

## **CHAPTER 141 DISPUTE RESOLUTION--BENEFIT REVIEW CONFERENCE**

### **28 TAC §§141.1, 141.2, 141.4, and 141.7**

**1. INTRODUCTION.** The Commissioner of Workers' Compensation (Commissioner), Texas Department of Insurance, Division of Workers' Compensation (Division) adopts amendments to §§141.1, 141.2, 141.4, and 141.7 of this title (relating to Requesting and Setting a Benefit Review Conference, Canceling or Rescheduling a Benefit Review Conference, Sending and Exchanging Pertinent Information, and Division Actions After Benefit Review Conference respectively) with changes to the proposed text published in the May 7, 2010 issue of the *Texas Register* (35 TexReg 3623).

In accordance with Government Code §2001.033(a)(1), the Division's reasoned justification for these rules is set out in this order, which includes the preamble, which in turn includes the rules. The preamble contains a summary of the factual basis of the rules, a summary of comments received from interested parties, names of those groups and associations who commented and whether they were in support of or in opposition to adoption of the rules, and the reasons why the Division agrees or disagrees with some of the comments and recommendations.

A request for a public hearing was not received. The public comment period closed June 7, 2010.

**2. REASONED JUSTIFICATION.** These amendments are necessary to implement statutory provisions of House Bill 7, enacted by the 79th Legislature, Regular Session, effective September 1, 2005 (HB 7). HB 7 amended Chapter 410, Subchapter A of the Labor Code by adding §410.007 regarding useful information for a Benefit Review Conference (BRC). It also amended Chapter 410, Subchapter B of the Labor Code by amending §410.023 regarding documentation of prior

efforts to resolve a dispute before a request for a BRC and §410.026 regarding powers and duties of a Benefit Review Officer (BRO).

Labor Code §410.007 requires the Division to determine the type of information that is most useful to parties to help resolve disputes regarding benefits and to publish a list of such information in appropriate media, including the Division's internet website.

Labor Code §410.023 requires the party requesting the BRC to provide documentation of efforts made to resolve the dispute before requesting the BRC. It also directs the Commissioner to adopt guidelines by rule regarding the type of information necessary to satisfy this requirement.

Labor Code §410.026 provides that a BRO may schedule an additional BRC if the BRO determines that available information pertinent to the resolution of disputed issues was not produced at the initial BRC and a second BRC has not already been conducted.

The Division has changed some of the proposed language in the text of the rule as adopted in response to public comments received. The Division has also made some changes for clarification and editorial reasons. The changes, however, do not materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

The Division clarified §141.1(e) of this title to provide that the Division will schedule a BRC if the request is both complete and otherwise appropriate for a BRC. For example, for medical disputes, a BRC is not a prerequisite to a contested case hearing (CCH) under Labor Code §413.0311. Conforming changes were made to §141.1(h) of this title to state that a BRC will only be set if the request meets the standards of §141.1(e) of this title.

The Division received comments recommending that the Division should inform the requestors for a BRC why their request was denied and state what additional documentation needs to be submitted to get the request approved. In response, the Division has revised §141.1(f) of this title to add a requirement to explain why a request for a BRC was denied but not

to specify in the rule what additional documentation is needed since documentation of the requestor's prior efforts to resolve the dispute will vary on a case-by-case basis. The reasons for the denial will be in the Division's response sent to the requestor.

In response to a comment, the Division modified §141.2(b) of this title to clarify that the opposing party does not have a unilateral, unrestricted right to cancel or reschedule a BRC. Cancellation or rescheduling can only be made by the Division, by the party who requested the BRC, or at the mutual request of the parties.

The Division modified §141.2(b) and (c) of this title to update the nomenclature to current practice. References to the "field office managing the claim" were updated to "Division", to provide operational flexibility in managing the docketing function.

The Division also received comments recommending that when canceling or rescheduling a BRC after the unrestricted cancellation period, an injured employee should not have good cause to cancel on the grounds that the injured employee does not want to pursue the insurance carrier's issues. The Division revised §141.2(c)(3) of this title to replace "the injured employee no longer desires to pursue the issue " with "the party requesting the benefit review conference no longer desires to pursue the issue." The injured employee will still retain the right to cancel if it is the injured employee's request.

The Division removed the specific uniform resource locator (URL) of the Division's website in §141.4(b) of this title because URLs become outdated too quickly. The Division website may be located at any point in time through conventional search engines. This is a nonsubstantive change.

Further, the Division received a recommendation to extend the time period for the opposing party to send all pertinent information in its possession, not previously exchanged, to the requesting party and other parties. The proposal provided for 10 calendar days after receiving a copy of the request for a BRC. The Division revised §141.4(d) of this title to extend the time

period to 10 working days in order to ensure that the opposing party has sufficient time to compile and exchange all pertinent information with the requesting party and other parties.

Lastly, the Division revised §141.4(h) of this title to more clearly describe the retention schedule of the Division relating to documentation and pertinent information submitted for a BRC. The Division removed surplus and duplicative language to state the rule in a more understandable, straightforward manner. The rule as proposed stated that "Information provided to the Division will not be retained by the Division after the conclusion of the benefit review conference. The benefit review conference is an informal process and no record of evidence is taken. The benefit review conference is concluded for the purpose of information retention when the parties reach an agreement on the issues, have unresolved issues set for a contested case hearing, or fail to reschedule a second benefit review conference within at least 90 days after the first benefit review conference." The adopted language states that "The Division will not retain the pertinent information received for the BRC after the parties (1) reach an agreement on the issues, (2) set unresolved issues for a contested case hearing, or (3) fail to reschedule a second benefit review conference within at least 90 days after the first benefit review conference."

The Division added an effective date provision at the end of each section. The effective date of each section is October 1, 2010.

## **2. HOW THE SECTIONS WILL FUNCTION.**

### **Section 141.1 of this title sets forth the procedures for requesting and setting a BRC.**

Under subsection (a), a party must try to resolve a dispute before requesting a BRC. This is required by Labor Code §410.023(b). Subsection (a) should also be read in conjunction with subsection (d) of this section, which requires the requestor to document the efforts made to resolve and provides examples of acceptable documentation of efforts.

Under subsection (b), an injured employee, subclaimant or insurance carrier may request a BRC. An employer may request a BRC to contest compensability if the insurance carrier has accepted the claim as compensable.

Under subsection (c), a subclaimant must also comply with the requirements of §140.6 of this title (relating to Subclaimant Status: Establishment, Rights, and Procedures).

Subsection (d) sets forth the requirements for requesting a BRC. The request must be in the form and manner required by the Division; currently, this is the DWC Form - 045 (*Request for a Benefit Review Conference*). A revised draft of the DWC Form - 045 was posted for comment at the same time as the proposed rule. The revised DWC Form - 045 reflects the requirements of the BRC request which now requires the requesting party to identify and describe the issues in dispute and provide documentation of the efforts that the requestor made to resolve the dispute before the request was submitted. For example, when a request for a BRC is made to dispute an issue for which a designated doctor was appointed, the documentation of efforts to resolve the disputed issue may include correspondence with the opposing party, a log of telephone calls made to the opposing party regarding the disputed issue, the designated doctor's response to a letter of clarification, if any, or the Division's denial of a request for a letter of clarification, if any. Additionally, in disputes regarding the entitlement to supplemental income benefits, the requesting party, such as an insurance carrier, may show documentation of efforts by providing copies of the Notice of Determination required by §130.104(e) of this title (relating to Determination of Entitlement or Non-entitlement for Subsequent Quarters) and any other efforts to confirm the injured employee's compliance with the requirements of §130.102 of this title (relating to Eligibility for Supplemental Income Benefits; Amount), e.g., correspondence with the opposing party and a log of telephone calls made to the opposing party regarding the disputed issue. The requestor must certify by signature that reasonable efforts have been made to resolve the dispute and that

the pertinent information has been sent to the other party or parties. The request must be sent to the Division and a copy to the opposing party or parties.

Under subsection (e), the Division will schedule a BRC if a request meets the requirements of subsection (d) and is otherwise appropriate for a BRC. This is a clarification because a BRC is not the appropriate forum for some disputes. For example, a BRC is not a prerequisite to a CCH for medical disputes under Labor Code §413.0311.

Under subsection (f), a request for a BRC that does not meet the requirements of subsection (d) is incomplete and will be denied. The Division will notify the parties of the denial and state the reasons for the denial. If a BRC request is denied, a party may submit a new request for a BRC that meets the requirements of subsection (d). A resubmitted report requires documentation of efforts to resolve a dispute. A denied request for a BRC does not constitute a dispute proceeding, except as provided by subsection (g) of this section.

Under subsection (g), a party may have a CCH to appeal the Division's determination that a request is incomplete or to establish that the party had good cause for failing to meet the requirements of subsection (d). This gives a person who is impacted by the timely dispute filing requirements of other rules a procedure to establish that their original request should have been accepted under Division rules and that their original date of filing should be retained.

Under subsection (h), the Division will schedule a BRC within 40 days after the request was received by the Division and will schedule an expedited BRC within 20 days after the request was received by the Division, if the request meets the requirements of subsection (e) of this section.

Under subsection (i), the Division will give written notice of the date, time, and location of the BRC to the parties and to the employer, by first class mail, electronic transmission, or personal delivery.

Under subsection (j), the BRC will be conducted at a site no more than 75 miles from the injured employee's residence at the time of injury, unless the Division determines that good cause exists for selecting another site.

Under subsection (k) the effective date of §141.1 of this title is October 1, 2010.

**Section 141.2 of this title prescribes the procedures for canceling or rescheduling a BRC.**

Under subsection (a), the Division may cancel or reschedule a BRC on its own motion, at the request of the party who requested the conference, or at the mutual request of the parties.

Under subsection (b), only the persons identified in subsection (a) may request a cancellation or rescheduling. There is a 10-day unrestricted period to cancel or reschedule.

Under subsection (c), cancellation or rescheduling requests will only be granted for good cause after the 10-day unrestricted period. The requests must be in writing, unless waived by the Division, and sent to the Division and opposing parties.

Under subsection (d), the Division will timely notify the parties of a cancellation or rescheduling.

Under subsection (e) the effective date of §141.2 of this title is October 1, 2010.

**Section 141.4 of this title sets forth the requirements for sending and exchanging pertinent information.**

There are two different types of documentation required by this chapter. The first type of documentation shows efforts to resolve a dispute before requesting a BRC, as reflected in §141.1(d)(2) of this title. That documentation must be provided with the request for a BRC. Examples of the types of documentation that can be submitted to show efforts to resolve a dispute are described in that section.

The second type of documentation supports or opposes an issue in the BRC. This is the pertinent information requirement under §141.4(a) of this title. Pertinent information is to be exchanged between the parties early in the dispute process and then sent to the Division not later than 14 days before the BRC, as provided in §141.4(e) of this title.

Under subsection (a) "pertinent information" is defined as all information relevant to the resolution of the disputed issue or issues to be addressed at the BRC.

Under subsection (b) examples of "pertinent information" are listed on the Division's website, as required by Labor Code §410.007.

Under subsection (c), the requestor must send all pertinent information in its possession, not previously exchanged, to the opposing party or parties before the time a request for a BRC is sent to the Division.

Under subsection (d), the opposing party must send all pertinent information in its possession, not previously exchanged, to the requesting party and other parties within 10 working days after receiving a copy of the request for a BRC. This was changed from 10 calendar days in the proposal, in response to comments.

Under subsection (e), all parties must supplement their exchanges with new pertinent information that comes into their possession after the first exchange by sending the new pertinent information to the other parties not later than 14 days before the BRC, or not later than five days before an expedited conference. The parties must also send to the Division all pertinent information in the party's possession, not previously sent to the Division, not later than 14 days before the BRC, or not later than five days before an expedited conference.

Under subsection (f), the parties must bring to the BRC any pertinent information that becomes available less than 14 days before the BRC.

Under subsection (g), the BRO may schedule a second conference upon a determination that pertinent information necessary to resolve the dispute has not been submitted or exchanged. However, no more than two BRCs will be scheduled for each disputed issue.

Under subsection (h), the Division will not retain pertinent information exchanged for the BRC after the parties reach an agreement on the issues, have unresolved issues set for a CCH, or fail to reschedule a second BRC within at least 90 days after the first BRC. This does not apply to the documentation of efforts to resolve the issues in dispute submitted with the DWC Form - 045. Pertinent information documents are only used to address disputed issues at a BRC. The BRC pertinent information documents are defined in §141.4 of this title as documents relevant to the disputed issue for use at the BRC, not "records" for the claim file.

Under subsection (i) the effective date of §141.4 of this title is October 1, 2010.

**Section 141.7 of this title provides for the Division actions after a BRC.**

Under subsection (a), if all issues in dispute are resolved at the BRC by agreement or settlement, the agreement or settlement must be reduced to writing and signed by each party and their designated representative, if any, and the BRO. The BRO will make the agreement part of the claim file. If all issues in dispute are resolved at the BRC by settlement, the BRO will submit the signed settlement to the Commissioner or Commissioner's designee for approval. If the settlement is rejected, the parties may request a second BRC, if a second BRC has not already been held, or a CCH.

Under subsection (b), if all issues in dispute are not resolved at the first BRC, the BRO may set a second BRC or a CCH. If all issues in dispute are not resolved at the second BRC, a CCH will be scheduled by the BRO. A party must affirmatively request a CCH in lieu of a second BRC. The BRO has the discretion of whether to grant a CCH if a second BRC has not been held.

Under subsection (c), the BRO must submit a written report and any signed agreements to the Division's central office in Austin within five days after the BRC is closed.

Under subsection (d), the Division will send a file-stamped copy of the report and notice of the date, time, and location of the CCH to the parties.

Under subsection (e) the effective date of §141.7 of this title is October 1, 2010.

### **3. SUMMARY OF COMMENTS AND AGENCY RESPONSES.**

**Comment:** A commenter provides observations regarding decisions and orders of Contested Case Hearing Officers.

**Agency Response:** The Division acknowledges the comments but does not have a response because the comments are not specific to this proposed rule.

**Comment:** A commenter states that an injured employee should be legally responsible for payment of a medical bill as soon as the insurance carrier denies a claim. This would force the injured employee to request a BRC quickly to resolve the claim and make a CCH unnecessary and redundant.

**Agency Response:** The Division disagrees. The liability of the injured employee for a medical bill and the structure of the dispute resolution process are set forth in the Labor Code and are beyond the scope of this rulemaking.

**Comment:** A commenter supports the proposed changes, but questioned whether they could be done in reality. The commenter asks how the rule changes will be communicated and enforced.

**Agency Response:** The rule changes will be communicated through the *Texas Register*, the Division website, Division public information announcements, Field Office seminars, and other communication media. The rule changes will be enforced via administrative procedures, such as

a denial of a BRC request, only canceling or rescheduling BRCs in accordance with the rule requirements and the issuance of administrative violations through Division complaint and enforcement processes.

**Comment:** A commenter recommends revisions to the revised DWC Form - 045 (*Request for a Benefit Review Conference*) to create two separate boxes for issues under section III.

**Agency Response:** The Division acknowledges the comment. It has been delivered to the Division form team for their consideration. The revised form will be issued simultaneously with the adoption of this rule. The revised DWC Form - 045 was posted for comment at the same time as the proposal of this rule, however, web posting of the DWC Form - 045 was not a formal proposal and comments received are not required to be responded to in accordance with the Texas Administrative Procedures Act.

#### **§141.1(d)(2)**

**Comment:** Several commenters state that the requirement to provide details and supporting documentation of efforts made by the requesting party to resolve the disputed issues in the request for a BRC is unnecessary, burdensome, is likely to make BRCs less accessible to injured employees and will increase the cost of legal services for injured employees represented by attorneys. The commenters recommend two changes: (1) require an exhibit list instead of the documents themselves; and (2) require the provision of documents only on request from the Division.

**Agency Response:** The Division disagrees. The documentation of efforts requirement is required by Labor Code §410.023(b). The purpose of the new rule is to accelerate resolution of disputes, not necessarily to accelerate BRCs. Parties may resolve many disputes between themselves without the necessity of a BRC if they effectively communicate with each other.

Current practices demonstrate that many parties attend initial BRCs without sufficient preparation, issue analysis, or document exchange. The legislature determined that a person is not entitled to a BRC if he or she has not first at least made an attempt to resolve the dispute without utilizing Division resources. The requirement for parties to attempt to resolve disputes prior to requesting BRCs and the early notification and documentation of disputed issues is anticipated to lead to a more effective and efficient dispute resolution process without the need for a BRC.

**Comment:** A commenter states that disputes of a designated doctor's assessment requiring letters of clarification (LOCs) should be exempted from the requirements of §141.1(d)(2) of this title. Only the Division has the authority to communicate directly with a designated doctor.

**Agency Response:** The Division disagrees. Parties should not use a DWC Form - 045 to request a letter of clarification. A party is not required to request clarification in order to request a BRC to dispute a designated doctor assessment. A party dissatisfied with a designated doctor assessment should communicate with the opposing party, not the designated doctor. To comply with §141.1(d)(2) of this title, a party should document all efforts undertaken with the opposing party to resolve the ultimate issue addressed by the designated doctor. For example, when a request for a BRC is made to dispute an issue for which a designated doctor was appointed, the documentation of efforts to resolve the disputed issue may include correspondence with the opposing party, a log of telephone calls made to the opposing party regarding the disputed issue, the designated doctor's response to a letter of clarification, if any, or the Division's denial of a request for a letter of clarification, if any.

### **§141.1(d)(3)**

**Comment:** A commenter recommends that an Office of Injured Employee (OIEC) ombudsman be able to sign a request for a BRC on behalf of an injured employee.

**Agency Response:** The Division disagrees. Labor Code §404.105 authorizes OIEC ombudsmen to assist injured employees, not to legally represent them.

#### **§141.1(f)**

**Comment:** Several commenters state that the Division should tell the requestors why their request for a BRC was denied and state what additional documentation needs to be submitted to get the request approved.

**Agency Response:** The Division agrees to provide reasons why a request for BRC was denied, but not to state what additional documentation is needed. The Division does not know what particular documents are available to the requestor and notes that the documentation of efforts to resolve a dispute prior to a BRC request will vary on a case by case basis. The Division has modified §141.1(f) of this title, which now states that the Division will notify the parties if a request is denied and the reasons for the denial. Reasons for the denial are not stated in the rule but will be provided in the Division's response sent to the requestor.

**Comment:** A commenter requested that the Division identify the employee who determined that the request was incomplete, so that the requesting party can contact that person in order to discuss what additional documentation is required before the request will be granted.

**Agency Response:** The Division declines to put that information requirement in a rule. The Division will state the reason(s) for a denial in a Division's response to the requestor; the response will provide Division contact information for questions.

**Comment:** A commenter asks how an injured employee can have a request for a BRC granted in a case where the injured employee is going to rely on testimony in order to establish entitlement to benefits.

**Agency Response:** The requestor of a BRC must submit written documentation of efforts to resolve the dispute prior to requesting a BRC per Labor Code §410.023. This is different from the requirement to exchange pertinent information based on testimony. Pertinent information related to the issues in dispute is not required to be filed with the Division at the time of filing of the request for a BRC, but is required to be filed with the Division no later than 14 days prior to the date of the BRC. When oral testimony is going to be relied on to support a party's position on an issue, a party should provide a written statement signed by the witness or a professional transcription of a recorded statement of the witness may be prepared and exchanged as part of the pertinent information. Written or transcribed witness statements are examples of pertinent information found in the Division's web page. Alternatively, a party may prepare a written description of the anticipated testimony to be provided at the BRC and exchange the summary as part of the pertinent information.

**Comment:** A commenter recommends that the rule require the Division to notify a requestor within a specified time period that the request is incomplete. The commenter also recommends that a request should be deemed complete if the requestor is not notified within the specified time period.

**Agency Response:** The Division disagrees. The time periods are internal administrative functions and will be addressed through administrative policies, not by rule. The standards for a complete request are in §141.1(d) of this title. There is no provision for completeness by default.

**Comment:** A commenter recommends that the Division modify §141.1(f) of this title to provide that submitting an incomplete request for a BRC will be sufficient to stop the first certification of maximum medical improvement (MMI) and impairment rating (IR) from becoming final under Labor Code §408.123(e).

**Agency Response:** The Division disagrees. The Division has noted instances where parties will submit a DWC Form - 045 for the purposes of preventing a first certification of MMI or IR from becoming final under Labor Code §408.123(e) and §130.12 of this title (relating to Finality of the First Certification of Maximum Medical Improvement and/or First Assignment of Impairment Rating), but specifically say on the form that they do not want to proceed with a BRC. The purpose of requesting a BRC is to resolve a dispute and a party submitting a BRC request should be prepared to move forward with the BRC at the time the request is made. The purpose of these rules is to provide a timely and efficient mechanism to parties who need to resolve disputes regarding certain aspects of a workers' compensation claim. Consequently, if a party wants to dispute the first certification of MMI or IR on a claim, then §130.12 of this title requires a party to either request a BRC or request a designated doctor examination. After a complete request is submitted, approved, and a BRC scheduled, the party has established a dispute of the first certification of MMI and/or IR in accordance with §408.123(e), effective as of the date the request was filed. A party may obtain a CCH under §141.1(g) of this title to determine that they had good cause for filing an incomplete request for a BRC and retain the original date of filing the request for a BRC.

#### **§141.1(g)**

**Comment:** Several commenters state that it is inefficient to hold a CCH in order to decide if a request for a BRC should be granted.

**Agency Response:** The Division disagrees. In most cases a requestor will simply revise and resubmit a request that has been rejected. That will be the quickest and easiest way to proceed. In some cases, however, a person is directly impacted by the timely filing requirement of related statutes and rules. For instance, the date of filing a request for a BRC is critical in order to prevent a certification of MMI or IR from becoming final under Labor Code §408.123(e). In those cases, it

is reasonable to give affected parties a procedure to establish good cause for failing to meet the requirements of §141.1(d) of this title or to establish that their denied request should have been accepted under Division rules to retain the original date of filing.

**Comment:** A commenter asked whether a new form would be created for the purpose of requesting a CCH to dispute DWCs determination that a BRC was incomplete.

**Agency Response:** The development of an additional form is not planned at this time. Division forms are developed to handle large volumes of procedures. The Division does not anticipate there will be a large volume of requests for a CCH to dispute the Division's determination that a BRC was incomplete, but reserves the right to develop a form if one becomes necessary.

#### §141.1(i)

**Comment:** Several commenters recommend that the rule should specify that the parties shall receive a minimum amount of notice, such as at least 30 days notice before the BRC is set and at least 10 days notice before an expedited BRC.

**Agency Response:** The Division disagrees. The time periods are internal administrative functions and will be addressed through administrative policies, not by rule.

#### §141.2(b)

**Comment:** A commenter stated that the Division should identify a specific contact person to whom the request for cancellation or rescheduling of a BRC should be directed.

**Agency Response:** The Division disagrees. Staff assignments vary between offices and within an office, depending on workload. The specific person in an office assigned to consider requests for cancellation or rescheduling may change over time. An interested party should simply call the relevant field office and they will be directed to the appropriate person at that time. Phone

numbers, including toll free numbers, of the field office will be on the BRC set notice sent to the parties.

**Comment:** A commenter states that an opposing party should not have an unrestricted right to cancel a BRC in the 10 day period after notice of a setting.

**Agency Response:** The Division agrees. The opposing party does not have a unilateral, unrestricted right to cancel. The Division has modified §141.2(b) of this title to clarify that only the parties identified in §141.2(a) of this title can request a cancellation or rescheduling. Section 141.2(a) of this title states that a cancellation or rescheduling of a BRC can only be made by the Division, the party who requested the BRC, and the parties by mutual agreement.

#### **§141.2(c)**

**Comment:** A commenter opines that a scheduled BRC should count toward the two BRC limit if the party who requested the BRC requests a cancellation after the 10 day period or fails to attend a scheduled BRC.

**Agency Response:** The Division agrees in part and disagrees in part. A BRC cancellation request for good cause is subject to Division approval and the Division uses internal processes to monitor for the abuse of processes and procedures. Abuse of any Division policy or process should immediately be brought to the attention of the Division. However, if the party requesting the BRC fails to attend the BRC as scheduled, the BRC may be held in the party's absence, which would apply to the limit of two BRCs. A party that does not attend a scheduled BRC without good cause is also subject to administrative violations.

**Comment:** A commenter states that the rule should specify that only BROs can make good cause determinations for continuances or resets.

**Agency Response:** The Division disagrees and declines to make the change. Some examples of good cause, such as illness or death of the injured employee, should not require the time and expertise of a BRO to verify. Staff assignments are an internal administrative function. Certain scheduling determinations are best addressed through administrative policies and procedures, not by rule. Abuse of the system or claims not made in good faith should be brought to the attention of Division staff.

### **§141.2(c)(3)**

**Comment:** Several commenters state that an injured employee should not have good cause to cancel on the grounds that the injured employee does not want to pursue the insurance carrier's issue.

**Agency Response:** The Division agrees and clarifies that §141.2(c)(3) has been modified to read "the party requesting the benefit review conference no longer desires to pursue the issue." The injured employee will still retain the right to cancel if it is the injured employee's issue.

### **§141.4(b) and (c)**

**Comment:** A commenter objects to publication of examples of pertinent information on the Division website and references to the website in the rule, stating that it constitutes improper rulemaking outside the administrative procedures act.

**Agency Response:** The Division disagrees and declines to make the change. Labor Code §410.007 requires the Division to publish, in media including the Division's website, a list of information that is useful to parties in resolving benefit disputes and that provides guidance regarding the type of information a party should exchange, have, and/or provide at a BRC or CCH. The pertinent information list is also expressly referred to as "examples of pertinent information"

and is not intended as an exhaustive or limiting list of information that should be provided in a pre BRC situation, a BRC, or CCH.

#### **§141.4(c) and (d)**

**Comment:** Several commenters state that the requirement to exchange pertinent information should start after receipt of the notice of setting of the BRC.

**Agency Response:** The Division disagrees. The purpose of the requirement under §141.4(c) and (d) of this title to exchange documents early in the process is to encourage early resolution of the dispute. Once the parties have the opportunity to see all pertinent information, they may be better able to resolve the dispute themselves without a BRC.

#### **§141.4(c), (d) and (e)**

**Comment:** Several commenters state that the parties should not have to engage in multiple exchanges of documentation.

**Agency Response:** The Division disagrees that the rule requires multiple exchanges. Section 141.4 only requires a party to send a particular document once. The subsequent supplemental exchange requirements only apply to documents not previously exchanged. Once a document is provided, it does not have to be sent again. If a party sends all of its pertinent information in the beginning, there will not be any further exchanges. It is only when new documents are acquired that the duty to supplement the original exchange occurs. Exchanges of documentation relate to pertinent information, which is different from documentation of efforts to resolve a dispute. There is no requirement to exchange documentation of efforts to resolve a dispute.

#### **§141.4(d)**

**Comment:** A commenter recommends an optimal time period of 14 working days and a minimum of 10 working days after receiving a copy of the request for a BRC to provide pertinent information to the opposing party, rather than the proposed 10 calendar days.

**Agency Response:** The Division agrees to extend the time period to 10 working days and §141.4(d) of this title is revised accordingly.

#### **§141.4(e)**

**Comment:** A commenter recommends that, if a non-expedited BRC is set within 20 days of the request, additional pertinent information should be sent to the other parties within five days of the BRC setting.

**Agency Response:** The Division disagrees. If a non-expedited BRC is set within 20 days of the request, pertinent information will have been exchanged within 10 working days of the BRC request as required by §141.4(d) of this title. The subsequent supplemental exchange requirements in §141.4(e) of this title only apply to documents not previously exchanged. Any documentation obtained prior to the BRC after the supplemental exchange should be provided at the BRC in accordance with §141.4(f) of this title.

#### **§141.4(h)**

**Comment:** A commenter opines that the rule should provide for electronic filing and retention of pertinent documents.

**Agency Response:** The Division disagrees. The proposed rule does not specify the format of the documentation exchange. The rule is flexible enough to accommodate other means of filing as the technological capability of the Division grows and evolves.

**Comment:** Several commenters oppose the non-retention policy of this provision. Three changes to the provision were suggested: the documents should be kept permanently in the claim file, the documents should be electronically scanned and retained and documents should at least be retained until all issues raised at the BRC are final.

**Agency Response:** The Division disagrees. According to §141.4(a) of this title, pertinent information documents are only used to address disputed issues at a BRC. The BRC pertinent information documents are defined in §141.4 of this title as documents relevant to the disputed issue for use at the BRC, not “records” for the claim file. The documents will be retained until the parties reach an agreement on the issues, have unresolved issues set for a CCH, or fail to reschedule a second benefit review conference within at least 90 days after the first benefit review conference. The Division copy of the BRC exchange is not documentation to be used by a party to meet the discovery requirements at a CCH under §142.13 of this title (relating to Discovery), relating to Discovery. Therefore, the Division does not have any administrative purpose for keeping the BRC documentation after the conclusion of the BRC.

#### **§141.7(d)**

**Comment:** Several commenters state that this subsection should set a five working day time period for the Division to send the BROs report to the parties after the Division receives it.

**Agency Response:** The Division disagrees. The time period is an internal administrative function and will be addressed through administrative policies and procedures, not by rule.

### **5. NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.**

**For, without changes:** MillerCoors.

**For, with changes:** American Insurance Association, Insurance Council of Texas, Office of Injured Employee Counsel, Property Casualty Insurers Association of America, Texas Mutual Insurance Company.

**Against:** None.

## **6. STATUTORY AUTHORITY.**

These amendments are adopted under Labor Code §§410.007, 410.023, 410.026, 410.025, 410.021, 410.029, 410.031, 410.034, 410.151, 410.154, 401.024, 409.009, 410.027, 402.00116, 402.00111, 402.00128 and 402.061.

Section 410.007 requires the Division to determine the type of information that is most useful to parties to help resolve disputes regarding income benefits and to publish a list of such information in appropriate media, including its internet website. Section 410.023 requires the party requesting the BRC to provide documentation of efforts made to resolve the dispute before requesting the BRC and directs the Commissioner to adopt guidelines by rule regarding the type of information necessary to satisfy this requirement. Section 410.026 denotes the powers and duties of a benefit review officer including the power to schedule no more than two BRCs on a disputed issue. Section 410.025 authorizes the Commissioner to prescribe the scheduling of BRCs and expedited hearings, and the required notice related to the scheduling. Section 410.021 sets forth the BRC as a nonadversarial and informal proceeding within the dispute resolution process which purpose is designed to explain, discuss, mediate and resolve disputed issues by agreement of the parties. Section 410.029 provides that a dispute may be resolved either in whole or in part at a BRC, and that the results must be reduced to writing and signed. Section 410.031 requires that the benefit review officer must prepare a detailed written report if there is an incomplete resolution at the BRC. Section 410.034 requires the Commissioner to prescribe the times within which the BRC agreement and report must be filed. Section 410.151 provides for the

issues that cannot be addressed at a CCH. Section 410.154 provides for the scheduling of a CCH. Section 401.024 defines "electronic transmission" as the transmission of information by facsimile, electronic mail, electronic data interchange, or any other similar method. Section 409.009 provides for the filing of written claims with the Division as a subclaimant. Section 410.027 specifies that the Commissioner shall adopt rules for conducting BRCs.

Section 402.00116 grants the powers and duties of chief executive and administrative officer to the Commissioner and the authority to enforce Labor Code Title 5, and other laws applicable to the Division or Commissioner. Section 402.00111 provides that the Commissioner shall exercise all executive authority, including rulemaking authority, under Labor Code Title 5. Section 402.00128 vests general operational powers to the Commissioner including the authority to delegate, and assess and enforce penalties as authorized by Labor Code Title 5. Section 402.061 provides the Commissioner the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

## **7. TEXT.**

### **§141.1. Requesting and Setting a Benefit Review Conference.**

(a) **Prior Notification.** Prior to requesting a benefit review conference, a disputing party must notify the other party or parties of the nature of the dispute and attempt to resolve the dispute.

(b) **Who May Request.** A request for a benefit review conference may be made by an injured employee, a subclaimant, or an insurance carrier. An employer may request a benefit review conference to contest compensability when the insurance carrier has accepted the claim as compensable.

(c) Subclaimant. A request for a benefit review conference made by a subclaimant under Labor Code §409.009 must also comply with the requirements of §140.6 of this title (relating to Subclaimant Status: Establishment, Rights, and Procedures).

(d) Request for Benefit Review Conference. A request for a benefit review conference shall be made in the form and manner required by the division. The request shall:

(1) identify and describe the disputed issue or issues;

(2) provide details and supporting documentation of efforts made by the requesting party to resolve the disputed issues, including but not limited to, copies of the notification provided in accordance with subsection (a) of this section, correspondence, e-mails, facsimiles, records of telephone contacts, or summaries of meetings or telephone conversations. For the purposes of this subsection, copies of the notification provided in accordance with subsection (a) of this section, correspondence, e-mails, facsimiles, records of telephone contacts, or summaries of meetings or telephone conversations should not include all attachments of pertinent information exchanged with the opposing party or parties as required by §141.4 of this title (relating to Sending and Exchanging Pertinent Information);

(3) contain a signature by the requesting party attesting that reasonable efforts have been made to resolve the disputed issue(s) prior to requesting a benefit review conference, and that any pertinent information in their possession has been provided to the other parties as required by §141.4(c) of this title; and

(4) be sent to the division and opposing party or parties.

(e) Complete Request. A request that meets the requirements of subsection (d) of this section is a complete request for a benefit review conference. The division will schedule a benefit review conference if the request is complete and otherwise appropriate for a benefit review conference.

(f) Incomplete Request. A request for a benefit review conference that does not meet the requirements of subsection (d) of this section is an incomplete request and will be denied.

(1) A denied request for a benefit review conference does not constitute a dispute proceeding, except as provided by subsection (g) of this section.

(2) The division will notify the parties if a request is denied and state the reasons for the denial.

(3) Upon notice from the division, the requesting party may submit a new request for a benefit review conference that meets the requirements of this section.

(g) Incomplete Request Denials. If a party disagrees with the division's determination that the request was incomplete, or, if a party has good cause for failing to meet the requirements of subsection (d) of this section, the party may pursue an administrative appeal of the division's determination in accordance with Chapter 142 of this title (relating to Dispute Resolution--Benefit Contested Case Hearing). The party may also request an expedited contested case hearing in accordance with §140.3 of this title (relating to Expedited Proceedings).

(h) Setting. If a request meets the standards of subsection (e) of this section, the division will schedule a benefit review conference within 40 days after the request was received by the division and within 20 days after the request was received by the division, if the division determines that an expedited setting is needed.

(i) Notice. After setting the benefit review conference, the division shall provide, by first class mail, electronic transmission, or personal delivery, written notice of the date, time, and location to the parties and to the employer.

(j) Site. The benefit review conference will be conducted at a site no more than 75 miles from the injured employee's residence at the time of injury, unless the division determines that good cause exists for selecting another site.

(k) Effective date. The effective date of this section is October 1, 2010.

**§141.2. Canceling or Rescheduling a Benefit Review Conference.**

(a) The division may cancel or reschedule a benefit review conference:

- (1) on its own motion;
- (2) at the request of the party who requested the conference; or
- (3) at the mutual request of the parties.

(b) A request for cancellation or rescheduling under subsection (a) of this section shall be made by notifying the division within 10 days of the date the notice of setting is received. The date the notice of setting is received is deemed to be the fifth day after the date of the notice. Cancellation or rescheduling requests made during this 10-day period are unrestricted unless a pattern of abuse is detected.

(c) Cancellation or rescheduling requests made after the unrestricted cancellation period defined in subsection (b) of this section shall be in writing unless waived by the division and sent to the division and opposing party or parties. The request shall be granted only on a showing of good cause. Good cause may include, but is not limited to, the following:

- (1) the parties independently resolved the disputed issue or issues by agreement or settlement, as provided by Chapter 147 of this title (relating to Dispute Resolution--Agreements, Settlements, Commutations);
- (2) the conference was scheduled with the wrong insurance carrier;
- (3) the party requesting the BRC no longer desires to pursue the issue;
- (4) the injured employee has died and no additional benefits appear due; or
- (5) illness of a party.

(d) The division will notify the parties of a cancellation or rescheduling of a benefit review conference in a timely manner.

(e) Effective date. The effective date of this section is October 1, 2010.

**§141.4. Sending and Exchanging Pertinent Information.**

(a) As used in this chapter "pertinent information" means all information relevant to the resolution of the disputed issue or issues to be addressed at the benefit review conference, including but not limited to:

- (1) reports regarding the compensable injury;
- (2) the injured employee's wage records; and
- (3) the injured employee's medical records.

(b) Examples of "pertinent information" are listed on the division's website.

(c) All pertinent information, as described in subsections (a) and (b) of this section, not previously exchanged, in the possession of the party requesting a benefit review conference must be sent to the opposing party or parties before the time the request for a benefit review conference is sent to the division.

(d) The opposing party must send all pertinent information in its possession, not previously exchanged, to the requesting party and other parties within 10 working days after receiving a copy of the request for a benefit review conference.

(e) Not later than 14 days before the benefit review conference, or not later than five days before an expedited conference set under §141.1(d)(2) of this title (relating to Requesting and Setting a Benefit Review Conference):

(1) all pertinent information in the parties' possession not previously sent to the division shall be sent to the division; and

(2) all pertinent information in the parties' possession not previously exchanged must be sent to the other parties.

(f) Additional pertinent information that becomes available thereafter shall be brought to the conference in sufficient copies for the division and opposing party or parties.

(g) The benefit review officer may schedule a second conference upon a determination that pertinent information necessary to resolve the dispute has not been submitted or exchanged. No more than two benefit review conferences may be scheduled for each disputed issue.

(h) The division will not retain the pertinent information received for the BRC after the parties:

- (1) reach an agreement on the issues;
- (2) set unresolved issues for a contested case hearing; or
- (3) fail to reschedule a second benefit review conference within at least 90 days

after the first benefit review conference.

(i) Effective date. The effective date of this section is October 1, 2010.

#### **§141.7. Division Actions After a Benefit Review Conference.**

(a) All Issues Resolved. Division actions if all issues are resolved at the benefit review conference.

(1) If all issues in dispute are resolved at the benefit review conference by agreement or settlement, the agreement or settlement must be reduced to writing and signed by each party and their designated representative, if any, and the benefit review officer.

(2) The benefit review officer shall make the agreement part of the claim file. If all issues in dispute are resolved at the benefit review conference by settlement, the benefit review officer shall submit the signed settlement to the commissioner or commissioner's designee for handling as provided by Chapter 147 of this title (relating to Dispute Resolution--Agreements, Settlements, Commutations). If the commissioner or commissioner's designee rejects the settlement, the parties may request:

(A) a second benefit review conference, if a second benefit review conference has not already been held; or

(B) a contested case hearing.

(b) Issues Not Resolved. Division actions if issues are not resolved at the benefit review conference.

(1) After First Benefit Review Conference. If all issues in dispute are not resolved at the first benefit review conference, the benefit review officer may set a second benefit review conference or a contested case hearing.

(2) After Second Benefit Review Conference. If all issues in dispute are not resolved at the second benefit review conference, a contested case hearing will be scheduled by the benefit review officer.

(c) Written Report. Within five days after the benefit review conference is closed, the benefit review officer shall submit the written report and any signed agreements to the division's central office in Austin in accordance with Labor Code §410.031 and §410.034.

(d) Copies of Report and Hearing Notice. The division shall send to the injured employee; injured employee's representative, if any; the insurance carrier; subclaimants; and the employer the following:

(1) a file-stamped copy of the report; and

(2) notice of the date, time, and location of the contested case hearing.

(e) Effective date. The effective date of this section is October 1, 2010.

**8. CERTIFICATION.** The agency hereby certifies that the adopted amendments and sections have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas, on August 6, 2010.

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

IT IS THEREFORE THE ORDER of the Commissioner of Workers' Compensation that §§141.1, 141.2, 141.4 and 141.7 specified herein, concerning dispute resolution by the benefit review conference are adopted.

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ROD BORDELON  
COMMISSIONER OF WORKERS' COMPENSATION

ATTEST:

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Dirk Johnson  
General Counsel

COMMISSIONER ORDER NO 10-0062