TITLE 28. INSURANCE

PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

SUBCHAPTER A: Designated Doctor Scheduling and Examinations

28 TAC §§127.1, 127.5, and 127.10

SUBCHAPTER B: Designated Doctor Certification, Recertification, and Qualifications

28 TAC §§127.100, 127.110, 127.130, and 127.140

SUBCHAPTER C: Designated Doctor Duties and Responsibilities

28 TAC §127.220

INTRODUCTION. The Texas Department of Insurance, Division of Workers' Compensation adopts amendments to 28 Texas Administrative Code (TAC) §§127.1, 127.5, 127.10, 127.100, 127.110, 127.130, 127.140, and 127.220.

As part of the development process for these adopted rules, the division posted an informal working draft of the rule text on its website on August 18, 2017. In response to comments, the division substantially changed 28 TAC §127.5 and re-posted the informal changes on its website on November 1, 2017. The division formally proposed amendments in the May 18, 2018, issue of the *Texas Register* (43 TexReg 3210). The division drafted a notice of correction in the June 1, 2018, issue of the *Texas Register* (43 TexReg 3653) to correct *Texas Register* publication errors. Additionally, the division held a public hearing on June 18, 2018.

Title 28 TAC §§127.1, 127.5, 127.10, 127.140, and 127.220 are adopted without changes to the proposed text published in the May 18, 2018, issue of the *Texas Register* (43 TexReg 3210). Title 28 TAC §§127.130, 127.100, and 127.110 are adopted with changes to the proposed text as described in this adoption order. In response to a comment, the division adds the phrase "or previously held" after the word "holds" in §127.130(b)(9) of this title to clarify that initial board

certification is sufficient for a physician to meet the qualification standards outlined in this rule. Additionally, in a nonsubstantive change, the division adds the word "the" before the word "Evaluation" in amended §127.100(f)(4)(E) of this title and in all similar 28 TAC Chapter 127 references to the "American Medical Association Guides to the Evaluation of Permanent Impairment" to correct typographical errors.

The division adopts these amendments to promote transparency in the designated doctor assignment process, retain licensed medical doctors and doctors of osteopathy, clarify certain designated doctor qualification standards, and update certification requirements. Additionally, the division adopts non-substantive amendments throughout 28 TAC Chapter 127 to: (i) correct grammatical errors; (ii) conform to current agency style; (iii) re-letter and re-number rule text; (iv) update statutory citations; and (v) non-substantively simplify and clarify sections. In conjunction with this adoption order, the division finalizes revisions to DWC Form-032, *Request for Designated Doctor Examination*, DWC Form-068, *Designated Doctor Examination Data Report*, and an internal form entitled *Presiding Officer's Directive to Order a Designated Doctor Exam* for consistency with amendments made in this adoption order. Form revisions will be made available on the division's website along with a copy of the adoption order.

In accordance with Government Code §2001.033, the division's reasoned justification for the sections set out in this order includes the preamble and a detailed section-by-section description.

REASONED JUSTIFICATION. In the Texas workers' compensation system, the division assigns a designated doctor to perform a medical examination to resolve questions about an employee's work-related injury. The questions are whether impairment was caused by the compensable injury; whether maximum medical improvement has been attained; the extent of the injured employee's compensable injury; whether the injured employee's disability is a direct result of the work-related

injury; the ability of the injured employee to return to work; or similar issues. Prior amendments to the designated doctor program were enacted to implement House Bill (HB) 2605 of the 82nd Legislature, Regular Session. Since the implementation of HB 2605, the division has identified three areas to strengthen and improve designated doctor functions that require additional rulemaking. The three areas are the designated doctor assignment process, qualification standards, and certification requirements. Labor Code §408.0041 and §408.1225 provide statutory authority for the designated doctor program, including but not limited to, designated doctor assignments, designated doctor certification and recertification, and designated doctor qualification standards. Title 28 TAC Chapter 127 implements these Labor Code sections. Additionally, other statutory provisions that provide general rulemaking authority are cited in the statutory authority section of this adoption order.

Over the past few years, participation in the designated doctor program has declined, particularly among licensed medical doctors and doctors of osteopathy. The division acknowledges that several factors may have contributed to this decline, such as the adoption of the division's enhanced training and testing requirements under HB 2605. In adopting amendments to 28 TAC Chapter 127, the number of licensed medical doctors and doctors of osteopathy serving as designated doctors is noted because these practitioners are qualified to evaluate nearly all musculoskeletal and non-musculoskeletal injuries seen in the workers' compensation system. The number of licensed doctors of chiropractic serving as designated doctors has also declined over the past few years, but not at the same rate as medical doctors and doctors of osteopathy.

In 2012, 75 percent of designated doctors were medical doctors and 9 percent were doctors of osteopathy. By 2017, the participating rates had dropped. Thirty percent of designated doctors were medical doctors and 4 percent were doctors of osteopathy. As licensed medical doctors and doctors of osteopathy are the only doctors qualified by rule to perform non-musculoskeletal examinations, a

continuing downward trend in program participation by these practitioners could produce severe consequences for system participants and injured employees in need of a designated doctor examination to evaluate non-musculoskeletal injuries or certain complex diagnoses. Moreover, a continuing decline in available practitioners overall may force injured employees to travel farther to attend an examination or delay the dispute resolution process because of an inability to find a qualified designated doctor. This decline has prompted the division to focus on ensuring an adequate number of appropriately qualified doctors participate in the system.

HB 2605 of the 82nd Legislature, Regular Session amended Labor Code §408.0041(b) to require that a medical examination be performed by the next available doctor on the division's list of certified designated doctors whose credentials are appropriate for "the area of the body affected by the injury and the injured employee's diagnosis." Additionally, HB 2605 deleted the requirement that a designated doctor's credentials be appropriate for the "issue in question" and the injured employee's "medical condition." In 2013, the division implemented an automated system to assign designated doctor examinations and adopted new rules governing designated doctor certifications, training, testing, and qualifications.

Over time, the division's methodology for assigning examinations to designated doctors for evaluation of injuries to the musculoskeletal areas of the body produced an unbalanced distribution of assignments among doctors qualified to perform these examinations. The division's concern is whether the distribution of available assignments is proper given the doctors' qualifications and the sheer number of designated doctor examinations assigned. To address these concerns, the division adopts amendments to 28 TAC §127.5 to address how the division assigns a designated doctor examination and provide an assignment distribution methodology more balanced for all doctors qualified to evaluate musculoskeletal areas of the body. It is expected that the new assignment

methodology will increase the transparency of the designated doctor assignment process and help retain licensed medical doctors and doctors of osteopathy on the designated doctor's list.

Labor Code §402.021(a) provides in part that a basic goal of the workers' compensation system is to ensure each injured employee has access to a fair dispute resolution process. The statute further provides that the legislative intent is to minimize the likelihood of disputes, but resolve them promptly and fairly when they arise. In furtherance of this legislative intent and the corresponding goals of the workers' compensation system, the division determined that examinations involving certain complex and rare diagnoses are most appropriately performed by doctors with extensive clinical expertise and appropriate designated doctor training. The division acknowledges that designated doctors may be authorized to evaluate certain conditions falling within the scope of their licenses. However, under Labor Code §408.0041(b), a requested medical examination must be performed by the next available doctor on "the division's list of certified designated doctors whose credentials are appropriate for the area of the body affected by the injury and the injured employee's diagnosis." Therefore, in accordance with the statutory mandate, the division determined the qualification standards of designated doctors and clarifies those established standards to ensure the most optimally qualified doctor is selected for an examination.

To serve as a designated doctor in the workers' compensation system, a doctor has to maintain active certification as directed under Labor Code §408.1225(a). Designated doctor certification allows the division to ensure that a doctor has met proper eligibility requirements, including educational experience, previous training, and knowledge of processes for the proper assignment of dates of maximum medical improvement and impairment ratings. Labor Code §408.1225(a-3) requires the division to develop guidelines for certification training programs to ensure

a designated doctor's competency and continued competency in assessment, including testing criteria.

Division-required testing and training is not static and new developments may require updates. It is important that designated doctors attend training based on the most current information to ensure designated doctors are competent and can demonstrate continued competency in performing specific designated doctor duties. Therefore, the division adopts a specific timeframe for a doctor to submit documentation of successful completion of division-required training and testing when applying for certification and reduces the specific timeframe for submission when applying for recertification. The effect of these amendments is to shorten the time between attending a division-required training and applying for a designated doctor certification or recertification so that the doctor attends training based on the latest information. Security of the designated doctor certification examination has become increasingly important in recent years and the division is committed to protecting the integrity of its division-required tests. The division adopts amendments that limit the number of times a doctor may take the certification examination in a given time period to increase test security and protect the test content.

Amended 28 TAC §127.1.

Title 28 TAC §127.1 outlines the process for requesting a designated doctor examination. To request a designated doctor examination, the insurance carrier, injured employee, or injured employee's representative, if applicable, must provide the division with certain information necessary to process the request. The DWC-Form 032, *Request for Designated Doctor Examination*, is the form prescribed by the division to request a designated doctor examination. The DWC Form-032 serves a variety of functions, including providing information for claim record creation, information for

associating the injured employee with the appropriate insurance carrier, updating injured employee information to notify parties, and assigning examinations to qualified designated doctors.

It is important that the injured employee, injured employee's representative, if applicable, or insurance carrier provide accurate information on the form to prevent unnecessary delay in updating information or in assigning a designated doctor. The division acknowledges that requestors of designated doctor examinations may not be aware of certain information at the time of the request. The revised DWC Form-032 simplifies requesting a designated doctor examination by no longer requiring certain information which may not be known to requestors at the time of the request.

Amended §127.1(b) deletes the phrase in existing paragraph (2), "explain any change of condition if the requestor indicates that the injured employee's medical condition has changed since a previous designated doctor examination on the same claim;" because the phrase is duplicative and no longer necessary. Additionally, the amendment simplifies DWC Form-032 because the revised form contains a field in which a requestor can provide good cause for requesting an examination within 60 days. A change in an injured employee's medical condition is an example of good cause which can be provided in the DWC Form-032 field.

Amended §127.1(b) re-numbers the subsection paragraphs (3) – (7) and (9) - (12) to paragraphs (2) – (6) and (7) – (10), respectively. The division adopts the non-substantive amendment to account for deleted text.

Amended §127.1(b)(2) adds the phrase "body part or body parts" and deletes the phrase "part of the body." The division adopts the non-substantive amendment to conform to agency style.

Amended §127.1(b)(3) deletes the words "provide a" and "of" to conform to agency style. Amended §127.1(b)(3) adds the phrase "court, or all injuries" to clarify that the requestor list all

injuries determined to be part of the compensable injury by the division or a court of law or injuries accepted as compensable by the insurance carrier.

Amended §127.1(b) deletes the phrase in existing paragraph (8) "state whether the injured employee has attended any other designated doctor examinations on this claim and, if so, provide the date of the most recent examination and the name of the examining designated doctor;" because the phrase is no longer necessary. The division adopts the amendment because the requestor may not be aware of prior examinations and the division already maintains this information.

Amended §127.1(b)(9)(G) adds the word "designated" before the word "doctor." The division adopts the non-substantive amendment to improve clarity.

Amended §127.1(e) adds the phrase "administrative law judge" and deletes the phrase "hearing officer" in this subsection. The division adopts the amendment to conform to HB 2111 of the 85th Legislature, Regular Session, which replaced statutory references to "hearing officer" with "administrative law judge."

Amended §127.1(f) adds the rule citation "§127.5(b)" and deletes the referenced rule citation "§127.5(a)." The division adopts the amendment to correct the referenced rule citation.

Amended §127.1(g) deletes the date "September 1, 2012" and adds "December 6, 2018" to delay the effective date of the rule amendments and allow system participants sufficient time to prepare and update their systems.

Amended 28 TAC §127.5.

Labor Code §408.0041(b) requires a designated doctor examination to be performed by the next available doctor on the division's list of certified designated doctors whose credentials are

appropriate for the area of the body affected by the injury and the injured employee's diagnosis as determined by commissioner rule. As previously discussed, the division implemented an automated system to standardize designated doctor examination assignments and increase efficiency in the designated doctor assignment process. The system assigns examinations to the next available qualified designated doctor on the list based upon the injured employee's county of residence and maintains a separate rotation of designated doctors, by county, who are willing to perform examinations in that county. The system assigns examinations nightly in order to comply with Labor Code §408.0041(b), which in part requires the division to assign a designated doctor examination no later than the 10th day after a request is approved.

Depending on the volume of examination requests in a given day, the next available qualified designated doctor can be assigned up to five examinations in a particular county. The assignment of up to five examinations reflects economies of scale that may be achieved by a designated doctor with multiple assignments in a particular location. However, the number of examination requests varies each day and the division must assign only one examination to a designated doctor if that is the only examination for which a particular designated doctor is qualified and available. Designated doctors willing to conduct exams in rural counties may often have only one examination assigned at a time and the assignment of multiple examinations, when available, may offset the expenses associated with travel to rural counties for a single examination. The assignment of up to five examinations to the next available doctor for which the designated doctor is qualified in a particular county is beneficial to designated doctors because it decreases their expenses and creates scheduling efficiency for the designated doctor when travel is involved. Without the benefit of receiving additional designated doctor examinations, designated doctors might choose to decline individual assignments because it is not cost-effective when travel is involved.

Once the next available doctor is assigned an examination, the doctor moves to the bottom of the list in the county. Sometimes, an examination requires a doctor with qualifications other than the next doctor on the list. When this occurs, the automated system searches the list to find the next qualified doctor for the examination, assigning only that examination to the selected designated doctor, and then moving this doctor to the bottom of the list in the county. This is due in part to the division's mandate to assign the next available doctor qualified to perform a designated doctor examination. Over time, however, the division has noticed an unintended consequence resulting from this assignment process. The assignment process distributed assignments for musculoskeletal conditions to licensed medical doctors and doctors of osteopathy in an unbalanced manner because when an examination required the qualifications of these practitioners and they were not the next doctor on the list, the licensed medical doctor or doctor of osteopathy moved to the bottom of the list after receiving the one examination and did not benefit from an assignment of up to five examinations. This unbalanced distribution is significant because 70 percent of all designated doctor examination requests involve only musculoskeletal conditions and licensed medical doctors or doctors of osteopathy rarely have an opportunity to receive multiple examinations of this type in the same county.

The adopted distribution methodology is consistent with Labor Code §408.0041(b) because it assigns requested medical examinations based on a designated doctor's credentials appropriate for the area of body affected and the injured employee's diagnosis determined by the qualifications standards in amended 28 TAC §127.130. The transparency of the distribution methodology addresses concerns about how a designated doctor is selected and ensures a more equitable distribution of designated doctor assignments.

Amended §127.5(a) adds an applicability subsection. The division adopts the amendment to clarify that the designated doctor assignment process applies to designated doctor examination requests made on or after the effective date of the section.

Amended §127.5(b) re-letters the section, specifically existing subsections (a), (b), (c), (d), (e), and (f) to subsections (b), (c), (d), (h), (i), and (l), respectively. The division adopts the non-substantive amendment to account for added text.

Amended §127.5(c) adds the letter "(b)(4)" after the word "subsection" and deletes the letter "(a)(4)" to correct the subsection.

Amended §127.5(d) adds the letter "(h)" after the word "subsection" and deletes the letter "(d)" to correct the subsection.

Amended §127.5(e) provides that the division will maintain two independent lists in each county of the state from which the next available doctor will be selected. Amended §127.5(e) provides that one list will consist of designated doctors qualified to perform examinations under amended §127.130(b)(1)-(4) of this title and the other list will consist of designated doctors qualified to perform examinations under §127.130(b)(5)-(9) of this title. Amended §127.5(e) further provides that a qualified designated doctor may be placed on both lists. The division adopts the amendment to show that designated doctors are placed on a list based on credentials appropriate for the area of body affected and the injured employee's diagnosis.

Amended §127.5(e)(1) provides that a designated doctor will be added to the appropriate list(s) for the county of each address the doctor has filed with the division. The division adopts the amendment to explain when designated doctors are added to a list in a county.

Amended §127.5(e)(2) provides that a designated doctor will be placed at the bottom of the appropriate list(s) when a designated doctor adds an address to a county the doctor is not currently listed in. The division adopts the amendment to explain the order in which a designated doctor will appear on a list in a county.

Amended §127.5(e)(3) provides that a designated doctor will be removed from a list when the designated doctor no longer has an address listed in a county. The division adopts the amendment to explain when designated doctors are removed from a list in a county.

Amended §127.5(f) adds an introductory phrase "Except as provided in subsection (h) of this section, the division will assign designated doctor examinations as follows:" to explain how designated doctor examinations will be assigned. The division adopts the amendment to clarify that subsequent designated doctor examinations do not apply to the assignment methodology outlined in this section.

Amended §127.5(f)(1) provides that examination requests for a county will be sorted and distributed to the appropriate list each working day. The division adopts the amendment to explain that examination requests received during each twenty-four hour period are sorted based on the qualification standards necessary to perform the examination.

Amended §127.5(f)(2) provides that the division may assign up to five examinations to the next available doctor at the top of the appropriate list depending on the volume of requested examinations. The division adopts the amendment to clarify that on any given day in a particular county a designated doctor has the opportunity to receive up to five examinations on either list. However, the number of examination requests varies each day and the division must assign only one examination

to a designated doctor if that is the only examination for which a particular designated doctor is qualified and available.

Amended §127.5(f)(3) provides that after a designated doctor receives an assignment from one list, the designated doctor will then move to the bottom of that list. The division adopts the amendment to explain how designated doctors rotate in the list once they receive an assignment. Amended §127.5(f)(3) also clarifies that one list rotation does not affect the other list rotation.

Amended §127.5(g) provides that the division may exempt a designated doctor from the applicable qualification standard under section §127.130(d) and assign a designated doctor as necessary if there is no qualified and available designated doctor in the county of the injured employee. The division adopts the amendment to ensure the division has administrative flexibility to select an appropriate designated doctor in uncommon circumstances, such as when a qualified doctor may not be qualified on the date of the examination because of various external factors, including pending disciplinary action by the doctor's licensing board.

Amended §127.5(h) adds the word "reassign" and deletes the word "use" to conform to agency style.

Amended §127.5(i) deletes the phrase "there exists" and adds the word "exists" after the phrase "a scheduling conflict" to conform to agency style. Amended §127.5(i) adds the sentences, "An examination cannot be rescheduled without the mutual agreement of both the designated doctor and the injured employee. The designated doctor must maintain and document:" to remind system participants that an agreement to reschedule is mandatory and to ensure that both parties to a designated doctor examination agree to a rescheduled appointment. The division adopts the amendment to help monitor rescheduled examinations agreed upon by the injured employee and the

designated doctor. The division has received complaints regarding designated doctors not contacting injured employees to obtain an agreement prior to rescheduling examinations as required by amended §127.5(i) of this title. Proper communication and mutual agreement on the date and time of an exam are critical, since the consequences of failure to attend the examination by the injured employee may include the suspension of temporary income benefits by the insurance carrier under §127.25(a) of this title.

Amended §127.5(i)(1) adds the phrase "the date and time of the designated doctor examination listed on the division's order;" to ensure that 21 days has not elapsed since the originally scheduled examination.

Amended §127.5(i)(2) adds the phrase "the date and time of the agreement to reschedule with the injured employee;" to verify that an agreement was made with the injured employee.

Amended §127.5(i)(3) adds the phrase "how contact was made to reschedule, indicate the telephone number, facsimile number, or email address used to make contact;" to ensure the method and contact information is correct. An injured employee may change their phone number or email address and it is important that the division is able to verify the information if a scheduling issue or complaint arises.

Amended §127.5(i)(4) adds the phrase "the reason for the scheduling conflict;" to identify repeated patterns of rescheduling, whether by the designated doctor or the injured employee.

Amended §127.5(i)(5) adds the phrase "the date and time of the rescheduled designated doctor examination." The division adopts the amendment to verify that the rescheduled examination is set to occur within the 21 days of the originally scheduled examination.

Amended §127.5(j) adds the sentence, "Failure to document and maintain the information in subsection (i) of this section, creates a rebuttable presumption that the examination was rescheduled without mutual agreement of both the designated doctor and injured employee." The division adopts the amendment to clarify the responsibility of the designated doctor to maintain information about rescheduled examinations and emphasize the importance of a designated doctor obtaining a mutual agreement from the injured employee prior to rescheduling an examination.

Amended §127.5(k) adds the word "The" and deletes the phrase, "If both the designated doctor and the injured employee agree to reschedule the examination, the" because the requirement to agree to reschedule is found in subsection (i) of this section.

Amended §127.5(l) deletes the date "September 1, 2012" and adds, "December 6, 2018" to delay the effective date of the rule amendments and allow system participants sufficient time to prepare and update their systems.

Amended 28 TAC §127.10.

Title 28 TAC §127.10 addresses general procedures for designated doctor examinations, including requirements regarding the receipt of medical records and analyses, reports, and record retention.

Amended §127.10(d) deletes the word "possible" and adds the word "reasonable" before the phrase "outcome for the extent of the injury." The division adopts the amendment to clarify that when maximum medical improvement or impairment rating cases simultaneously include an extent of injury determination the designated doctor need only opine on reasonable outcomes based on the extent of the injury. The requirement to take into account each "possible" outcome when extent of injury is requested is impractical depending on the number of conditions in dispute. Taking into account each

"reasonable" outcome will ensure that there are certifications of maximum medical improvement and impairment ratings that an administrative law judge may rely on when settling a dispute.

Amended §127.10(k) deletes the date "September 1, 2012" and adds "December 6, 2018" to delay the effective date of the rule amendments and allow system participants sufficient time to prepare and update their systems.

Amended 28 TAC §127.100.

Labor Code §408.1225(a-2) requires the division to evaluate the qualification of designated doctors for certification using eligibility requirements including demonstrated ability to perform specific designated doctor duties. The statute also requires standard training and testing to be completed in accordance with division policies and guidelines. Labor Code §408.1225(a-3) requires the division to develop guidelines for certification training programs to ensure a designated doctor's competency and continued competency in assessment including testing criteria. Division-required testing and training often require updates and designated doctors need to be equipped with the latest information. To ensure continued competency among designated doctors, the division adopts amendments to specify a timeframe for a doctor to submit documentation of successful completion of division-required training and testing when applying for certification and reduces the specific timeframe for submission when applying for recertification. It is important that a doctor applying for designated doctor certification completes a division-required training course with the latest updates.

Test security is an important element of ensuring continued competency among designated doctors practicing in the system. The division adopts amendments that provide testing limitations to limit test memorization and an unfair advantage in multiple testing attempts. The division is determined to confront attempts to undermine the testing process including unauthorized disclosure

of test questions through memorization. The new testing limitations allow for a fixed period between test attempts to help prevent test memorization and ensure continued competency.

Labor Code §408.1225(b) requires the division to ensure the quality of designated doctor decisions and reviews through active monitoring. Designated doctors who have previously practiced in the workers' compensation system may apply for certification when the period for applying for recertification has lapsed. Currently, 28 TAC §127.100 does not address specifically the division's authority to consider as part of the certification process the quality of a designated doctor's decisions if the doctor has previously served as designated doctor. The division adds factors to consider when evaluating whether a designated doctor should be certified similar to those used when evaluating a designated doctor for recertification. The factors help to ensure the division evaluates a previously certified designated doctor's demonstrated ability to perform specific designated doctor duties and to ensure the division continues active monitoring of designated doctors.

Amended §127.100(a) adds an applicability subsection. The division adopts the amendment to clarify that the section applies to designated doctor certification applications received on or after the effective date of this section.

Amended §127.100(b) re-letters the section, specifically existing subsections (a), (b), (c), (d), (e), (f), (g), and (h) to subsections (b), (c), (d), (f), (g), (h), (i), and (j), respectively. The division adopts the non-substantive amendment to account for added text.

Amended §127.100(b) deletes two references to the phrase "who is not a designated doctor" before the words "must" to conform to agency style.

Amended §127.100(b)(1) adds the letter "(c)" and deletes the letter "(b)" after the word "subsection" to correct the subsection.

Amended §127.100(b)(2) adds the phrase "within the past 12 months" before the word "successfully." The division adopts the amendment to designate a time for submitting documentation certifying successful completion of all division-required training and testing. Twelve months is sufficient time to submit documentation of successful completion of division-required training and testing and ensures the designated doctors are equipped with the latest information.

Amended §127.100(c) adds the letter "A" and deletes the phrase "For the purposes of subsection (a) of this section, a" to conform to agency style.

Amended §127.100(d) adds the sentences "If a doctor passes a division-required test, the doctor may not retest within a twelve month period. If a doctor fails a division-required test, the doctor may not retest more than three times within a six month period:" to emphasize the importance of test security and protecting the content of division-required tests.

Amended §127.100(d)(1) adds the phrase "After the first or second attempt, the doctor must wait 14 days before retaking the test; or" to identify the number and length of time between each attempt a doctor applying for designated doctor certification or recertification can sit for a division-required test.

Amended §127.100(d)(2) adds the phrase "after the third attempt, the doctor must wait six months before retaking the test." The division adopts the amendment to identify the number and length of time between each attempt that a doctor applying for designated doctor certification or recertification can sit for a division-required test.

Amended §127.100(e) deletes the word "only" after the word "Approvals" to conform to agency style.

Amended §127.100(f) adds the word "may" and deletes the word "shall" after the word "Doctors" to conform to agency style.

Amended §127.100(f)(1) adds the phrase "and documentation" after the word "information." The division adopts the non-substantive amendment to clarify that a doctor is submitting documents, i.e., an application and certificates. Amended §127.100(f)(1) adds the letter "(b)" and deletes the letter "(a)" after the word "subsection" to correct the subsection. Amended §127.100(f)(1) deletes the phrase ", including having completed all division-required training and passed all division-required examinations" because it is no longer necessary with the addition of the phrase "and documentation."

Amended §127.100(f)(2) adds the letter "(c)" and deletes the letter "(b)" after the word "subsection" to correct the subsection.

Amended §127.100(f)(4) adds the phrases "events, or occurrences," "the commissioner determines to," and "including but not limited to:" to clarify the commissioner's authority to take action as necessary to restrict participation of a designated doctor as permitted under Labor Code §408.1225(b)(1).

Amended §127.100(f)(4)(A) adds the phrase "the quality of the doctor's past reports as a certified designated doctor, if any;" Amended §127.100(f)(4)(B) adds the phrase "a history of complaints as a certified designated doctor, if any;" Amended §127.100(f)(4)(C) adds the phrase "excess requests for deferral from the designated doctor list as a certified designated doctor, if any;" Amended §127.100(f)(4)(D) adds the phrase "a pattern of overturned reports by the division or a court as a certified doctor, if any;" Amended §127.100(f)(4)(E) adds the phrase "a demonstrated lack of ability to apply or properly consider the American Medical Association Guides to the Evaluation of Permanent Impairment adopted by the division for the assignment of impairment ratings and all

return-to-work and treatment guidelines adopted by the division as a certified designated doctor, if any;" Amended §127.100(f)(4)(F) adds the phrase "a demonstrated lack of ability to consistently perform designated doctor examinations in a timely manner as a certified designated doctor, if any;" Amended §127.100(f)(4)(G) adds the phrase "a demonstrated failure to identify disqualifying associations as a certified designated doctor, if any;" Amended §127.100(f)(4)(H) adds the phrase "a demonstrated lack of ability to ensure the confidentiality of the injured employee medical records and claim information provided to or generated by a certified designated doctor, if any;" The division adopts these amendments as useful factors to consider during the certification process regardless of whether a doctor is currently serving as a designated doctor.

Amended §127.100(f)(4)(I) adds the phrase "applying for certification less than a year from denial of a previous designated doctor certification or recertification application, if any; or" to allow a designated doctor time to address a recommendation or establish a pattern of new conduct based on a denial of a previous designated doctor certification or recertification application.

Amended §127.100(f)(4)(J) adds the word "any" and deletes the phrase "such as" to conform to agency style.

Amended §127.100(h) adds the letter "(g)" and deletes the letter "(e)" after the word "subsection" to correct the subsection.

Amended §127.100(j) deletes the date, "September 1, 2012" and adds "December 6, 2018" to delay the effective date for the rule amendments and allow system participants sufficient time to prepare and update their systems.

Amended 28 TAC §127.110.

Title 28 TAC §127.110 addresses designated doctor recertification. This section outlines requirements necessary for a designated doctor to renew their certification.

Amended §127.110(a) adds an applicability subsection. The division adopts the amendment to clarify that the section applies to designated doctor recertification applications received on or after the effective date of this section. Amended §127.110(a) also deletes the phrase "If a designated doctor's certification expires before January 1, 2013:" because the transitional language is no longer necessary.

Amended §127.110(a)(1) – (a)(4) deletes the transitional language because it applies to applications received before January 1, 2013.

Amended §127.110(b) deletes the phrase "on or after January 1, 2013" after the word "expires" and the phrase "after this date" because the language references obsolete transitional language.

Amended §127.110(b)(1) adds the number "12" and deletes the number "18" after the word "past." The division adopts the amendment for consistency with the designated doctor certification rule in amended 28 TAC §127.100(b)(2).

Amended §127.110(b)(3) adds the rule citation "§127.100(c)" and deletes the rule citation "§127.100(b)" to correct the referenced rule citation. Amended §127.110(b)(3) adds the title of the referenced rule citation, "relating to Designated Doctor Certification" to conform to agency style. Amended §127.110(b)(3) adds the sentence "For purposes of recertification, division-required testing limitations as described in §127.100(d) of this title apply." The division adopts the amendment for consistency with testing limitations outlined in amended §127.100(d).

Amended §127.110(e)(1) adds the phrase "and documentation" after the word "information." The division adopts the non-substantive amendment to clarify that a doctor is submitting documents,

i.e., an application and certificates. Amended §127.110(e)(1) deletes the phrase ", including verification of having timely completed all division-required training and passed all division-required examinations" because it is no longer necessary with the addition of the phrase "and documentation."

Amended §127.110(e)(2) adds the rule citation "§127.100(c)" and deletes the rule citation "§127.100(b)" to correct the referenced rule citation.

Amended §127.110(e)(5) adds the phrase "events, or occurrences" and the phrase "the commissioner determines to" to clarify the commissioner's authority to take action as necessary to restrict participation of a designated doctor as permitted under Labor Code §408.1225(b)(1).

Amended §127.110(e)(5)(I) deletes the word "other" for consistency with designated doctor certification rule in amended 28 TAC §127.100(f)(4)(J).

Amended §127.110(h) deletes the date, "September 1, 2012" and adds "December 6, 2018" to delay the effective date for the rule amendments and allow system participants sufficient time to prepare and update their systems.

Amended 28 TAC §127.130.

In 2011, the Texas Sunset Advisory Commission (Sunset), recommended that the division develop qualification requirements for designated doctors in part to ensure that a level of expertise and consistency was achieved when resolving differing medical opinions in the dispute resolution process. Sunset stated that "the combination of eligibility, training, and testing standards used to determine an applicant's qualifications was insufficient to adequately ensure the applicant had the specific skill set necessary to serve as a designated doctor assessing injuries common to the workers' compensation system." Sunset further stated that, "simply because doctors are well qualified to practice in their given professions does not mean that they are capable, without demonstrating

additional skills, to perform the specific functions required of a designated doctor, or have the appropriate credentials to assess a specific issue or medical condition in question."

HB 2605 of the 82nd Legislature, Regular Session amended Labor Code §408.0041(b) to require that a medical examination be performed by the next available doctor on the division's list of certified designated doctors whose credentials are appropriate for "the area of the body affected by the injury and the injured employee's diagnosis" and deleted the requirement that a designated doctor's credentials be appropriate for the "issue in question" and the injured employee's "medical condition."

In 2013, the division implemented HB 2605 and in response to Sunset's recommendation, enhanced its qualification standards for identified injuries and diagnoses relating to seven areas of the body and matching those areas to particular licensed health care providers. Sunset stated that, "this recommendation will give the division the flexibility it needs to determine how to best combine qualification requirements to ultimately ensure that designated doctors have the ability to perform the examinations required by state law." When exercising this flexibility, the division does not define a doctor's scope of practice. Rather, the division is developing qualification standards for designated doctor examinations, as mandated in Labor Code §408.0041(b) and determined by commissioner rule.

Additionally, the division recognized that the broad qualification categories could under some circumstances permit a designated doctor to evaluate a particular injury or complex diagnosis that may require a designated doctor with a higher level of expertise in a particular medical specialty. Therefore, the division developed board certification categories to ensure that the most optimally qualified doctor is assigned while maintaining adequate flexibility to assign a designated doctor in counties where a specialist may not be available as described under §127.130(d) of this title.

Amended §127.130(a) adds an applicability section to clarify that the amended qualification standards apply to designated doctor assignments made on or after the effective date of this section. The amendment minimizes confusion regarding current qualification standards applicable to designated doctor assignments made prior to the effective date of this rule. Amended §127.130(a) also deletes the transitional language because it is no longer necessary to describe qualification standards prior to January 1, 2013.

Amended §127.130(b) adds the letter "A" and deletes the phrase "For examinations performed on or after January 1, 2013, a" because the phrase is no longer necessary. Amended §127.130(b) adds the title of the referenced rule citation, "relating to Disqualifying Associations" to conform to current agency style.

Amended §127.130(b)(3) adds the phrase "musculoskeletal structures of the" before the word "torso" to delineate injuries that a licensed doctor of chiropractic, a licensed medical doctor, or licensed doctor of osteopathy are qualified to examine. The amendment also clarifies that some injuries related to the torso may involve non-musculoskeletal structures so as to require evaluation by a licensed medical doctor or doctor of osteopathy.

Amended §127.130(b)(5) adds the word "jaw" and deletes the word "jaws" to correct a grammatical error. Amended §127.130(b)(5) adds the phrase "including a temporomandibular joint" to clarify that this body part is included in the teeth and jaw body area.

Amended §127.130(b)(7) adds the sentence "To examine injuries and diagnoses relating to mental and behavioral disorders, a designated doctor must be a licensed medical doctor or doctor of osteopathy." The division adopts the non-substantive amendment to reassign "mental and behavioral disorders" to a new paragraph for division data collection purposes.

Amended §127.130(b)(8) re-numbers paragraphs (7), (8), to paragraphs (8), (9), respectively. The division adopts the non-substantive amendment to account for added text. Amended §127.130(b)(8) adds the phrases "cuts to skin involving underlying structures" and "non-musculoskeletal structures of the torso;" to clarify injuries that a licensed medical doctor or doctor of osteopathy is qualified to examine these body areas. Licensed medical doctors and doctors of osteopathy possess the educational experience and training necessary to evaluate the impact of these injuries. The division notes that other injuries involving structures beneath the skin, such as rotator cuff tears, anterior cruciate ligament tears, carpal tunnel syndrome, or injuries involving compression or inflammation of nerves, tendons or ligaments, are not cuts and are appropriately suited for evaluation by licensed medical doctors, doctors of osteopathy, or doctors of chiropractic. Amended §127.130(b)(8) adds the words "hernia;" "respiratory;" "endocrine;" "hematopoietic;" and "urologic" to clarify the body areas that a licensed medical doctor or doctor of osteopathy are qualified to examine. Amended §127.130(b)(8) deletes the phrase "mental and behavioral disorders;" and the words "tendon lacerations; and dislocations." The division adopts the amendments to reassign mental and behavioral disorders into an independent paragraph for division data collection purposes and relocate dislocations to a board certification category because dislocations are complex injuries less frequently seen in the workers' compensation system and board certified medical doctors and doctors of osteopathy possess the educational experience and training necessary to evaluate the severity of these injuries. Additionally, tendon lacerations are examples of cuts to an underlying structure of the skin and are no longer necessary to describe separately.

Amended §127.130(b)(9) adds the number "(8)" and deletes the number "(7)" after the word "paragraphs" to correct the referenced paragraphs in the subsection.

Amended §127.130(b)(9)(A) adds the phrase "including concussion and post-concussion syndrome," to capture the most commonly diagnosed traumatic brain injuries. Amended §127.130(b)(9)(A) also deletes the word "or" and adds the word "and" to correct the board specialty name.

Amended §127.130(b)(9)(B) adds the words "and diagnoses," "fracture" and the phrase "or cauda equina syndrome" to clarify conditions that are similar to, but are not injuries to the spinal cord. Amended §127.130(b)(9)(B) deletes the words "including," and "fractures" and adds the letter "a" to reference a single spinal fracture. The division adopts the amendment to clarify that a single spinal fracture is sufficient under this category.

Amended §127.130(b)(9)(C) adds the phrase "deep partial or full thickness burns, also known as 2nd" before the word "3rd" and deletes the phrase "over 9 percent or greater of the body." The division adopts the amendment to conform to current medical terminology. Additionally, the amendment clarifies that 2nd, 3rd, or 4th degree burns covering any portion of the body surface area are complex and are not limited to over 9 percent of the body.

Amended §127.130(b)(9)(D) adds the board specialty "plastic surgery" to the list of appropriate certifications from the American Board of Medical Specialties or the American Osteopathic Association Bureau of Osteopathic Specialists qualified to examine complex regional pain syndrome (reflex sympathetic dystrophy). The division adopts the amendment because board certified plastic surgeons possess the educational experience and training necessary to evaluate the severity of these injuries. Designated doctors board certified in plastic surgery are qualified to perform designated doctor examinations on several complex diagnoses infrequently seen in the workers' compensation system. These diagnoses include severe burns and multiple fractures under amended §127.130(b)(9)(C) and (E).

Amended §127.130(b)(9)(E) adds the words "joint dislocation," and the phrase "pelvis or hip fracture." Amended §127.130(b)(9)(E) deletes the words "bone," "excluding," and "spinal fractures." The division adopts the amendments to clarify which injuries are more complex and less frequently seen in the workers' compensation system. Additionally, board certified medical doctors and doctors of osteopathy possess the educational experience and training necessary to evaluate the severity of these injuries.

Amended §127.130(b)(9)(G) adds the word "burns" and deletes the phrase "exposure limited to skin exposure" to conform to current medical terminology.

Amended §127.130(e) adds the word "qualification" after the word "appropriate" and deletes the word "selection" to correct a grammatical error. Amended §127.130(e) deletes the letter "(a)" and the words "or," "either," and "as applicable," to correct the subsection and grammar.

Amended §127.130(g)(1) adds the rule citation "§127.110(b)" and deletes the rule citations "§127.110(a) or (b)" to correct the referenced rule citation.

Amended §127.130(g)(2) deletes the letter "(a)" and the words "or," "either," and "as applicable," to correct the subsection and grammar.

Amended §127.130(i) deletes the date, "September 1, 2012" and adds "December 6, 2018" to delay the effective date for the rule amendments and allow system participants sufficient time to prepare and update their systems.

Amended 28 TAC §127.140.

Amended §127.140(d) adds the rule citation "§127.5(b)" and deletes the rule citation "§127.5(a)" to correct the referenced rule citation.

Amended §127.140(g) deletes the date, "September 1, 2012" and adds "December 6, 2018" to delay the effective date for the rule amendments and align the effective date with other rules.

Amended 28 TAC §127.220.

Amended §127.220(c) deletes all phrases in existing paragraph (2) "list all injuries included on the examination request as: determined to be compensable by the division; accepted as compensable by the insurance carrier; or, for informational purposes only, the diagnosis code for each injury;" because this information no longer needs to be reported.

Amended §127.220(c)(2) re-numbers the paragraphs (3), (4), (5), (6), and (7) to paragraphs (2), (3), (4), (5), and (6), respectively. The division adopts the non-substantive amendment to account for deleted text.

Amended §127.220(d) deletes the date, "September 1, 2012" and adds "December 6, 2018" to delay the effective date for the rule amendments and allow system participants sufficient time to prepare and update their systems.

SUMMARY OF COMMENTS AND AGENCY RESPONSE

General

Comment: Several commenters support the division's efforts to improve the efficiency and effectiveness of the designated doctor process. Commenters also support the division's efforts to increase physician participation. A commenter states that restoring the ability of a designated doctor to be assigned multiple injured employees per assignment represents one of the most important ways to increase physician participation.

Division Response: The division appreciates the supportive comment. No change was made in response to this comment.

Comment: Several commenters state that there is no evidence the proposed changes will increase participation of licensed medical doctors and doctors of osteopathy. Commenters state that the division cannot expect participation in a program demanding high levels of professional knowledge and experience without fair market value for services and fair reimbursement for the time commitment required. A commenter states that the division is asking too much of the designated doctors and more money is warranted. Another commenter states that between low reimbursement, complicated medical cases, and an increased number of no shows, there is no incentive for physicians to continue with the division, especially if they have an active medical practice.

Division Response: The division appreciates the comments and notes that these rule amendments are designed to simplify certain designated doctor processes, retain doctors, allow for better monitoring, and provide transparency through a new assignment methodology. This methodology is designed to retain licensed medical doctors and doctors of osteopathy on the designated doctor's list by providing a more balanced assignment distribution for all doctors qualified to evaluate musculoskeletal areas of the body.

The division acknowledges that reimbursement rates are particularly important to designated doctors, but emphasizes that designated doctor fees and reimbursement procedures are addressed in Chapter 134 of this title and are therefore outside of the scope of this project. No change was made in response to this comment.

Comment: Several commenters suggest increasing reimbursement to encourage participation. Commenters suggest increasing reimbursement rates for extent of injury questions.

One commenter states fair monetary reimbursement will attract more licensed medical doctors and doctors of osteopathy to participate in the designated doctor system. Another commenter suggests an increase of $1,200 for extent of injury questions. Another commenter suggests increasing non-musculoskeletal examinations by 25 percent. A commenter states that the scheduled fees for examinations and decision making "are cheap for today's economy." A commenter states that the lack of reimbursements have caused doctors to leave the system and suggests the division implement a record review fee charged to the insurance carrier. Another commenter suggests reinstating the reimbursement of no show appointments because of the lost opportunity a physician has to perform other billable services due to traveling to appointments where an examinee did not attend.

Division Response: The division appreciates the comments and notes that these rule amendments are designed to simplify certain designated doctor processes, retain doctors, allow for better monitoring, and provide transparency through a new assignment methodology. This methodology is designed to retain licensed medical doctors and doctors of osteopathy on the designated doctor's list by providing a more balanced assignment distribution for all doctors qualified to evaluate musculoskeletal areas of the body.

The division acknowledges that reimbursement rates are particularly important to designated doctors, but emphasizes that designated doctor fees and reimbursement procedures are addressed in Chapter 134 of this title and are therefore outside of the scope of this project. No change was made in response to this comment.

Comment: A commenter states that the business of being a designated doctor has decreased in profitability over the years and it is not worth the time and effort for licensed medical doctors and doctors of osteopathy to perform designated doctor examinations especially if they have to travel.

Division Response: The division realizes that all doctors make decisions as to how they want to conduct their business as a designated doctor, including whether to travel or not. The amendments are designed to incentivize designated doctors by creating a more balanced distribution of assignments. No change was made in response to this comment.

Comment: A commenter states that the division has failed to properly identify the actual reasons health care providers have left the designated doctor program and is only able to guess the solutions for attracting more licensed medical doctors and doctors of osteopathy to the program. Another commenter states that a complete lack of transparency and "aggressive actions" against designated doctors is why many licensed medical doctors and doctors of osteopathy have left the system.

Division Response: The division appreciates the comments. In the preamble, the division acknowledges that several factors may have contributed to health care providers leaving the system. Specifically, the division stated, "that several factors may have contributed to this decline, such as the adoption of the division's enhanced training and testing requirements required under HB 2605." The division emphasizes that the amendments are designed to simplify certain designated doctor processes, retain doctors, allow for better monitoring, and provide transparency through a new assignment methodology. The division notes that the new assignment methodology is designed to retain licensed medical doctors and doctors of osteopathy on the designated doctor's list by providing a more balanced assignment distribution for all doctors qualified to evaluate musculoskeletal areas of the body. No change was made in response to this comment.

Comment: Commenters state that the proposed amendments will eliminate participation by a majority of qualified doctors of chiropractic who travel. A commenter states that reducing appointments given to doctors of chiropractic may reduce the number of those who participate in the

system and negatively impact the injured employee. Commenters state that there is no evidence that a chiropractor's participation has had a negative impact on system participants or caused an imbalance among other healthcare providers. Commenters state that doctors of chiropractic have had fewer complaints, enforcement actions, and better dispute resolution outcomes than other licensed healthcare providers in the system. A commenter states that doctors of chiropractic should be treated equally in the selection process for all musculoskeletal assignments.

Division Response: The division appreciates the comments. The new assignment methodology is designed to retain licensed medical doctors and doctors of osteopathy on the designated doctor's list by providing a more balanced assignment distribution for all doctors qualified to evaluate musculoskeletal areas of the body. This balanced distribution has no effect on the number of assignment requests received in a particular county. The division emphasizes that depending on the volume of assignments on a given day, the next available doctor on either list may receive up to five assignments. Furthermore, the division acknowledges the commitment and appreciates the service provided by doctors of chiropractic. No change was made in response to this comment.

Comment: A commenter states that the current system is "predatory" and "insurance companies have too much influence over the division." The commenter states that the system only benefits insurance companies while injured employees, qualified doctors, and others are cheated. The commenter further states that the system "deserves investigation for RICO violations." Another commenter states that insurance companies are controlling the designated doctor program and the division is allowing and justifying this improper relationship.

Division Response: The division appreciates the comment but disagrees. The division emphasizes that the amendments are consistent with all statutory requirements of the Labor Code.

To the extent any system participant has a complaint, the system participant is encouraged to submit a complaint through the division's complaint process outlined on the division website at https://www.tdi.texas.gov/consumer/complfrm.html. No change was made in response to this comment.

Comment: Commenters state that because of a lack of enforcement insurance carriers have an unfair advantage. Commenters state that since 2013 there has been no enforcement action for misleading or misrepresentation of conditions or diagnoses, which are often manipulated to favor a particular provider type. Commenters allege that because TXCOMP provides a public record of the doctor's profiles and availability in each county, a requestor can pre-determine which provider type will be selected based on information placed on the DWC Form-032. If a requestor knows a doctor of chiropractic is qualified to see the injured employee, and no medical doctors or doctors of osteopathy are available in that county, the requestor can alter the document to include an area or condition which may or may not be a part of the record in order to skip over the doctor of chiropractic in favor of a medical doctor or doctor of osteopathy in other counties. Many times the injured employee is unable to travel to the appointment and the insurance carrier wins the case by default.

Division Response: The division appreciates the comment but disagrees that there is a lack of enforcement. The division notes that monitoring and enforcement are addressed in Chapter 180 of this title and therefore outside of the scope of this project. The division further notes that a requestor of a designated doctor examination certifies that the information on the DWC Form-032 is true and correct, and any misstatement or falsification could result in enforcement action. To the extent any system participant has a complaint or witnesses an inappropriate action, the system participant is encouraged to submit a complaint through our complaint process outlined on the division website at

https://www.tdi.texas.gov/consumer/complfrm.html. No change was made in response to this comment.

Comment: The commenter states that in some cases the "medical advisor's recommendations and rule violations" can jeopardize a healthcare provider's ability to practice because those recommendations are sent to the Texas Medical Board for disciplinary action. The commenter further states that the division can restrict a designated doctor's future participation upon submission of a recertification application after the designated doctor has completed the required training and testing. The commenter suggests that the division provide an annual report of any allegations or rulings which may negatively impact a designated doctor's future participation prior to any required training or testing because there is no timely notification of alleged violations other than an education or warning letter.

Division Response: The division appreciates the comment and notes that §180.26(g) of this title permits warning letter notification as an alternative to imposing sanctions. Notifications are issued timely upon discovery of alleged violations. Moreover, the division emphasizes its ability to pursue enforcement actions against a designated doctor for administrative violations and to issue sanctions that can range from a warning letter to removal from the designated doctor list. The division declines to provide an annual report of allegations as this suggestion is unrelated to the amendments and is therefore outside the scope of the project. No change was made in response to this comment.

Comment: A commenter states that the confidentiality of complaints is a complete denial of a designated doctor's right to due process. The commenter further states that this promotes an environment of "cherry-picking" against certain doctors forcing them to spend money defending

themselves against unknown allegations. Another commenter expresses concern that the division picks and chooses which doctor to go after and kicks out the doctors they do not like.

Division Response: The division appreciates the comment and notes that Labor Code §402.092 provides that information compiled or maintained by the division with respect to a division investigation is considered an investigation file and is confidential. Additionally, Labor Code §402.0235 requires the division to assign priorities to complaint investigations based on risk. The risk-based complaint investigation system considers the severity of the alleged violation, whether the alleged violator showed continued or willful noncompliance, and whether a commissioner order has been violated. Moreover, Labor Code §413.05115 requires the division to have a clear process for selecting health care providers for compliance audit or review, and handling complaint-based medical case reviews. No change was made in response to this comment.

Comment: A commenter expresses frustration when a complaint is filed against a doctor. The commenter states that the division sends a letter requesting the doctor to provide more information about the complaint and the doctor has no idea what the complaint is, who made the complaint, or why the complaint was filed. The commenter further states that few people file complaints because they are complaining to the very people that will hear the case. The commenter recommends having an independent committee to oversee all complaints. Another commenter recommends that the designated doctor system including the complaint process be independent from various system participants and not subject to their control. The commenter states that complaints against a designated doctor should be public and highlights that the medical board has made complaints public.

Division Response: The division appreciates the comment and notes that Labor Code §402.092 provides that information compiled or maintained by the division with respect to a division investigation is considered an investigation file and is confidential. For quality of care complaints filed

against the designated doctor, the division notes that the Office of the Medical Advisor notifies a designated doctor that a complaint is filed and requests additional information to determine if a medical quality review is warranted. Moreover, Labor Code §§413.05115 - 413.0513 describe the duties of the medical quality review panel and the quality assurance panel, which assist the medical advisor in performing duties, such as making recommendations about appropriate actions regarding health care providers. Additionally, Labor Code §413.0511 requires the division to adopt criteria for handling complaints as well as conducting compliance audits and this adopted medical quality review process is available on the division's website. The adopted process outlines the roles and responsibilities of the division's Medical Advisor, Medical Quality Review Panel, and the Quality Assurance Panel, and it describes the process for notifying subjects of a review, the process for enforcement referrals, including informal settlement conferences, and the process for referral to other licensing boards. No change was made in response to this comment.

Section 127.1

Comment: A commenter questions the rationale for deleting subsection (b)(2) of §127.1 of this title, which requires the requestor of a designated doctor examination to explain a change in condition if the injured employee's medical condition has changed since a previous designated doctor examination on the same claim.

Division Response: The division notes that subsection (b)(2) of §127.1 of this title is duplicative and a requestor can still provide an explanation of a change in medical condition if the requestor is attempting to schedule a designated doctor examination within 60 days of a previous designated doctor examination. No change was made in response to this comment.

Section 127.5

Comment: Several commenters support the two independent lists for each county and the assignment of up to five examinations. A commenter states that the proposal represents a thoughtful attempt to ensure that cases are assigned to the designated doctor with the most appropriate qualifications for handling a specific injury or condition. Commenters state that injured employees benefit when qualified doctors are retained to perform designated doctor examinations. Another commenter states that by prioritizing county assignments to specially qualified designated doctors and offering up to five assignments will likely attract new specially qualified practitioners.

Division Response: The division appreciates the supportive comment. No change was made in response to this comment.

Comment: A commenter states that the current selection process already allows licensed medical doctors to evaluate both musculoskeletal and non-musculoskeletal examinations and the change to a two list system is "unnecessary, unethical, and professionally bigoted." The commenter states that the amendments do not serve the injured employees and are "undoubtedly motivated by financial incentives" to licensed medical doctors and their lobbying interests. Another commenter states that a dual list scheduling system introduces a new means for bias and incorrect interpretation by schedulers.

Division Response: The division appreciates the comment but disagrees. The division emphasizes that the assignment process is automated. This automated system increases efficiency and prevents bias in the assignment process. The new assignment methodology is designed to retain licensed medical doctors and doctors of osteopathy on the designated doctor's list by providing a more balanced assignment distribution for all doctors qualified to evaluate musculoskeletal areas of the body. As discussed in the preamble, the current system created an unintended consequence whereby licensed medical doctors and doctors of osteopathy frequently received only one

examination and rarely had an opportunity to receive up to five examinations. The new assignment methodology ensures a more balanced system. No change was made in response to this comment.

Comment: A commenter states that there is no basis to change the rules simply because a licensed medical doctor does not want to travel. The commenter states that one list is sufficient and if the injured employee needs a specialist the designated doctor can refer the injured employee to a specialist in accordance with an existing rule. The commenter suggests the division have two lists: a generalist list and a specialist list, where the specialist appears on both lists.

Division Response: The division agrees that designated doctors must refer injured employees to specialists when necessary to resolve the issue in question under §127.10(d) of this title, but disagrees that one list is sufficient. As discussed in the preamble, the current system created an unintended consequence whereby licensed medical doctors and doctors of osteopathy frequently received only one examination and rarely had an opportunity to receive up to five examinations. The new assignment methodology ensures a more balanced system. The division appreciates the suggestion of maintaining two lists and notes that the new assignment methodology includes two independent lists in each county of the state. One list consists of designated doctors qualified to perform examinations under amended §127.130(b)(1)-(4) of this title and the other list consists of designated doctors qualified to perform examinations under §127.130(b)(5)-(9) of this title. No change was made in response to this comment.

Comment: Commenters question how the current selection process is unbalanced when the needs of the state are fulfilled. Commenters state that licensed medical doctors and doctors of osteopathy have an advantage over doctors of chiropractic because they qualify for nearly all musculoskeletal conditions, but refuse to participate in counties which doctors of chiropractic participate. Commenters state that the new system is misleading because the language "for all

doctors" does not include doctors of chiropractic. Another commenter expresses skepticism that licensed medical doctors and doctors of osteopathy are being deprived of additional examinations in a particular county.

Division Response: The division agrees that the current selection process is fulfilling the needs of the state, but as discussed in the preamble the current system created an unintended consequence whereby licensed medical doctors and doctors of osteopathy frequently received only one examination and rarely had an opportunity to receive up to five examinations. The division disagrees that the new assignment methodology is misleading and emphasizes that Labor Code §408.0041(b) requires a medical examination be performed by the next available doctor on the division's list of certified designated doctors whose credentials are appropriate for "the area of the body affected by the injury and the injured employee's diagnosis." No change was made in response to this comment.

Comment: Commenters state that the amendments will reduce the number of appointments by 75% in large counties, eliminate the traveling doctor, and increase the burden of travel to all injured employees who live in remote areas. Commenters state that the amendments will have a negative impact on all system participants, who will see a drop in the quality of designated doctors, because new, inexperienced medical doctors and doctors of osteopathy will be favored over those experienced designated doctors who have been in the system for years.

Division Response: The division appreciates the comment but disagrees. The division emphasizes that the new assignment methodology is designed to retain licensed medical doctors and doctors of osteopathy on the designated doctor's list by providing a more balanced assignment distribution for all doctors qualified to evaluate musculoskeletal areas of the body. This balanced distribution has no effect on the assignment requests received for a particular county. The

amendments will not prevent designated doctors from being assigned "one appointment" in smaller counties as the division is unable to predict the number of examination requests received in a county. No change was made in response to this comment.

Comment: A commenter inquires about assignment cancellations and withdrawals made by the division. Commenters suggest returning designated doctors back to the top of the list when assignment cancellations or withdrawals occur by the division.

Division Response: The division declines to return a designated doctor back to the top of the list upon assignment cancellations or withdrawals. The division emphasizes that withdrawals and cancellations occur for a variety of different reasons and the risk of withdrawal applies to all designated doctors. Additionally, the new assignment methodology is designed to provide a more balanced distribution of assignments and the continuation of the incentive to offer up to five assignments to the next available designated doctor may offset those occurrences. No change was made in response to this comment.

Comment: A commenter states that all system participants should have a live daily view of the rotation list in each county to verify that the division is adhering to the scheduling standards.

Division Response: The division appreciates the comment but declines to provide a live daily view of the rotation list in each county for verification purposes. The division notes that Labor Code §402.083 mandates confidentiality of injury information and providing a live daily rotation list would be contrary to the statutory mandate. The division further emphasizes that the assignment process is automated. The automated system increases efficiency and prevents bias in assigning examinations. No change was made in response to this comment.

Comment: Several commenters recommend holding examination requests longer than 24 hours to allow designated doctors to gain more assignments. A commenter questions why a designated doctor is unable to remain at the top of the list for 48 hours when the statute allows an assignment to be made by the 10th day.

Division Response: The division appreciates the comments but declines to make a change in the rule text. Labor Code §408.0041(b) requires the division to assign a designated doctor no later than the 10th day after an approved request. The division emphasizes that assigning examination requests on a nightly basis reflects the best interest of the injured employee. Imposing the various suggested timeframes would frustrate statutory compliance and unnecessarily restrict the division's administrative ability to meet the deadline. No change was made in response to this comment.

Comment: A commenter encourages the division to use local doctors because using traveling doctors create problems, such as constant date changes, exam room lockouts, or lack of access to records.

Division Response: The division appreciates the comment and notes that Labor Code §408.0041(b) requires a medical examination be performed by the next available doctor on the division's list of certified designated doctors whose credentials are appropriate for "the area of the body affected by the injury and the injured employee's diagnosis," regardless of the designated doctor's practice locations. No change was made in response to this comment.

Comment: A commenter expresses concern that assigning more examinations to licensed medical doctors and doctors of osteopathy may result in a reduced quality of work because those doctors perform fewer examinations. The commenter suggests the division perform outcome assessments of designated doctors to improve quality control. The commenter states that when a

designated doctor's administrative procedures and quality of reports are less than average, the designated doctor should be considered for exclusion as a designated doctor.

Division Response: The division appreciates the comment but disagrees that the quality of work will be reduced as a result of the more balanced assignment methodology. Labor Code §408.1225 requires the commissioner to ensure the quality of a designated doctor's decision and review through active monitoring of those decisions and reviews. The division continuously monitors designated doctor compliance, including audits and the investigation of complaints. No change was made in response to this comment.

Comment: A commenter questions the division's action in ensuring the designated doctor receives an injured employee's address and phone number to confirm an examination. The commenter questions the fairness in requiring a designated doctor to attend examinations and review records in advance for an injured employee who does not respond to attempts to confirm their examination because of outdated contact information. The commenter states that it is critical to maintain and verify updated information before sending the claim to designated doctors due to the number of patients who move or change phone numbers following an injury.

Division Response: The division agrees and expects a requestor of a designated doctor examination to provide updated contact information because the division relies on the information provided by the requestor. The division notes that §127.15(b) of this title does not prohibit a designated doctor from contacting the insurance carrier and the treating doctor to ask about administrative matters. However, inaccurate information does not relieve the designated doctor from the duty to attend the ordered examination. The division emphasizes that if the designated doctor is unable to contact the injured employee, the designated doctor should contact the division for assistance. No change was made in response to this comment.

Section 127.100

Comment: Commenters express concern over the division's acknowledgment of factors such as the division's enhanced training and testing requirements contributing to the decline in the number of licensed medical doctors and doctors of osteopathy. The commenters state that testing scores are a reflection of the quality of training and one has to ask who is at fault when a board certified physician cannot pass a competency examination in their field of specialty.

Division Response: In the preamble, the division specifically stated that "several factors may have contributed to this decline, such as the adoption of the division's enhanced training and testing requirements required under HB 2605." The division emphasizes that Labor Code §408.1225(a-2)(2) requires standard training and testing to be completed in accordance with policies and guidelines developed by the division. No change was made in response to this comment.

Comment: A commenter suggests that the division approach the legislature to request elimination of the designated doctor testing. The commenter also suggests that the division offer better teaching and education to show designated doctors what is required.

Division Response: The division appreciates the comment and emphasizes that Labor Code §408.1225(a-2)(2) requires standard training and testing to be completed in accordance with policies and guidelines developed by the division. No change was made in response to this comment.

Comment: A commenter states that 50 percent of new designated doctors take the PSI competency exam more than once to pass the test. The commenter suggests that the division provide ongoing online training because "many physicians and chiropractors are forced to join management or third party agents" to get enough training to pass the PSI competency exam. Another commenter questions why the designated doctor training course is only offered four times a

year and states that an online training program would help train and give the designated doctor time to practice while the designated doctor waits in line for six months to get their first examination. The commenter states that an online course could be accessible anytime and could provide updates about new rules and appeals panel decisions.

Division Response: The division agrees that new designated doctors often take the PSI competency test more than once but disagrees that there is not enough training provided. The division emphasizes that Labor Code §408.1225(a-2)(2) requires standard training and testing to be completed in accordance with policies and guidelines developed by the division. The division notes that designated doctors have the option to take an additional workshop or webinar courses to further supplement their studies. Division-required training is sufficient to satisfy the training requirements for designated doctor certification and recertification; however, the designated doctor is always encouraged to engage in self-study. Furthermore, the division appreciates the online training suggestion and is currently investigating the feasibility of offering an online training course. No change was made in response to this comment.

Comment: A commenter states that it is a problem to require designated doctors to pay for a state-required set of guideline subscriptions, such as Official Disability Guidelines and Medical Disability Advisor when other states which require state guidelines pay for them.

Division Response: The division appreciates the comment and emphasizes that Labor Code §413.011 requires the commissioner to adopt treatment and return to work guidelines. The division adopted the Official Disability Guidelines, published by Work Loss Data Institute and the Medical Disability Advisor guidelines, published by the Reed Group, Ltd in 28 TAC §137.10 and §137.100, respectively. No change was made in response to this comment.

Comment: A commenter states that test memorization should not be the reason the division implements testing limitations because applicants may have a difficult time taking tests. Another commenter states that testing limitations may unnecessarily punish designated doctors who fail a test and potentially delay the availability of examinations for injured employees. Another commenter states that preventing applicants from coming back often will likely not stop people from stealing the test.

Division Response: The division appreciates the comment. The division emphasizes that the allotted timeframes are necessary to ensure test integrity and a designated doctor's continued competency. No change was made in response to this comment.

Comment: A commenter states that a more reasonable waiting period is seven days after the first and second attempt and no more than 60 days after the third attempt. Another commenter states that five testing attempts is better than three if an applicant has to take the recertification exam. Commenters suggest retesting immediately or within a week after the first and second attempt and have the option to retake the training or wait six months after the third attempt.

Division Response: The division appreciates the comment. The division emphasizes that the allotted timeframes are necessary to ensure test integrity and a designated doctor's continued competency. No change was made in response to this comment.

Comment: A commenter questions how a doctor can re-focus their studies to raise a testing score if the doctor is not allowed to know what questions are missed.

Division Response: The division notes that upon test completion, a designated doctor is provided a test score report that reveals the subject matter area of deficiency. To ensure test

integrity, the division is unable to provide information about individual test questions. No change was made in response to this comment.

Comment: A commenter suggests that the division implement a mandatory report writing program for designated doctors. The commenter states that this type of program would promote accuracy and serve to improve the quality of reports and the dispute resolution processes.

Division Response: The division appreciates the comment but declines to implement a mandatory writing program for designated doctors as a part of these rule amendments. The required designated doctor certification training course includes modules which outline the required elements of a designated doctor report. Furthermore, the designated doctor is encouraged to review the division's website at http://www.tdi.texas.gov//wc/dd/certtraining.html for additional information. No change was made in response to this comment.

Comment: A commenter states that hearing decisions are rarely communicated to the designated doctor upon a reexamination of an injured employee. The commenter states that routinely providing hearing information to the designated doctors would allow them to determine whether their report effectively addressed the issues for examinees, insurance carriers, and hearings personnel. The commenter states that regular feedback to the individual designated doctor should facilitate improvement in the quality of their determinations going forward.

Division Response: The division agrees and notes that Labor Code §413.022 requires the division to evaluate the quality and timeliness of decisions made by designated doctors. The division's current designated doctor evaluation procedure is posted on its website and will help the division increase testing and training quality by identifying areas for designated doctor improvement. No change was made in response to this comment.

Comment: A commenter states that the denial letter of a designated doctor certification application is vague and the permitted written response is insufficient to address the division's concerns. The commenter suggests providing a face-to-face hearing upon denial of a designated doctor certification application. The commenter also suggests that doctors work with the division to formulate a plan of corrective remedies to satisfy the board's doubts of a doctor's capacity. Examples of corrective remedies include changing the number or range of testing locations, using a mentor designated doctor to monitor and correct a doctor's actions, taking division courses in deficient subject areas, or other actions.

Division Response: The division appreciates the comment but disagrees that a written response is insufficient. The division emphasizes that the written response is permitted upon a denial of either a designated doctor certification or recertification application to allow a doctor to address reasons for a denial. The division notes that §127.110(f) of this title permits an informal hearing upon denial of a designated doctor recertification application because factors considered at the recertification may be irrelevant at the certification stage. The division disagrees with a corrective remedies plan and further notes that Labor Code §413.022 requires the division to review the quality of designated doctor examinations. The division's current designated doctor evaluation procedure is posted on its website and will help the division increase testing and training quality by identifying areas for designated doctor improvement. No change was made in response to this comment.

Section 127.110

Comment: A commenter states that many primary and specialty boards for licensed medical doctors and doctors of osteopathy are either decreasing the requirements for recertification or eliminating the process altogether. The commenter suggests that the division consider eliminating recertification exams or extending them to every three years. The commenter states that primary and

specialty boards are recertifying licensed medical doctors and doctors of osteopathy by requiring specific continuing medical education and further states that continuing education courses are less onerous, more beneficial, and may result in more physician participation.

Division Response: The division appreciates the comment but declines to eliminate recertification examinations or extend recertification examinations to every three years. Labor Code §408.1225(a-2)(2) requires standard training and testing to be completed in accordance with policies and guidelines developed by the division. Moreover, the division designs its training and testing to ensure that designated doctors receive specific information necessary to conduct designated doctor examinations. Other continuing medical education courses do not specifically address designated doctor training and, therefore, are insufficient for the purposes of designated doctor recertification. No change was made in response to this comment.

Section 127.130

Comment: A commenter supports the proposal to better define the qualifications necessary for a designated doctor to handle the most complicated types of injuries. The commenter states that not every type of physician or other health care provider is qualified to handle every type of injury. Another commenter supports the proposal to clarify and expand the list of medical conditions that require an examination to be performed by a designated doctor with special qualifications. The commenter states that the division should consider expanding the list further.

Division Response: The division appreciates the supportive comment, but emphasizes that the qualification rules are appropriate to ensure the most optimally qualified doctor is selected for an examination. No change was made in response to this comment.

Comment: Commenters state that the division complicates the system "by continuously manipulating" the qualification standards in order to disqualify doctors of chiropractic in direct violation of their scope of practice, protected under the Chiropractic Act. Another commenter states that implementing a practice of discrimination of a licensed doctor of chiropractic's scope of practice is not a solution.

Division Response: The division appreciates the comments but declines to make a changes to the rule text. The division emphasizes that Labor Code §408.0041(b) requires that a medical examination be performed by the next available doctor on the division's list of certified designated doctors whose credentials are appropriate for "the area of the body affected by the injury and the injured employee's diagnosis." The division is not defining any doctor's scope of practice. Rather the division clarifies existing qualification standards for designated doctor examinations as mandated by Labor Code §408.0041(b) and determined by commissioner rule. No change was made in response to this comment.

Comment: A commenter states that "if the division wants better outcomes then require correct diagnoses" because outcomes for injured employees with chronic injuries are terrible at best. The commenter recalls an administrative law judge determination based on a peer review opinion and states that if the injured employee is diagnosed with a sprain or strain and it is later discovered to be a disc injury it is almost impossible for an injured employee to get an injury properly classified.

Division Response: The division appreciates the comment; however, it is related to dispute resolution matters and is therefore outside of the scope of this project. No change was made in response to this comment.

Comment: A commenter states that the division has an established rule that allows designated doctors to refer injured employees to specialists without having to further complicate the qualification standards. The commenter states that many doctors are well-trained to resolve disputes and because a provider is board certified, or a medical doctor, or a doctor of osteopathy it does not ensure the provider is more effective in resolving disputes. The commenter states that the designated doctor program consists of medical-legal work and a provider's discipline does not necessarily equate with credentials or quality of work. The division has chosen to define credentials directly relating to scope of practice and this is not equivalent for the designated doctor program.

Division Response: The division appreciates the comment but declines to make a change to the rule text. The division emphasizes that it is not defining any doctor's scope of practice. Rather the division clarifies existing qualification standards for designated doctor examinations as mandated by Labor Code §408.0041(b) and determined by commissioner rule. Title 28 TAC §127.10(c) permits designated doctors to refer to specialists; however, the division emphasizes that Labor Code §408.0041 requires the division to account for specific diagnoses, among other factors, when determining the credentials appropriate for a particular designated doctor examination. The division also notes that the requirements under §127.130 of this title provide a safeguard for instances where no doctor qualified is available to perform the examination. In these instances, the division will rely on other designated doctors, who through the use of referrals for specialist consultations and their training as designated doctors, to incorporate these referrals into their reports to produce a designated doctor report of high quality. No change was made in response to this comment.

Comment: A commenter states that there is no need to separate board certified doctors from other doctors based on qualifications. The commenter makes a correlation between administrative

law judges and licensed doctors of chiropractic and questions why doctors of chiropractic are not qualified to see 99 percent of all conditions.

Division Response: The division appreciates the comment. The division emphasizes that Labor Code §408.0041(b) requires a medical examination be performed by the next available doctor on the division's list of certified designated doctors whose credentials are appropriate for "the area of the body affected by the injury and the injured employee's diagnosis." For the vast majority of diagnoses seen in the Texas workers' compensation system, any doctor who is trained to be a designated doctor and who can evaluate the area of the body at issue within the scope of the doctor's license will be appropriately qualified for the purposes of Labor Code §408.0041 to perform a designated doctor examination of any injury or diagnosis relating to that area of the body. The division notes that some complex injuries require a doctor with a higher level of expertise in a particular medical specialty to perform an examination, and the qualification requirements in §127.130 of this title ensure that these subcategories of diagnoses and injuries are evaluated by optimally qualified individuals with objectively demonstrable expertise while also preventing designated doctors who could not evaluate these conditions within the scope of their license or who may not have the appropriate training and specialty from examining these conditions. No change was made in response to this comment.

Comment: A commenter suggests adding the sentence, "Nothing in this section may be construed as authorizing a designated doctor to practice outside the scope of practice established by the designated doctor's Texas licensure act," because the division's qualification standards do not expressly state all the nuances of the limitations on statutorily set scopes of practice.

Division Response: The division appreciates the comment but decline to make a change to the rule text. The division emphasizes that §127.200(a)(12) of this title already imposes a duty on

designated doctors to notify the division if the doctor's participation on a claim would cause the designated doctor to exceed the scope of the doctor's license. No change was made in response to this comment.

Comment: A commenter states that the language regarding "injuries involving compression or inflammation of nerves" could be construed as authorizing doctors of chiropractic to treat the nerves which is outside of the their statutory scope of practice and therefore not a part of the body that doctors of chiropractic are authorized to treat in the workers' compensation system. The commenter references a pending appeal where a Texas district court ruled that the definition of "musculoskeletal system" to include "nerves" in a chiropractic scope of practice rule is void as it exceeds the scope of chiropractic.

Division Response: The division appreciates the comment but declines to make a change to the rule text. The division emphasizes that designated doctors do not provide treatment. The division further emphasizes that it is not defining any doctor's scope of practice. Rather, the division clarifies existing qualification standards for designated doctor examinations as mandated by Labor Code §408.0041(b) and determined by commissioner rule. The division states in the preamble examples of injuries which would not be deemed as cuts. Specifically, the division stated, "The division notes that other injuries involving underlying structures of the skin such as, rotator cuff tears, anterior cruciate ligament tears, carpal tunnel syndrome, or injuries involving compression or inflammation of nerves, tendons or ligaments, are not cuts and are appropriately suited for evaluation by licensed medical doctors, doctors of osteopathy, or doctors of chiropractic." Moreover, designated doctors have a duty under §127.200 of this title to notify the division if the doctor's participation on a claim would cause the designated doctor to exceed the scope of the doctor's license. The division notes that these scope of practice determinations are best made by doctors subject to the applicable laws and licensing

boards, and the division expects its designated doctors to be vigilant and forthcoming in informing the division if they feel a claim would require the designated doctor to exceed their scope of practice.

Comment: A commenter expresses concern that the division's proposed board certification language imposes a maintenance of certification requirement on physicians because of the use of the word "holds." The commenter suggests modifying language by adding words such as "initial" and "previously held." The commenter states that the intent behind SB 1148 of the 85th Legislature, Regular Session originated from a recent change in which the American Board of Medical Specialists and the American Osteopathic Association Bureau of Osteopathic Specialists moved away from lifetime certifications and towards imposing additional recertification processes for physicians to maintain national board certifications.

Division Response: The division agrees and adds the phrase "or previously held" after the word "holds" in amended §127.130(b)(9) of this title to clarify that initial board certification is sufficient for a physician to meet the qualification standards outlined in this rule. The division notes that the intent of this rule is to set qualification standards for designated doctor examinations and not to impose a maintenance of certification requirement for physician board certifications.

Comment: A commenter states that the American Board of Medical Specialists (ABMS) maintenance of certification process has become so costly and oppressive that many qualified physicians have simply refused to re-certify or participate with the current ABMS recertification requirements. The commenter states that excluding physicians with board certifications through entities other than ABMS will potentially limit the pool of well-qualified physicians who possess the necessary competencies to perform designated doctor examinations in Texas. The commenter further states that other competing certifying boards, such as the National Board of Physicians and

Surgeons, the American Board of Physician Specialties, and the Association of American Physicians and Associates, are making headway.

Division Response: The division appreciates the comment and elected to limit its definition of board certification to certifications granted by the member boards of ABMS and American Osteopathic Association Bureau of Osteopathic Specialists (AOABOS). Moreover, the ABMS and AOABOS are the standard certifying boards approved by the Texas Medical Board as outlined in 22 TAC §164.4. No change was made in response to this comment.

Comment: A commenter states that family medicine, internal medicine, and occupational medicine have significant overlap in residency training requirements. The commenter states that there is little difference in the required capabilities to effectively address the same types of injuries and conditions presented in workers' compensation and requests reconsideration of examination exclusions for family medicine. The commenter suggests creating a task force to perform more in-depth research of the training requirements and real-world medical practice experience of the primary care specialties, and adjust the designated doctor qualifications grids.

Division Response: The division declines to reconsider examination exclusions for family medicine. Under Labor Code §408.0041(b), the division is required by rule to determine which doctor's credentials are appropriate for the area of the body affected by the injury and the injured employee's diagnosis. Amended 28 TAC §127.130 details which board certified medical doctor or doctor of osteopathy possess the appropriate clinical background and training to evaluate the more uncommon and complex diagnoses. The division declines to create a task force and emphasizes that the amended qualification standards are sufficient to ensure that qualified designated doctors will be available to perform the vast majority of examinations. No change was made in response to this comment.

Comment: A commenter suggests deleting the word "including" because it results in an inappropriate expansion of the definition of traumatic brain injuries.

Division Response: The division appreciates the comment but disagrees because a concussion is a form of traumatic brain injury. No change was made in response to this comment.

Comment: A commenter states that doctors of chiropractic are trained to handle and manage cauda equina syndrome. The commenter states that cauda equina syndrome is another diagnosis related estimate in the American Medical Association, Guides to the Evaluation of Permanent Impairment that anyone in the system can do and suggests the division reconsider this change to prevent the perception of a potentially false doctor shortage.

Division Response: The division appreciates the comment and acknowledges that certain conditions may be within a chiropractor's scope of practice; however, under Labor Code §408.0041(b) the division has determined that board certified medical doctors and doctors of osteopathy are qualified to examine this diagnosis based on their extensive clinical expertise and training. No change was made in response to this comment.

Comment: A commenter suggests adding spinal fracture and cauda equina syndrome to those injuries and diagnoses relating to the spine and musculoskeletal structures of the torso in amended §127.130(b)(3) of this title. The commenter states that while surgical treatments of spinal fracture and cauda equina syndrome are not within chiropractic scope of practice, an injured employee who has received surgical treatment can be appropriately evaluated by a licensed doctor of chiropractic.

Division Response: The division appreciates the comment and acknowledges that certain conditions may be within a chiropractor's scope of practice; however, under Labor Code

§408.0041(b) the division has determined that board certified medical doctors and doctors of osteopathy are qualified to examine these diagnoses based on their extensive clinical expertise and training. No change was made in response to this comment.

Comment: A commenter suggests adding spinal fractures, fractures, and joint dislocations to those injuries and diagnoses relating to the spine and musculoskeletal structures of the torso in amended §127.130(b)(3) of this title to allow doctors of chiropractic to perform examinations. The commenter states that the licensing boards do not stop a doctor of chiropractic from managing or examining patients with these conditions and a licensed doctor of chiropractic is expected to use judgment as to whether they are able to treat for that condition.

Division Response: The division appreciates the comment and acknowledges that certain conditions may be within a chiropractor's scope of practice; however, under Labor Code §408.0041(b) the division has determined that board certified medical doctors and doctors of osteopathy are qualified to examine these diagnoses based on their extensive clinical expertise and training. No change was made in response to this comment.

Comment: A commenter suggests adding fractures and joint dislocations to those injuries and diagnoses relating to the spine and musculoskeletal structures of the torso in amended §127.130(b)(3) of this title to allow doctors of chiropractic to perform examinations for injured employees who have received treatment for such conditions. The commenter states that licensed doctors of chiropractic should not be deprived from providing services involving joint dislocations because the biomechanical condition of the musculoskeletal system can include joint dislocations.

Division Response: The division appreciates the comment and acknowledges that certain conditions may be within a chiropractor's scope of practice; however, under Labor Code

§408.0041(b) the division has determined that board certified medical doctors and doctors of osteopathy are qualified to examine these diagnoses based on their extensive clinical expertise and training. No change was made in response to this comment.

Comment: A commenter recommends including tears to address Appeals Panel Decision 171154-s, which found a distinction between laceration and a tear. The commenter also suggests retaining the following language from the initial informal draft:

"To examine tendon, nerve, or vascular lacerations, or tears, compartment syndrome, brachial plexus or lumbosacral plexus injury, a designated doctor must be board certified in emergency medicine, orthopaedic surgery, plastic surgery, surgery, neurological surgery, neurology, physical medicine and rehabilitation, or occupational medicine by the American Board of Medical Specialists (ABMS) or board certified in emergency medicine, orthopedic surgery, plastic surgery, surgery (general), neurological surgery, neurology, physical medicine, physical medicine and rehabilitation, preventive medicine/occupational-environmental medicine, or preventive medicine/occupational by the American Osteopathic Association Bureau of Osteopathic Specialists (AOABOS)."

Division Response: The division declines to make this change. The division clarifies the word "laceration" by adding "cuts to the skin involving underlying structures." The division states in the preamble examples of injuries which would not be deemed as cuts and referenced tears. Specifically, the division stated, "The division notes that other injuries involving underlying structures of the skin such as, rotator cuff tears, anterior cruciate ligament tears, carpal tunnel syndrome, or injuries involving compression or inflammation of nerves, tendons or ligaments, are not cuts and are appropriately suited for evaluation by licensed medical doctors, doctors of osteopathy, or doctors of chiropractic." The division emphasizes that the new language is designed to simplify indicating a cut

on a request for a designated doctor examination. No change was made in response to this comment.

Section 127.140

Comment: A commenter states that any doctor who has worked for an insurance company or injured employee should not be allowed to serve as a designated doctor or participate in the overall training unless that doctor has stopped working for a year. Another commenter questions why a doctor working for a scheduling company, with huge insurance carrier contracts, is allowed to perform a designated doctor examination for that same insurance carrier or even their own company. The commenter states that it is a disqualifying association and a conflict of interest for a doctor to perform required medical examinations, peer reviews, and post-designated doctor required medical examinations for an insurance carrier and then perform a designated doctor examination for the same insurance carrier. Another commenter states that it is a problem when doctors who have been designated doctors, required medical examination doctors and peer review doctors practice in the same office.

Division Response: The division appreciates the comment and notes that Labor Code §408.1225(d) requires the division to develop rules that ensure a designated doctor has no conflicts of interest in serving as a designated doctor. The division adopted §127.140 of this title in 2012, which states that a designated doctor shall also have a disqualifying association relevant to a claim if an agent of the designated doctor has an association relevant to a claim that would constitute a disqualifying association. The duty of investigating whether or not a designated doctor may have a disqualifying association relevant to a claim requires vigilance on the part of all parties. A single party is unlikely to have sufficient information in all cases to identify the existence of all possible disqualifying associations. The division notes that §127.140(a) of this title lists circumstances that

"may" constitute a disqualifying association and that determination must be made on a case-by-case basis by the division. To the extent any system participant has a complaint or witnesses an inappropriate action, the system participant is encouraged to submit a complaint through our complaint process outlined on the division website at https://www.tdi.texas.gov/consumer/complfrm.html. No change was made in response to this comment.

Section 127.220

Comment: A commenter suggests retaining §127.220(c)(2) of this title because by deleting the subsection insurance carriers will be expected to identify all injuries or conditions that are alleged, but not in dispute. This will cause compliance issues when a claimant is alleging an injury but has not made the insurance carrier aware of the injury and results in insurance carriers improperly completing the DWC Form-032. The commenter also states that deleting the subsection conflicts with §124.3(e) of this title, which does not require the insurance carrier to file a Plain Language Notice (PLN) 11 disputing extent of injury until the carrier is denying a bill on the basis of extent of injury.

Division Response: The division appreciates the comment and notes that §127.220(c)(2) of this title describes part of what a designated doctor must include on DWC Form-068, *Designated Doctor Examination Data Report,* when a designated doctor resolves questions other than maximum medical improvement, impairment rating, and return to work. The division emphasizes that the information in subsection (c)(2) was included for division data collection purposes and the division determines it is no longer necessary to collect the data. The division further emphasizes that this change has no effect on a request for a designated doctor exam as suggested by the commenter since this change only affects the report produced by the designated doctor after the exam has already taken place. No change was made in response to this comment.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL

For: American Insurance Association; Texas Orthopaedic Association; Office of Injured Employee Counsel; Texas Medical Association

For, with changes: Texas Mutual Insurance Company; Insurance Council of Texas; Property Casualty Insurers Association of America; Texas Chiropractic Association

Against: 11 individuals

Neither for nor against: Exam Works; four individuals

STATUTORY AUTHORITY. The amendments are adopted under Labor Code §§402.00111, 402.00116, 402.00128, 402.061, 408.0041, 408.0043, 408.025, and 408.1225. Labor Code §402.00111 requires the commissioner of workers' compensation to exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code. Labor Code §402.00116 requires 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 the division or commissioner. Labor Code §402.00128 requires the commissioner to conduct the daily operations of the division and implement division policy. Labor Code §402.061 requires the commissioner of workers' compensation to adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act. Labor Code §408.0041(b) provides that a requested medical examination be performed by the next available doctor on the designated doctor list whose credentials are appropriate for the area of the body affected by the injury and the injured employee's diagnosis. Labor Code §408.0041(e) provides that the report of the designated doctor has presumptive weight unless the preponderance of the evidence is to the contrary. Labor Code §408.0041(f) provides that unless ordered by the commissioner, the insurance carrier shall pay

benefits based on the opinion of the designated doctor during the pendency of any dispute. Labor Code §408.0043 requires designated doctors, other than dentists and chiropractors, who review a specific workers' compensation case to meet certain professional specialty requirements. Labor Code §408.025(a) provides that the commissioner shall adopt requirements for reports and records that are required to be filed with the division or provided to the injured employee, the employee's attorney, or the insurance carrier by a health care provider. Labor Code §408.1225(a-2) requires standard training and testing to be completed in accordance with policies and guidelines developed by the division. Labor Code §408.1225(a-3) requires the division to develop guidelines that ensure competency in assessments including testing criteria. Labor Code §408.1225(a-4) requires the division to implement a procedure to periodically review and update the guidelines developed in Labor Code §408.1225(a-3).

TEXT.

§127.1. Requesting Designated Doctor Examinations.

(a) At the request of the insurance carrier, an injured employee, the injured employee's representative, or on its own motion, the division may order a medical examination by a designated doctor to resolve questions about the following:

(1) the impairment caused by the injured employee's compensable injury;

(2) the attainment of maximum medical improvement (MMI);

(3) the extent of the injured employee's compensable injury;

(4) whether the injured employee's disability is a direct result of the work-related injury;

(5) the ability of the injured employee to return to work; or

(6) issues similar to those described by paragraphs (1) - (5) of this subsection.

(b) To request a designated doctor examination a requestor must:

(1) provide a specific reason for the examination;

(2) report the injured employee's current diagnosis or diagnoses and body part or body parts affected by the injury;

(3) list all injuries determined to be compensable by the division or court, or all injuries accepted as compensable by the insurance carrier;

(4) provide general information regarding the identity of the requestor, injured employee, employer, treating doctor, insurance carrier;

(5) identify the workers' compensation health care network certified under Insurance Code, Chapter 1305 through which the injured employee is receiving treatment, if applicable;

(6) identify whether the claim involves medical benefits provided through a political subdivision under Labor Code §504.053(b)(2) and the name of the health plan, if applicable;

(7) submit the request on the form prescribed by the division under this section. A copy of the prescribed form can be obtained from:

(A) the division's website at www.tdi.texas.gov/wc/indexwc.html; or

(B) the Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744 or any local division field office location;

(8) submit the request to the division and a copy of the request to each party listed in subsection (a) of this section who did not request the designated doctor examination;

(9) provide all information listed in subparagraphs (A) - (G) of this paragraph below applicable to the type of examination the requestor seeks:

(A) if the requestor seeks an examination on the attainment of MMI, include the statutory date of maximum medical improvement, if any;

(B) if the requestor seeks an examination on the impairment rating of the injured employee, include the date of MMI that has been determined to be valid by a final decision of division or court or by agreement of the parties, if any;

(C) if the requestor seeks an examination on the extent of the compensable injury, include a description of the accident or incident that caused the claimed injury and a list of all injuries in question;

(D) if the requestor seeks an examination on whether the injured employee's disability is a direct result of the work-related injury, include the beginning and ending dates for the claimed periods of disability; state if the injured employee is either not working or is earning less than pre-injury wages as defined by Labor Code §401.011(16);

(E) if the requestor seeks an examination regarding the injured employee's ability to return to work in any capacity and what activities the injured employee can perform, include the beginning and ending dates for the periods to be addressed if the requestor is requesting for the designated doctor to examine the injured employee's work status during a period other than the current period;

(F) if the requestor seeks an examination to determine whether or not an injured employee entitled to supplemental income benefits may return to work in any capacity for the identified period, include the beginning and ending dates for the qualifying periods to be addressed and whether or not this period involves the ninth quarter or a subsequent quarter of supplemental income benefits;

(G) if the requestor seeks an examination on topics under subsection (a)(6) of this section, specify the issue in sufficient detail for the designated doctor to answer the question(s); and

(10) provide a signature to attest that every reasonable effort has been made to ensure the accuracy and completeness of the information provided in the request.

(c) If a party submits a request for a designated doctor examination under subsection (b) of this section that would require the division to schedule an examination within 60 days of a previous examination of the injured employee that party must provide good cause for scheduling that designated doctor examination in order for the division to approve the party's request. For the purposes of this subsection, the commissioner or the commissioner's designee shall determine good cause on a case by case basis and will require at a minimum:

(1) if that requestor also requested the previous examination, a showing by the requestor that the submitted questions could not have reasonably been included in the prior examination and a designated doctor examination is reasonably necessary to resolve the submitted question(s) and will affect entitlement to benefits; or

(2) if that requestor did not request the previous examination, a showing by the requestor a designated doctor examination is reasonably necessary to resolve the submitted question(s) and will affect entitlement to benefits.

(d) The division shall deny a request for a designated doctor examination and provide a written explanation for the denial to the requestor:

(1) if the request does not comply with any of the requirements of subsection (b) or (c) of this section;

(2) if the request would require the division to schedule an examination in violation of Labor Code §§408.0041, 408.123, or 408.151;

(3) if the commissioner or the commissioner's designee determines the request to be frivolous because it lacks either any legal or any factual basis that would merit approval; or

(4) if the insurance carrier has denied the compensability of the claim or otherwise denied liability for the claim as a whole and reported the denial to the division in accordance with §124.2 of this title (relating to Carrier Reporting and Notification Requirements) and the dispute is not yet resolved.

(e) If a division administrative law judge or benefit review officer determines during a dispute regarding the compensability of a claim as a whole that an expert medical opinion would be necessary to resolve a dispute as to whether the claimed injury resulted from the claimed incident, the administrative law judge or benefit review officer may order the injured employee to attend a designated doctor examination to address that issue.

(f) A party may dispute the division's approval or denial of a designated doctor request through the dispute resolution processes outlined in Chapters 140 - 144 and 147 of this title (relating to Dispute Resolution processes, proceedings, and procedures). Parties may not dispute a designated doctor examination request or any information on the request until the division has either approved or denied the request. Additionally, a party is entitled to seek an expedited contested case hearing under §140.3 of this title (relating to Expedited Proceedings) to dispute an approved or denied request for a designated doctor examination. The division, upon timely receipt and approval of the request for expedited proceedings, shall stay the disputed examination pending the decision and order of the expedited contested case hearing. Parties seeking expedited proceedings and the stay of an ordered examination must file their request for expedited proceedings with the division within three working days of receiving the order of designated doctor examination under §127.5(b) of this title (relating to Scheduling Designated Doctor Appointments).

(g) This section will become effective on December 6, 2018.

§127.5. Scheduling Designated Doctor Appointments.

(a) Applicability. This section applies to designated doctor examination requests made on or after the effective date of this section.

(b) The division, within 10 days after approval of a valid request, shall issue an order that assigns a designated doctor and shall notify the designated doctor, the treating doctor, the injured employee, the injured employee's representative, if any, and the insurance carrier that the designated doctor will be directed to examine the injured employee. The order shall:

(1) indicate the designated doctor's name, license number, examination address and telephone number, and the date and time of the examination or the date range for the examination to be conducted;

(2) explain the purpose of the designated doctor examination;

(3) require the injured employee to submit to an examination by the designated doctor;

(4) require the designated doctor to perform the examination at the indicated examination address; and

(5) require the treating doctor, if any, and insurance carrier to forward all medical records in compliance with §127.10(a)(3) of this title (relating to General Procedures for Designated Doctor Examinations).

(c) The examination address indicated on the order in subsection (b)(4) of this section may not be changed by any party or by an agreement of any parties without good cause and the approval of the division.

(d) Except as provided in subsection (h) of this section, the division shall select the next available doctor on the designated doctor list for a medical examination requested under §127.1 of this title (relating to Requesting Designated Doctor Examinations). A designated doctor is available to perform an examination at any address the doctor has filed with the division if the doctor:

(1) does not have any disqualifying associations as described in §127.140 of this title (relating to Disqualifying Associations);

(2) is appropriately qualified to perform the examination in accordance with §127.130 of this title (relating to Qualification Standards for Designated Doctor Examinations);

(3) is a certified designated doctor on the day the examination is offered and has not failed to timely file for recertification under §127.110 of this title (relating to Designated Doctor Recertification), if applicable; and

(4) has not treated or examined the injured employee in a non-designated doctor capacity within the past 12 months and has not examined or treated the injured employee in a non-designated doctor capacity with regard to a medical condition being evaluated in the designated doctor examination.

(e) To select the next available doctor, the division will maintain two independent designated doctor lists for each county in this state. One list will consist of designated doctors qualified to perform examinations under §127.130(b)(1)-(4) of this title, and the other list will consist of designated doctors qualified to perform examinations under §127.130(b)(5)-(9) of this title. Nothing in this section prevents a qualified designated doctor from being on both lists.

(1) A designated doctor will be added to the appropriate designated doctor list for the county of each address the doctor has filed with the division.

(2) When a designated doctor adds an address for a county the doctor is not currently listed in, the doctor will be placed at the bottom of the appropriate list for that county.

(3) When a designated doctor removes the only address for a county the doctor is currently listed in, the designated doctor will be removed from the list for that county.

(f) Except as provided in subsection (h) of this section, the division will assign designated doctor examinations as follows:

(1) Each working day all examination requests within a given county will be sorted and distributed to the appropriate list based on the designated doctor qualification standards.

(2) Depending on the volume of requested examinations, the division will then assign up to five examinations to the next available designated doctor at the top of the appropriate list.

(3) Assignment of an examination moves the designated doctor receiving the assignment to the bottom of the list from which the designated doctor was selected. Receipt of an assignment on one list does not change a designated doctor's position on the other list.

(g) Nothing in this section prevents the division from exempting a designated doctor from the applicable qualification standard under §127.130(d) of this title. The division may assign a designated doctor as necessary if there is no available designated doctor in the county of the injured employee.

(h) If the division has previously assigned a designated doctor to the claim at the time a request is made, the division shall reassign that doctor again unless the division has authorized or required the doctor to stop providing services on the claim in accordance with §127.130 of this title. Examinations under this subsection must be conducted at the same examination address as the designated doctor's previous examination of the injured employee or at another examination address approved by the division.

(i) The designated doctor's office and the injured employee shall contact each other if a scheduling conflict exists for the designated doctor appointment. The designated doctor or the injured employee who has the scheduling conflict must make the contact at least one working day prior to the appointment. The one working day requirement will be waived in an emergency situation. An examination cannot be rescheduled without the mutual agreement of both the designated doctor and the injured employee. The designated doctor must maintain and document:

(1) the date and time of the designated doctor examination listed on the division's order;

(2) the date and time of the agreement to reschedule with the injured employee;

(3) how contact was made to reschedule, indicate the telephone number, facsimile number, or email address used to make contact;

(4) the reason for the scheduling conflict; and

(5) the date and time of the rescheduled designated doctor examination.

(j) Failure to document and maintain the information in subsection (i) of this section, creates a rebuttable presumption that the examination was rescheduled without mutual agreement of both the designated doctor and injured employee.

(k) The rescheduled examination shall be set to occur no later than 21 days after the scheduled date of the originally scheduled examination and may not be rescheduled to occur before the originally scheduled examination. Within one working day of rescheduling, the designated doctor shall contact the division, the injured employee or the injured employee's representative, if any, the injured employee's treating doctor, and the insurance carrier with the time and date of the rescheduled examination. If the examination cannot be rescheduled no later than 21 days after the scheduled date of the originally scheduled examination or if the injured employee fails to attend the rescheduled examination, the designated doctor shall notify the division as soon as possible but not later than 21 days after the scheduled date of the originally scheduled examination. After receiving this notice, the division may select a new designated doctor.

(l) This section will become effective on December 6, 2018.

§127.10. General Procedures for Designated Doctor Examinations.

(a) The designated doctor is authorized to receive the injured employee's confidential medical records and analyses of the injured employee's medical condition, functional abilities, and return-to-work opportunities to assist in the resolution of a dispute under this subchapter without a signed

release from the injured employee. The following requirements apply to the receipt of medical records and analyses by the designated doctor:

(1) The treating doctor and insurance carrier shall provide to the designated doctor copies of all the injured employee's medical records in their possession relating to the medical condition to be evaluated by the designated doctor. For subsequent examinations with the same designated doctor, only those medical records not previously sent must be provided. The cost of copying shall be reimbursed in accordance with §134.120 of this title (relating to Reimbursement for Medical Documentation).

(2) The treating doctor and insurance carrier may also send the designated doctor an analysis of the injured employee's medical condition, functional abilities, and return-to-work opportunities. The analysis may include supporting information such as videotaped activities of the injured employee, as well as marked copies of medical records. If the insurance carrier sends an analysis to the designated doctor, the insurance carrier shall send a copy to the treating doctor, the injured employee, and the injured employee's representative, if any. If the treating doctor sends an analysis to the designated doctor, the treating doctor shall send a copy to the insurance carrier, the injured employee, and the injured employee's representative, if any. The analysis sent by any party may only cover the injured employee's medical condition, functional abilities, and return-to-work opportunities as provided in Labor Code §408.0041.

(3) The treating doctor and insurance carrier shall ensure that the required records and analyses (if any) are received by the designated doctor no later than three working days prior to the date of the designated doctor examination. If the designated doctor has not received the medical records or any part thereof at least three working days prior to the examination, the designated doctor shall report this violation to the division within one working day of not timely receiving the records. Once notified, the division shall take action necessary to ensure that the designated doctor receives

the records. If the designated doctor does not receive the medical records within one working day of the examination or if the designated doctor does not have sufficient time to review the late medical records before the examination, the designated doctor shall reschedule the examination to occur no later than 21 days after receipt of the records.

(b) Before examining an injured employee, the designated doctor shall review the injured employee's medical records, including any analysis of the injured employee's medical condition, functional abilities and return to work opportunities provided by the insurance carrier and treating doctor in accordance with subsection (a) of this section, and any materials submitted to the doctor by the division. The designated doctor shall also review the injured employee's medical condition and history as provided by the injured employee, any medical records provided by the injured employee, and shall perform a complete physical examination of the injured employee. The designated doctor shall give the medical records reviewed the weight the designated doctor determines to be appropriate.

(c) The designated doctor shall perform additional testing when necessary to resolve the issue in question. The designated doctor shall also refer an injured employee to other health care providers when the referral is necessary to resolve the issue in question and the designated doctor is not qualified to fully resolve the issue in question. Any additional testing or referral required for the evaluation is not subject to preauthorization requirements nor shall those services be denied retrospectively based on medical necessity, extent of injury, or compensability in accordance with the Labor Code §408.027 and §413.014, Insurance Code Chapter 1305, or Chapters 10, 19, 133, or 134 of this title (relating to Workers' Compensation Health Care Networks, Agents' Licensing, General Medical Provisions, and Benefits--Guidelines for Medical Services, Charges, and Payments, respectively) but is subject to the requirements of §180.24 of this title (relating to Financial Disclosure). Any additional testing or referral examination and the designated doctor's report must be

completed within 15 working days of the designated doctor's physical examination of the injured employee unless the designated doctor receives division approval for additional time before the expiration of the 15 working days. If the injured employee fails or refuses to attend the designated doctor's requested additional testing or referral examination within 15 working days or within the additional time approved by the division, the designated doctor shall complete the doctor's report based on the designated doctor's examination of the injured employee, the medical records received, and other information available to the doctor and indicate the injured employee's failure or refusal to attend the testing or referral examination in the report.

(d) Any evaluation relating to either maximum medical improvement (MMI), an impairment rating, or both, shall be conducted in accordance with §130.1 of this title (relating to Certification of Maximum Medical Improvement and Evaluation of Permanent Impairment). If a designated doctor is simultaneously requested to address MMI or impairment rating and the extent of the compensable injury in a single examination, the designated doctor shall provide multiple certifications of MMI and impairment ratings that take into account each reasonable outcome for the extent of the injury. A designated doctor who determines the injured employee has reached MMI or who assigns an impairment rating, or who determines the injured employee has not reached MMI, shall complete and file a report as required by §130.1 of this title and §130.3 of this title (relating to Certification of Maximum Medical Improvement and Evaluation of Permanent Impairment by a Doctor Other than the Treating Doctor). If the designated doctor provided multiple certifications of MMI and impairment ratings, the designated doctor must file a Report of Medical Evaluation under §130.1(d) of this title for each impairment rating assigned and a Designated Doctor Examination Data Report pursuant to §127.220 of this title (relating to the Designated Doctor Reports) for the doctor's extent of injury determination. The designated doctor, however, shall only submit one narrative report required by §130.1(d)(1)(B) of this title for all impairment ratings assigned and extent of injury findings. All

designated doctor narrative reports submitted under this subsection shall also comply with the requirements of §127.220(a) of this title.

(e) A designated doctor who examines an injured employee pursuant to any question relating to return to work is required to file a Work Status Report that meets the required elements of these reports described in §129.5 of this title (relating to Work Status Reports) and a narrative report that complies with the requirements of §127.220(a) of this title within seven working days of the date of the examination of the injured employee. This report shall be filed with the treating doctor, the division, and the insurance carrier by facsimile or electronic transmission. In addition, the designated doctor shall file the reports with the injured employee and the injured employee's representative, if any, by facsimile or by electronic transmission if the designated doctor has been provided with a facsimile number or email address for the recipient, otherwise, the designated doctor shall send the report by other verifiable means.

(f) A designated doctor who resolves questions on issues other than those listed in subsections (d) and (e) of this section, shall file a Designated Doctor Examination Data Report that complies with §127.220(c) of this title and a narrative report that complies with §127.220(a) of this title within seven working days of the date of the examination of the injured employee. These reports shall be filed with the treating doctor, the division, and the insurance carrier by facsimile or electronic transmission. In addition, the designated doctor shall provide these reports to the injured employee and the injured employee's representative, if any, by facsimile or by electronic transmission if the designated doctor has been provided with a facsimile number or email address for the recipient, otherwise, the designated doctor shall send the reports by other verifiable means.

(g) The report of the designated doctor is given presumptive weight regarding the issue(s) in question the designated doctor was properly appointed to address, unless the preponderance of the evidence is to the contrary.

(h) The insurance carrier shall pay all benefits, including medical benefits, in accordance with the designated doctor's report for the issue(s) in dispute. If the designated doctor provides multiple certifications of MMI/impairment ratings under subsection (d) of this section because the designated doctor was also ordered to address the extent of the injured employee's compensable injury, the insurance carrier shall pay benefits based on the conditions to which the designated doctor determines the compensable injury extends. For medical benefits, the insurance carrier shall have 21 days from receipt of the designated doctor's report to reprocess all medical bills previously denied for reasons inconsistent with the findings of the designated doctor's report. By the end of this period, insurance carriers shall tender payment on these medical bills in accordance with the Act and Chapters 133 and 134 of this title. For all other benefits, the insurance carrier shall tender payment no later than five days after receipt of the report.

(i) The designated doctor shall maintain accurate records for, at a minimum, five years from the anniversary date of the date of the designated doctor's last examination of the injured employee. This requirement does not reduce or replace any other record retention requirements imposed upon a designated doctor by an appropriate licensing board. These records shall include the injured employee's medical records, any analysis submitted by the insurance carrier or treating doctor (including supporting information), reports generated by the designated doctor as a result of the examination, and narratives provided by the insurance carrier and treating doctor, to reflect:

(1) the date and time of any designated doctor appointments scheduled with an injured employee;

(2) the circumstances regarding a cancellation, no-show or other situation where the examination did not occur as initially scheduled or rescheduled and, if applicable, documentation of the agreement of the designated doctor and the injured employee to reschedule the examination and

the notice that the doctor provided to the division, the injured employee's treating doctor, and the insurance carrier within 24 hours of rescheduling an appointment;

(3) the date of the examination;

(4) the date medical records were received from the treating doctor or any other person;

(5) the date reports described in subsections (d), (e), and (f) of this section were submitted to all required parties and documentation that these reports were submitted to the division, treating doctor, and insurance carrier by facsimile or electronic transmission and to other required parties by verifiable means;

(6) the name(s) of any referral health care providers used by the designated doctor, if any; the date of appointments by referral health care providers; and the reason for referral by the designated doctor; and

(7) the date, if any, the doctor contacted the division for assistance in obtaining medical records from the insurance carrier or treating doctor.

(j) Parties may dispute any entitlement to benefits affected by a designated doctor's report through the dispute resolution processes outlined in Chapters 140 - 144 and 147 of this title (relating to Dispute Resolution processes, proceedings, and procedures).

(k) This section will become effective on December 6, 2018.

§127.100. Designated Doctor Certification.

(a) Applicability. This section applies to designated doctor applications received on or after the effective date of this section.

(b) In order to serve as a designated doctor, a doctor must be certified as a designated doctor. To be certified as a designated doctor, a doctor must:

(1) submit a complete designated doctor certification application as described by subsection (c) of this section;

(2) submit a certificate or certificates certifying that the doctor has within the past 12 months successfully completed all division required trainings and passed all division required testing on the specific duties of a designated doctor under the Act and division rules, including demonstrated proficient knowledge of the currently adopted edition of the American Medical Association Guides to the Evaluation of Permanent Impairment and the division's adopted treatment and return-to-work guidelines;

(3) be licensed in Texas;

(4) have maintained an active practice for at least three years during the doctor's career. For the purposes of this subsection, a doctor has an active practice if the doctor maintains or has maintained routine office hours of at least 20 hours per week for 40 weeks per year for the treatment of patients; and

(5) own or subscribe to, for the duration of the doctor's term as a certified designated doctor, the current edition of the American Medical Association Guides to the Evaluation of Permanent Impairment adopted by the division for the assignment of impairment ratings and all return-to-work and treatment guidelines adopted by the division.

(c) A complete designated doctor certification application must be completed on the division's required form for certification applications and must include:

(1) contact information for the doctor;

(2) information on the doctor's education;

(3) a description of the doctor's license(s), certifications, and professional specialty, if any;

(4) a description of the doctor's work history and hospital or other health care provider affiliations;

(5) a description of any affiliations the doctor has with a workers' compensation health care network certified under Chapter 1305, Insurance Code or political subdivision under Labor Code §504.053(b)(2);

(6) information regarding the doctor's current practice locations;

(7) disclosure questions regarding the doctor's professional background, education, training, and fitness to perform the duties of a designated doctor, including disclosure and summary of any disciplinary actions taken against the doctor by any state licensing board or other appropriate state or federal agency;

(8) the identities of any person(s) with whom the doctor has contracted to assist in performance or administration of the doctor's designated doctor duties;

(9) an attestation that:

(A) all information provided in the application is accurate and complete to the best of the doctor's knowledge;

(B) the doctor will inform the division of any changes to this information as required by §127.200(a)(8) of this title (relating to Duties of a Designated Doctor); and

(C) the doctor shall consent to any on-site visits, as provided by §127.200(a)(15) of this title, by the division at facilities used or intended to be used by the designated doctor to perform designated doctor examinations for the duration of the doctor's certification.

(d) If a doctor passes a division-required test, the doctor may not retest within a twelve month period. If a doctor fails a division-required test, the doctor may not retest more than three times within a six month period.

(1) After the first or second attempt, the doctor must wait 14 days before retaking the test; or

(2) After the third attempt, the doctor must wait six months before retaking the test.

(e) The division shall notify a doctor of the commissioner's approval or denial of the doctor's application to be certified as a designated doctor in writing. Denials will include the reason(s) for the denial. Approvals certify a doctor for a term of two years and will include the effective date and expiration date of the certification. Approvals will also include the examination qualification criteria under §127.130 of this title (relating to Qualification Standards for Designated Doctor Examinations) that the division has assigned to the designated doctor as part of the doctor's certification.

(f) Doctors may be denied certification as a designated doctor:

(1) if the doctor did not submit the information and documentation required by subsection (b) of this section;

(2) if the doctor did not submit a complete application for certification as required by subsection (c) of this section;

(3) for having a relevant restriction on their practice imposed by a state licensing board, certification authority, or other appropriate state or federal agency, including the division; or

(4) for other activities, events, or occurrences that the commissioner determines to warrant denial of a doctor's application for certification as a designated doctor, including but not limited to:

(A) the quality of the doctor's past reports as a certified designated doctor, if any;

(B) a history of complaints as a certified designated doctor, if any;

(C) excess requests for deferral from the designated doctor list as a certified designated doctor, if any;

(D) a pattern of overturned reports by the division or a court as a certified designated doctor, if any;

(E) a demonstrated lack of ability to apply or properly consider the American Medical Association Guides to the Evaluation of Permanent Impairment adopted by the division for

the assignment of impairment ratings and all return-to-work and treatment guidelines adopted by the division as a certified designated doctor, if any;

(F) a demonstrated lack of ability to consistently perform designated doctor examinations in a timely manner as a certified designated doctor, if any;

(G) a demonstrated failure to identify disqualifying associations as a certified designated doctor, if any;

(H) a demonstrated lack of ability to ensure the confidentiality of injured employee medical records and claim information provided to or generated by a certified designated doctor, if any;

(I) applying for certification less than a year from denial of a previous designated doctor certification or recertification application; or

(J) any grounds that would allow the division to sanction a health care provider under the Act or division rules.

(g) Within 15 working days after receiving a denial, a doctor may file a written response with the division, which addresses the reasons given to the doctor for denial.

(1) If a written response is not received by the 15th working day after the date the doctor received the notice, the denial will be final effective the following day. No further notice will be sent.

(2) If a written response which disagrees with the denial is timely received, the division shall review the response and shall notify the doctor of the commissioner's final decision. If the final decision is still a denial, the division's final notice shall provide the reason(s) why the doctor's response did not change the commissioner's decision to deny the doctor's application for certification as a designated doctor. The denial will be effective the day following the date the doctor receives notice of the denial unless otherwise specified in the notice.

(h) Designated doctors whose application for certification is approved but wish to dispute the examination qualification criteria under §127.130 of this title that the division assigned to the doctor may do so through the procedures described in subsection (g) of this section. Designated doctors must include in their response to the division the specific criteria they believe should be modified and documentation to justify the requested change.

(i) Designated doctors who are designated doctors on the effective date of this section shall be considered certified for the duration of the designated doctor's current certification. Before the expiration of the designated doctor's current certification, the designated doctor must timely apply for recertification under the applicable requirements of §127.110 of this title (relating to Designated Doctor Recertification).

(j) This section will become effective on December 6, 2018.

§127.110. Designated Doctor Recertification.

(a) Applicability. This section applies to designated doctor applications received on or after the effective date of this section.

(b) If a designated doctor's certification expires, the designated doctor must apply for recertification. Designated doctors seeking recertification must:

(1) submit to the division certificate(s) evidencing that the doctor has, within the past 12 months, successfully completed all division required trainings and passed all division required testing on the specific duties of a designated doctor under the Act and division rules, including demonstrated proficient knowledge of the current division adopted edition of the American Medical Association Guides to the Evaluation of Permanent Impairment and the division's adopted treatment and return-to-work guidelines;

(2) own or subscribe to, for the duration of the doctor's term as a certified designated doctor, the current edition of the American Medical Association Guides to the Evaluation of

Permanent Impairment adopted by the division for the assignment of impairment ratings and all return-to-work and treatment guidelines adopted by the division; and

(3) submit to the division a complete application for recertification that meets the requirements of §127.100(c) of this title (relating to Designated Doctor Certification). For purposes of recertification, division-required testing limitations as described in §127.100(d) of this title apply.

(c) The division will not assign examinations to a designated doctor during the 45 days prior to the expiration of the designated doctor's certification if the division fails to receive the required information in subsection (b)(1) - (3) of this section from the designated doctor before that time though the designated doctor may still provide services on claims to which the designated doctor had been previously assigned during this period. A designated doctor who seeks to be recertified as a designated doctor and who fails to apply for recertification under subsection (b)(1) - (3) of this section at least 45 days prior to the expiration of the designated doctor's certification commits an administrative violation. A designated doctor who fails to apply for recertification under this section within 30 days after the expiration of the designated doctor's certification may no longer apply for recertification and must instead apply for certification of §127.100 of this title.

(d) The division will notify a doctor in writing of the commissioner's approval or denial of the doctor's application to be recertified as a designated doctor under subsection (b) of this section. Denials will include the reason(s) for the denial. Approvals recertify a doctor for a term of two years and will include the effective date and expiration date of the certification. Approvals will also include the designated doctor's examination qualification criteria under §127.130 of this title (relating to Qualification Standards for Designated Doctor Examinations) that the division has assigned to the doctor as part of the doctor's recertification.

(e) The division may deny an application for recertification under subsection (b) of this section for the following reasons:

(1) the doctor did not submit the information and documentation required by subsection (b) of this section;

(2) if the doctor failed to properly update the doctor's initial application for certification under §127.100(c) of this title;

(3) for having a relevant restriction on their practice imposed on the doctor by a state licensing board, certification authority, or other appropriate state or federal agency, including the division;

(4) for requesting unnecessary referral examinations or testing or failure to comply with requirements of §180.24 of this title (relating to Financial Disclosure) when requesting referral examinations or additional testing; or

(5) for other activities, events, or occurrences that the commissioner determines to warrant denial of a doctor's application for recertification as a designated doctor, including but not limited to:

(A) the quality of the designated doctor's past reports;

(B) the designated doctor's history of complaints;

(C) excess requests for deferral from the designated doctor list by the doctor;

(D) a pattern of overturned reports by the division or a court;

(E) a demonstrated lack of ability to apply or properly consider the American Medical Association Guides to the Evaluation of Permanent Impairment adopted by the division for the assignment of impairment ratings and all return-to-work and treatment guidelines adopted by the division;

(F) a demonstrated lack of ability to consistently perform designated doctor examinations in a timely manner;

(G) a demonstrated failure to identify disqualifying associations;

(H) a demonstrated lack of ability to ensure the confidentiality of injured employee medical records and claim information provided to or generated by the designated doctor; or

(I) any grounds that would allow the division to sanction a health care provider under the Act or division rules.

(f) Within 15 working days after receiving a denial, a doctor may file a written response with the division that addresses the reasons given to the doctor for denial or may submit a written request an informal hearing before the division to address the reasons given for the denial.

(1) If neither a response nor a written request for informal hearing is received by the 15th working day after the date the doctor received the notice, the denial will be final effective the following day. No further notice will be sent.

(2) If a written response which disagrees with the denial is timely received, the division will review the response and will notify the doctor of the commissioner's final decision in writing. If the final decision is still a denial, the division's final notice shall provide the reason(s) why the doctor's response did not change the commissioner's decision to deny the doctor's application for recertification as a designated doctor. The denial will be effective the day following the date the doctor receives notice of the denial unless otherwise specified in the notice.

(3) If a written request for informal hearing is timely received, the division will set the informal hearing to occur no later than 31 days after the request is received. At the informal hearing, the designated doctor may present evidence that addresses the reasons the doctor was denied recertification to the commissioner's designated representatives. The designated doctor may have an attorney present. At the conclusion of the informal hearing, the designated representatives will provide the designated doctor with their final recommendation regarding the doctor's recertification. If the final recommendation is still a denial, the designated representatives will provide the reason(s)

why they decided not to recertify the doctor as a designated doctor. After the informal hearing, the designated representatives will forward their recommendation to the commissioner who will review the final recommendation and all evidence presented at the informal hearing and make a final decision. The division shall notify the designated doctor of the commissioner's final decision in writing. The decision will be effective the day following the date the doctor receives notice of the decision unless otherwise specified in the notice.

(g) Designated doctors whose application for recertification under subsection (b) of this section is approved but wish to dispute the examination qualification criteria under §127.130 of this title that the division assigned to the doctor may do so through the procedures described in subsection (f) of this section. Designated doctors must include in their response to the division or present at the informal hearing the specific criteria they wish to be modified and documentation to justify the requested change.

(h) This section will become effective on December 6, 2018.

§127.130. Qualification Standards for Designated Doctor Examinations.

(a) Applicability. This section applies to designated doctor assignments made on or after the effective date of this section.

(b) A designated doctor is qualified to perform a designated doctor examination on an injured employee if the designated doctor meets the appropriate qualification criteria for the area of the body affected by the injury and the injured employee's diagnosis and has no disqualifying associations under §127.140 of this title (relating to Disqualifying Associations). A designated doctor's qualification criteria are determined as follows:

(1) To examine injuries and diagnoses relating to the hand and upper extremities, a designated doctor must be a licensed medical doctor, doctor of osteopathy, or doctor of chiropractic.

(2) To examine injuries and diagnoses relating to the lower extremities excluding feet, a designated doctor must be a licensed medical doctor, doctor of osteopathy, or doctor of chiropractic.

(3) To examine injuries and diagnoses relating to the spine and musculoskeletal structures of the torso, a designated doctor must be a licensed medical doctor, doctor of osteopathy, or doctor of chiropractic.

(4) To examine injuries and diagnoses relating to feet, including toes and heel, a designated doctor must be a licensed medical doctor, doctor of osteopathy, doctor of chiropractic, or doctor of podiatric medicine.

(5) To examine injuries and diagnoses relating to the teeth and jaw, including a temporomandibular joint, a designated doctor must be a licensed medical doctor, doctor of osteopathy, or doctor of dental surgery.

(6) To examine injuries and diagnoses relating to the eyes, including the eye and adnexal structures of the eye, a designated doctor must be a licensed medical doctor, doctor of osteopathy, or doctor of optometry.

(7) To examine injuries and diagnoses relating to mental and behavioral disorders, a designated doctor must be a licensed medical doctor or doctor of osteopathy.

(8) To examine injuries and diagnoses relating to other body areas or systems, including but not limited to internal systems; ear, nose, and throat; head and face; skin; cuts to skin involving underlying structures; non-musculoskeletal structures of the torso; hernia; respiratory; endocrine; hematopoietic; and urologic; a designated doctor must be a licensed medical doctor or doctor of osteopathy.

(9) Notwithstanding paragraphs (1) – (8) of this subsection, a designated doctor must be a licensed medical doctor or doctor of osteopathy who has the required board certification to examine any of the following diagnoses. For purposes of this section, a designated doctor is "board certified" in

a required specialty or subspecialty, as applicable, if the designated doctor holds or previously held a general certificate in the required specialty or a subspecialty certificate in the required subspecialty from the American Board of Medical Specialties (ABMS) or if the designated doctor holds or previously held a primary certificate in the required specialty and a certificate of special qualifications or certificate of added qualifications in the required subspecialty from the American Osteopathic Association Bureau of Osteopathic Specialists (AOABOS).

(A) To examine traumatic brain injuries, including concussion and post-concussion syndrome, a designated doctor must be board certified in neurological surgery, neurology, physical medicine and rehabilitation, or psychiatry by the ABMS or board certified in neurological surgery, neurology, physical medicine and rehabilitation, or psychiatry by the AOABOS.

(B) To examine spinal cord injuries and diagnoses, a spinal fracture with documented neurological deficit, or cauda equina syndrome, a designated doctor must be board certified in neurological surgery, neurology, physical medicine and rehabilitation, orthopaedic surgery, or occupational medicine by the ABMS or board certified in neurological surgery, neurology, physical medicine and rehabilitation, orthopedic surgery, preventive medicine/occupational-environmental medicine, or preventive medicine/occupational by the AOABOS.

(C) To examine severe burns, including chemical burns, defined as deep partial or full thickness burns, also known as 2nd, 3rd, or 4th degree burns, a designated doctor must be board certified in dermatology, physical medicine and rehabilitation, plastic surgery, orthopaedic surgery, surgery, or occupational medicine by the ABMS or board certified in dermatology, physical medicine and rehabilitation, plastic and reconstructive surgery, orthopedic surgery, surgery (general), preventive medicine/occupational-environmental medicine, or preventive medicine/occupational by the AOABOS.

(D) To examine complex regional pain syndrome (reflex sympathetic dystrophy), a designated doctor must be board certified in neurological surgery, neurology, orthopaedic surgery, plastic surgery, anesthesiology with a subspecialty in pain medicine, occupational medicine, or physical medicine and rehabilitation by the ABMS or board certified in neurological surgery, neurology, orthopedic surgery, plastic surgery, preventive medicine/occupational-environmental medicine, preventive medicine/occupational, anesthesiology with certificate of added qualifications in pain management, or physical medicine and rehabilitation by the AOABOS.

(E) To examine multiple fractures, joint dislocation, and pelvis or hip fracture, a designated doctor must be board certified in emergency medicine, orthopaedic surgery, plastic surgery, physical medicine and rehabilitation, or occupational medicine by the ABMS or board certified in emergency medicine, orthopedic surgery, plastic surgery, physical medicine and rehabilitation, preventive medicine/occupational-environmental medicine, or preventive medicine/occupational by the AOABOS.

(F) To examine complicated infectious diseases requiring hospitalization or prolonged intravenous antibiotics, including blood borne pathogens, a designated doctor must be board certified in internal medicine or occupational medicine by the ABMS or board certified in internal medicine, preventive medicine/occupational-environmental medicine, or preventive medicine/occupational by the AOABOS.

(G) To examine chemical exposure, excluding chemical burns, a designated doctor must be board certified in internal medicine, emergency medicine, or occupational medicine by the ABMS or board certified in internal medicine, emergency medicine, preventive medicine/occupational-environmental medicine, or preventive medicine/occupational by the AOABOS.

(H) To examine heart or cardiovascular conditions, a designated doctor must be board certified in internal medicine, emergency medicine, occupational medicine, thoracic and cardiac surgery, or family medicine by the ABMS or board certified in internal medicine, emergency medicine, preventive medicine/occupational-environmental medicine, preventive medicine/occupational, thoracic and cardiovascular surgery or family practice and osteopathic manipulative treatment by the AOABOS.

(c) To be qualified to perform an initial examination on an injured employee, a designated doctor, other than a chiropractor, must be qualified under Labor Code §408.0043. A designated doctor who is a chiropractor must be qualified to perform an initial designated doctor examination under Labor Code §408.0045. If, however, the requirements of this subsection would disqualify a designated doctor otherwise qualified under subsection (b) of this section, pursuant to Labor Code §408.0041(b-1), does not apply.

(d) For any particular designated doctor examination, the division may exempt a designated doctor from the applicable qualification standard if no other designated doctor is qualified and available to perform the examination. Additionally, the division may not offer a qualified designated doctor an examination if it is reasonably probable that the designated doctor will not be qualified on the date of the examination.

(e) A designated doctor who performs an initial designated doctor examination of an injured employee and had the appropriate qualification criteria to perform that examination under subsection (b) of this section, shall remain assigned to that claim and perform all subsequent examinations of that injured employee unless the division authorizes or requires the designated doctor to discontinue providing services on that claim.

(f) The division may authorize a designated doctor to stop providing services on a claim if the doctor:

(1) decides to stop practicing in the workers' compensation system;

(2) decides to stop practicing as a designated doctor in the workers' compensation system;

(3) relocates the doctor's residence or practice;

(4) has asked the division to indefinitely defer the doctor's availability on the designated doctor list;

(5) determines that examining the injured employee would require the designated doctor to exceed the scope of practice authorized by the doctor's license; or

(6) can otherwise demonstrate to the division that the doctor's continued service on the claim would be impracticable or could impair the quality of examinations performed on the claim.

(g) The division will prohibit a designated doctor from providing services on a claim if:

(1) the doctor has failed to become recertified as a designated doctor under §127.110(b) of this title (relating to Designated Doctor Recertification);

(2) the doctor no longer has the appropriate qualification criteria under subsection (b) of this section, to perform examinations on the claim;

(3) the doctor has a disqualifying association, as specified in §127.140 of this title, relevant to the claim;

(4) the doctor has repeatedly failed to respond to division appointment, clarification, or document requests, or other division inquiries regarding the claim;

(5) the doctor's continued service on the claim could endanger the health, safety, or welfare of either the injured employee or doctor; or

(6) the division has revoked or suspended the designated doctor's certification.

(h) The division will prohibit a designated doctor from performing examinations on all new or existing claims if the designated doctor has had the doctor's license revoked or suspended and the suspension has not been probated by an appropriate licensing authority.

(i) This section will become effective on December 6, 2018.

§127.140. Disqualifying Associations.

(a) A disqualifying association is any association that may reasonably be perceived as having potential to influence the conduct or decision of a designated doctor. Disqualifying associations may include:

(1) receipt of income, compensation, or payment of any kind not related to health care provided by the doctor;

(2) shared investment or ownership interest;

(3) contracts or agreements that provide incentives, such as referral fees, payments based on volume or value, and waiver of beneficiary coinsurance and deductible amounts;

(4) contracts or agreements for space or equipment rentals, personnel services, management contracts, referral services, billing services agents, documentation management or storage services or warranties, or any other services related to the management or operation of the doctor's practice;

(5) personal or family relationships;

(6) a contract with the same workers' compensation health care network certified under Chapter 1305, Insurance Code or a contract with the same political subdivision or political subdivision health plan under Labor Code §504.053(b)(2) that is responsible for the provision of medical benefits to the injured employee; or

(7) any other financial arrangement that would require disclosure under the Labor Code or applicable division rules, the Insurance Code or applicable department rules, or any other

association with the injured employee, the employer, or insurance carrier that may give the appearance of preventing the designated doctor from rendering an unbiased opinion.

(b) For examinations performed after January 1, 2013, a designated doctor shall also have a disqualifying association relevant to an examination or claim if an agent of the designated doctor has an association relevant to the claim that would constitute a disqualifying association under subsection (a) of this section.

(c) A designated doctor shall not perform an examination if that doctor has a disqualifying association relevant to that claim. If a designated doctor learns of a disqualifying association relevant to a claim after accepting the examination, the designated doctor must notify the division of that disqualifying association within two working days of learning of the disqualifying association. A designated doctor who performs an examination even though the doctor has a disqualifying association relevant to that claim commits an administrative violation.

(d) Insurance carriers shall notify the division of any disqualifying associations between the designated doctor and injured employee because of the network affiliations described under subsection (a)(6) of this section within five days of receiving the division's order of designated doctor examination under §127.5(b) of this title (relating to Scheduling Designated Doctor Appointments).

(e) If the division determines that a designated doctor with a disqualifying association performed a designated doctor examination, all reports produced by that designated doctor as a result of that examination shall be stripped of their presumptive weight.

(f) A party that seeks to dispute the selection of a designated doctor for a particular examination based on a disqualifying association or to dispute the presumptive weight of a designated doctor's report based on a disqualifying association must do so through the division's dispute resolution processes in Chapter 410, Labor Code and Chapters 140 - 144 and 147 of this title (relating to Dispute Resolution processes, proceedings, and procedures).

(g) This section will become effective on December 6, 2018.

§127.220. Designated Doctor Reports.

(a) Designated doctor narrative reports must be filed in the form and manner required by the division and at a minimum:

(1) identify the question(s) the division ordered to be addressed by the designated doctor examination;

(2) provide a clearly defined answer for each question to be addressed by the designated doctor examination and only for each of those questions;

(3) sufficiently explain how the designated doctor determined the answer to each question within a reasonable degree of medical probability;

(4) demonstrate, as appropriate, application or consideration of the American Medical Association Guides to the Evaluation of Permanent Impairment, division-adopted return-to-work and treatment guidelines, and other evidence-based medicine, if available;

(5) include general information regarding the identity of the designated doctor, injured employee, employer, treating doctor, and insurance carrier;

(6) state the date of the examination and the address where the examination took place;

(7) summarize any additional testing conducted or referrals made as part of the evaluation, including the identity of any health care providers to which the designated doctor referred the injured employee under §127.10(c) of this title (relating to General Procedures for Designated Doctor Examinations), the types of tests conducted or referrals made and the dates the testing or referral examinations occurred, and explain why the testing or referral was necessary to resolve a question at issue in the examination;

(8) include a narrative description of the medical history, physical examination, and medical decision making performed by the designated doctor, including the time the designated

doctor began taking the medical history of the injured employee, physically examining the employee, and engaging in medical decision making and the time the designated doctor completed these tasks;

(9) list the specific medical records or other documents the designated doctor reviewed as part of the evaluation, including the dates of those documents and which, if any, medical records were provided by the injured employee;

(10) be signed by the designated doctor who performed the examination;

(11) include a statement that there is no known disqualifying association as described in §127.140 of this title (relating to Disqualifying Associations) between the designated doctor and the injured employee, the injured employee's treating doctor, the insurance carrier, the insurance carrier's certified workers' compensation health care network, or a network established under Chapter 504, Labor Code;

(12) certify the date that the report was sent to all recipients required by and in the manner required by §127.10 of this title; and

(13) indicate on the report that the designated doctor reviewed and approved the final version of the report.

(b) Designated doctors who perform examinations under §127.10(d) or (e) of this title shall also complete and file the division forms required by those subsections with their narrative reports. Designated doctors shall complete and file these forms in the manner required by applicable division rules.

(c) Designated doctors who perform examinations under §127.10(f) of this title must, in addition to filing a narrative report that complies with subsection (a) of this section, also file a Designated Doctor Examination Data Report in the form and manner required by the Division. A Designated Doctor Examination Data Report must:

(1) include general information regarding the identity of the designated doctor, injured employee, insurance carrier, as well as the identity of the certified workers' compensation health care network under Chapter 1305, Insurance Code, if applicable, or whether the injured employee is receiving medical benefits through a political subdivision health care plan under Labor Code §504.053(b)(2) and the identity of that plan, if applicable;

(2) identify the question(s) the division ordered to be addressed by the designated doctor examination;

(3) provide a clearly defined answer for each question to be addressed by the designated doctor examination and only for each of those questions. For extent of injury examinations, the designated doctor should also provide, for informational purposes only, a diagnosis code for each disputed injury;

(4) state the date of the examination, the time the examination began, and the address where the examination took place;

(5) list any additional testing conducted or referrals made as part of the evaluation, including the identity of any health care providers to which the designated doctor referred the injured employee under §127.10(c) of this title, the types of tests conducted or referrals made and the dates the testing or referral examinations occurred;

(6) be signed by the designated doctor who performed the examination.

(d) This section will become effective on December 6, 2018.

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Cassie Brown

Commissioner of Workers' Compensation

COMMISSIONER'S ORDER NO._____

ATTEST:

X _____

Nicholas Canaday III

General Counsel

Texas Department of Insurance, Division of Workers' Compensation

COMMISSIONER'S ORDER NO._____