

## **TITLE 28. INSURANCE**

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

#### **CHAPTER 141: DISPUTE RESOLUTION – BENEFIT REVIEW CONFERENCE**

##### **Title 28 Texas Administrative Code (TAC) §141.2**

**1. INTRODUCTION.** The Texas Department of Insurance, Division of Workers' Compensation (division) proposes to amend 28 TAC §141.2. The proposed change deletes obsolete rule text. In addition, the proposed amendment clarifies that there is only one "first request" to reschedule a benefit review conference that need not demonstrate good cause. 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.** The purpose of the proposed amendment is to clarify that there is only one "first request" to reschedule a benefit review conference that need not demonstrate good cause. The clarification is necessary to give notice that either party may request to reschedule a benefit review conference, and that subsequently scheduled benefit review conferences do not also have a "first request" that will be granted without a showing of good cause. The rule also provides that requests to cancel or reschedule a benefit review conference must be sent to the division and opposing parties no later than five days before the scheduled benefit review conference. Parties opposing such requests must file written opposition with the division within three days of receiving the cancellation or rescheduling request. A

claimant who is neither represented by an attorney nor assisted by OIEC may request to cancel or reschedule a BRC by contacting the division in any manner. In addition, the division is deleting obsolete rule text.

This clarification is appropriate in order to facilitate timely resolution of disputes by requiring a showing of good cause in order to reschedule BRCs that have already been continued once. Specifying timeframes for filing and responding to requests to reschedule provides guidance and certainty to system participants regarding these procedures.

The division is deleting rule text stating that the date the notice of setting is received is deemed to be the fifth day after the date of the notice because it is duplicative of the requirements already stated in 28 TAC §102.5.

**3. FISCAL NOTE.** Mr. Kerry Sullivan, deputy commissioner for Hearings, has determined that for each year of the first five years the proposed amendment 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 amendment. 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 amendment, as described below.

**4. PUBLIC BENEFIT.** Mr. Sullivan has also determined that, for each year of the first five years the proposed amendment is in effect, a public benefit anticipated as a result of the proposed amendment will include quicker resolution of disputes.

**5. ANTICIPATED COSTS TO COMPLY WITH THE PROPOSAL.** Mr. Sullivan

anticipates that there will be no costs to comply with this rule because more prompt resolution of disputes is anticipated to reduce carrying costs associated with disputes.

Because the division has determined that the proposed amendment 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 amendment 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 does not create a new regulation. The proposal does not expand, limit or repeal an existing regulation, but it does clarify an existing regulation. The proposed rule does not increase or decrease

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](mailto: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 §141.2 is proposed under the authority of Labor Code §§402.00111, 402.00116, 402.00128, 402.061, and 410.027.

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.

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

## **11. TEXT.**

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

~~[(a) Applicability. This subsection applies to a benefit review conference that is requested before December 1, 2011.]~~

~~(1) The division may cancel or reschedule a benefit review conference:~~

~~(A) on its own motion;~~

~~(B) at the request of the party who requested the conference; or~~

~~(C) at the mutual request of the parties.~~

~~(2) A request for cancellation or rescheduling under paragraph (1) of this subsection 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.~~

~~(3) Cancellation or rescheduling requests made after the unrestricted cancellation period defined in paragraph (2) of this subsection 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:~~

~~(A) 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);~~

~~(B) the conference was scheduled with the wrong insurance carrier;~~

~~(C) the party requesting the BRC no longer desires to pursue the issue;~~

~~(D) the injured employee has died and no additional benefits appear due; or~~

~~(E) illness of a party.~~

~~(4) The division will notify the parties of a cancellation or rescheduling of a benefit review conference in a timely manner.]~~

~~[(b) Applicability. This subsection applies to a benefit review conference that is requested on or after December 1, 2011.]~~

(a) ~~[(1)]~~ In this subsection, "good cause" will be determined at the discretion of the benefit review officer on a case-by-case basis, including consideration of prejudice to parties, and means:

(1) ~~[(A)]~~ objective facts beyond the control of a party, which reasonably:

(A) ~~[(i)]~~ prevent a party from attending the benefit review conference; or

(B) ~~[(ii)]~~ would prevent the benefit review conference from accomplishing its purpose, such as the need for a reasonable amount of additional time to secure necessary evidence for the dispute; or

(2) ~~[(B)]~~ objective facts which make the benefit review conference unnecessary.

(b) ~~[(2)]~~ The division may cancel ~~[or reschedule]~~ a benefit review conference at any time before the benefit review conference:

(1) ~~[(A)]~~ on its own motion;

(2) [(B)] at the request of the party who requested the conference; or

(3) [(C)] at the mutual request of the parties.

(c) The division may reschedule a benefit review conference at any time before the benefit review conference:

(1) on its own motion, or

(2) at the request of a party.

(d) [(3)] A request for cancellation or rescheduling under subsection (b) or (c) of this section [paragraph (2)(B) or (C) of this subsection] shall be made by notifying the division in writing, with a copy to all parties, 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.]~~

(1) The first request to reschedule a benefit review conference under this subsection (d) does not have to demonstrate good cause for the request but must comply with §140.9 of this title.

(2) [(4)] A request to reschedule or cancel a benefit review conference made outside of the 10-day period, as well as all subsequent rescheduling requests under subsection (c) of this section by any party, [Cancellation or rescheduling requests under paragraph (2)(B) or (C) of this subsection made after the unrestricted cancellation period defined in paragraph (3) of this subsection] must:

(A) be in writing and in the form prescribed by the division;

(B) demonstrate good cause for canceling or rescheduling, as defined by ~~paragraph (1) of this~~ subsection (a) of this section; ~~and~~

(C) be sent to the division and opposing party or parties no later than five days before the scheduled benefit review conference unless good cause is demonstrated for filing later; ~~and~~[-]

(D) comply with the requirements of §140.9 of this title.

(3) A claimant who is neither represented by an attorney nor assisted by OIEC may request that a benefit review conference be rescheduled or cancelled by contacting the division in any manner.

(4) [(5)] A cancellation of a benefit review conference without simultaneous rescheduling constitutes a withdrawal of the dispute on the issue. A request to cancel a benefit review conference subject to §130.12 of this title (relating to Finality of the First Certification of Maximum Medical Improvement and/or First Assignment of Impairment Rating) must comply with the provisions of §130.12(b)(3) of this title.

(5) Unless otherwise directed by a presiding officer, a party opposing the rescheduling or cancellation of a benefit review conference must file any written opposition with the division within three days of receiving the cancellation or rescheduling request.

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

(7) If the benefit review officer denies a request to cancel or reschedule a benefit review conference under this section, the benefit review officer will notify the parties in writing and state the reasons for the denial.

**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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