

SUBCHAPTER A. General Rules For Enforcement
28 TAC §180.19 Performance-Based Oversight Incentives

1. INTRODUCTION. The Commissioner of Workers' Compensation (Commissioner), Texas Department of Insurance, Division of Workers' Compensation (Division) adopts new §180.19 concerning the performance-based oversight (PBO) with changes to the proposed text published in the September 28, 2007 issue of the *Texas Register* (32 TexReg 6749).

In accordance with Government Code §2001.033, the preamble contains a summary of the factual basis of the rule, a summary of comments received from interested parties, names of those groups and associations who commented and whether they were in support of or in opposition to adoption of the rule, and the reasons why the Division agrees or disagrees with some of the comments and proposals.

Changes made to the proposed rule are in response to public comments received in writing and at a public hearing held on October 29, 2007, and are described in the summary of comments and responses section of this preamble. Other changes were made for consistency or to correct typographical or grammatical errors.

2. REASONED JUSTIFICATION. Several key recommendations to the Texas Legislature from the *Sunset Advisory Commission Staff Report, April 2004*, on the Texas Workers' Compensation Commission (Commission) focused on creating a new regulatory approach that would emphasize overall compliance and performance-based oversight linked to regulatory outcomes. Generally, key findings from the report recommended the

Commission review the overall compliance history and performance of system participants in order to concentrate efforts on those participants whose data indicated compliance issues. A similar recommendation was for the Commission to create incentives to reward high performing system participants that did not cause compliance issues. The 79th Legislature enacted some of these recommendations in HB 7.

New §180.19 is necessary to implement Labor Code §402.075, as added by HB 7, enacted by the 79th Texas Legislature, Regular Session. Labor Code §402.075(a) requires the Commissioner, by rule, to adopt requirements that provide incentives for overall compliance in the workers' compensation system and that emphasize performance-based oversight linked to key regulatory outcomes.

The new rule confirms the key regulatory goals required by §402.075 by listing the regulatory goals applicable to the rule and also requires that assessments be completed once a biennium for system participants.

The Division implemented the new regulatory approach required by Labor Code §402.075 by relying on currently reported or available data for system participants. Section 402.075(c) requires the Division to “examine overall compliance records and dispute resolution and complaint resolution practices to identify insurance carriers and health care providers who adversely impact the workers' compensation system and who may require enhanced regulatory oversight. Labor Code §402.075(c) requires the Division to conduct the assessment through analysis of data maintained by the Division and through self-reporting by insurance carriers and health care providers and does not restrict the manner

in which the Division performs the assessment. The Division expects that as the performance of the system participants improves within the areas selected for the initial assessment, the areas selected for future assessments will shift to those requiring more oversight to improve overall compliance.

The new rule provides that there will be three regulatory tiers – high, average, and poor. Placement in a tier is determined by reviewing the assessed participant's degree of compliance and success in meeting the key regulatory goals relative to other assessed participants.

The rule also provides what incentives will be offered to those entities placed into a regulatory tier, including those specifically listed in Texas Labor Code §402.075(f) as required for the high performers, and those available to system participants regardless of tier placement.

3. HOW THE SECTIONS WILL FUNCTION. New §180.19(a) sets forth the purpose of the rule and the key regulatory goals against which the insurance carriers and health care providers will be assessed. The key regulatory goals of subsection (a) align with the general goals and mission of the workers' compensation system set forth in Labor Code §402.021.

New §180.19(b) states that the assessments based on the key regulatory goals will be conducted at least once each biennium. In April 2007, the Division selected for the initial assessment, those system participants having a significant impact on the workers'

compensation system due to their volume of claims handled, forms filed, premium rate, or other relevant criteria the Division deemed appropriate. With the exception of the win/loss ratios in contested case hearings (CCHs), the Division chose factors to assess the insurance carriers and the health care providers from data that the participants are required to report under the Labor Code and Division rules. The Division employed a modified bell curve in its assessment that allows the workers' compensation industry to have a clear understanding of expected performance goals and effectively distribute participants at both ends of the curve. This method compares a participant performance with another participant performance for the same duty, in the same review period and is a complete distribution control method. It allows for a fair, effective and complete distribution of participants when the actual performance level is higher or lower than the industry level.

New §180.19(c) establishes three regulatory tiers that distinguish among poor, average, and high performers in the system. The subsection further provides that insurance carriers and health care providers who are assessed will be placed in one of the three regulatory tiers based on their performance in relation to other assessed carriers and health care providers. In the initial assessment the Division did not, however, assess all insurance carriers and health care providers because many wrote below a specific level of premium or had other factors that minimized their impact upon the workers' compensation system. Those insurance carriers and health care providers that were not assessed and tiered as high, average or poor performers are not relieved from compliance with statutory and rule related duties or from regulatory oversight.

New §180.19(d) provides that the incentives will be based on the regulatory tier in which the insurance carrier or health care provider is placed after the assessment.

New §180.19(e) provides that the Commissioner, in granting incentives, may consider any other relevant factors that lead to overall compliance or factors which adversely impact the workers' compensation system.

New §180.19(f) sets out the incentives required for high tier performers as set forth in Labor Code §402.075(f). New rule §180.19(g) implements the requirements of Labor Code §402.075(g) and sets out incentives that may be applied to an insurance carrier or health care provider who was assessed and placed in any of the three regulatory tiers.

There are no additional rules or rule amendments anticipated in order to implement the proposed changes.

4. SUMMARY OF COMMENTS AND AGENCY'S RESPONSE.

Comment: Commenter states that the rule will never work because the Division cannot keep up with all insurance companies and health care providers.

Agency Response: The Division disagrees. The Division is currently required to monitor and enforce the compliance of participants in the Texas workers' compensation system. The Division achieves this through audits and enforcement, fraud, education, workers' health and safety, self insurance, return to work, medical quality, legal and dispute resolution programs. The new rule does not change the requirements of the Division to monitor and enforce the compliance of system participants, including insurance carriers and

health care providers. The new rule follows the directive of Labor Code §402.075 to establish regulatory tiers and provide incentives to improve the overall compliance of insurance carriers and health care providers in the system and to focus the Division's regulatory oversight on those that are identified as poor performers.

Comment: Commenter recommended that the words “within the system” be replaced with the words “among system participants” in 28 Tex. Admin. Code §180.19(a)(2) which states “increase of timely and accurate communications within the system”.

Agency Response: The Division agrees with the recommended change to “among system participants” and modifies the rule language accordingly. The language is consistent with the language appearing in the statute relating to the goals of the Division found at Texas Labor Code §402.021(b)(9).

Comment: Commenters state that the methodology and assessment should be in the rule and requested that the Division delineate the requirements by which parties will be assessed in the rule. Commenters also state that the rule as proposed does not meet the statutory mandate to adopt requirements that provide incentives for compliance and emphasize oversight linked to regulatory outcomes.

Agency Response: The Division disagrees. The specific methodology for assessing the regulatory compliance of insurance carriers and health care providers is not within the scope of the rule. Labor Code §402.075(c) directs the Division to assess the performance

of insurance carriers and health care providers through the analysis of data but does not require that a particular methodology be adopted. By comparison, §402.075 is more specific and directs the division to develop regulatory tiers for poor, average, and high performers and to focus its regulatory oversight on those system participants identified as poor performers. The provisions of §402.075(c) provide the Commissioner with the regulatory discretion necessary to adapt the assessment methodology as necessary to assess the performance of the system participants over time. Furthermore, Labor Code §402.00128(b)(12), which states, “The commissioner ... may ... exercise other powers and perform other duties as necessary to implement and enforce this title” provides the Commissioner the discretion to select, review, and assess different measures of compliance.

The Division also disagrees with the assertion that the proposed rule does not meet the statutory mandate to adopt requirements that provide incentives for compliance and emphasize oversight linked to regulatory outcomes. The purpose of the new rule, as detailed by statute, is to establish performance based tiers and incentives to increase the overall compliance of insurance carriers and health care providers in the system and to emphasize performance based oversight linked to regulatory outcomes. The Division is required to assess the regulatory outcomes of the insurance carriers and health care providers in order to tier them. The tier into which each insurance carrier and health care provider is placed is directly dependant upon the degree to which the tiered participant complied with the Texas Workers' Compensation Act and the Division rules as compared to

all other insurance carriers and health care providers that the Division is required to assess. Insurance carriers and health care providers have a duty to comply with all requirements in the Texas Workers' Compensation Act and the Division Rules and should strive for 100% compliance. Therefore, the areas of compliance that the Division determines to review for assessment purposes and the degree of compliance associated with each tier should be inconsequential to the insurance carriers and health care providers to be assessed and tiered.

Comment: Commenter states there will be no fiscal impact to state or local government regarding the employment or enforcement of the rule.

Agency Response: The Division agrees and thanks the commenter.

Comment: Commenter recommended adding language to the Statutory Authority section of the proposed rule to say, "Section 402.075 requires the Commissioner of Workers' Compensation to provide incentives within each tier to promote compliance and high performance from workers' compensation participants by providing biennial assessment."

Agency Response: The Division disagrees that additional language is needed for the Statutory Authority section of the proposed rule. The suggested comment addresses policy issues which have no impact on the actual rule.

Comment: Commenter objected to the use of the win/loss methodology used by the Division in the first assessment as it did not and cannot assess the full statutory scope and focus as set out in Labor Code §402.075.

Agency Response: The Division disagrees. Although the assessment methodology is not within the scope of this rule and is a procedure for the Division to determined within its sole discretion, assessing the contested case hearing win/loss ratio does assess the full statutory scope and focus of Texas Labor Code §402.075. Labor Code §402.021 states that a goal for the system is to minimize the likelihood of disputes and to resolve them promptly and fairly when identified. Further, a key regulatory goal of the system, as identified in 28 Tex. Admin. Code §180.19(a) is to limit disputes to those appropriate and necessary.

Comment: Commenters state that the proposed rule fails to provide a definition for the three tier levels and requests that the criteria be clearly defined in the rule. Commenters stated that the proposed rule should establish a tier structure.

Agency Response: The Division disagrees with adding tier definitions to the rule. The tier structure of high, average and low is stated in the rule. The specific standards for assessed insurance carriers and health care providers to be placed in a high, average or low tier depend upon the degree to which the individual insurance carriers and health care providers are meeting the regulatory goals established in this rule as compared to the

success of other insurance carriers and health care providers being assessed in meeting the same regulatory goals.

Comment: Commenter states that because the rule is “incentive-based” that Division should not publish poor and average tier results.

Agency Response: The Division disagrees. Labor Code §402.075 does not prohibit the publication of all tiers. Stakeholders’ input indicated that it would be an incentive for average and poor performers to improve their standing if all tier results were posted.

Comment: Commenters state that penalties for non-compliance must be assessed pursuant to §414 and §415 of the Labor Code. The commenter stated the language as proposed in 28 Tex. Admin. Code §§180.19(g)(2) and (3) contains openly restrictive language respecting penalties, by its terms, penalties may only be ‘lower’ than normal (only for the ‘high performer’ tier) or ‘reduced’ (when self-disclosed in any tier). This is inappropriate and violates both the statute and specific rules more properly dealing with penalties.

Agency Response: The Division agrees that penalties are assessed pursuant to §414 and §415 of the Labor Code. The incentives specified in this rule are discretionary and listed in Labor Code §402.075(e) as possible regulatory incentives for purposes of performance based oversight. This proposed rule is intended to supplement Labor Code §414 and §415 and does not supersede those statutes.

Comment: Commenter requested that the title of the rule be changed from “Performance Based Oversight Incentives” to “Performance-Based Oversight and Performance Incentives.”

Agency Response: The Division disagrees that the title should be changed. The purpose of the rule is to develop incentives and emphasize performance-based oversight linked to regulatory outcomes.

Comment: Commenter states the key regulatory goals for the performance based oversight process should be linked to the compliance categories set forth in 28 Tex. Admin. Code §180.11 and Contested Case Hearing (CCH) outcomes should not be included as key performance goals.

Agency Response: The Division disagrees that the key regulatory goals for the performance based oversight process should be linked to the compliance categories set forth in 28 Tex. Admin. Code §180.11. The compliance categories set forth in 28 Tex. Admin. Code §180.11 were a means to categorize various duties under the Texas Workers' Compensation Act and Division rules and to assist with identifying and calculating administrative penalties assessed for violations occurring prior to September 1, 2005. The Division further disagrees that CCH outcomes should not be included as a key regulatory goal. Labor Code §402.075 requires that the Division, among other things, examine the overall dispute resolution practices of the insurance carriers and health care providers to

determine compliance with the key regulatory goals provided in this rule and the general regulatory goals of the Division found in Labor Code §402.021.

Comment: Commenter states the performance standards for each key regulatory goal (as expanded under this concept) should be linked to the compliance standards set forth in 28 Tex. Admin. Code §180.12.

Agency Response: The Division disagrees that the performance standards need to be incorporated into the rule. Participants are required to be compliant with the Labor Code and Division rules. The higher the compliance of an assessed participant relative to other assessed system participants, the higher the system participant will be placed in the tier system. The Division further disagrees that the performance standards for each key regulatory goal should be linked to the compliance standards set forth in 28 Tex. Admin. Code §180.12. Section 180.12 provides for minimal compliance standards that system participants are expected to meet for compliance categories defined in 28 Tex. Admin. Code §180.11. These compliance standards are not those provided in this rule or in Labor Code §402.075 and are typically utilized when the Division conducts an audit of the participant.

Comment: Commenter stated that the Division would find it difficult, if not impossible, to complete their respective review of data associated with the PBO assessment process if all ten compliance categories were included in the review. The rule would need to provide that

the Division give insurers notice of a smaller subset of compliance categories that would be considered the key regulatory goals for the upcoming PBO review.

Agency Response: The Division agrees that a review of all ten compliance categories set forth in 28 Tex. Admin. Code §180.11 would be difficult; therefore, these ten compliance categories are not the key regulatory goals. The Division identified six key regulatory goals that aligned with the general goals as the statute (§402.075) indicates. The general goals may be found in §402.021 of the Labor Code.

Comment: Commenters state that the performance of insurer carriers and health care providers should be based upon their actual performance and not incorporate the application of a bell curve as discussed in the Division's concept paper. The Division should use a census methodology that considers data from a specific time period for all future PBO assessments.

Agency Response: The Division disagrees. Labor Code §402.075 does not require that the Division's assessment methodology be provided in rule and, by not doing so, allows the Division the discretion to change its assessment methodology as needed to fulfill the legislative intent. To include the assessment methodology in this rule would restrict the Division's ability to shift its regulatory focus, as needed, to areas of compliance that are, or become, areas that adversely impact the workers' compensation system. Labor Code §402.075 requires that the Division assess the insurance carriers and health care providers using data maintained by the Division. Labor Code §402.075 leaves within the sole

discretion of the Division the task of determining the areas upon which to focus its assessment and the methodology by which to analyze the Division maintained data and to conduct the assessment. Furthermore, the statute leaves within the sole discretion of the Division the obligation of determining which assessment methodologies are most effective in accomplishing the legislative intent to increase the assessed participants' overall compliance with the key regulatory goals and to minimize the factors adversely impacting the workers' compensation system. The Division's determinations of the areas of assessment and the most effective methodology to apply are procedural and are not appropriate to include in this rule.

The Division further disagrees that a bell curve should not be used in the assessment. The bell curve is a common methodology that compares performance relative to all the system participants assessed. The Division employed a modified bell curve in its assessment that allows the workers' compensation industry to have a clear understanding of expected performance goals and effectively distribute participants at both ends of the curve. This method compares a participant performance with another participant performance for the same duty, in the same review period and is a complete distribution control method. It allows for a fair, effective and complete distribution of participants when the actual performance level is higher or lower than the industry level. Assessments based upon the actual performance of tiered participants may lessen the incentive to improve performance. For example, if an assessment score of 90 percent moved a system participant into the high performer tier, under the methodology proposed by the commenter,

there would be no incentive to improve above that 90 percent. In theory, all the system participants could cluster at 90 percent or slightly above and would be in the high performer tier, but would have no incentive to improve and to reach 100 percent.

Comment: Commenters state that the rule should allow the assessed system participant to request a reassessment at a minimum of six months after the Division has released and published the PBO assessment results and tier rankings. Commenters state there should be an appeal process to the Division staff application of the law or other decisions prior to ranking being published.

Agency Response: The Division disagrees. Labor Code §402.075 provides only for the Division's initial performance assessment and a performance assessment of the insurance carriers and the health care carriers at least every biennium thereafter. There is no statutory provision for a reassessment upon request or an appeal process. Labor Code §402.075 leaves within the Division's sole discretion the ability to determine the need for more frequent performance assessments and whether resources are available to conduct more frequent performance assessments.

Comment: Commenters state the rule should require Division staff to provide insurers with feedback on the data corrections submitted during the time period provided for review of the data that will be used for each insurer's PBO assessment. Commenter(s) request that the

proposal rule require the Division to respond as to which changes were accepted and which were not and why.

Agency Response: The Division disagrees that the rule should include requirements that the Division provide insurers with feedback on the data corrections. The Division will make every effort to be available to answer participants' questions regarding the PBO assessment and methodology.

Comment: Commenter states that the identity of the third-party administrator (TPA) should be added to the PBO assessment results so that insurers will be able to use the assessment results as a means to gauge the performance of and to select TPAs.

Agency Response: The Division disagrees. Labor Code §402.075 requires the Division to assess insurance carriers and health care providers and does not provide statutory authority to conduct PBO related assessments of TPAs or report TPAs associated with the tiered insurance carriers. HB 472, enacted by the 80th Legislature and codified, in part, in Insurance Code Chapter 4151, brought workers' compensation TPAs under the regulatory authority of the Texas Department of Insurance.

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

For: Office of Injured Employee Counsel.

For, with changes: Pamela R. Beachley, Attorney and Counselor at Law; Risk Management Services and the State Office of Risk Management.

Against: Insurance Council of Texas, Service Lloyds Insurance Company, American Insurance Association-Southwest Region, Texas Cotton Ginners' Trust, Property Casualty Insurers Association of America, and Marsha Cooper.

6. STATUTORY AUTHORITY. The new rule is adopted under Labor Code §402.061, which authorizes the Commissioner to adopt rules necessary to administer the Act and Labor Code §402.075, which requires the Commissioner, by rule, to adopt requirements that provide incentives for overall compliance in the workers' compensation system and that emphasize performance-based oversight linked to key regulatory outcomes.

7. TEXT.

§180.19. Incentives

(a) The purpose of this section is to develop incentives and emphasize performance-based oversight to regulatory outcomes. Regulatory outcomes are assessed for the following key regulatory goals:

- (1) provide timely and accurate income and medical benefits;
- (2) increase timely and accurate communications among system participants;
- (3) encourage safe and timely return of injured employees to productive roles;
- (4) promote safe and healthy workplaces;
- (5) ensure each injured employee shall have access to prompt, high-quality, cost-effective medical care; and

(6) limit disputes to those appropriate and necessary.

(b) At least once every biennium, the Division shall assess the performance of insurance carriers and health care providers based on the key regulatory goals stated in subsection (a)(1)-(6).

(c) Insurance carriers and health care providers who are assessed will be placed into one of the following regulatory tiers based upon their level of compliance with the Labor Code and related rules and their performance in meeting the key regulatory goals in §180.19(a) relative to the performance of all other assessed insurance carriers and health care providers:

- (1) high performers;
- (2) average performers; or
- (3) poor performers.

(d) Incentives will be based on the regulatory tier into which the insurance carrier or health care provider was placed after being assessed on the key regulatory goals.

(e) In granting incentives, the Commissioner may also consider any other factors that the Commissioner finds relevant which leads to overall compliance or which may adversely impact the workers' compensation system.

(f) Incentives for insurance carriers and health care providers placed into the high performer regulatory tier are:

- (1) public recognition, and
- (2) use of that designation as a marketing tool.

(g) Other incentives for insurance carriers and health care providers placed into a regulatory tier may include:

(1) limited audit exemption for insurance carriers and health care providers placed in the average and high performers regulatory tiers, while reserving the Division's discretion to audit an average or high performer if deemed necessary;

(2) penalties which may be lower than normally assessed for insurance carriers and health care providers who have been placed in the high performer regulatory tier;

(3) penalties which may be reduced for insurance carriers and health care providers in any regulatory tier who self-disclose non-compliance;

(4) flexibility for audits and inspections based on performance and placement in any regulatory tier; and

(5) any other incentive the Commissioner may deem appropriate.

8. CERTIFICATION. The agency hereby certifies that the adopted amendment and sections have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas, on _____, 2007.

Norma Garcia
General Counsel
Division of Workers' Compensation
Texas Department of Insurance

IT IS THEREFORE THE ORDER of the Commissioner of Workers' Compensation that §180.19 specified herein, concerning performance based oversight, is adopted.

Albert Betts
Commissioner of Workers' Compensation

ATTEST:

Norma Garcia
General Counsel

COMMISSIONER ORDER NO. _____