

TITLE 28. INSURANCE

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

CHAPTER 140: DISPUTE RESOLUTION – GENERAL PROVISIONS

Title 28 Texas Administrative Code (TAC) §§140.1, 140.8, and new 140.9

1. INTRODUCTION. The Texas Department of Insurance, Division of Workers' Compensation (division) proposes to amend 28 TAC §140.1 and §140.8, and to adopt new §140.9. The proposed changes replace "hearing officer" and "hearings officer" with "administrative law judge," replace "commission" with "division," replace "appeals panel members" with "appeals panel judges," and delete the definition for director of the hearings division. The proposed changes also include one style and usage change by deleting the word "the" from within the parentheses in §140.1(1). The proposed new §140.9 requires that all requests to presiding officers from carriers, carrier representatives, claimants represented by an attorney, or claimants assisted by the Office of Injured Employee Counsel (OIEC) must include a statement that the requesting party made reasonable efforts to confer with other parties about the request. The new §140.9 also creates timeframes for parties to respond to such requests. Carriers and carrier representatives are required to send copies of requests and responses to OIEC as well as the injured employee when a claimant is assisted by OIEC. An informal working draft of the rule text was published on the division's website on April 9, 2018, and the division received two comments.

2. BACKGROUND AND PURPOSE. House Bill (HB) 2111, enacted by the 85th Texas Legislature, Regular Session, replaced all references to “hearing officer” and “hearings officer” in the Texas Workers’ Compensation Act with “administrative law judge.” The purpose of this proposal is to make conforming changes to the division’s rules. In addition, the division is replacing outdated references and removing an unused definition.

New §140.9 requires that parties represented by an attorney or assisted by OIEC must include with any requests a signed statement that the requesting party made reasonable efforts to confer with other parties about the request. Further, new §140.9 sets a deadline for responses to requests. Responses to requests for continuance must be filed within three days of receipt of the request and any responses to other requests must be filed within five days of receipt. The proposed rule provides presiding officers with discretion to consider a request or response that is not timely filed or that otherwise fails to comply with requirements of the new section. Claimants who are neither represented by an attorney nor assisted by OIEC may request to continue a proceeding by contacting the division in any manner.

Requiring parties to confer and report their attempts to reach agreement facilitates the contested case process as it encourages parties to resolve disputes on their own and at the earliest point possible. It also informs the presiding officer of dates the parties are available for rescheduled proceedings, which will reduce continuances. This requirement also informs the presiding officer when a request is unopposed so that it can be ruled on immediately.

Creation of a timeframe for filing responses informs parties how long they have to file responses and assures them that no action will be taken on a contested request until the response time has elapsed.

Authorizing presiding officers to consider untimely or otherwise noncompliant requests and responses in the interest of justice provides appropriate discretion to the presiding officer to reach a just result based on case-specific circumstances presented. Authorizing claimants who are neither represented by an attorney nor assisted by OIEC to request a continuance by contacting the division in any manner is consistent with current practice and keeps the dispute resolution process accessible to claimants who are navigating it on their own.

3. FISCAL NOTE. Mr. Kerry Sullivan, deputy commissioner for Hearings, has determined that for each year of the first five years the proposed amendments will be in effect there will be no fiscal impact to state or local governments as a result of enforcing or administering the proposal. There will be no measurable effect on local employment or the local economy as a result of the proposed amendments. Local government and state government as a covered regulated entity will be impacted in the same manner as persons required to comply with the proposed amendments, as described below.

4. PUBLIC BENEFIT. Mr. Sullivan has also determined that, for each year of the first five years the proposed amendments are in effect, there will be a number of public benefits. The public benefits anticipated as a result of the proposed amendments include matching the terminology of the rule to that of the Labor Code, improved fairness and certainty by setting a timeframe for responding to requests, and improved

efficiency by requiring parties to try to resolve disputes before requesting relief from the division.

5. ANTICIPATED COSTS TO COMPLY WITH THE PROPOSAL. Mr. Sullivan anticipates that there will be no costs to comply with these rules. Most party representatives and OIEC already confer prior to filing requests because resolving issues without the need for division intervention is quicker and less costly than resolving disputes more formally. Such action is also consistent with the Texas Lawyers' Creed, which attorneys practicing before the division must observe under 28 TAC §150.1. The Texas Lawyers' Creed provides that attorneys should generally agree to reasonable requests for extensions of time and for waiver of procedural formalities and should attempt to resolve by agreement objections to pleadings and discovery requests and responses.

Requiring all party representatives and claimants assisted by OIEC to undertake these efforts will reduce the overall time and cost involved in resolving disputes by avoiding submission of agreed matters for a proceeding when unnecessary and, when presiding officer action is needed, more promptly getting to the presiding officer the information required to make a ruling. It will also result in fewer continuances when the parties confer in advance and propose new hearing dates that accommodate their schedules. Specifying a timeframe for parties to respond to requests will save time and expenses associated with communicating with the division regarding whether a request is opposed, whether a response will be filed, and when it is due.

Because the division has determined that the proposed amendments will have no costs to system participants, Government Code §2001.0045 does not apply.

6. ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS.

The division has determined that adoption of the proposed amendments will not have a direct, adverse economic impact on system participants who qualify as small or micro-businesses or rural communities who may be self-insured insurance carriers.

Therefore, the provisions of Government Code §2006.002(c) do not apply to this rule proposal.

7. GOVERNMENT GROWTH IMPACT STATEMENT. Government Code §2001.0221

requires a state agency to prepare a government growth impact statement for a proposed rule describing the impact the proposed rule will have during the first five years that the rule would be in effect. The proposed rule will not create or eliminate a government program. Implementation of the proposed rule does not require the creation of new employee positions or the elimination of existing employee positions. Implementation of the proposed rule does not require an increase or decrease in future legislative appropriations to the division. The proposed rule does not require an increase or decrease in fees paid to the division. The proposal creates a new regulation and does not expand, limit or repeal an existing regulation. The proposed rule does not change the number of individuals subject to the rule's applicability. The proposed rule will not significantly affect the state's economy. Any impact would be positive by making the dispute resolution process more efficient.

8. TAKINGS IMPACT ASSESSMENT. The division has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action. Therefore, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

9. REQUEST FOR PUBLIC COMMENT. If you would like to submit written comments on this proposal, please submit your comments by 5:00 p.m. CST on December 3, 2018. A request for a public hearing must be sent separately from your written comments. Send written comments or hearing requests by email to rulecomments@tdi.texas.gov or by mail to Ashley Hyten, Texas Department of Insurance, Division of Workers' Compensation, Office of the General Counsel, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645. If a hearing is held, the division will consider written comments and public testimony presented at the hearing.

10. STATUTORY AUTHORITY. Amended §§140.1 and 140.8 are proposed under the authority of Labor Code §§402.00111, 402.00116, 402.00128, 402.061, 410.027, and 410.157.

Labor Code §402.00111 states that the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority, under the Texas Workers' Compensation Act.

Labor Code §402.00116 states that the commissioner of workers' compensation is the division's chief executive and administrative officer and shall administer and enforce the Texas Workers' Compensation Act, other workers' compensation laws of this state,

and other laws granting jurisdiction to or applicable to the division or the commissioner of workers' compensation.

Labor Code §402.00128 states that the commissioner of workers' compensation shall conduct the daily operations of the division and otherwise implement division policy and, among other functions, may delegate; assess and enforce penalties; and enter appropriate orders.

Labor Code §402.061 states that the commissioner shall adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act.

Labor Code §410.027 states that the commissioner shall adopt rules for conducting benefit review conferences.

Labor Code §410.157 states that the commissioner shall adopt rules governing procedures under which contested case hearings are conducted.

The proposed amendments affect the Texas Workers' Compensation Act, Texas Labor Code, Title 5, Subtitle A.

11. TEXT.

§140.1. Definitions. The following words and terms, when used in this part, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Benefit dispute--A disputed issue arising under the Texas Workers' Compensation Act (~~the~~ Act) in a workers' compensation claim regarding compensability or eligibility for, or the amount of, income or death benefits.

(2) Benefit proceeding--A proceeding pursuant to the Act, Chapter 410, conducted by a presiding officer to resolve one or more benefit disputes. Benefit

proceedings include benefit review conferences, benefit contested case hearings, appeals, and, after January 1, 1992, arbitration.

~~[(3) Director of the hearings division--The director of the Division of Hearings and Review, or his delegatee.]~~

(3) ~~[(4)]~~ Party to a proceeding--A person entitled to take part in a proceeding because of a direct legal interest in the outcome.

(4) ~~[(5)]~~ Presiding officer--The division ~~[commission]~~ employee, or independent arbitrator, assigned to conduct a proceeding. Presiding officers include benefit review officers, administrative law judges ~~[hearing officers]~~, ~~[and]~~ appeals panel judges ~~[members]~~, and~~[-~~ after January 1, 1992,~~]~~ arbitrators.

(5) ~~[(6)]~~ Special accommodations--Individuals and equipment necessary to allow an individual who does not speak English or who has a physical, mental, or developmental handicap to participate in a proceeding. The term includes spoken language translators and sign language translators.

(6) ~~[(7)]~~ Stipulation--A voluntary accord between parties to a benefit contested case hearing regarding any matter relating to the hearing that does not constitute an agreement, as defined by the Act, §401.011(3), or a settlement, as defined by the Act, §401.011(40).

§140.8. Procedures for Health Care Insurers to Pursue Reimbursement of Medical

Benefits under Labor Code §409.0091.

(a) – (g) (No change.)

(h) Request for Dispute Resolution. The rules applicable to dispute resolution vary according to the reason for denial of reimbursement. Disputes regarding extent of injury, liability, or medical necessity must be resolved prior to pursuing a medical fee dispute. A request for medical dispute resolution may be filed in lieu of a request for subclaimant status, and shall be considered a request for subclaimant status for purposes of this section.

(1) Claim or Treatment Not Compensable.

(A) (No change.)

(B) The health care insurer may pursue dispute resolution to obtain an order from an administrative law judge [~~a hearings officer~~] regarding compensability or eligibility for benefits in accordance with Labor Code Chapter 410 and applicable Division rules.

(C) (No change.)

(2) – (3) (No change.)

(i) (No change.)

§ 140.9. Requests by Parties.

(a) This subsection applies to carriers, carrier representatives, claimants represented by an attorney, and claimants assisted by the Office of Injured Employee

Counsel (OIEC). The parties shall work collaboratively to reach any agreement reasonably necessary for the efficient disposition of a case. Unless presented during a proceeding, all requests to presiding officers, including rescheduling and continuance requests, discovery requests, and other requests, must be in writing and include a signed statement that the requester made reasonable efforts to confer with the other party or parties about the request. If the requester was unable to confer with the other party or parties, the statement must summarize the efforts made to confer. If the parties conferred, the statement must:

- (1) include whether the other party or parties oppose the request; and
- (2) for a request to reschedule or continue a proceeding, propose a date

and time the parties are available for the rescheduled proceeding that has been coordinated with the division's docketing section.

(b) Requests must be sent to the division and to the opposing party or parties. For claimants represented by an attorney, requests must be sent to the claimant and the claimant's representative. For claimants assisted by OIEC, requests must be sent to the claimant and to OIEC.

(c) Unless otherwise directed or allowed by a presiding officer, any responses to requests for rescheduling and continuance must be filed, in writing, with the division and delivered to all parties within three days of receipt of the request and any responses to other requests must be filed, in writing, with the division and delivered to all parties within five days of receipt.

(d) Unless precluded by other law, a presiding officer may, in the interest of justice, consider a request or response that is not timely filed or which otherwise fails to comply with the requirements of this section. The presiding officer may reconsider previous rulings made in the absence of this information.

(e) Requests to reschedule or cancel a benefit review conference must meet the requirements of §141.2 of this title (relating to Canceling or Rescheduling a Benefit Review Conference).

(f) Claimants who are neither represented by an attorney nor assisted by OIEC may request a continuance by contacting the division in any manner.

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

Issued at Austin, Texas, on October 17, 2018.

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