Title 28. Insurance
Part 2. Texas Department of Insurance,
Division of Workers' Compensation
Subchapter G - Prospective and Concurrent Review of Health Care
Section 134.600

1. INTRODUCTION. The Texas Department of Insurance, Division of Workers' Compensation (DWC) adopts amendments to Title 28, Texas Administrative Code (TAC) §134.600, concerning *Preauthorization, Concurrent Utilization Review, and Voluntary Certification of Health Care* without changed to the text as published in the May 4, 2018, issue of the *Texas Register* (43 TexReg 2712); therefore the rule will not be republished. As part of this rulemaking, DWC had proposed amendments to 28 TAC §134.230, *Return to Work Rehabilitation Programs*. DWC has discontinued that part of the rulemaking, and the proposed amendments to §134.230 are now withdrawn.

DWC published an informal working draft of the rule text on its website on January 19, 2018. Proposed amendments to 28 TAC §134.230 and §134.600 were published in the May 4, 2018, issue of the Texas Register (43 TexReg 2712). The public comment period closed on June 4, 2018, and DWC received eight written comments. A public hearing was not requested.

In response to comments, DWC now formally withdraws the proposed amendments to 28 TAC §134.230, concerning *Return to Work Rehabilitation Programs*. As a result, the current requirements for return to work rehabilitation programs remain intact, including requirements related to billing and reimbursement for work conditioning (WC) and work hardening (WH) services.

In accordance with Government Code §2001.033, DWC's reasoned justification for this rule is set out in this order, which includes the preamble. The following paragraphs include a

detailed section-by-section description and reasoned justification of all amendments to 28 TAC §134.600.

2. REASONED JUSTIFICATION. Amended 28 TAC §134.600 removes references to the preauthorization exemption for Commission on Accreditation of Rehabilitation Facilities (CARF) accredited programs related to WC and WH services. WC and WH programs were first acknowledged in the workers' compensation system in the mid-1990s. Both services are highly structured, goal-oriented, and individualized treatment programs designed to maximize the ability of injured employees to return to work (RTW). WC programs employ a single disciplinary approach using real or simulated work activities in conjunction with conditioning tasks. WH programs are interdisciplinary in nature designed to address the functional, physical, behavioral, and vocational needs of the injured employee.

Senate Bill (SB) 1494 of the 85th Legislature, Regular Session (2017), amended Texas Labor Code §413.014. Prior to the amendment, the statute required the commissioner to adopt rules to require preauthorization and concurrent review for WC or WH services provided by a health care facility not credentialed by an organization recognized by commissioner rules. DWC interpreted the prior statute as requiring that the commissioner recognize a credentialing organization. This interpretation of the statute was implemented through adoption of §134.600 (a)(5) and §134.600 (p)(4) and has been in effect for more than a decade. SB 1494 amended Labor Code §413.014(c)(2) to require preauthorization and concurrent review for all WC and WH services. SB 1494 also added subsection (c-1) that gives the commissioner discretion to exempt from preauthorization and concurrent review WC and WH services "provided by a health care facility credentialed by an organization designated by commissioner rule." The adopted amendment to §134.600 reflects the

commissioner's decision to exercise the discretion provided by Labor Code §413.014(c-1) to not designate a credentialing organization for preauthorization exemption.

As part of its FY 2017 Research Agenda, the DWC Workers' Compensation Research and Evaluation Group (REG) updated a 2003 study conducted by its predecessor, the Research and Oversight Council on Workers' Compensation, which had compared differences in utilization, cost, and disability duration outcomes for accredited and non-accredited work hardening and work conditioning programs. The REG published the results of that study, entitled "Outcome Comparisons of Return to Work Programs by Accreditation Status" in September 2017.

Examining new injury claims from 2010 to 2013, the REG measured the impact of CARF accreditation on utilization, cost, and disability duration outcomes in RTW rehabilitation services. Using regression analysis, the REG controlled for the effects of external factors such as age, gender, network status, injury type, and injury severity. The results showed that there was no statistically significant difference in the disability duration measured by the length of temporary income benefits (TIBs) between accredited and non-accredited programs.

There were, however, significant differences in costs and utilization. For WH services, CARF-accredited programs had lower utilization and higher costs than non-accredited programs. For WC services, CARF-accredited programs had higher utilization and higher costs than non-CARF accredited programs.

The significant differences in costs were attributed to the medical fee guidelines that specify a 20 percent reduction in reimbursement for non-accredited programs. As a result of combined effects of different reimbursement rates and utilization, the average per claim cost of CARF-accredited programs was higher than non-accredited programs by 12 percent ($667) in WH programs, and by 67 percent ($733) in WC programs. Despite the difference in average claim cost, there was no significant

difference in the disability duration between claims with CARF-accredited and non-accredited WC and WH programs. These results are similar to those in the 2003 study conducted by the Research and Oversight Council in Workers' Compensation.

Over time, there have been fewer CARF-accredited programs registering with DWC for exemption from preauthorization for WC and WH services. In 2003, there were 76 CARF-accredited programs registered with DWC. Currently there are 22 CARF-accredited WC and WH programs in Texas and 16 of these programs have registered for the exemption with DWC. Historically, some CARF-accredited programs have not requested exemption from preauthorization and have preferred the certainty of establishing medical necessity through the preauthorization process prior to providing services, thereby eliminating the need for retrospective review of the services for medical necessity and removing a potential barrier to payment.

Based upon the REG report's findings and the commissioner's discretion to not designate a credentialing organization for the purposes of the preauthorization exemption for WC and WH services granted to the commissioner by Senate Bill 1494, the adopted amendments to 28 TAC §134.600 remove the exemption status from CARF-accredited WC and WH programs.

Amended §134.600(a)(5) has been deleted to remove the exemption from preauthorization for WC and WH services for division exempted CARF-accredited programs. The remaining subsections, (a)(6)-(11), have been renumbered accordingly without substantive amendment. This effectuates the decision to no longer recognize a credentialing organization for exemption from preauthorization requirements for WC and WH services. This decision is based on the REG report's findings regarding outcomes, the absence of evidence contradicting the report's findings, and the commissioner's discretion to not recognize a credentialed health care facility as exempt from the preauthorization requirement for WC and WH services, discussed in detail above.

Amended §134.600(p)(4)(A) and (B) remove references to exempted WC or WH services. This change results from DWC no longer recognizing a credentialing organization for exemption from preauthorization requirements for WC and WH services, as discussed above.

Amended §134.600(p)(12) makes a non-substantive change to conform to agency style. This change does not materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

Amended §134.600(p)(14) makes non-substantive changes to conform to agency style, including changing "pursuant to" to "under." These changes do not materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

Amended §134.600(q)(2)(A) and (B) have been deleted to remove references to exempted WC or WH services. This change results from DWC no longer recognizing a credentialing organization for exemption from preauthorization requirements for WC and WH services, as discussed above.

3. SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Comment: A commenter agreed with the proposed amendments. The commenter believes that some facilities may remain CARF-accredited for market appearances but most non-public facilities may forgo renewing CARF certification. Commenter believes that the proposed amendments will result in provider savings in CARF certification fees and indirect staff/operations costs related to CARF certification, less stress on staff, and improved injured employee care.

Division Response: DWC appreciates the comment, and notes that accreditation is a business decision to be made by individual health care providers. No change was made in response to this comment.

Comment: Commenters expressed support for removing the pre-authorization exemption status for CARF-accredited facilities. A commenter stated that the exemption was based on the assumption that the CARF-accredited facilities would provide superior services and achieve better results. The REG report refuted that assumption.

Division Response: DWC appreciates the supportive comments. No change was made in response to these comments.

Comment: A commenter supported the proposed amendment to remove the CARF-accredited program exemption from preauthorization. The commenter stated that the exemption isn't warranted based on the lack of statistically significant difference in disability duration of care provided by CARF-accredited and non CARF-accredited programs. The commenter also asserted that WC and WH services provided at CARF-accredited programs should go through the same utilization review process as non-accredited programs.

Division Response: DWC appreciates the supportive comment**.** We agree that the same utilization review process should apply to CARF-accredited programs as well as other programs and that there is value in having a single review process. No change was made in response to this comment.

Comment: A commenter noted that the REG report found that the services provided at CARF-accredited facilities do not achieve better return-to-work outcomes and are associated with significantly higher claim costs.

Division Response: DWC agrees that the services at CARF-accredited facilities did not achieve better return-to-work outcomes. The cost concerns are primarily related to the fee schedule which has been withdrawn from this rulemaking and which will be reviewed at a later time to ensure that the fees are fair, reasonable, and designed to ensure both quality medical care and effective cost control. No change was made in response to this comment.

Comment: A commenter stated that CARF accreditation requires the commenter's facility to conform to 1600 standards, with a focus on patient outcomes. Commenter did not believe facilities without CARF accreditation have documented proof of outcomes or provide the same quality of services that CARF-accredited providers who have been forced to study their patient outcomes.

Division Response: DWC appreciates the comment, but notes that while the commenter stated that CARF-accredited programs have better outcomes, DWC did not receive any outcome data from CARF, from any CARF-accredited programs, or from any of the commenters. The September 2017 REG report compared the differences in utilization, cost, and outcome measurements associated with RTW rehabilitation programs and found that there was no statistically significant difference in disability duration between CARF-accredited and non-accredited programs. This finding was consistent with the findings and analysis of the impact of CARF-accredited and non-accredited WC and WH programs from the 2003 Research and Oversight Council on Workers' Compensation study. No change was made in response to this comment.

Comment: A commenter was concerned that the proposed rules would negate many of the advances achieved through CARF accreditation including additional quality and safety standards. CARF-accredited program operators believe that adherence to CARF accreditation standards result in higher patient satisfaction and outcomes. CARF-accredited program operators also want recognition for the time, effort, and financial expense toward improving care and outcomes. The commenter urged DWC to maintain the current distinctions for CARF-accredited programs.

Division Response: DWC appreciates the comment and notes that the proposed rule changes simply remove the exemption from preauthorization for CARF-accredited facilities. Section 134.230 provides that RTW rehabilitation programs should continue to meet the program standards in the CARF Medical Rehabilitation Standards Manual. Voluntary adherence to these standards has been

the practice since 2002. Further, DWC did not receive any outcome data from CARF, any CARF-accredited programs, nor any of the commenters. No change was made in response to this comment.

Comment: A commenter believed that the REG study is not accurate because the data is five years old and based on TIBs. The commenter asserted that TIBs is not an accurate measure of ability to return to work because TIBs can be paid in instances where an injured employee has restrictions that the employer cannot accommodate or while the injured employee is waiting for an impairment rating. The commenter also asserted that the utilization review process also inflates the number of days an injured employee may receive TIBs, adding up to 30 days before an injured employee could return to work.

Division Response: DWC appreciates the comment and notes that the duration an injured employee receives TIBs is a reasonable and available method for measuring disability duration in workers' compensation systems. As to the age and relevance of the data utilized in the REG study, the claims analyzed were from injury years 2010-2013, but the services analyzed were rendered in 2010-2016. This allowed each claim to be evaluated for up to 36 months after the injury. Including more recent injury years in the analysis would have reduced the ability to analyze the differences between accredited and non-accredited WC and WH programs by limiting the timeframe to evaluate services post-injury, which would have affected the reliability of the results. No change was made in response to this comment.

Comment: Commenters recommended that DWC update the terms "work conditioning" and "work hardening" because CARF no longer uses those terms. Commenters suggested that DWC adopt the current CARF terms for these services: General Occupational Rehabilitation Program and Comprehensive Occupational Rehabilitation.

Division Response: DWC declines to make the suggested change to the terms work conditioning and work hardening. WC and WH are generally accepted terms throughout workers' compensation systems. Also, the American Medical Association CPT Code Manual identifies WC and WH services with specific procedure codes. Changing the terms to those suggested could cause unnecessary confusion among DWC stakeholders and could create unnecessary disputes between health care providers and insurance carriers. No change was made in response to these comments.

Comment: Commenters supported the proposed change to the rates based on the REG study's finding that there was no statistical difference in outcomes between CARF and non-CARF facilities.

Division Response: DWC appreciates the supportive comment. However, based upon other concerns raised by the commenters regarding the proposed fee changes for WC and WH services, DWC has withdrawn the proposed amendments to 28 TAC §134.230. DWC will evaluate the fee schedule for WC and WH services in the future to ensure that these fees are fair, reasonable, and designed to not only ensure quality medical care, but also achieve effective medical cost control.

Comment: One commenter believed that the higher reimbursement rate isn't justified by return-to-work outcomes for injured workers and that the costs per claim were significantly higher when the services were performed at CARF-accredited programs.

Division Response: As noted, DWC has withdrawn the proposed amendments to 28 TAC §134.230. DWC will evaluate the fee schedule for WC and WH services in the future to ensure that these fees are fair, reasonable, and designed to not only ensure quality medical care but to also achieve effective medical cost control.

Comment: A commenter expressed concern that proposed 28 TAC §134.230(b) is written such that return to work rehabilitation programs must meet CARF standards. The commenter asserted that, if that is the case, costs of compliance would increase and DWC would have added more regulations in

violation of Government Code §2001.0045, *Requirement for Rule Increasing Cost to Regulated Persons*. The commenter believed that insurers would deny payment to facilities that they perceive as not having met that standard. The commenter stated that the increased costs of CARF standards of compliance will not be mitigated by the proposed reimbursement rates. The commenter expressed that if DWC states Government Code §2001.0045(c)(6) is not applicable because the amendments are to protect the health safety and welfare of the residents of the state, that would contradict the REG study's findings that there is no statistically significant difference in disability duration between CARF-accredited and non-accredited programs.

Division Response: Based upon the concerns raised by the commenters regarding the proposed fee changes for WC and WH services, DWC has withdrawn the proposed amendments to 28 TAC §134.230. Regardless, the proposed amendments to 28 TAC §134.230(b) only suggested, not required, that work rehabilitation programs meet CARF standards. DWC notes that this suggestion has been in place since 2002 and is not a new requirement. DWC will evaluate the fee schedule for WC and WH services in the future to ensure that these fees are fair, reasonable, and designed to not only ensure quality medical care but to also achieve effective medical cost control.

Comment: Two commenters supported setting one fee for WH and WC, but recommend that the rates be increased to be more in line with the Physician Fee Schedule for therapeutic activities 97530 and therapeutic exercise 97110. The commenter asserted that the rates of $28.80/ hour for WC and $51.20/hour for WH patients would not be enough to pay the hourly salary of an occupational therapist or physical therapist. Previously published fee schedules provided a $36 WC/hour and $64/hour WH rate. The commenter noted that costs for occupational therapists are rising. A commenter stated that the cost of running occupational and physical therapy practices continue to

rise and that there are fewer providers of Occupational Rehabilitation Programs/WC and WH services due to costs and required components of those programs.

Division Response: Based upon the concerns raised by the commenters regarding the proposed fee changes for WC and WH services, DWC has withdrawn the proposed amendments to 28 TAC §134.230. DWC will evaluate the current fee schedule for WC and WH services in the future to ensure that these fees are fair, reasonable, and designed to not only ensure quality medical care, but also achieve effective medical cost control.

Comment: Commenters asked for clarification as to whether more than one WC or WH patient could be seen at one time or if one patient at a time is the limit. Commenters suggested that if providers are limited to one patient at a time, the reimbursement could reflect this with a modifier.

Division Response: DWC appreciates the comment and acknowledges that the commenters have not requested a change in the proposed rule text. DWC also notes that WC and WH CPT codes, 97546 and 97545 are described by the American Medical Association CPT Assistant as services that "do not require one-on-one physician or therapist contact. These codes represent a program developed to address the person's strength, endurance, flexibility, motor control, and cardiopulmonary capacity related to performance of the work tasks that are identified through a job description or through communication with others involved in the person's health care and return to work management."

Comment: A commenter was concerned that removing the preauthorization exemption from CARF-accredited WC and WH programs may result in a decrease in the number of programs available to an injured employee. The commenter requested that DWC monitor programs for decreases in availability or accessibility as a result of the proposed rule and revisit the preauthorization exemption issue if there is a decrease.

Division Response: DWC appreciates the comment. DWC monitors the system for appropriate implementation of the rules and their impact to the system.

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

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

For with changes: Texas Occupational Therapy Association and Texas Physical Therapy Association

Against: North Texas Rehabilitation Center and Texas Hospital Association

Neither for nor against: Office of Injured Employee Counsel

5. STATUTORY AUTHORITY. The amendments are adopted under Labor Code §§402.00111, 402.00116, 402.00128, 402.061, 413.014(c)(2), 504.053, and Texas Insurance Code §1305.351. The proposed amendments support the implementation of the Workers' Compensation Act, Texas Labor Code Title 5, Subtitle A.

Labor Code §402.00111, *Relationship between Commissioner of Insurance and Commissioner of Workers' Compensation; Separation of Authority; Rulemaking*, authorizes the commissioner of workers' compensation to exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code.

Labor Code 402.00116, *Chief Executive*, authorizes the commissioner to administer and enforce the Texas Workers' Compensation Act and other workers' compensation laws of this state and laws granting jurisdiction or applicable to DWC or the commissioner.

Labor Code §402.00128, *General Powers and Duties of Commissioner*, authorizes the commissioner to conduct the daily operations of DWC and implement DWC policy.

Labor Code §402.061, *Adoption of Rules*, authorizes the commissioner of workers' compensation to adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act.

Labor Code §413.014(c)(2), *Preauthorization Requirements; Concurrent Review and Certification of Health Care*, requires the adoption of rules providing for preauthorization and concurrent review for work-hardening or work-conditioning services.

Labor Code §504.053, *Election*, provides that if a political subdivision or pool provides medical benefits to injured employees in accordance with §504.053(b)(2), then Chapter 413 (including preauthorization lists and fee guidelines), does not apply, except for §413.042, *Private Claims; Administrative Violation*.

Insurance Code §1305.351, *Utilization Review in Network*, provides that the preauthorization requirements of Labor Code §413.014 and the commissioner of workers' compensation rules do not apply to health care provided through a workers' compensation network.

6. TEXT.

§134.600. *Preauthorization, Concurrent Utilization Review, and Voluntary Certification of Health Care*

(a) The following words and terms when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise:

(1) Adverse determination: A determination by a utilization review agent made on behalf of a payor that the health care services provided or proposed to be provided to an injured employee are not medically necessary or appropriate. The term does not include a denial of health care services due to the failure to request prospective or concurrent utilization review. An adverse

determination does not include a determination that health care services are experimental or investigational.

(2) Ambulatory surgical services: surgical services provided in a facility that operates primarily to provide surgical services to patients who do not require overnight hospital care.

(3) Concurrent utilization review: a form of utilization review for on-going health care listed in subsection (q) of this section for an extension of treatment beyond previously approved health care listed in subsection (p) of this section.

(4) Diagnostic study: any test used to help establish or exclude the presence of disease/injury in symptomatic individuals. The test may help determine the diagnosis, screen for specific disease/injury, guide the management of an established disease/injury, and formulate a prognosis. -

(5) Final adjudication: the commissioner has issued a final decision or order that is no longer subject to appeal by either party.

(6) Outpatient surgical services: surgical services provided in a freestanding surgical center or a hospital outpatient department to patients who do not require overnight hospital care.

(7) Preauthorization: a form of prospective utilization review by a payor or a payor's utilization review agent of health care services proposed to be provided to an injured employee.

(8) Reasonable opportunity: At least one documented good faith attempt to contact the provider of record that provides an opportunity for the provider of record to discuss the services under review with the utilization review agent during normal business hours prior to issuing a prospective, concurrent, or retrospective utilization review adverse determination:

(A) no less than one working day prior to issuing a prospective utilization review adverse determination;

(B) no less than five working days prior to issuing a retrospective utilization review adverse determination; or

(C) prior to issuing a concurrent or post-stabilization review adverse determination.

(9) Requestor: the health care provider or designated representative, including office staff or a referral health care provider or health care facility that requests preauthorization, concurrent utilization review, or voluntary certification.

(10) Work conditioning and work hardening: return-to-work rehabilitation programs as defined in this chapter.

(b) – (o) (No change)

(p) Non-emergency health care requiring preauthorization includes:

(1) inpatient hospital admissions, including the principal scheduled procedure(s) and the length of stay;

(2) outpatient surgical or ambulatory surgical services as defined in subsection (a) of this section;

(3) spinal surgery;

(4) all work hardening or work conditioning services;

(5) physical and occupational therapy services, which includes those services listed in the Healthcare Common Procedure Coding System (HCPCS) at the following levels:

(A) Level I code range for Physical Medicine and Rehabilitation, but limited to:

(i) Modalities, both supervised and constant attendance;

(ii) Therapeutic procedures, excluding work hardening and work conditioning;

(iii) Orthotics/Prosthetics Management;

(iv) Other procedures, limited to the unlisted physical medicine and rehabilitation procedure code; and

(B) Level II temporary code(s) for physical and occupational therapy services provided in a home setting;

(C) except for the first six visits of physical or occupational therapy following the evaluation when such treatment is rendered within the first two weeks immediately following:

(i) the date of injury; or

(ii) a surgical intervention previously preauthorized by the insurance carrier;

(6) any investigational or experimental service or device for which there is early, developing scientific or clinical evidence demonstrating the potential efficacy of the treatment, service, or device but that is not yet broadly accepted as the prevailing standard of care;

(7) all psychological testing and psychotherapy, repeat interviews, and biofeedback, except when any service is part of a preauthorized return-to-work rehabilitation program;

(8) unless otherwise specified in this subsection, a repeat individual diagnostic study:

(A) with a reimbursement rate of greater than $350 as established in the current Medical Fee Guideline; or

(B) without a reimbursement rate established in the current Medical Fee Guideline;

(9) all durable medical equipment (DME) in excess of $500 billed charges per item (either purchase or expected cumulative rental);

(10) chronic pain management/interdisciplinary pain rehabilitation;

(11) drugs not included in the applicable division formulary;

(12) treatments and services that exceed or are not addressed by the commissioner's adopted treatment guidelines or protocols and are not contained in a treatment plan preauthorized by the insurance carrier. This requirement does not apply to drugs prescribed for claims under §§134.506, 134.530 or 134.540, of this title (relating to Pharmaceutical Benefits);

(13) required treatment plans; and

(14) any treatment for an injury or diagnosis that is not accepted by the insurance carrier under Labor Code §408.0042 and §126.14 of this title (relating to Treating Doctor Examination to Define the Compensable Injury).

(q) The health care requiring concurrent utilization review for an extension for previously approved services includes:

(1) inpatient length of stay;

(2) all work hardening or work conditioning services;

(3) physical and occupational therapy services as referenced in subsection (p)(5) of this section;

(4) investigational or experimental services or use of devices;

(5) chronic pain management/interdisciplinary pain rehabilitation; and

(6) required treatment plans.

(r) – (u) (No change)

11. CERTIFICATION. The agency certifies that legal counsel has reviewed the adoption and found it to be within the state agency's legal authority.

Issued at Austin, Texas, on October 11, 2018.

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

The commissioner adopts amendments to §134.600.

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Cassie Brown
Commissioner of Workers' Compensation

COMMISSIONER'S ORDER NO._____

ATTEST:

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