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

**§126.17** ***Guidelines for Examination by a Treating Doctor or Referral Doctor After a Designated Doctor Examination to Address Issues Other Than Certification of Maximum Medical Improvement and the Evaluation of Permanent Impairment***

(a) An examination by the injured employee's treating doctor or another doctor to whom the injured employee is referred by the treating doctor to determine any issue other than certification of maximum medical improvement and the evaluation of permanent impairment may be appropriate after a designated doctor examination if:

(1) the designated doctor issued an opinion on the issue;

(2) the injured employee is not satisfied with the designated doctor's opinion; and

(3) the treating doctor or the referral doctor has not already provided the injured employee with a written report that meets the standard described by subsection (b) of this section on the issue addressed by the designated doctor.

(b) The treating doctor or the referral doctor shall complete a narrative report. The report should include objective findings of the examination and an analysis that explains how the objective findings lead to the conclusion reached by the doctor. This report shall be filed with the

insurance carrier, the injured employee and the injured employee's representative. Notwithstanding §129.5 of this title (relating to Work Status Reports), if the treating doctor or the referral doctor examines the injured employee to address an issue relating to return to work, the doctor must also file a Work Status Report.

(c) The insurance carrier shall reimburse the injured employee for all reasonable travel expenses as specified in Chapter 134, Subchapter B of this title (relating to Miscellaneous Reimbursement) for attending an appropriate medical examination.

(d) Nothing in this section is construed to limit or prohibit the injured employee from obtaining reasonable and necessary medical care for the compensable injury or from obtaining a written report from a treating doctor or a referral doctor on any issue under Labor Code §408.0041(a)(3) – (6) prior to a designated doctor examination.

**CERTIFICATION.**

This agency hereby certifies that the new rule has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued at Austin, Texas, on _____, 2012.

X _____

Dirk Johnson
General Counsel
Texas Department of Insurance,
Division of Workers' Compensation

**IT IS THEREFORE THE ORDER** of the Commissioner of Workers' Compensation that 28 TAC §126.17 concerning Guidelines for Examination by a Treating Doctor or Referral Doctor After a Designated Doctor Examination to Address Issues Other Than Certification of Maximum Medical Improvement and the Evaluation of Permanent Impairment is adopted.

AND IT IS SO ORDERED.

X

ROD BORDELON
COMMISSIONER OF WORKERS' COMPENSATION

ATTEST:

X

Dirk Johnson
General Counsel
Texas Department of Insurance,
Division of Workers' Compensation