TITLE 28. INSURANCE

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

CHAPTER 144 – DISPUTE RESOLUTION

SUBCHAPTER A – ARBITRATION

§§144.1 - 144.7 and §§144.9 - 144.16

Adoption

1. INTRODUCTION.

The Commissioner of Workers' Compensation (Commissioner), Texas Department of Insurance, Division of Workers' Compensation (Division) adopts amendments to §§144.1 - 144.7 and §§144.9 - 144.16 (relating to Authority and Duties of Arbitrators; Ex Parte Communications; Delivery of Copies of Documents; Election to Engage in Arbitration; Statement of Disputes; Assignment of Arbitrator; Setting the Arbitration Proceeding; Exchange of Evidence and Proposed Resolution; Stipulations, Agreements, and Settlements; Continuance; Failure to Attend Arbitration; Rights of Parties; Usual Order of Proceedings; Award of the Arbitrator; and Requesting a Copy of the Record, respectively). The amendments to §§144.1 - 144.3, 144.6, 144.7, and 144.9 - 144.16 are adopted without changes to the proposed text as published in the March 23, 2012, issue of the *Texas Register* (37 TexReg 1997). The amendments to §144.4 and §144.5 are adopted with changes to the proposed text as published in the March 23, 2012, issue of the *Texas Register* (37 TexReg 1997). These changes, however, do not materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

In accordance with Government Code §2001.033, the Division's reasoned justification for these amendments is set out in this order, which includes the preamble, which in turn includes the rules. The reasoned justification is contained throughout the preamble, including the reasons why the amended rules are necessary; the factual, policy and legal bases for the amended rules; a summary of comments received from interested parties, names of the entities that commented and whether they were in support of or in opposition to the adoption of the rules, and the reasons why the Division agrees or disagrees with the comments and recommendations.

The Division published an informal draft of these proposed amendments on the Division's website for informal comment on December 6, 2011. There were two informal comments received. Following formal proposal of the amendments, the Commissioner conducted a public hearing on the proposed amendments on April 13, 2012. Three entities provided public testimony at this hearing. The public comment period for these proposed amended rules ended on April 24, 2012. The Division received four public comments.

2. REASONED JUSTIFICATION.

These adopted amendments to Chapter 144 are necessary to implement portions of House Bill 2605, enacted by the 82nd Legislature, Regular Session, effective September 1, 2011 (HB 2605), that change the appellate process for appeals of medical fee dispute resolution cases.

HB 2605 added Labor Code §413.0312 which applies to medical fee disputes that remain unresolved after review by the Division under Labor Code §413.031(b) - (i) and also provides the appeal process for all medical fee disputes. Included in this new appellate

process is the opportunity for the parties to elect to engage in arbitration as provided by Labor Code §413.0312(d) and Labor Code Chapter 410, Subchapter C.

Labor Code §413.0312(b) requires parties who appeal a Division medical fee dispute resolution (MFDR) decision to mediate the dispute in a benefit review conference (BRC) under Labor Code Chapter 410, Subchapter B. 28 TAC §133.307(g) and (g)(1) have been simultaneously adopted elsewhere in this issue of the *Texas Register* and contain the process and requirements for seeking a review of a decision by the Division's MFDR Section. Labor Code §413.0312(d) provides that if issues remain unresolved after a BRC, then the parties may elect to engage in arbitration as provided under Labor Code §410.104 which describes the process and consequences for electing arbitration by the Division instead of a contested case hearing and the limits of this arbitration. Labor Code §413.0312(e) provides that if arbitration is not elected by the parties to a medical fee dispute as described by this statute then the party is entitled to a contested case hearing at the State Office of Administrative Hearings (SOAH) in the manner provided for a contested case under Government Code Chapter 2001.

The Division adopts these amendments to Chapter 144 which are necessary to: (1) implement changes made by new Labor Code §413.0312 to the Division's arbitration procedures; (2) conform with changes made to simultaneously adopted amendments to 28 TAC §133.307 (relating to MDR of Fee Disputes) which are published elsewhere in this issue of the *Texas Register*; (3) clarify and update Division rules concerning how documents relating to arbitration under Chapter 144 may be sent, including for consistency directing the parties to send arbitration related documentation to the Division's chief clerk of proceedings;

(4) preserve the rights of parties and system participants in arbitration; and (5) make other nonsubstantive changes that clarify these Division rules.

The adopted amendments to §144.1(a) correct an outdated citation to the former codification of the Texas Workers' Compensation Act and replace it with the correct citation to Labor Code §410.005 and §410.109.

The adopted amendments to §144.1(b) clarify that the arbitrator has a duty to disclose to the division's chief clerk of proceedings and to all parties the existence of any potential conflicts of interest prior to and during the arbitration, including any pecuniary, personal or business related interest. The amendments require the disclosure of any circumstances that may reasonably raise a question as to the impartiality of the arbitrator, including any past or present relationships with the parties. The adopted amendments are made in accordance with the provisions of Labor Code §410.102(b) and (c) and §410.111 and the *Code of Professional Responsibility and Conduct for the National Academy of Arbitrators*. These conflict provisions are necessary because Labor Code §410.111 requires the commissioner to adopt rules for arbitration consistent with generally recognized arbitration principles and procedures.

An arbitrator in a case is required to protect the interests of all parties under adopted §144.1(b)(2) and these adopted amendments clarify when an arbitrator has a conflict of interest in a case. The Division adopts these amendments to clarify that both actual and apparent conflicts of interest should be disclosed as either actual conflict of interest or appearance of are both capable of eroding trust in the arbitration process, and that the Division and parties should be made aware of any actual or apparent conflicts. Disclosure of conflicts is necessary for the protection of the parties interests as stated in §144.1(b)(2).

Labor Code §410.102 requires that the Commissioner adopt rules relating to the qualifications of arbitrators. Requiring disclosure of an arbitrator's potential conflicts of interests is also necessary to provide parties with sufficient information for rejection of an assigned arbitrator consistent with §144.6(c).

The adopted amendment to §144.1(b)(9) clarifies that the arbitrator also has a duty to comply with the codes of professional responsibility and conduct promulgated by the arbitrator's professional association. Adoption of these amendments is consistent with the goal of impartial dispute resolution.

The adopted amendment to §144.2 deletes subsection (c) of this rule because it is unnecessary since any violation of a rule, order, or decision of the Commissioner is an administrative violation under Labor Code Chapter 415, specifically §415.021(a).

The adopted amendments to §144.3 clarify that a party that sends a document relating to the arbitration proceeding shall send it to the division's chief clerk of proceedings or the arbitrator and deliver copies to all other parties or their representatives or attorneys.

The nonsubstantive language "one or more" has been deleted from §144.4(a) because it is unnecessary.

The adopted amendments to §144.4(b) are adopted to clarify that a request for arbitration must be completed and signed by both parties, requested on a form prescribed by the Division, and sent to the Division's chief clerk of proceedings. The title "Arbitration Section of the Division of Hearings" has been deleted from the adopted text because the title is outdated.

The adopted amendments to §144.4(c)(3) clarify that a party's response to the disputes identified as unresolved in the benefit review officer's report shall be sent to the

division's chief clerk of proceedings for proper internal handling on behalf of the Director of Hearings.

The adopted amendments to §144.4(d) clarify that, except as provided by §144.10, the decision to proceed with arbitration is also binding and irrevocable for the resolution of fee disputes. This adopted amendment is necessary to reflect Labor Code §410.104(c) and clarify the effect of an election. This amendment is also necessary to clarify the limitations of stipulations in arbitration. Parties to medical fee dispute arbitration may not enter into a settlement or enter into a stipulation on a dispute regarding compensability, extent of injury, liability, or medical necessity for the same service for which there is a medical fee dispute. The adopted amendment to §144.4(d) is necessary because parties not involved in the dispute of medical fees can be party to other parts of a claim and those parties could be prejudiced by inclusion of those disputes in arbitration. This change is also included to prevent duplicative or contradictory resolution of disputes.

The adopted amendment to §144.5(a) is a nonsubstantive change that deletes the unnecessary language "benefit dispute or disputes" and replaces it simply with "dispute(s)."

The adopted amendment to §144.5(b)(3) clarifies that a statement of dispute in the arbitration of a medical fee dispute may not include the issues described in adopted §144.5(d) which are disputes regarding compensability, extent of injury, liability, or medical necessity for the same service for which there is a medical fee dispute. These adopted amendments are necessary to clarify what issues may not be adjudicated during the arbitration of a medical fee dispute in accordance with the provisions of §133.307 of this title.

The adopted amendment to §144.5(c) updates the subsection by clarifying that additional disputes submitted by consent shall be sent to the division's chief clerk of proceedings not later than 10 days before the arbitration proceedings.

The adopted §144.5(d) provides that the statement of dispute in the arbitration of a medical fee dispute may not include a dispute regarding compensability, extent of injury, liability, or medical necessity for the same service for which there is a medical fee dispute. Chapter 133, Subchapter D of this title (relating to Dispute of Medical Bills) requires parties to resolve such disputes prior to requesting medical fee dispute resolution by the division. The adopted amendment to §144.5(d) is necessary because parties not involved in the dispute of medical fees can be party to other parts of a claim and those parties could be prejudiced by inclusion of those disputes in arbitration. This change is also included to prevent duplicative or contradictory resolution of disputes.

Adopted §144.5(d) also provides that if a party provides the arbitrator with documentation listed in §133.307(d)(2)(H) or (I) of this title (relating to MDR of Fee Disputes) that shows unresolved issues regarding compensability, extent of injury, liability, or medical necessity for the same service subject to the fee dispute, then the arbitrator shall abate the arbitration proceedings until those issues have been resolved. This adopted rule is necessary to prevent the injured employee who may not be a party to the fee dispute from being bound by the ruling. Furthermore, it prevents a carrier from being ordered to pay for a bill in which it has no underlying legal obligation. Finally, it prevents conflicting or duplicative decisions. The requirement to present evidence is so arbitrator can verify the existence of a dispute before abating the proceedings.

The adopted amendments to §144.6(a) replace "director of the Division of Hearings" with "division" because "director of the Division of Hearings" is an outdated job title**.**

The adopted amendments to §144.9(b) delete an obsolete classification of a Class D administrative violation penalty and maximum penalty amount for a party that does not comply with the provisions of that section. These adopted amendments conform this rule with Labor Code §410.112.

The adopted amendments to §144.10(a) update citations to the Act's definition of a agreement and settlement.

The adopted new §144.10(d) provides that the parties to a medical fee dispute may not enter into a (1) settlement or (2) a stipulation or agreement on a dispute regarding compensability, extent of injury, liability, or medical necessity for the same service for which there is a medical fee dispute. This adopted amendment is consistent with the purposes underlying adopted §144.5(d) and is necessary in order prevent the arbitrator and parties to the arbitration of a medical fee dispute from adjudicating issues regarding compensability, extent of injury, liability, or medical necessity for the same service for which there is a medical fee dispute.

The adopted new §144.10(e) states that parties to a medical fee dispute may not resolve the dispute by negotiating fees that are inconsistent with any applicable fee guidelines adopted by the Commissioner. This amendment is consistent with provisions in the Act that govern the adjudication of medical fee disputes such as Labor Code §413.031(c) and §413.0312(c). Labor Code §413.031(c) requires the Division in a medical fee dispute to adjudicate the payment given the relevant statutory provisions and Commissioner rules. Relevant statutory provisions and commissioner rules include statutes and rules governing

fee guidelines adopted by the Commissioner. Labor Code §413.0312(c) prohibits the parties at a BRC for a medical fee dispute from negotiating fees that are inconsistent with any applicable fee guidelines adopted by the Commissioner.

The adopted amendments to §144.11(a) clarify that any request for a continuance must be directed to the division's chief clerk of proceedings and are necessary because the title "Arbitration Section of the Division" is outdated. This adopted amendment is necessary to direct requests for continuance to the appropriate area of the Division.

The adopted amendments to §144.12 delete the "Class D" classification of the administrative violation and the maximum penalty amount for a party who fails to attend any session of the arbitration proceeding after electing arbitration. This adopted amendment is necessary to conform this rule to Labor Code §410.113.

The adopted nonsubstantive amendments to §144.13 change the reference to "commission" rules to "division" rules and provide that a stenographic report created by a party is to be sent to the "division's chief clerk of proceedings" as opposed to the "commission."

The adopted amendments to §144.15(a)(4) require the final award by the arbitrator to be sent to the division.

The adopted amendments to §144.15(b) update a citation to a section of the Texas Workers' Compensation Act that has been recodified to state Labor Code §410.121. This amendment is necessary to clarify the circumstances under which an arbitrator's award may be vacated. Labor Code §410.121 restricts the ability of a court to vacate an arbitrator's award to situations in which: "(1) the award was procured by corruption, fraud, or misrepresentation; (2) the decision of the arbitrator was arbitrary and capricious; or (3) the

award was outside the jurisdiction of the division." The adopted amendments to §144.15 (b) also clarify that the absence of the right of appeal of the award of the arbitrator also means there is no right to judicial review. These adopted amendments are necessary for implementation of §413.0312(d), which allows arbitration of medical fee disputes consistent with the statutory limits on judicial review contained in Labor Code §410.121.

The adopted amendment to §144.16 updates terminology in that section by changing the term "commission" to "division".

Adopted amendments to §§144.3, 144.6(d)(3), 144.7(b), 144.11(a), and 144.15(a)(4) delete the requirement that certain documents sent for Division arbitration be sent return receipt requested because it is not necessary. These sections have been amended to allow delivery of certain documents (including notice of the assignment of an arbitrator, notice of rejection of the assigned arbitrator, notice of the time and place scheduled for the arbitration, a request for continuance, and the award of the arbitrator) by certified mail without the requirement that this certified mail be delivered with a return receipt requested. Adopted amendments to these sections also replace the word "telephonic" with the word "electronic" to incorporate more current methods of communication and to conform terminology in this rule to terminology in 28 TAC §102.4 and §102.5 concerning the electronic transmission of information.

Other adopted amendments to the Chapter 144 rules make minor and administrative changes to the rule text to: (i) correct typographical, grammatical, and punctuation errors in the current rule text; (ii) re-letter and renumber rule text; (iii) clarify existing provisions in the rules; and (iv) make nonsubstantive changes to terminology such as changing the term "he/she" to "arbitrator," "requester" to "requestor," "Department" to "department," "claimant" to

"injured employee," "Department's" to "department's," "Division" to "division," "Division's" to "division's," and adding the word "injured" to "employee" and "chief" to "clerk of proceedings."

The Division has made some changes to the proposed text in response to comments. Specifically, in response to comments on text in §144.5(d), the Division has clarified that rule by adding text that provides if a party provides the arbitrator with documentation listed in 28 TAC §133.307(d)(2)(H) or (I) that shows unresolved issues regarding compensability, extent of injury, liability, or medical necessity for the same service subject to the fee dispute, then the arbitrator shall abate the arbitration proceedings until those issues have been resolved. This adopted rule is necessary to prevent the injured employee who may not be a party to the fee dispute from being bound by the ruling. Furthermore, it prevents a carrier from being ordered to pay for a bill in which it has no underlying legal obligation. Finally, it prevents conflicting or duplicative decisions. The requirement to present evidence is so arbitrator can verify the existence of a dispute before abating the proceedings.

The Division has also made nonsubstantive changes to the proposed text for the purpose of providing consistency in terminology in the text. First, the Division inserted "chief" before "clerk of proceedings" in §144.5(c)(4) in order to make that term consistent with other adopted rules in Chapter 144 which provide for documents related to arbitration be sent to the chief clerk of proceedings. Second, the Division has added "and irrevocable" after "binding" in §144.4(d). This change clarifies that an election for arbitration in a medical fee dispute is binding and irrevocable on parties. Labor Code §410.104(c) uses "binding and irrevocable" and so the Division adopts this change in order to reflect the statutory authority.

3. HOW THE SECTIONS WILL FUNCTION.

Section 144.1 describes the authority and duties of arbitrators. Section 144.1(a) allows the arbitrator to perform specific enumerated tasks relevant to the arbitration of eligible disputes. Section §144.1(b) states the duties of an arbitrator in an eligible dispute.

Section §144.2 prohibits the arbitrator from communicating with any party outside of the arbitration regarding the substantive facts, issues, law, or rules unless the communication is in writing and a copy must be delivered to all parties to the arbitration. This section allows parties to communicate with the arbitrator about any procedural matter.

Section 144.3 provides that a party to an arbitration that sends any information to the chief clerk of proceedings or arbitrator must also deliver a copy of that information to all the other parties or their representatives, and specifies the manner by which that information can be sent. This section also requires a statement certifying such delivery to be included on any document sent by a party to the division's chief clerk of proceedings or arbitrator.

Section 144.4 contains the rules that attach when parties mutually agree to engage in arbitration.

Section 144.5 states the contents and requirements for a statement of disputes. This rule states the procedure by which parties may, by unanimous consent, submit additional disputes not included in the benefit review officer's report or the responses of the parties. This rule also provides that a statement of dispute in the arbitration of a medical fee dispute may not include a dispute regarding compensability, extent of injury, liability, or medical necessity for the same service for which there is a medical fee dispute. If a party provides the arbitrator with documentation listed in §133.307(d)(2)(H) or (I) of this title (relating to MDR of Fee Disputes) that shows unresolved issues regarding compensability, extent of injury,

liability, or medical necessity for the same service subject to the fee dispute, then the arbitrator shall abate the arbitration proceedings until those issues have been resolved.

Section 144.6 provides that the Division will maintain a list of qualified arbitrators and provides procedures for assignment of an arbitrator by the Division and how a party may reject an assigned arbitrator.

Section 144.7 sets forth the procedure for setting an arbitration proceeding. This section also contains restrictions regarding the setting of an arbitration.

Section 144.9 contains requirements related to the exchange of evidence and the proposed resolution of the dispute. This rule also provides that the failure to comply with this rule without good cause as determined by the arbitrator is an administrative violation.

Section 144.10 sets forth how parties may enter into stipulations and also contains some limits on what stipulations can contain. This rule also prohibits parties to a medical fee dispute from negotiating fees that are inconsistent with any applicable fee guidelines adopted by the Commissioner.

Section 144.11 sets out how a continuance may be requested. This rule provides that a continuance may be granted for up to 30 days only upon a determination of good cause. This rule also limits each party to one continuance.

Adopted §144.12 provides that failure to attend any session of the arbitration is an administrative violation unless the arbitrator determines that the party had good cause not to attend.

Adopted §144.13 state the rights of parties during Division arbitration.

Adopted §144.14 states the usual order of proceedings in an arbitration and provides that an electronic recording of the proceedings will be made by the arbitrator.

Adopted §144.15 contain requirements for the awards by arbitrators.

Adopted §144.16 provides that a party may request a copy of the record of the arbitration and the cost for the record is assessed by the Division.

4. SUMMARY OF COMMENTS AND AGENCY'S RESPONSES.

§144.5: Commenters express concern that if an arbitrator issues an award while a dispute involving compensability, extent of injury, liability, or medical necessity is outstanding, a party may be forced to pay a medical fee for a claim later determined to be noncompensable or unrelated to the compensable injury or for a health care service later determined to be not medically necessary. The commenters believe that the proposed rule should be clarified to include, "Should a party raise unresolved issues regarding compensability, medical necessity, liability and extent of injury for the same service then the arbitration proceeding shall be abated until the issues relevant to the medical fee dispute have been resolved."

Agency Response: The Division agrees that clarification in the process is necessary to prevent the risk of ordering payment for a health care service later determined to be not medically necessary, a noncompensable injury or for a medical condition that is unrelated to the compensable injury. Although the Division does not adopt the text suggested by the commenters, the Division has adopted similar text stating that if a party provides the arbitrator with documentation listed in 28 TAC §133.307(d)(2)(H) or (I) that shows unresolved issues regarding compensability, extent of injury, liability, or medical necessity for the same service subject to the fee dispute, then the arbitrator shall abate the arbitration proceedings until those issues have been resolved. This adopted rule is necessary to prevent a carrier from being ordered to pay for a bill in which it has no underlying legal obligation. Furthermore, it

prevents the injured employee who may not be a party to the fee dispute from being bound by the ruling. Finally, it prevents conflicting or duplicative decisions. The requirement to present evidence is so the arbitrator can verify the existence of a dispute before abating the proceedings.

§144.5: Commenter had concerns about the language in the informal proposal, in that it had prohibited a discussion of compensability, extent of injury, liability, or medical necessity in the arbitration of a medical fee dispute which are addressed, and Commenter supports the provision as proposed.

Agency Response: The Division appreciates the supportive comment. The Division reiterates that changes were made to §144.5 as proposed.

§144.11: A commenter states that in the interest of clarity, the Division should indicate whether the arbitrator or some other entity at the Division will be making the decision to grant or deny the continuance. The commenter states that a continuance request might be more properly directed to the arbitrator.

Agency Response: The Division disagrees that clarity in this rule is necessary. The Division also declines to change rule language as proposed in §144.11, as under the Labor Code §410.110, an arbitrator cannot rule on a request for a continuance. Labor Code § 410.110(a) explains a request for continuance must be directed to the director, which is the director of hearings, and that the director may grant a continuance only if the director determines, giving due regard to the availability of the arbitrator, that good cause for the continuance exists. The Division cannot change the rule to contradict statutory authority.

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

For: Texas Medical Association

For, with changes: Insurance Council of Texas, Property and Casualty Insurer's Association of America, Office of Injured Employee Counsel

Against: None

Neither for or Against: None

6. STATUTORY AUTHORITY.

The amendments are adopted under the Labor Code §§402.00111, 402.061, 410.005(b), 410.102, 410.109, 410.111, 410.113, 410.121, 413.0312, and 415.021(a). Labor Code §402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority under Title 5 of the Labor Code. Labor Code §402.061 provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act. Labor Code §410.005(b) pertains to the venue for administrative proceedings in arbitration cases and states the guidelines for where the arbitration proceedings may be held. Labor Code §410.102 requires that the Commissioner of Workers' Compensation establish procedures ensuring the qualifications of arbitrators. Labor Code §410.109 contains the requirements regarding the scheduling of the arbitration. Labor Code §410.111 requires the Commissioner of Workers' Compensation to adopt rules for arbitration that are consistent with generally recognized arbitration principles and procedures. Labor Code §410.113 states that each party shall attend the arbitration prepared to set forth in detail its position on unresolved issues and the issues on which it is prepared to stipulate. Further, this section states that a party commits an administrative violation if the party does not attend the

arbitration unless the arbitrator determines that the party had good cause not to attend. Labor Code §410.121 contains the criteria whereby a court of competent jurisdiction is required to vacate an arbitrators award. Labor Code §413.0312 provides the requirements for the review of medical fee disputes by the Division. Labor Code §415.021(a) provides that in addition to any other provisions in Labor Code, Title 5, Subtitle A relating to violations, a person commits an administrative violation if the person violates, fails to comply with, or refuses to comply with Labor Code, Title 5, Subtitle A or a rule, order, or decision of the Commissioner or Workers' Compensation; in addition to any sanctions, administrative penalty, or other remedy authorized by Labor Code, Title 5, Subtitle A, the Commissioner may assess an administrative penalty against a person who commits an administrative violation; the administrative penalty shall not exceed $25,000 per day per occurrence; each day of noncompliance constitutes a separate violation; the Commissioner's authority under Labor Code Chapter 415 is in addition to any other authority to enforce a sanction, penalty, fine, forfeiture, denial, suspension, or revocation otherwise authorized by law.

7. TEXT.

§144.1. *Authority and Duties of Arbitrators*.

(a) The arbitrator is authorized but not limited to:

(1) set the time and location of the arbitration proceeding pursuant to the applicable provisions of Labor Code §410.005 and §410.109;

(2) compel the parties to exchange all pertinent medical reports and other documentary evidence, and proposals for resolving the issues in dispute;

(3) conduct, at the arbitrator's discretion, preliminary conferences to identify issues to resolve questions concerning evidence and witnesses, and to otherwise expedite the arbitration proceeding;

(4) exclude individuals other than the parties and the employer from the arbitration proceeding;

(5) administer oaths;

(6) take official notice of the law of Texas and other jurisdictions, Texas city and county ordinances, the content of the Texas Register, the rules of state agencies, facts that are judicially cognizable, and generally recognized facts within the division's specialized knowledge;

(7) determine the relevancy and materiality of the evidence offered, without a requirement to conform to legal rules of evidence; and

(8) accept stipulations by the parties on uncontested issues.

(b) The arbitrator has a duty to:

(1) disclose to all parties and the division's chief clerk of proceedings any potential conflicts of interest prior to and during the arbitration, including any pecuniary, personal or business related interest. Further, to disclose any circumstances that may affect or reasonably raise a question as to the impartiality of the arbitrator, including any past or present relationships with the parties;

(2) protect the interests of all parties, including the advisement of the injured employee's rights if not represented;

(3) maintain the confidentiality of the arbitration proceeding;

(4) encourage brevity, consistent with completeness, at all stages of the arbitration proceeding;

(5) ensure that all relevant evidence has been disclosed to the arbitrator and to all parties;

(6) render an award based upon the evidence and consistent with the terms of the Act, and the rules and policies of the division;

(7) ensure an electronic recording is made of the proceedings;

(8) arrange for the provision of interpreter services if necessary; and

(9) comply with standards of conduct and ethical principles of the arbitrator's professional group, those set forth in the Act, division rules, and the codes of professional responsibility and conduct promulgated by the arbitrator's professional association.

§144.2. *Ex Parte Communications*.

(a) On any substantive matter regarding facts, issues, law, or rules, an arbitrator may not communicate with any party outside the arbitration unless the communication is:

(1) in writing; and

(2) a copy is delivered to all parties to the arbitration.

(b) Notwithstanding subsection (a) of this section, any party may communicate with the arbitrator concerning any procedural matter.

§144.3. *Delivery of Copies of Documents.*

A party who sends a document relating to the arbitration proceeding to the division's chief clerk of proceedings or the arbitrator shall also deliver copies of the document to all other parties, or their representatives or attorneys. Delivery shall be accomplished by

presenting in person, mailing by certified mail, or electronic transmission. The document sent to the division's chief clerk of proceedings or the arbitrator shall contain a statement certifying delivery using the following format: "I hereby certify that I have on the ____ day of _____, _____, delivered a copy of the attached document to _____ by _____ (state manner of delivery)."

§144.4. *Election to Engage in Arbitration*.

(a) Following a benefit review conference where disputed benefit issue(s) remain unresolved, the parties may mutually agree to engage in arbitration on those issues.

(b) Parties agreeing to engage in arbitration must complete and sign a form prescribed by the division and file it with the division's chief clerk of proceedings not later than the 20th day after the last day of the benefit review conference.

(c) A party may submit a response to the disputes identified as unresolved in the benefit review officer's report. The response shall:

(1) be in writing;

(2) describe and explain the party's position on the unresolved dispute or disputes;

(3) be sent to the division's chief clerk of proceedings no later than 20 days after receiving the benefit review officer's report; and

(4) be delivered to all other parties, as provided by §144.3 of this title (relating to Delivery of Copies of Documents).

(d) Except as provided by §144.10 of this title (relating to Stipulations, Agreements, and Settlements), the decision to proceed with arbitration in place of a division contested

case hearing, once filed with the division's chief clerk of proceedings, is binding and irrevocable for the resolution of all disputes arising out of the claims that are under the jurisdiction of the division. For medical fee disputes arising from Labor Code §413.0312, except as provided by §144.10, of this title, the decision to proceed with arbitration in place of a contested case hearing at the State Office of Administrative Hearings is binding and irrevocable for the resolution of that dispute.

§144.5. *Statement of Disputes.*

(a) Statement of disputes. The statement of disputes is a written description of the dispute(s) to be considered by the arbitrator. A dispute not expressly included in the statement of disputes will not be considered by the arbitrator.

(b) Statement of disputes after a benefit review conference. The statement of disputes for an arbitration proceeding conducted after a benefit review conference includes:

(1) the benefit review officer's report, identifying the disputes remaining unresolved at the close of the benefit review conference;

(2) the parties' responses to the benefit review officer's report, if any; and

(3) additional disputes by unanimous consent, as provided by subsections (c) and (d) of this section.

(c) Additional disputes by unanimous consent. Parties may, by unanimous consent, submit for inclusion in the statement of disputes one or more disputes not identified as unresolved in the benefit review officer's report. Additional disputes submitted by consent shall:

(1) be made in writing;

(2) identify the dispute and explain each party's position on it;

(3) be signed by all parties;

(4) be sent to the division's chief clerk of proceedings no later than 10 days before the arbitration proceeding; and

(5) explain why the issue was not raised earlier

(d) The statement of dispute in the arbitration of a medical fee dispute may not include a dispute regarding compensability, extent of injury, liability, or medical necessity for the same service for which there is a medical fee dispute. Chapter 133, Subchapter D of this title (relating to Dispute of Medical Bills) requires parties to resolve such disputes prior to requesting medical fee dispute resolution by the division. If a party provides the arbitrator with documentation listed in §133.307(d)(2)(H) or (I) of this title (relating to MDR of Fee Disputes) that shows unresolved issues regarding compensability, extent of injury, liability, or medical necessity for the same service subject to the fee dispute, then the arbitrator shall abate the arbitration proceedings until those issues have been resolved.

§144.6. *Assignment of Arbitrator*.

(a) The division will maintain, in random name order, lists of qualified arbitrators established by the division. Not later than the 30th day after an election to engage in arbitration is filed, an arbitrator will be assigned from the appropriate list. Each party will be notified immediately either personally or by certified mail.

(b) Assignment from the list of arbitrators shall be from the top of the list. When the list has been exhausted by assignment of each arbitrator to a case, the list will be randomly reordered.

(c) Each party to the arbitration proceeding is entitled to one rejection of an assigned arbitrator and must exercise such rejection not later than the third day following receipt of

notification of an arbitrator's assignment. Once a rejection is exercised, the next arbitrator from the top of the list will be assigned.

(d) A rejection exercised by a party must be:

(1) in writing;

(2) signed by the party or authorized representative;

(3) personally delivered, sent by certified mail or electronic transmission, not later than the third day following receipt of notice of an arbitrator's assignment, to the division's chief clerk of proceedings with a copy to all parties.

§144.7. *Setting the Arbitration Proceeding*.

(a) Following any rejections as set forth in §144.6 of this title (relating to Assignment of Arbitrator), the arbitrator shall schedule arbitration to be held not later than the 30th day following the assignment of the arbitrator.

(b) The arbitrator shall notify, in writing, all parties and the employer of the time and place scheduled for the arbitration. The notification shall be by personal delivery or certified mail.

(c) Unless the assigned arbitrator determines that good cause exists for the selection of a different location, arbitration proceedings may not be conducted at a site more than 75 miles from the injured employee's residence at the time of injury.

§144.9. *Exchange of Evidence and Proposed Resolution*.

(a) Not later than the seventh day preceding the arbitration proceeding, each party is required to exchange with the other party, and file with the arbitrator:

(1) all pertinent medical reports and other documentary evidence in the party's possession not previously exchanged or filed; and

(2) written proposals for resolving the issues in dispute.

(b) A party failing to comply with this requirement without good cause, as determined by the arbitrator, commits an administrative violation.

§144.10. Stipulations, Agreements, and Settlements.

(a) Except as provided by subsections (d) and (e) of this section, at any time before or during the arbitration proceeding, parties may:

(1) enter into stipulations, defined as a voluntary accord between parties to an arbitration regarding any matter relating to the arbitration that does not constitute an agreement or a settlement, as defined by Labor Code §401.011;

(2) resolve one or more benefit disputes by agreement; or

(3) resolve all benefit disputes by settlement.

(b) Stipulations shall be made as follows:

(1) in writing; and

(2) signed by all parties to the stipulation, or their representatives.

(c) Agreements and settlements shall be made as provided by Chapter 147 of this title (relating to Dispute Resolution--Agreements, Settlements, Commutations).

(d) Parties to a medical fee dispute may not enter into a:

(1) settlement; or

(2) a stipulation or agreement on a dispute regarding compensability, extent of injury, liability, or medical necessity for the same service for which there is a medical fee dispute.

(e) Parties to a medical fee dispute may not resolve the dispute by negotiating fees that are inconsistent with any applicable fee guidelines adopted by the commissioner of workers' compensation.

§144.11. *Continuance*.

(a) Any request for a continuance by a party must be directed to the division's chief clerk of proceedings and served personally by certified mail, or by electronic transmission, on all other parties.

(b) A continuance may be granted for up to 30 days only upon a determination of good cause. Notwithstanding the existence of good cause, not more than one continuance will be granted to each party.

§144.12. *Failure to Attend Arbitration*.

A party who fails to attend any session of the arbitration proceeding after electing arbitration commits an administrative violation unless the arbitrator determines that the party had good cause not to attend.

§144.13. *Rights of Parties*.

(a) Each party to the arbitration proceeding is entitled to be present, to have a full, fair, and impartial hearing of all relevant evidence, and to present the party's respective position on the issue(s) in dispute.

(b) Parties to the arbitration are entitled to be represented by counsel or other representative authorized under and in accordance with the Texas Workers' Compensation Act and division rules.

(c) Each party, and the arbitrator, is permitted to call witnesses who have relevant information to testify (under oath if required by the arbitrator or requested by a party) and to ask questions of any witnesses called.

(d) A party desiring to have a record made of the arbitration proceeding by stenographic means may do so and is responsible for arranging for and the expense of making a record by such means. A copy of the stenographic report shall be provided to the division's chief clerk of proceedings at no charge and may be made available to the other parties.

§144.14. *Usual Order of Proceedings*.

(a) The arbitration proceeding will begin with preliminary matters including the introduction of copies of the election of arbitration and the assignment of the arbitrator, the introduction of all parties and representatives, statements for the record of the date, time, and place of the proceedings, and a concise statement of the disputed issue(s).

(b) An electronic recording of the proceeding will be made by the arbitrator.

(c) The arbitrator will allow and may assist each party to make a brief opening statement setting forth its position on unresolved issues and the issues with respect to which it is prepared to stipulate.

(d) The requestor shall be the first party to present all relevant evidence desired in support of the claim including the testimony of witnesses.

(e) Following the requestor's presentation of evidence, the other party to the proceeding may present evidence desired to be considered by the arbitrator, including the calling of witnesses.

(f) After each party has presented the evidence desired, the arbitrator may call for additional evidence that the arbitrator considers necessary for a proper understanding and determination of the issues.

(g) Each party may present closing statements as desired, but the record may not remain open for written briefs unless requested by the arbitrator.

§144.15. *Award of the Arbitrator*.

(a) Not later than the seventh day after the last day of arbitration, the arbitrator shall enter the final award which must:

(1) be in writing;

(2) be signed and dated by the arbitrator;

(3) include a statement of the arbitrator's decision on the contested issues and the parties' stipulations on uncontested issues;

(4) be sent to the division and all parties by certified mail, or personal delivery; and

(5) be filed as a part of the permanent claim file.

(b) The award entered is final and binding on all parties. Except as provided by Labor Code §410.121 there is no right of appeal or judicial review.

(c) The arbitrator's award is a final order of the division.

(d) For the purposes of correcting a clerical error, an arbitrator retains jurisdiction of the award for 20 days after the date of the award.

§144.16. *Requesting a Copy of the Record*.

A party or the employer may request a copy of the electronic recording of the arbitration proceeding from the division. The requestor shall pay the cost of the duplication, as established by the division.

8. CERTIFICATION.

This agency hereby certifies that the adopted amendments have been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued at Austin, Texas, on _____, 2012.

X _____

Dirk Johnson
General Counsel
Texas Department of Insurance,
Division of Workers' Compensation

IT IS THEREFORE THE ORDER of the Commissioner of Workers' Compensation that the amendments to §§144.1 - 144.7, relating to Authority and Duties of Arbitrators, Ex Parte Communications, Delivery of Copies of Documents, Election To Engage in Arbitration, Statement of Disputes, Assignment of Arbitrator, and Setting the Arbitration Proceeding, specified herein, and §§144.9 - 144.16, relating to Exchange of Evidence and Proposed Resolution, Stipulations, Agreements, and Settlements, Continuance, Failure To Attend

Arbitration, Rights of Parties, Usual Order of Proceedings, Award of the Arbitrator, and

Requesting a Copy of the Record, respectively, are adopted.

AND IT IS SO ORDERED.

X

ROD BORDELON
COMMISSIONER OF WORKERS' COMPENSATION

ATTEST:

X

Dirk Johnson
General Counsel

COMMISSIONER ORDER NO.