

SUBCHAPTER R. UTILIZATION REVIEW AGENTS 28 TAC §19.1722

1. INTRODUCTION. The Commissioner of Insurance adopts amendments to §19.1722, relating to the Utilization Review Advisory Committee. The amendments are adopted without changes to the proposed text published in the August 14, 2009 issue of the *Texas Register* (34 TexReg 5485).

2. REASONED JUSTIFICATION. The amendments are necessary to re-establish a Utilization Review Advisory Committee pursuant to the Insurance Code §4201.003. Section 4201.003 requires the Commissioner to appoint an advisory committee to advise the Commissioner on development of rules regarding the administration of Chapter 4201, as authorized by the Government Code §2001.031. The Utilization Review Advisory Committee previously established and operated pursuant to the prior §19.1722 automatically terminated on December 31, 1998, pursuant to prior §19.1722(e). It is necessary to establish a new committee because of the enactment of House Bill (HB) 4290, 81st Legislature, Regular Session, effective September 1, 2009. HB 4290 enacts changes to the Insurance Code Chapter 4201 that result in the need to substantively revise 28 TAC Chapter 19, Subchapter R, relating to the regulation of utilization review agents. HB 4290 expands the definition of "utilization review" in the Insurance Code Chapter 4201 to include retrospective reviews for medical necessity and to include reviews to determine the experimental or investigational nature of health

care services. Rules are necessary to implement HB 4290, and the Utilization Review Advisory Committee that is established by this adoption order will advise the Commissioner on development of the rules necessary to Implement HB 4290.

The Government Code, Chapter 2110 specifies the requirements and procedures for state agency advisory committees. The Government Code §2110.0012 provides that a state agency has established an advisory committee if state or federal law has specifically created the committee to advise the agency or the agency has, under state or federal law, created the committee to advise the agency. The Government Code §2110.005 requires a state agency that establishes an advisory committee to, by rule, state the purpose and tasks of the committee and describe the manner in which the committee will report to the agency. The Government Code §2110.008 authorizes a state agency that has established an advisory committee to designate the date on which the committee will automatically be abolished and requires that the designation be by rule. Additionally, the Government Code §2110.008 provides for automatic abolishment of an advisory committee on the fourth anniversary of the creation of the advisory committee if no abolishment date by rule is provided.

The amendment to §19.1722(a) clarifies that the use of the term “advisory committee” throughout the section is a reference to the Utilization Review Advisory Committee.

Amendments are adopted to update obsolete statutory references in §19.1722(a) and (d) as a result of the adoption of the non-substantive Insurance Code revision. These amendments are necessary for ease of use and readability of the rules. The

Insurance Code Article 21.58A, which was referenced in §19.1722(a), was repealed in the non-substantive Insurance Code revision, Acts 2005, 79th Leg., Ch. 727, §4, effective April 1, 2007. The Insurance Code Article 21.58A was readopted without substantive change as the Insurance Code Chapter 4201 in the same non-substantive Insurance Code revision. The Insurance Code Article 21.58A, §13, which was cited in §19.1722(d), was readopted as the Insurance Code §4201.003 as part of the non-substantive Insurance Code revision. Additionally, amendments are adopted to change references to "Insurance Code" to "the Insurance Code" throughout the section to reflect current agency style.

An amendment to §19.1722(b) establishes that the purpose of the advisory committee is to: (i) advise the Commissioner on the development of rules determined by the Department as necessary to implement HB 4290, 81st Legislature, Regular Session, effective September 1, 2009, that amends the Insurance Code Chapter 4201; and (ii) to advise the Commissioner on other changes and additions to the existing rules regulating utilization review that the Department determines are needed to administer the Insurance Code Chapter 4201.

The amendment to §19.1722(c)(1) provides that the advisory committee shall review and evaluate proposed changes and additions to the current utilization review rules. The amendment to §19.1722(c)(2) provides that the advisory committee shall advise and consult with the Commissioner or the Commissioner's representative during its review and evaluation made pursuant to §19.1722(c)(1). The amendments also delete §19.1722(c)(3), which is no longer needed, and redesignate existing

§19.1722(c)(4) as §19.1722(c)(3). The amendment to newly designated §19.1722(c)(3) provides that the advisory committee shall perform other tasks related to the development of rules as provided by §19.1722(c)(1) and as requested by the Commissioner pursuant to the Insurance Code Chapter 4201.

Amendments to §19.1722(d) and §19.1722(d)(1) add two additional representatives to the utilization review advisory committee. The additional representatives are: (i) a representative for a workers' compensation carrier and (ii) a representative for injured employees. These two representatives are added for the following reason: When the Insurance Code chapter 4201 was first enacted as Article 21.58A in 1991, the utilization review provisions in it were not made applicable to health care services provided as part of workers' compensation coverage. Instead, it only applied to the utilization review of health care services provided under health coverage. However, in 1997 the Legislature required workers' compensation coverage to be made subject to the utilization review requirements in the Insurance Code. The Government Code §2001.002(b) provides that the composition of an advisory committee that advises a state agency regarding an industry or occupation regulated or directly affected by the agency must provide a balanced representation between the industry or occupation and consumers of services provided by the agency, industry, or occupation. Therefore, with the applicability of the Insurance Code chapter 4201 utilization review provisions to workers' compensation it is necessary that the Utilization Review Advisory Committee include a balanced representation of the workers' compensation industry and consumers. Additionally, it is necessary to amend §19.1722(d)(1) to clarify that the

reference in existing §19.1722(d)(1) to one representative for a “consumer group” is actually referring to one representative for a “health coverage consumer group.” This reference in existing §19.1722(d)(1) could result in confusion because it does not specify the type of consumer group. When the Insurance Code chapter 4201 was first enacted as Article 21.58A, it required “one representative for. . . a consumer group.” The original statute did not specify what type of consumer group was to have a representative on the Utilization Review Advisory Committee; however, since the original statute only applied to health coverage, the most effective type of consumer group to be represented on the committee would be a *health coverage* consumer group. As noted above, the expansion of applicability of the Insurance Code utilization review provisions to apply to workers’ compensation coverage necessitates the addition of two new representatives to the advisory committee to ensure a balanced representation: a representative for a workers’ compensation insurance carrier, and a representative for injured employees. Injured employees could be considered a type of consumer, therefore to avoid confusion between the original reference to “a consumer group” and the new group that must be represented for balanced representation, injured employees, §19.1722(d)(1) has been clarified to mean a “*health coverage* consumer group.”

New §19.1722(e) is necessary to address reporting requirements of the committee. The subsection provides that after completion of review and evaluation of proposed changes and additions to the current utilization review rules in 28 TAC Chapter 19, Subchapter R, or completion of any other tasks in accordance with

§19.1722(c)(3), the advisory committee shall submit a report of its recommendations to the Commissioner. Existing §19.1722(e) is redesignated as §19.1722(f).

Under the amendment to newly designated §19.1722(f), the advisory committee shall automatically terminate on December 31, 2010, unless, before its termination, the Commissioner extends its duration by rule.

3. HOW THE SECTION WILL FUNCTION. The amendment to §19.1722(a) clarifies that the use of the term "advisory committee" throughout the section is a reference to the Utilization Review Advisory Committee.

As a result of the amendments to update obsolete statutory references in §19.1722(a) and (d), the rules will be easier to use and to understand.

Under the amendment to §19.1722(b)(1) and in accordance with the stated purpose, the advisory committee will: (i) advise the Commissioner on the development of rules determined by the Department as necessary to implement HB 4290 enacted by the 81st Legislature to amend the Insurance Code Chapter 4201, relating to Utilization Review and Independent Review; and (ii) advise the Commissioner on other changes and additions to the existing rules regulating utilization review that the Department determines are needed to administer the Insurance Code Chapter 4201.

The advisory committee, pursuant to the amendment to §19.1722(c)(1), will review and evaluate proposed changes and additions to the existing utilization review rules. Pursuant to the amendment to §19.1722(c)(2), the advisory committee will advise and consult with the Commissioner or the Commissioner's representative during the

review and evaluation of any proposed changes and additions to the existing utilization review rules. Under the amendment to newly designated §19.1722(c)(3), the advisory committee will perform other tasks related to the development of rules as provided by §19.1722(c)(1) and as requested by the Commissioner pursuant to the Insurance Code Chapter 4201.

Two additional representatives are added to the advisory committee by the amendments to §19.1722(d) and §19.1722(d)(1). The additional representatives are: (i) a representative for a workers' compensation carrier and (ii) a representative for injured employees. The reference to "one representative for . . . a consumer group" in §19.1722(d)(1) is amended to clarify that the paragraph refers to "one representative for . . . a *health coverage* consumer group."

Committee requirements are addressed by new §19.1722(e). The advisory committee will, pursuant to the subsection, submit a report of its recommendations to the Commissioner after completion of review and evaluation of proposed changes and additions to the current utilization review rules in 28 TAC Chapter 19, Subchapter R, or completion of any other tasks in accordance with §19.1722(c)(3).

The advisory committee will, pursuant to the amendment to newly designated §19.1722(f), automatically terminate on December 31, 2010 unless, before its termination, the Commissioner extends its duration by rule.

4. SUMMARY OF COMMENTS AND AGENCY RESPONSE.

§19.1722(d)(1). Committee Membership.

Comment: A commenter suggests that proposed §19.1722(d)(1) be changed to provide that the Utilization Review Advisory Committee include an Office of Injured Employee Counsel (OIEC) representative in its membership. The commenter states that OIEC is the Texas agency statutorily charged with representing the interests of injured employees as a class, and that as such it should have input in the process of developing the utilization review rules, particularly because the utilization review process has become increasingly important in the workers' compensation system. The commenter also states that OIEC's experience and expertise in assisting injured employees in the Texas workers' compensation system would allow it to provide useful insights to the process of utilization review rule development.

Agency Response: The Department agrees with the commenter that OIEC should be represented on the Utilization Review Advisory Committee; however, it is not necessary to change the proposed text to provide for such representation. The proposed rule, which is adopted without change, specifies that the advisory committee shall be comprised of representatives of various interested parties, including "[o]ne representative for. . . injured employees." Because the OIEC is charged with representing the interests of injured employees in Texas, the appointment of an OIEC representative to the Utilization Review Advisory Committee would be appropriate.

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

For with changes: The Office of Injured Employee Counsel.

Against: None.

6. STATUTORY AUTHORITY. The amendments are adopted pursuant to the Government Code §§2110.002, 2110.005, 2110.008, and 2110.0012, and the Insurance Code §4201.003 and §36.001. The Government Code §2110.002(b) provides that the composition of an advisory committee that advises a state agency regarding an industry or occupation regulated or directly affected by the agency must provide a balanced representation between the industry or occupation and consumers of services provided by the agency, industry, or occupation. The Government Code §2110.005 requires a state agency, when it establishes an advisory committee, to adopt rules that state the purpose and tasks of the advisory committee and that describe the manner in which the advisory committee will report to the agency. Section 2110.008(a) provides that a state agency that has established an advisory committee may designate the date on which the committee will automatically be abolished, that the designation must be by rule, and that the committee may continue in existence after that date only if the agency amends the rule to provide for a different abolishment date. The Government Code §2110.0012 provides that a state agency has established an advisory committee if state or federal law has specifically created the committee to advise the agency or if the agency has, under state or federal law, created the committee to advise the agency. The Insurance Code §4201.003(a) authorizes the Commissioner to adopt rules to implement Insurance Code Chapter 4201. The Insurance Code §4201.003(c) requires the Commissioner to appoint an advisory committee to advise the Commissioner on development of rules regarding the administration of Chapter 4201 and specifies the duties and composition

of the advisory committee. The Insurance Code §36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

7. TEXT.

§19.1722. Utilization Review Advisory Committee.

(a) Purpose and Scope. The purpose of this section is to set out the responsibilities of the Utilization Review Advisory Committee (advisory committee); define its tasks and the manner in which it will report to the commissioner; specify its membership; and set its duration. The advisory committee is established pursuant to the Insurance Code §4201.003(c).

(b) Purpose of the Advisory Committee. The purpose of the advisory committee is to:

(1) advise the commissioner on the development of rules determined by the department as necessary to implement HB 4290, 81st Legislature, Regular Session, effective September 1, 2009, that amends the Insurance Code Chapter 4201; and

(2) advise the commissioner on other changes and additions to the existing rules regulating utilization review that the department determines are needed to administer the Insurance Code Chapter 4201.

(c) Tasks. The tasks of the advisory committee include those tasks specified in the following paragraphs:

(1) The advisory committee shall review and evaluate proposed changes and additions to the current utilization review rules in this subchapter, and the advisory committee shall make recommendations to the commissioner regarding such proposed changes and additions;

(2) The advisory committee shall advise and consult with the commissioner or the commissioner's representative during its review and evaluation made pursuant to paragraph (1) of this subsection; and

(3) The advisory committee shall perform other tasks related to the development of rules as provided by paragraph (1) of this subsection and as requested by the commissioner pursuant to the Insurance Code Chapter 4201 and the Government Code Chapter 2110.

(d) Membership. Pursuant to the Insurance Code §4201.003, the membership of the advisory committee shall include:

(1) One representative for each of the following: the Office of Public Insurance Counsel, an insurance company, a health maintenance organization, a group hospital service corporation, a workers' compensation insurance carrier, a utilization review agent, a health coverage consumer group, injured employees, an employer, a physician, a dentist, a hospital, a registered nurse, and other health care providers; and

(2) The commissioner or the commissioner's representative, who shall be an ex-officio member and must be present at every advisory committee meeting. Any member who resigns from the advisory committee shall be replaced by the

commissioner with another member representing the same interest as the member who resigned.

(e) Reporting Requirements. After completion of review and evaluation of proposed changes and additions to the current utilization review rules in this subchapter, or completion of any other tasks in accordance with subsection (c)(3) of this section, the advisory committee shall submit a report of its recommendations to the commissioner.

(f) Duration. The advisory committee shall automatically terminate on December 31, 2010, unless, before its termination, the commissioner extends its duration by rule.

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

Issued at Austin, Texas, on October 16, 2009.



Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance

09-0842

TITLE 28. INSURANCE
Part I. Texas Department of Insurance
Chapter 19. Agents' Licensing

Adopted Section
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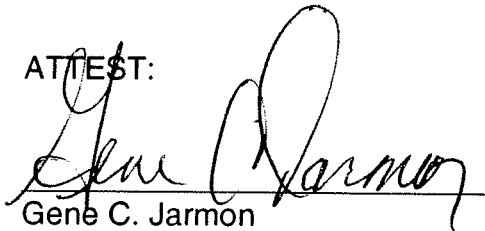
IT IS THEREFORE THE ORDER of the Commissioner of Insurance that amendments to §19.1722 specified herein, concerning the Utilization Review Advisory Committee, are adopted.

AND IT IS SO ORDERED.



MIKE GEESLIN
COMMISSIONER OF INSURANCE

ATTEST:



Gene C. Jarmon
General Counsel and Chief Clerk

COMMISSIONER'S ORDER NO.

09-0842

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