

SUBJECT: Out-of-network fee guidelines under the workers' compensation system

COMMITTEE: Business and Industry — favorable, with amendment

VOTE: 9 ayes — Giddings, Elkins, Darby, Bailey, Bohac, Castro, Martinez,
Solomons, Zedler

0 nays

WITNESSES: For — Andrew Kant, Texas Orthopedic Association; Stephen Norwood, Texas Medical Association; (*Registered, but did not testify*: Charles Bailey, Texas Hospital Association; Tristan Castaneda, Jr., Workers' Compensation Pharmacy Alliance; Michael Cunningham, Texas Building and Construction Trades Council, AFL-CIO; Mary Hennigan, Texas Occupational Therapy Association; Rick Levy; Texas AFL-CIO; John Pike, Texas Ambulatory Surgery Center Society and Texas Orthopedic Association; Lynda Woolbert, Coalition for Nurses in Advanced Practice)

Against — Ron Cobb, American Insurance Association; Cathy DeWitt, Texas Association of Business; Joe Woods, Property Casualty Insurers Association of America

On — Norman Darwin, Office of Injured Employee Counsel; Amy Lee, Texas Department of Insurance

BACKGROUND: After the 1989 workers' compensation reform (71st Legislature, second called session), insurance carriers and employers had discount fee contracts with certain health care providers that came to be called "voluntary networks." Carriers and employers could not direct an employee to see a particular provider in a network, but if the employee chose to receive care from one of those providers, the provider would be paid the contractual fee discount rather than the fee established by the professional fee guidelines adopted by the Texas Workers' Compensation Commission.

In 2001, the 77th Legislature enacted HB 2600 by Brimer, which created regional health care delivery networks for workers' compensation injuries and specified that the term "regional health care delivery network" did not include voluntary insurance carrier networks, as long as the voluntary

networks did not direct care of an employee to specific providers. Regional health care networks were never implemented, and practices related to voluntary networks continued.

In 2005, the 79th Legislature enacted HB 7 by Solomons, the Texas Workers' Compensation Act, which repealed provisions on regional health care networks, including language regarding voluntary networks. HB 7 required that a workers' compensation health care network be certified as provided by statute and by rules adopted by the commissioner of insurance.

After HB 7, insurance carriers requested guidance from the Texas Department of Insurance (TDI) on the legality of voluntary networks, arguing that while HB 7 deleted references to voluntary networks, it made no specific prohibition. TDI's Commissioner's Bulletin #B-0071-05 stated that under HB 7, TDI must certify all networks.

Labor Code, sec. 413.011(d), added by HB 7, states that an insurance carrier may pay fees to a health care provider that are inconsistent with the fee guidelines adopted by TDI if the carrier or network has a contract with the health care provider that includes a specific fee schedule. TDI's Commissioner's Bulletin #B-0005-06 states that a voluntary network may exist as long as there is a contractual fee arrangement that is different from TDI's fee guidelines. For medical fee disputes regarding non-network and out-of-network care, TDI's Division of Worker's Compensation may request copies of the contracts under which fees are being paid.

DIGEST:

HB 473, as amended, would amend Labor Code, sec. 413.011(d) to establish that in order to secure health care for an injured employee, an insurance carrier could pay fees to a health care provider that exceeded TDI's fee guidelines if:

- access to medically necessary and reasonable treatment for the injured employee was hindered by application of the fee guidelines; and
- the insurance carrier or network arranging the out-of-network services had a contract with the health care provider that included a specific fee schedule.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2007.

**SUPPORTERS
SAY:**

HB 473 would permit deviations from TDI's workers' compensation medical fee guidelines in limited circumstances. Current law allows insurance carriers to deviate from statutory medical fee guidelines when there is a written agreement with the health care provider. That provision of HB 7 was intended for limited application. A major provision of HB 7, however, was to create certified workers' compensation networks in order for TDI to have regulatory oversight.

After HB 7 was enacted, questions arose regarding continued operation of voluntary networks, which have existed through contract law for decades. Upon examination of language placed in the Labor Code through HB 7, TDI had no choice but to tell carriers that voluntary networks could continue if all they did was negotiate a fee discount. Also, it came to light that there was no prohibition on leasing networks to other carriers, an arrangement sometimes called "silent preferred provider organizations (PPOs)."

HB 473, as amended in committee, would limit deviations from the fee guidelines to situations in which it could be shown that the fee guideline was a hindrance to necessary medical care for an injured employee. While carriers testified that the introduced bill virtually would eliminate voluntary networks and increase insurance companies' costs, the Workers' Compensation Research and Evaluation Group within TDI consistently has said that the price of medical treatment is not due to cost per treatment, but to the number of treatments.

For a long time, certain medical specialists have not handled workers' compensation cases. They refuse to accept injured workers within medical fee guidelines and do not want the tedium of additional paperwork. HB 473 would encourage specialists such as urologists and gastroenterologists, who are frequently required for treatment of spinal cord injuries, to participate in the workers' compensation system. The bill as reported from committee would make it possible in specific cases to pay in excess of fee guidelines.

Currently, confusion is abundant in the delivery of health care for injured workers. TDI does not know the number of voluntary networks operating

in the state, the average fee discount, or the number of claims applied to these networks. Frequently, providers do not know if they are in a voluntary or certified network because carriers can lease networks to other companies without informing the providers.

In response to concerns about potential constitutional takings with respect to existing voluntary network contracts, a proposed floor substitute to HB 473 would address potential questions and attempt to avoid that legal challenge. It would not eliminate voluntary networks but would require them to become certified by January 1, 2011. This would give voluntary networks a chance to fulfill their obligations under current contracts and time to comply with the network certification process, as provided by HB 7 and outlined in the Insurance Code.

The floor substitute would reduce some confusion with respect to voluntary networks by setting forth contractual requirements for transparency and giving TDI access to those contracts upon request. It would require carriers and networks to notify providers of the lease of a network to a different carrier in a manner and timeframe specified by commissioner rules. This provision would address confusion created when voluntary networks lease their networks to other companies without notifying providers who subsequently dispute a reduced payment for services, adding costs to the system and more confusion. Further, the substitute would establish specific contact information that each informal or voluntary network would have to provide, including a toll-free number by which a provider could contact that network, a list of each insurance carrier with whom the network had contracted, and a list of each entity and the person's contact information associated with the network and employed by the carrier

Although the floor substitute would permit the continuation of voluntary networks, it would place them under regulatory oversight within four years. The floor substitute would offer greater accountability for out-of-network services and voluntary networks than current law.

**OPPONENTS
SAY:**

Last session's HB 7 was a sincere attempt by stakeholders to establish certified networks for the workers' compensation system in Texas. However, getting certified networks up and running has taken longer than anticipated. The market should be allowed to work and reliance on government mandates regarding networks should be avoided. Unfortunately, injured employees do not have access to certified networks

throughout the state. Some areas have no certified networks, which could always be an issue in a state as large and diverse as Texas.

HB 473, as reported from committee, would create an artificial floor on what carriers could pay health care providers for fee-for-service contracts. If a provider is willing to accept a smaller rate, insurance companies should be able to negotiate that rate and use it. One carrier that writes 17 percent of the workers' compensation insurance in Texas estimates that it saved \$15 million on medical expenses last year because of fee discounts. HB 473, by not allowing non-network contractual agreements, would cause increased costs that eventually would be passed to employers.

The floor substitute would be an improvement because it still would allow each network to negotiate fees and place certain provisions of TDI's second Commissioner's Bulletin in statute. However, the provision to require certification of all networks, including informal and voluntary networks, by 2011, would be too confining. Two years from now, the circumstances with respect to network penetration will be clearer. The market ultimately should set the price for fee-for-service contracts, thereby benefiting employees, employers, and health care providers.

NOTES:

HB 473 as amended would state that the bill applied only to out-of-network services.

The author intends to offer a floor substitute that would:

- establish an "informal network" to mean a health care provider offering out-of-network services that must have a contract between an insurance carrier and health care provider that included a specific fee schedule;
- include a definition for "voluntary network" as found in former Labor Code, sec. 408.0223 before it was repealed last session by HB 7;
- specify that an informal network and voluntary network must be certified not later than January 1, 2011, and prohibit insurance carriers from discounting provider fees below the fee guidelines outside of a certified network after that date;
- require an insurance carrier or its authorized agent that chose to use an informal or voluntary network in order to obtain a contractual fee arrangement to have a contract with the provider on the carrier's behalf and a contract between the informal or voluntary network

and the provider that included a fee schedule and complied with notice requirements specified by commissioner rule;

- allow TDI to request copies from insurance carriers of each contract described above, as well as those contracts related to fee disputes arising from non-network and out-of-network care, specify that the contracts would be confidential, and mandate that the contracts involved with fee disputes have specific contractual and notice provisions ;
- direct networks and insurance carriers to notify, in accordance with commissioner rules, each provider participating in a network of anyone with access to the network's fee arrangements with that provider;
- order informal or voluntary networks to provide specific information to TDI, including a list of each insurance carrier and the carrier's contact information with whom the network had a contract and contact information for each entity associated with the network and employed on behalf of the insurance carrier, and to report any changes within 30 days;
- become effective September 1, rather than be eligible to become effective immediately.