

Kenneth B. Ford, Jr., M.D.
103 Sage Road
Houston, Texas 77056
May 24, 2010

To the Honorable Members of the Texas Sunset Commission

Re: Response to May 14, 2010 Letter from Commissioner Bordelon

I am writing in response to the letter of May 14, 2010 from Mr. Rod Bordelon. As I will explain briefly below, Mr. Bordelon has undermined the medical review process and the objectives of the Legislature, costing the Texas Workers' Compensation system millions of dollars and endangering the health and welfare of injured workers. This letter also addresses Mr. Bordelon's primary argument that focusing investigations on "outliers" in the Texas Workers Compensation System ("System") raises due process concerns, even though this enforcement strategy is used by virtually every major regulatory body in the country and was mandated by legislation enacted by the Texas Legislature.

Because I am prominently mentioned in his letter, I will briefly explain my role in the medical review process. I am a Board Certified Orthopedic Surgeon and practiced in Houston for 27 years until I retired in 2004. I met the first Medical Advisor of the old Texas Workers' Compensation Commission and he urged me to join him in Austin in an effort to improve medical care in what had become known as one of the worst systems in the United States. At that time, Texas had the highest cost per claim of any state in the country, and because of my training and background, I thought it would be a chance to provide some public service.

From September 2004 until February 2010 I served as both Medical Advisor and Assistant Medical Advisor for the Division, lasting longer than any other physician – about five and one-half years. When I was hired, the Medical Advisor requested that I take over the entire medical quality review process and be responsible for evaluating the majority of complaints related to quality of care. I accepted, and from that time until I retired, I was the only medical doctor involved with medical quality reviews from inception until completion of each review. For the first three or four years, I traveled from my home in Houston and paid all my own travel, and lodging expenses.

During my tenure, the Office of the Medical Advisor made every effort to follow the intent of the Legislature as clearly expressed in the Texas Mutual Insurance Company "TMIC" Grant that pays the Medical Quality Review Panel "MGRP" doctors for performing quality reviews.

Research mandated by the Legislature about ten years ago recognized that a small handful of doctors (4.5 per cent) were responsible for 70 per cent of the billing. Therefore reviews were to be targeted on the high utilizers or outliers responsible for the bulk of the costs. As stated in the TMIC Grant:

“The need to reduce overutilization in the system (inappropriate and unnecessary medical care) is a major goal of the Office of the Medical Advisor and the Medical Quality Review Panel..... The leading driver of high cost in our system is overutilization..... Because of careful selection of cases by the Medical Advisor and Commission Staff, our experience so far indicates that over 2/3 of the case reviews accomplished have identified significant problems.”

The two methods for selecting cases for review are described in the TMIC Grant:

The subjects are identified based either upon data demonstrating that their conduct is statistically outside the norms for system participants or based upon complaints that are carefully screened to identify significant issues.

The system established by the Legislature is, in fact, a very good one to ferret out unacceptable providers. All doctors working in the Office of the Medical Advisor during the past five and a half years have been competent professionals attempting to serve the public. The members of the Medical Quality Review Panel “MQRP” and Quality Assurance Panel “QAP” have also been very capable and competent to achieve the Legislature’s objectives. The decisions to remove or sanction doctors have been collaborative and made by a number of qualified, honest, unbiased professionals dedicated to improving health care.

During my years of intense involvement, the system has not worked. It has failed simply because the Commissioner has:

- (a) Directly intervened to undermine and prevent the success of the goals of the Legislature and TMIC Grant, even going so far as to dismiss unanimous decisions by the QAP after the offending doctors had agreed to end participation in the System.
- (b) Ignored the advice and opinions of highly qualified doctors serving under the Medical Advisor.
- (c) Permitted a relatively small group of doctors to (i) render dangerous, unwarranted medical procedures, (ii) prescribe unnecessary medications, including dangerous narcotics, and (iii) become involved with overdose deaths, and
- (d) Cost the system tens of millions of dollars in inappropriate medical care.

During this time the Medical Advisor and the MQRP/QAP have identified large numbers of doctors who have abused the system (I believe over 60 cases are currently pending in Enforcement), have done serious harm to their patients and have charged the system millions in unnecessary fees. At the time I retired, I’m not aware of a single one of these

doctors who has been taken to the State Office of Administrative Hearings "SOAH" and removed from the system.

Not only can this inappropriate care be devastating to an injured worker, but also the unnecessary costs are detrimental to the business community. Since the inception of the Division of Workers' Compensation, the vast majority of doctors identified as not providing appropriate care continue to practice in the system without restrictions. All of the medical doctors involved with the Office of the Medical Advisor are leaving the Division. I strongly believe this is a result of the Commissioner's failure to deal with doctors providing harmful medical care.

As indicated in his letter, Mr. Bordelon attempts to justify his protection of unqualified doctors by contending that doctors should be selected for review on a completely random basis. His view that the selection process used was unfair, violated due process rights and jeopardized the enforcement of cases is fundamentally wrong.

Mr. Bordelon, not only does not understand due process, he appears to be unaware that statistical programs identifying "outlier" doctors are used by hospitals and medical organizations throughout the United States in order to identify doctors whose practice should be subject to peer review that may lead to expulsion or other disciplinary action. For example, if a doctor has an unusual number of complications the doctor may be selected for evaluation. Obviously such a process is fair, more efficient and does not infringe on any doctor's due process rights. In fact, identifying outliers to focus investigations is used by law enforcement agencies throughout the country including, police, the FBI, the IRS and the Center for Medicaid and Medicare Services.

Mr. Bordelon's proposed "random review" process is inconsistent with the intention of the Legislature and the express terms of the TMIC Grant. It would necessarily (1) waste valuable resources (investigate the practices of many doctors whose practices are perfectly acceptable), and (2) result in a failure to investigate many of the doctors who scam the system and harm patients.

It is important to recognize that Mr. Bordelon's spurious due process claim relates solely to the selection of doctors whose cases will be reviewed, not the review process itself. Once selected and notified, doctors are given every opportunity to explain their positions and provide any facts and opinions relevant to the review. At times the reviews have been closed based on this information. No one could credibly say the review process is not abundantly fair.

Mr. Bordelon contrasts his proposed "random" system with what he calls "hand picking" – a term which, he believes, implies sinister, unfair selection. In fact, the complaint cases do require selection by a doctor. A doctor with years of knowledge, training and experience should carefully screen complaints. A complaint can come from anyone – not just an injured worker or the general public. In fact, some of the most reliable complaints come from other physicians who have a good understanding of unnecessary medical care and who have treated a patient injured by the over-utilizing or incompetent doctor. The

screening system used by the MQRP was the exact intent of the TMIC Grant – there is no other practical way to do it. To place these complaints of egregious practices in some type of random lottery, as the Commissioner believes is necessary, is irresponsible.

Although the Commissioner has blocked removal of many unqualified doctors over the last 5 years, Mr. Bordelon focuses on the cases he recently threw out after they had been selected, and reviewed by the Medical Advisor's office and MQRP. His letter states that there were eight cases, but there were nine.

Mr. Bordelon's allegation that the Office of the Medical Advisor inappropriately targeted these health care providers is simply incorrect. To illustrate, one of the nine cases he threw out involved a doctor who was reviewed in 2005 by the MQRP, and a unanimous vote by the QAP recommended his removal from the system. Mr. Bordelon is correct in his statement: "this is not the first time the MQRP review and enforcement process has been halted." The process was effectively shut down for about a year beginning in 2005 by Mr. Betts and again by Mr. Bordelon in 2010. Both of these shutdowns involved the doctor mentioned in the previous paragraph who, according to press reports, has attempted to influence the Commissioner through political contacts. The doctor continues to practice because Mr. Bordelon allowed him to escape a second quality medical quality review in 2010.

Mr. Bordelon indicates that I refused to discuss the nine cases he has chosen to dismiss. This is simply untrue. He seems to forget that in mid January 2010, I attended a 3-hour meeting designed to discuss nothing but the cases he was considering throwing out. In attendance were: Commissioner Bordelon, Dirk Johnson (General Counsel), Cass Burton (Enforcement), Bill Defoyd (Chiropractor and Assistant Medical Advisor), Howard Smith (Medical Advisor) and I believe two of Mr. Bordelon's staff, Matt Zurek and Mary Landrum. Contrary to Mr. Bordelon's accusations that I refused repeated requests, at no other time did he call me or specifically ask me to discuss these cases or answer any questions.

Not once in this meeting did the Commissioner mention that I had "hand picked" cases. Not once was there a clear description of how he perceived the cases to have been unfairly chosen for review. Not once was a question asked by the Commissioner or his staff about the harmful medical care that had been provided by these nine doctors. However, the Commissioner did go around the room asking whether or not the cases should be dropped – Dr. Smith, Dr. Defoyd, Dr. Ford and Cass Burton said "no." Mr. Bordelon and the General Counsel stated that they would not dismiss any of the cases that were based on complaints.

Following this meeting, the Commissioner decided to ignore recommendations by the Medical Advisor, two Assistant Medical Advisors, and the MQRP/QAP. He dismissed all the cases in spite of the fact he was advised that four or five of these doctors were already close to making an agreement with Enforcement attorney, Cathy Lockhart to leave the system or receive sanctions – exactly what the Medical Advisor had recommended.

The Commissioner and General Counsel's decision was met with great disappointment from the Office of the Medical Advisor and a memorandum was prepared, signed by all doctors in the Office and hand delivered to the Commissioner (see attachment). The Commissioner angrily rejected our opinions - this was one of the leading factors in my decision to retire.

My decision was made more easily after I learned of the extremely unfair and apparently retaliatory actions taken against nurse Ronnie Glenn and Enforcement attorney Cathy Lockhart. Mr. Bordelon failed to mention in his letter that these two employees were escorted from the building as though they were criminals, and kept completely in the dark about why they were placed on "administrative leave" for about 3 weeks. Then it was explained they were involved in "secretive and clandestine" activity, which proved to be nothing more than routine evaluation of billing data regarding the cases thrown out by the Commissioner. The data was undoubtedly embarrassing to Mr. Bordelon because it revealed a waste of State and TMIC Grant money, and millions of dollars of charges for unnecessary and harmful medical care.

I am not offended by the fact that Mr. Bordelon's letter to you highlights my frustration about the failure of the quality review process. You need to understand that many others share my views. This is indicated by the departure of all the physicians working with the Office of the Medical Advisor. In addition, I know many physicians who have been involved with the review process who agree fully with my views. The issues involving millions in waste, dishonest doctors and dangerous healthcare should be a matter of great concern to members of government of all political persuasions. I am confident that if these issues are investigated properly the appropriate actions will be taken.

I have no personal agenda or financial interest in these matters. If there are hearings or investigations concerning these matters, I will be pleased to be of assistance and provide the names of those who understand the failure of this system.

Thank you very much for considering this letter.

Sincerely yours,

Kenn Ford MD

Kenneth B. Ford, Jr., M.D.

MEMORANDUM

February 8, 2010

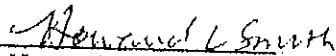
TO: Commissioner, Texas Workers' Compensation Commission

FROM: Office of the Medical Advisor

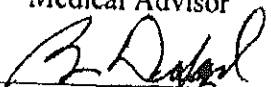
Resistance to recent recommendations from the Office of the Medical Advisor concerning some doctors practicing within the Texas Workers' Compensation System has caused concern within the Office. The recommendations have been based upon findings that patients of these doctors have not received the quality of medical care the Office and the MQRP believe they require, and to which they are entitled. These recommendations have been ignored or rejected by some within the System because of allegations of irregularities in the process whereby the doctors have been brought under scrutiny. These activities raise two distinct issues which must be addressed, simultaneously if necessary, but as mutually exclusive challenges.

First, and foremost, a finding of the MQRP/QAP that patients are not receiving proper care means patients are being harmed by the care received. No legal argument about process can negate that fact, nor justify failure to act in the best interest of the injured workers, regardless of the means whereby notice of that harm was brought to the Office. The System, as its first priority, has a *legal* obligation to provide quality medical care to the injured worker. Additionally, the professionals within the Office have *ethical* obligations to see that that care is delivered and if it isn't, to so advise the Commissioner. If "rights" of the subject doctors are compromised by irregularities in the oversight process, then those irregularities should be addressed. However, poor patient care must not be tolerated by the Commissioner, *for any reason*; and all within the Commission must support this position of the Commissioner. Those doctors have no "rights" to continue to provide poor care to the injured worker while process is being addressed.

The Workers' Compensation System was designed and established for the benefit of the worker, not as an exercise in process management [see and compare Labor Code 402.021(b)(4) and 402.021(b)(7) for expressions of intent of the legislature]. It is a responsibility of the Office of the Medical Advisor to ensure all within the System understand that premise. This communication, the Medical Advisor believes, is in furtherance of that responsibility.


Howard Smith MD JD
Medical Advisor


Ken Ford MD


Bill Defoy BC


Clark Watts MD JD