

**CHAPTER 148: HEARINGS CONDUCTED BY THE STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

28 TAC §§148.1 - 148.8, 148.10, 148.11, 148.13 - 148.17, and 148.19 - 148.24

1. INTRODUCTION.

The Texas Department of Insurance, Division of Workers' Compensation (Division) adopts amendments to 28 TAC §148.1, concerning Definitions; §148.2, concerning Scope and Applicability; §148.6, concerning Venue; §148.7, concerning Representation; §148.8, concerning Withdrawal of Hearing Request; §148.10, concerning Hearings Subpoenas to Compel Attendance and Subpoenas Duces Tecum; §148.11, concerning Commissions to Compel Attendance for Deposition; §148.13, concerning Recording the Hearing, §148.14, concerning Burden of Proof; §148.15, concerning Final Decision by the ALJ; §148.16, concerning Proposal for Decision or Order by the ALJ; §148.17, concerning Special Provisions for Administrative Penalties; §148.19, concerning Transcript or Duplicate of the Hearing Audiotape or Videotape; §148.20, concerning Reimbursement, Travel Expenses, and Fees for Witnesses and Deponents; §148.21, concerning Expenses to be Paid by Party Seeking Judicial Review; §148.22, concerning Failure to Appear or Comply with Order or Decision, Administrative Violation; and §148.23, concerning Division Enforcement of Orders.

The Division adopts new §148.3, concerning Requesting a Hearing; new §148.4, concerning Correction of Clerical Error; new §148.5, concerning Notice of Hearing; and new §148.24, concerning Confidentiality of Records.

These sections are adopted with changes to the proposed text published in the March 28, 2014 issue of the *Texas Register* (39 TexReg 2235). There was not a request for a public hearing submitted to the Division. The public comment period closed on April 28, 2014, and the Division received three written comments. The Division made changes to §148.3(d)(3) and (6), and §148.3(h) in response to

written comments. In addition to the changes made as a result of comments, the Division made nonsubstantive amendments to Chapter 148 to delete the section titles for each Labor Code and Government Code citation. None of the changes made in this adoption to the proposed text materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

In a separate, simultaneous adoption, the Division is adopting the repeal of §148.3, concerning Requesting a Hearing; §148.4, concerning Correction of Clerical Error in Medical Review Division Decisions or Orders Absent a Request for Hearing; §148.5, concerning Notice of Hearing; §148.9, concerning Informal Disposition; §148.12, concerning Ex Parte Communications; and §148.18, concerning Record of the Hearing, which is also published in this issue of the *Texas Register*.

In a separate, simultaneous adoption, the Division is adopting the repeal of §149.1, concerning Definitions; §149.2, concerning General Statement, §149.3, concerning Referral of Contested Cases to SOAH; §149.4, concerning Notice of Hearing; §149.5, concerning Hearings; §149.6, concerning Confidentiality of Records; §149.7, concerning Action Upon Withdrawal of Decision; §149.8, concerning Final Orders in Accordance with the Act §§411.049, 413.031, 413.055, and 415.034; §149.9, concerning Proposals for Decision in Accordance with the Act, §§402.072, 407.046, and 408.0231; and §149.10, concerning Custody of the Hearing Record.

2. REASONED JUSTIFICATION.

The adopted new sections and amendments are necessary to implement House Bill (HB) 2605, 82nd Legislature, Regular Session, effective September 1, 2011. The entire adoption order is part of the reasoned justification for the new and amended sections. HB 2605, in part, amended Labor Code §§402.073, 413.0311, 415.033, 415.034, and 415.036; and added Labor Code §§413.0312, 415.0211, and 504.055. Labor Code §402.073, in part, requires the State Office of Administrative Hearings (SOAH)

to enter a final decision in medical fee disputes and interlocutory orders and to propose a decision to the Commissioner in all other cases. Labor Code §413.0312, in part, provides that SOAH shall conduct medical fee disputes. Labor Code §413.0311 provides that the Division shall conduct contested case hearings of independent review organization (IRO) decisions regarding medical necessity disputes, rather than SOAH. Labor Code §415.0211 provides procedures for emergency cease and desist orders, including a hearing before SOAH and a 30-day filing deadline. Labor Code §415.033 requires the Division to initiate enforcement proceedings if a charged party fails to respond to the notice of possible administrative violation. Labor Code §415.034 requires SOAH to set a hearing on a possible administrative violation if requested by either the charged party or the Division. Labor Code §415.036 provides for a Commissioner's order to be reviewed under the substantial evidence rule. Labor Code §504.055 provides for expedited procedures for emergency first responders, including expedited contested case hearings regarding denial of a claim for medical benefits.

HB 2605 also adopted new provisions on cease and desist orders and motions for rehearing in certain cases, clarified procedures for default judgments, and deleted provisions concerning IRO medical necessity disputes and the hazardous employer program.

The Labor Code was amended by HB 7, 79th Legislature, Regular Session, effective September 1, 2005. Article 7, Section 7.01(24) of HB 7 repealed Labor Code §§411.041 - 411.050, the Hazardous Employer Program. The Division subsequently repealed its rules for the Hazardous Employer Program in 2009 (*34 TexReg 7314*). Amendments to Chapter 148 correspondingly delete references to the Hazardous Employer Program.

Section 148.1 addresses **Definitions**. Amended §148.1(2) deletes "Administrative Law Judge" from the defined term, and deletes the acronyms "(ALJ)" and "(SOAH)" to remove redundancies and for clarity.

Amended §148.1(4) defines the term “Chief Clerk of Proceedings.” This definition includes the elements of the definition of “TWCC Chief Clerk” in existing §148.1(13), concerning Definitions, which is deleted.

The definition of “Commission Representative” in existing §148.1(5) is deleted because the definition is redesignated as “Division Representative” in new §148.1(6) to maintain the alphabetical order in the section.

Existing §148.1(6) is redesignated as amended §148.1(5) and defines the term “contested case.” The existing phrase “subject, however, to the provisions of the Act as codified in the Texas Labor Code, Title 5, Subtitle A, including §§401.021(1), 411.049, 413.031, 413.055, 415.034, 402.073, 407.046, and 408.0231, 408.023, 408.024 and the rules adopted by the commission, in particular this chapter” was deleted to make the adopted definition mirror the definition of “contested case” in Government Code §2001.003(1). The Labor Code citations in existing §148.1(6) are redundant and therefore deleted. Also, the deletion of the reference to Labor Code §411.049 is necessary because that section was repealed in HB 7, 79th Legislature, Regular Session, effective September 1, 2005.

New §148.1(6) defines “Division Representative” as “the attorney or any representative that may be designated by the Commissioner or his designee to represent the division” and is necessary to conform to the proper name of the agency under Labor Code §402.001(b).

Existing §148.1(10) is redesignated as amended §148.1(9) and defines the term “Petitioner.” The amended definition of “petitioner” is necessary to clarify which party has the burden of proof at SOAH. Under amended §148.1(9), the Division is the petitioner when it seeks to impose a sanction or has issued an emergency cease and desist order, and, in all other cases, the petitioner is the party who filed a written request for a hearing.

Existing §148.1(11) is redesignated as amended §148.1(10) and defines the term “Respondent.” The definition of “Respondent” in amended §148.1(10) is necessary to clarify that the respondent is the opposing party when the Division seeks to impose a sanction or has issued an emergency cease and desist order in a contested case. In all other cases the respondent is the person responding to the petitioner’s request for a hearing.

The definition in existing §148.1(13) of “TWCC Chief Clerk” is deleted because the term is updated to conform to current agency terminology. The new term, “Chief Clerk of Proceedings,” is redesignated as new §148.1(4).

Section 148.2 addresses **Scope and Applicability**. Amended §148.2 is reorganized for clarification and consistency with Labor Code §402.073, as revised by HB 2605, 82nd Legislature, Regular Session, effective September 1, 2011.

Amended §148.2(a) clarifies that Chapter 148 governs contested case hearings before SOAH as authorized by the Texas Workers’ Compensation Act. The phrase “Except for benefit disputes, governed by chapters 140, 142, and 143 of this title (concerning Dispute Resolution-General Provisions; Dispute Resolution-Benefit Contested Case Hearing; and Dispute Resolution-Review by the Appeals Panel), these rules govern all” is deleted those disputes are heard by the division. Laws concerning benefit dispute resolution are found elsewhere in Labor Code including Chapter 410 and 28 TAC Chapters 140, 141, 142, 143, 144, and 147. Inclusion of the citations in the adopted rules would be repetitive and are therefore deleted. The phrase “This chapter governs” is added to clarify the scope of the chapter. The replacement of the word “to” with the word “which,” the deletion of the word “the,” and the replacement of the word “arising” with the phrase “as authorized,” are clarifying changes.

Amended §148.2(b) adds the phrase “This chapter governs” to replace the phrase “The procedural rules of the commission govern” for clarity, adds the word “provides” to replace “provide,” and adds “division on the following” to replace “commission” for clarity.

New §148.2(c)(1) is necessary to clarify that Government Code, Chapter 2001 applies to contested case hearings under Labor Code §§407.046, 407A.007, 413.031, 413.0312, 413.055, 415.0211, and 415.034.

Amended §148.2(c)(2) provides that Labor Code §401.021(1) applies to contested case hearings that are not specified in adopted §148.2(c)(1). The phrase “all other contested case” is added after “apply to” for clarity. The references to Labor Code §§402.072, 407.046, 408.0231, and 402.073(b) are deleted because they are unnecessary as the amended provision explains the applicability.

New §148.2(c)(3) clarifies that the Administrative Law Judge renders the final decision in medical fee disputes and interlocutory orders, as required by Labor Code §402.073(b).

Amended §148.2(c)(4) clarifies that the Commissioner renders the final decision in all other cases not covered by §148.2(c)(3). This provision is necessary to clarify the division of responsibilities and authority between the Division and SOAH.

Section 148.3 addresses **Requesting a Hearing**. Section 148.3 is reorganized into subsections for hearings requested by the Division, hearings requested by other parties, determining the date filed or received by the Chief Clerk of Proceedings, deadlines for filing, special requirements for filing medical fee disputes, special provisions for enforcement actions (notices of violation), late filings, and delivering the request for hearing to SOAH.

New §148.3(a) contains the requirements of existing §148.3(i), concerning Commission Request for Hearing, and deletes the references to Labor Code §407.046(b) and §411.0415(c). Labor Code §411.0415(c) is deleted because it was repealed in HB 7, 79th Legislature, Regular Session, effective

September 1, 2005. The reference to Labor Code §407.046(b) is included in the reference to “the Act,” so it is redundant and therefore deleted.

New §148.3(b) provides that other parties may request a hearing before SOAH and includes the requirements in existing §148.3(a), in part, with updated terminology. The requirement in existing §148.3(a) that a person requesting a hearing before SOAH follow the instructions in the notice letter regarding submission of an appeal is deleted because requirements are set forth in Labor Code statutes, including §§413.0312, 413.055, 415.032, and 415.034. The requirements in existing §148.3(a) are also in Division rules including §§148.3, concerning Requesting a Hearing; 133.306, concerning Interlocutory Orders for Medical Benefits; 133.307, concerning MDR of Fee Disputes; 180.8, concerning Notices of Violation; Notices of Hearing; Default Judgments; and 180.10, concerning Ex Parte Emergency Cease and Desist Orders.

New §148.3(c) contains the requirements of existing §148.3(b). The sentence “The request for hearing will be forwarded to the division’s Chief Clerk of Proceedings, but this may result in delay of processing the request” is added. The sentence was added to clarify that not properly addressing the request for a hearing may result in a processing delay because of the time required for the request to be delivered to the Chief Clerk of Proceedings.

New §148.3(d)(1) contains the 20-day deadline in existing §148.3(a)(1) for a medical fee dispute and adds a reference to Labor Code §413.0312. Labor Code §413.031 and §413.0312 are cited together and jointly referred to throughout the rule text because they are both related to medical fee disputes.

New §148.3(d)(2) contains the 20-day deadline in existing §148.3(a)(5) for an administrative violation and adds a reference to §180.8, adopted effective February 14, 2013. The addition of the reference to §180.8 is necessary because it is the rule governing procedures for notices of violation.

New §148.3(d)(3) contains a 20-day deadline for an interlocutory order. In response to comments, the Division changed the timeframe in the proposal from 30 days back to the existing timeframe of 20 days after receipt of an interlocutory order for consistency with other deadlines in the section and to conform to *Commercial Life Ins. Co. v. Tex. State Bd. Of Ins.*, 774 S.W.2d 650, 651 and 652 (Tex.1989) and *Frank v. Lib. Ins. Corp.*, 255 S.W.3d 314, 317-18 and 325-26 (Tex. App. – Austin, 2008, pet. den.). *Commercial Life* held that the time period for filing a motion for rehearing does not commence until the agency complies with its statutory duty to notify the parties of the order or decision. *Frank* held that the time period for filing a request for review with the appeals panel does not commence until both a party and their attorney have been notified of a decision.

New §148.3(d)(4) adds a 30-day deadline for filing a request for hearing on an emergency cease and desist order to conform to the requirements of Labor Code §415.0211(c).

New §148.3(d)(5) contains the 20-day deadline in existing §148.3(a)(3) for requesting a hearing on a refund order issued pursuant to a Division audit or review.

New §148.3(d)(6) requires requests for a hearing to be filed 20 days after receipt of notice of the action unless specified in other law or specified under §148.3(d). In response to comments, the Division changed the phrase “date of the action” to “receipt of notice of the action.” The change was necessary for consistency with other deadlines in the section and to conform to *Commercial Life Ins. Co. v. Tex. State Bd. Of Ins.*, and *Frank v. Lib. Ins. Corp.*, discussed above. Twenty days after receipt of notice is the standard deadline for all types of hearings under §148.3(d) other than for emergency cease and desist orders, and if a different specific deadline exists in another statute or rule, that more specific deadline would prevail.

The deadlines in existing §148.3(a)(2) and (6), regarding notice of identification as a hazardous employer and receipt of an IRO decision, are deleted. This is necessary because 28 TAC §§164.1 -

164.18, concerning the Hazardous Employer Program, were repealed in 2009 due to the repeal of Labor Code §§411.041 - 411.050 in HB 7, 79th Legislature, Regular Session, effective September 1, 2005.

Appeals of IRO decisions regarding determination of medical necessity are heard by TDI hearing officers, not SOAH, as required by Labor Code §413.0311, which was amended by HB 2605, 82nd Legislature, Regular Session, effective September 1, 2011.

New §148.3(e) mirrors the requirements in existing §148.3(c) for requests for hearing under Labor Code §413.031 and §413.0312. The request for hearing must (1) contain a statement indicating that it is a request for hearing; (2) include a copy of the findings and decision on which a hearing is being requested; (3) include a verification of the date of the conclusion of the Benefit Review Conference; (4) be signed by a requestor, respondent, or its representative; and (5) include a certificate of service.

New §148.3(f)(1) mirrors the requirements in existing §148.3(h) regarding notices of violation and states that if a person receives a notice of violation, they must either file an answer and pay the amount of the sanction or file an answer and ask for a hearing. The word “alleged” is deleted before the word “violation” in the title, and the word “penalty” is replaced with “sanction” to more closely track statutory language in Labor Code §415.032 and §415.0215.

New §148.3(f)(2) provides that if the person charged with an administrative violation does not file an answer to the notice of violation, the Division will schedule a hearing at SOAH. New §148.3(f)(2) is necessary to conform to 28 TAC §180.8, concerning Notices of Violation; Notices of Hearing; Default Judgments.

New §148.3(g) includes the requirements of existing §148.3(d) and adds a good cause exception to the dismissal of a late filing. New §148.3(g) provides that the Division shall send a letter to the requestor informing the requestor that the untimely request will be dismissed unless the requestor provides information of timely filing or good cause for untimely filing within 10 working days of the date of the

letter. Title 28 TAC §102.3(b), concerning Computation of Time, defines “working day.” New §148.3(g) provides that if the requestor responds with information about timely filing or good cause, the Chief Clerk of Proceedings will send the request for a hearing and the additional filing or good cause information to SOAH. If the requestor does not respond to the first letter within the time required, the Division will send a dismissal letter to the requestor. The SOAH ALJ will dismiss a request for hearing if the ALJ determines it to have been filed later than the deadline date without good cause. New §148.3(g) was revised in response to an informal comment and is necessary to provide procedures to resolve late filing disputes. It is anticipated that the procedures of §148.3(g) will be utilized in a small number of cases.

New §148.3(h) provides the reasons the Division will not deliver a request for a hearing to SOAH. New §148.3(h) includes the requirements of existing §148.3(g). The request will not be delivered if it has been withdrawn, dismissed for late filing under new §148.3(g), or if additional time is necessary to correct a clerical error discovered by the Division or a party.

New §148.4 addresses **Correction of Clerical Error**. New §148.4 combines existing §148.3(e), concerning Request for Correction of Clerical Error, and existing §148.4, concerning Correction of Clerical Error in Medical Review Division Decisions or Orders Absent a Request for Hearing, into a single section. The Division determined that two separate corrections of clerical error sections in the existing rules are unnecessary because they are redundant.

New §148.4(a) includes the requirements of existing §148.4(a) and (e), in part, and provides that the Division may correct clerical errors that it discovers at any time. New §148.4(a) adds the requirement that the Division notify the parties of a clerical error and give the parties an opportunity to object, which is necessary to give the opposing party due process and to ensure fairness and accuracy. New §148.4(a) also adds that the Division may enter a nunc pro tunc order after a decision has become final, which is necessary to clarify that the Division has the authority to correct its own mistakes at any time. New

§148.4(a) removes the requirement from existing §148.3(f) that the Division may only revise an order or decision to correct a clerical error prior to delivery of the request for a hearing to SOAH because new §148.4(a) provides that the Division may enter a nunc pro tunc order after an order or decision has become final and existing §148.3(f) would be in conflict with new §148.4(a).

New §148.4(b) includes the requirements of existing §148.4(a) that authorizes a party to request correction of a clerical error and adds a requirement that the request be made before an order or decision becomes final. A request must be made before the decision becomes final because parties need finality to (1) be able to appeal an order or decision or comply with the order or decision, (2) pay administrative penalties, or (3) modify their practices. The requirements in existing §148.4(b) for a request for correction of clerical error is not included in new §148.4(b) because a specific format is not necessary for the Division to correct a clerical error in a decision or order.

New §148.4(c) outlines the information that must be included in the notification letter the Division sends to the parties when a clerical correction is made. The letter must include the date of the original order, the erroneous part as originally stated, the corrected portion as it reads corrected, and the signature of the authorized Division personnel. This letter notifies the parties that a correction has been made and gives them notice in case there is further error. The letter thus completes the correction process, is a record that a specified correction has been made, and ensures accuracy in case further correction needs to be made.

The requirement in existing §148.4(f)(1) that any party affected by the order or decision may file a response with the medical review decision no later than 10 days after receipt of notice, is not included in new §148.4 because the order or decision may become final in less than 10 days by the time an error is discovered.

The requirement in existing §148.4(f)(2)(A) and (B) that the Commissioner either issue a corrected order or decision, advise the parties by verifiable means that the original order was correct, or advise the parties by verifiable means that the order cannot be corrected is not included in new §148.4. Removal of the requirement that the Commissioner advise the parties by verifiable means is deleted because it restricts the ability for the Division to call parties for clarification and is unnecessary because the parties already receive notice. The parties receive notice of the possible error, are given the opportunity to object, and receive notice of a correction after it is made under new §148.4.

The requirement in existing §148.4(g), that a request to correct clerical error shall not be deemed a request for hearing unless it complies with the requirements specified in existing §148.3(e), concerning Requesting a Hearing, is not included in new §148.4 because the requirements to request a hearing are set forth in new §148.3.

Section 148.5 addresses **Notice of Hearing**. New §148.5(a) includes the requirements in existing §148.5, concerning Notice of Hearing, and is reorganized for clarity.

New §148.5(a) requires the Chief Clerk of Proceedings to notify the parties of a hearing by verifiable means at least 10 days before the hearing at SOAH. This is consistent with Government Code §2001.051(1). New §148.5(a) also requires SOAH to send notice of a hearing to revoke a certificate of self-insurance not later than 30 days before the hearing date, as required by Labor Code §407.046(c).

New §148.5(b) provides the contents of a notice of hearing. It mirrors the requirements of existing §148.5(a).

New §148.5(c) allows some of the information required by new §148.5(b) to be provided by a Division representative, in lieu of the Chief Clerk of Proceedings. The same authorization is in existing §148.5(a).

New §148.5(d) provides that a person who receives a notice of a hearing on an administrative violation must file a written response within 20 days of receipt, as required by Labor Code §415.032(b) and 28 TAC §180.8(c).

New §148.5(e) includes the requirements of existing §148.5(b) concerning Notice of Hearing under Labor Code §407.046(b). Labor Code §407.046(b), existing §148.5(b) and new §148.5(e) all require SOAH to give 30 days notice of a hearing to revoke a certificate of authority to self-insure.

Section 148.6 addresses **Venue**. Amended §148.6 clarifies that hearings held under Chapter 148 are held in Austin, Travis County, Texas.

Section 148.7 addresses **Representation**. Amended §148.7(d) clarifies that nothing in the rules limits assistance available under Labor Code §404.105. Further, amendments to subsection (d) correct the reference to the ombudsman program from Labor Code, Chapter 409, Subchapter C, to Labor Code §404.105 because Subchapter C was redesignated to Subchapter D, Chapter 404, Labor Code, in HB 7, 79th Legislature, Regular Session, effective September 1, 2005.

Amended §148.7(e) deletes the phrase “a violation of this section shall be deemed a violation of a commission rule” in existing §148.7(e) because it is redundant.

Section 148.8 addresses **Withdrawal of Hearing Request**. Amended §148.8(a) clarifies that the petitioner may withdraw its request for a hearing by sending the request to both the Chief Clerk of Proceedings and to SOAH. This change is necessary to clarify that a requesting party must submit the request to the Chief Clerk of Proceedings and to SOAH in order to assure the correct party receives the withdrawal. It is anticipated that the procedures of §148.8 will be used in a small number of cases.

Amended §148.8(b) deletes references to SOAH appeals of IRO decisions because Labor Code §413.0311 provides that a Division Hearings Officer, and not SOAH, hears appeals of IRO decisions.

Section 148.10 addresses **Hearings Subpoenas to Compel Attendance and Subpoenas Duces Tecum**. Amended §148.10 contains nonsubstantive editorial revisions which are discussed in the early part of this introduction. Section 148.10 outlines subpoena issuance and requests and remedies for failing to comply with a subpoena.

Amended §148.11 addresses **Commissions to Compel Attendance for Deposition**. Amended §148.11(d) adds the phrase “made by” before “certified check” for clarity.

Amended §148.11(d)(4) changes the word “should” to “shall” to add the requirement that the party seeking the commission requiring deposition coordinate the location and time of attendance for witnesses. “Should” is replaced by “shall” in this adoption to eliminate any ambiguity because coordinating the time and location for witnesses is already required under existing §148.11(d)(4) and is consistent with the Division’s reasoned justification for the adoption of existing §148.11(d)(4) in the June 3, 2005, issue of the *Texas Register* (30 TexReg 3240). Coordination with the opposing party promotes efficiency and prevents unnecessary conflicts.

Amended §148.11(d)(4) substitutes the phrase “by mutual agreement with the parties and witness” with “by mutual agreement of the parties and witness” for clarity.

Amended §148.13 addresses **Recording the Hearing**. Nonsubstantive editorial revisions which are discussed in the early part of this introduction are adopted in §148.13, which outlines the procedures for arranging for court reporters and recording by a party.

Amended §148.14 addresses **Burden of Proof**. Nonsubstantive editorial revisions which are discussed in the early part of this introduction, are adopted in §148.14. Adopted §148.14(a) is formatted into subsections (a) – (d) for purposes of clarity. The phrase in previous §148.14(a) that states “pursuant to the Act §§402.072, 408.0231, 411.0415, 411.049, 415.021, 415.023, 415.032, and 415.034, (except

issues under §120.2(g) and (h) of this title, concerning Employer's First Report of Injury)” is deleted because it references existing law, and is, therefore, unnecessary.

Amended §148.14(a) includes the requirements of existing §148.14(a) and clarifies that the Division has the burden of proof in a contested case in which the Division seeks to impose a sanction or has issued an emergency cease and desist order. This clarification is necessary because the Division is the party seeking sanctions and changes in behavior from the other party. To put the burden of proof on the other party would require them to prove a negative, in other words, to prove that they weren't doing something they were accused of doing.

Amended §148.14(b) includes the requirements of existing §148.14(a) and adds a citation to Labor Code §413.0312.

Amended §148.14(c) includes the requirements of existing §148.14(a) and adds a reference to Labor Code §407.043 to clarify who has the burden of proof in a hearing on the denial of an application for a certificate of authority to self-insure.

Amended §148.14(e) includes the requirements of existing §148.14(b) and deletes the existing phrase “except in cases of appeals pursuant to §133.308 of this title (concerning Medical Dispute Resolution by Independent Review Organization) in which case the decision of the IRO shall be given presumptive weight.” Section 148.14(e) is necessary because IRO hearings are not heard by SOAH under Labor Code §413.0311.

Section 148.15 addresses **Final Decision by the ALJ**. Amended §148.15(a) includes the requirements of existing §148.15(a) and adds the requirement that “The ALJ shall adjourn the hearing after all evidence has been received.” Existing §148.15(a) provides that “after all evidence has been heard, the ALJ shall adjourn the hearing.” “Received” is a more accurate term than “heard” because evidence can be presented orally, in writing, by demonstrable evidence, and by other means. Amended

§148.15(a) concerns medical fee disputes and interlocutory orders, as required by Labor Code §402.073(b) and (c). References in existing §148.15(a) to Labor Code §411.049 and §415.034 are deleted because §411.049 was repealed in 2005 and §415.034 concerns hearing procedures on notices of violation, which are addressed in §148.16, concerning Proposal for Decision or Order by the ALJ.

Amended §148.15(b) adds a new heading “Decision or Order that May Become Final,” deletes the previous heading “Entry of orders” and provides that the ALJ shall issue a decision or order that may become final as required by Labor Code §402.073(b). The requirements in existing §148.15(b) are included in amended §148.15(c).

Amended §148.15(c) adds the heading “Contents of Decision or Order that May Become Final,” and clarifies the requirements for a decision or order that may become final. The requirements in existing §148.15(b) regarding an administrative penalty is deleted because sanctions are addressed in amended §148.16. The reference to 28 TAC §102.5, concerning General Rules for Written Communications To and From the Commission, in existing §148.15(c) is deleted because 28 TAC §102.5 applies to all communications to and from the Division except as otherwise provided.

Amended §148.15(d) adds “Decision or Order that May Become Final” to the heading, deletes “decision,” and adds the phrase “decision or order that may become final” to be consistent with the language of the APA, Government Code §§2001.141 – 2001.146, concerning motions for rehearing.

Amended §148.15(e) addresses procedures for motion for rehearing. Amended §148.15(e) provides that Government Code, Chapter 2001, Subchapter F, governs motions for rehearing and prerequisites for appealing a decision or order.

Amended §148.15(f) includes the requirements of existing §148.15(d) but provides that the finality of a decision or order is determined by the factors in Government Code §2001.144. The reference to 28 TAC §102.5, concerning General Rules for Written Communications To and From the Commission in

existing §148.15(d) is deleted because the finality of an order or decision is determined by the factors in Government Code §2001.144(a)(1) - (4), not by receipt of notice. Title 28 TAC §102.5 applies to all communications to and from the Division. Text was added to provide an exception to Government Code §2001.144 “except as provided by Labor Code §413.031 and 28 TAC §133.307 (concerning MDR of Fee Disputes),” because a different procedure is provided by Labor Code §413.031 and 28 TAC §133.307 for appeals of medical fee disputes. A party seeking judicial review of a medical fee dispute must file suit no later than the 45th day after the date SOAH mailed the party the notice of the decision. Government Code §2001.176 requires a party seeking judicial review of a contested case to file suit no later than the 30th day after the date on which the decision that is the subject of the complaint is final and appealable.

Amended §148.15(g) provides that the notification to a party of the ALJ's decision or order that has become final under Government Code §2001.144 constitutes exhaustion of administrative remedies, except as provided by Labor Code §413.031 and 28 TAC §133.307 (relating to MDR of Fee Disputes). The exception was added because of the different procedure provided by Labor Code §413.031 and 28 TAC §133.307 for appeals of medical fee disputes and discussed in the paragraph on §148.15(f). The provision that “a motion for rehearing will not be entertained” was deleted because a motion for rehearing is required for cases under Labor Code §§413.031, 413.0312, and 413.055.

Amended §148.15(h) provides that a party dissatisfied with a final decision or order of the ALJ may seek judicial review as provided by the Act and the APA and in accordance with Labor Code §413.031 and 28 TAC §133.307 (relating to MDR of Fee Disputes). The references to Labor Code §413.031 and 28 TAC §133.307 (relating to MDR of Fee Disputes) were added because of the different procedure provided by Labor Code §413.031 and 28 TAC §133.307 for appeals of medical fee disputes and discussed in the paragraph on §148.15(f).

Section 148.16 addresses the **Proposal for Decision or Order by the ALJ**. Amended §148.16(a) conforms to Labor Code §402.073(b) and (c). The references to “§§402.072, 407.046, and 408.0231, and in other cases not subject to §402.073(b) of the Act (relating to Cooperation with SOAH)” in existing §148.16(a) are deleted because they are included in cases not governed by §148.15 as stated in amended §148.16(a). Amended §148.16(a) provides that the ALJ shall adjourn the hearing after all evidence has been received to replace the requirement that the hearing be adjourned after all evidence is “heard” in existing §148.16(a). “Received” is a more accurate term than “heard” because evidence can be presented orally, in writing, by demonstrable evidence, and by other means.

Amended §148.16(b) includes the requirements for a proposal or order in existing §149.9, concerning Proposals for Decision in Accordance with the Act, §§402.072, 407.046, and 408.0231. Amended §148.16(b) adds the requirement that the ALJ make findings of fact on the ability of a party to pay a proposed sanction or bonding amount, if evidence is presented on that issue. Such findings of fact give the Commissioner the ability to consider the indigence of a respondent in a case. This does not create any new factors for the Commissioner to consider in addition to the criteria and requirements of Labor Code §415.021 or 28 TAC §180.26.

Amended §148.16(c) includes the requirements of existing §148.16(c) but deletes the requirement that the Chief of Staff and General Counsel receive notice of a proposal for decision from the TWCC Chief Clerk because it is not necessary to outline the Division’s internal communication processes by rule.

Amended §148.16(d) adds the requirement that any briefs or exceptions or replies to such filed with SOAH must also be filed with the Chief Clerk of Proceedings. Amended §148.16(d) deletes procedures for filing briefs and exceptions because procedures for filing briefs and exceptions are in the SOAH rules, 1 TAC §155.507. The reference to 28 TAC §102.5, concerning General Rules for Written

Communication To and From the Commission, in existing §148.16(d), is deleted because 28 TAC §102.5 already generally applies to all Division communication, and inclusion of the citation would be redundant.

Amended §148.16(e) adds a process for a party to submit a request for a Commissioner hearing to consider arguments within 10 days after SOAH issues the proposal for decision or order. The Commissioner may decide to hold a hearing to consider arguments because the Commissioner may need to more fully understand the position of the parties in a case. Subsections 148.16(e)(1), (2), and (3) provide the procedures for the hearing. It is anticipated that the Commissioner will convene a hearing to consider oral arguments in only a small percentage of cases.

Existing §148.16(e) concerning replies to a brief and exceptions is deleted because procedures for replying to briefs and exceptions are in the SOAH rules, 1 TAC §155.507, and inclusion of the requirement in these rules would be redundant.

Amended §148.16(f) provides that the Commissioner shall issue a decision or order that may become final in cases involving a revocation of authority to self-insure, a hearing on group self-insurance coverage, emergency cease and desist orders, and administrative violations. Amended §148.16(f) provides that in all other cases the Commissioner shall issue a final decision or order. Amended §148.16(f) is necessary to conform to the requirements in Labor Code §§407.046, 407A.007, 415.0211, and 415.034; and Government Code §2001.144.

Amended §148.16(g) provides that a motion for rehearing is a prerequisite for filing an appeal in cases under §148.16(f), as required by Government Code §2001.145.

Amended §148.16(h) requires the Chief Clerk of Proceedings to notify the parties by verifiable means of the final decision or order of the Commissioner and is necessary because notification is the essential element of the exhaustion of administrative remedies in amended §148.16(i). This requirement is in existing §148.16(f).

Requirements in existing §148.16(f) for a decision by the Commission in an open meeting within 120 days after the SOAH proposal for decision is delivered is deleted to conform to current agency procedure under Labor Code §402.00115. Existing §148.16(f) requires the “commission” to decide all cases at a posted meeting of the “commission.” This was the procedure of the Texas Workers’ Compensation Commission, which had six Commissioners and had to make decisions in an open meeting under the Open Meetings Act.

Amended §148.16(i) deletes the phrase “no motion for rehearing will be considered” because it conflicts with new §148.16(g). New §148.16(g) provides, in part, that a motion for rehearing may be filed in contested cases under §148.16. New §148.16(g) further provides, in part, that a motion for rehearing is a prerequisite for filing an appeal of a decision or order under Labor Code §§407.046, 407A.007, 415.0211, or 415.034.

Section 148.17 addresses **Special Provisions for Administrative Penalties**. Nonsubstantive editorial revisions discussed in the early part of this introduction are adopted in §148.17, which outlines the procedures for a party to respond to an assessment of a sanction to either pay the amount of the sanction or post a bond.

Section 148.19 addresses **Transcript or Duplicate of the Hearing Audiotape or Videotape**. Nonsubstantive editorial revisions discussed in the early part of this introduction are adopted in §148.19, which outlines the procedures for a party to obtain a transcript, audio, or video recording of the hearing.

Section 148.20 addresses **Reimbursement, Travel Expenses, and Fees for Witnesses and Deponents**. Nonsubstantive editorial revisions discussed in the early part of this introduction are adopted in §148.20, which outlines the procedures for reimbursement, payment of travel expenses, and payment of fees for witnesses and deponents.

Section 148.21 addresses **Expenses to be Paid by Party Seeking Judicial Review**.

Nonsubstantive editorial revisions discussed in the early part of this introduction are adopted in §148.21, which outlines the procedures for the Division to send a certified copy of the record of a proceeding to a reviewing court and for the assessment of the cost of preparing the record to the party seeking judicial review.

Section 148.22 addresses **Failure to Appear or Comply with Order or Decision, Administrative Violation**. Adopted §148.22 deletes the sentence “Failure to comply with such order or decision shall be deemed a violation of a commission rule” because the first sentence of the section already states that “A person commits an administrative violation if that person...fails to comply with an order of the ALJ....” Inclusion of the sentence is redundant, and therefore the sentence is deleted.

Section 148.23 addresses **Division Enforcement of Orders**. Nonsubstantive editorial revisions discussed in the early part of this introduction are adopted in §148.23, which outlines the procedures for the enforcement of a final order of SOAH.

New §148.24 addresses **Confidentiality of Records**. Section 148.24 includes the requirements of existing §149.6 (concerning Confidentiality of Records), which is being repealed. Nonsubstantive editorial revisions discussed in the early part of this introduction are adopted in §148.24, which outlines the protection of confidential information by SOAH, requests for open hearings, the Division remaining the custodian of records, and the responsibilities of SOAH and the Division under the Texas Public Information Act, Government Code, Chapter 552.

3. HOW THESE SECTIONS WILL FUNCTION.

Section 148.1 addresses Definitions of words and terms as used in Chapter 148, unless the context clearly indicates otherwise.

Section 148.2 provides that the ALJ renders the final decision in medical interlocutory orders and medical fee dispute resolution and provides that the commissioner renders the final decision in all other cases.

Section 148.3 addresses Requesting a Hearing. Subsection (a) provides that the division may request a hearing before SOAH as provided by Government Code, Chapter 2001, Labor Code §§401.001 et. Seq., and division rules.

Subsection (b) provides that other parties may file requests for hearing before SOAH as provided in the Labor Code and division rules.

Subsection (c) updates the nomenclature for the rules providing when a request for hearing is deemed filed or received and clarifies what happens when a request for hearing is sent to an office other than the Chief Clerk of Proceedings.

Subsection (d) provides deadlines for filing a request for hearing before SOAH. It includes a 30-day filing deadline for emergency cease and desist orders as required by Labor Code §415.0211(c) and a 20-day deadline for medical fee disputes, administrative violations, interlocutory orders, division audit or reviews, and requests for hearing on matters unspecified in this section.

Subsection (e) requires specific information in a request for hearing on a medical fee dispute.

Subsection (f) contains procedures for notices of violation as required by Labor Code, Chapter 415, Subchapter C and §180.8 of this title (relating to Notices of Violation; Notices of Hearing; Default Judgments).

Subsection (g) provides that the Chief Clerk of Proceedings will dismiss a request for hearing filed later than the deadline date, except for good cause and except for a request for hearing on a notice of violation.

Subsection (h) provides for the Chief Clerk of Proceedings to deliver a request for hearing to SOAH within 20 days of receipt, except when withdrawn, dismissed, or held for correction of clerical error.

Section 148.4 addresses correction of clerical error. The section provides that the division may correct clerical errors that it discovers on its own as well as errors that are brought to its attention by a party and provides that the division may enter a nunc pro tunc order after a decision has become final. The section requires the division to provide notice and an opportunity to respond.

Section §148.5 addresses **Notice of Hearing**. Section 148.5 requires the Chief Clerk of Proceedings to give at least 10-days notice of a hearing at SOAH, as required by Government Code §2001.051(1). The section requires SOAH to send notice of a hearing to revoke a certificate of self-insurance not later than 30 days before the hearing date, as required by Labor Code §407.046(c). It provides that a person who receives a notice of hearing on an administrative violation must file a written response within 20 days of receipt.

Section 148.6 addresses venue. The amendment adds the clarification that hearings held under Chapter 148 are held in Austin, Travis County, Texas.

Section 148.7 addresses representation of parties in cases before SOAH. It provides that only attorneys or adjusters may receive a fee for representing an injured employee before SOAH.

Section 148.8 addresses withdrawal of hearing request. Subsection (a) provides that the petitioner may withdraw its request for a hearing by sending the request to both the Chief Clerk of Proceedings and to SOAH.

Section 148.10 provides the procedures for obtaining a subpoena to compel attendance and a subpoena duces tecum.

Section 148.11 provides procedures to obtain a commission to compel attendance for a deposition.

Section 148.13 provides for the Division to arrange for a court reporter when required and for a party to record a hearing.

Section 148.14 addresses burden of proof. Subsection (a) clarifies that the division has the burden of proof in a contested case in which the division seeks to impose a sanction or has issued an emergency cease and desist order.

Subsection (b) provides that the party seeking relief has the burden of proof in hearings on noncompliance with selection requirements, medical dispute resolution, and interlocutory orders.

Subsection (c) provides that the certified self-insurer has the burden of proof in hearings on denial of application, revocation of certificate of authority, suspension or revocation of certificate for failure to pay assessment, and challenging the position of the division.

Subsection (d) provides that the employer has the burden of proof in a contested case involving the timely filing of the employer's first report of injury.

Subsection (e) provides that the standard of proof is preponderance of the evidence.

Section 148.15. concerns final decision by the ALJ. Subsection (a) provides that this section concerns medical fee disputes and interlocutory orders.

Subsection (b) provides that the ALJ shall issue a decision or order that may become final under this section.

Subsection (c) provides that when a decision or order requires any action, it must contain a period of time for such action to be completed.

Subsection (d) provides that the decision or order will be sent immediately to the parties or their representatives.

Subsection (e) provides that Government Code, Chapter 2001, Subchapter F governs post decision procedures, including motions for rehearing and prerequisites for appealing a decision or order.

Subsection (f) provides that the finality of a decision or order is determined by Government Code §2001.144.

Subsection (g) provides that notification that a decision of order has become final constitutes exhaustion of administrative remedies.

Subsection (h) provides that a party may seek judicial review.

Section 148.16 addresses proposal for decision by the ALJ.

Subsection (a) provides that this section applies to all cases not covered by §148.15.

Subsection (b) provides the required elements of a proposal for decision or order. Subsection (c) provides that SOAH shall furnish the proposal for decision or order to the Chief Clerk of Proceedings and the parties.

Subsection (d) provides for the filing of briefs and exceptions to the proposal for decision.

Subsection (e) provides that the commissioner may decide to hold a hearing to consider arguments to allow the commissioner to more fully understand the position of the parties in a case.

Subsection (f) provides that the commissioner shall issue a decision or order that may become final in cases involving a revocation of authority to self-insure, a hearing on group self-insurance coverage, emergency cease and desist orders, and administrative violations. In all other cases the commissioner shall issue a final decision or order.

Subsection (g) provides the procedures for a motion for rehearing and provides that a motion for rehearing is a prerequisite for filing an appeal in cases under subsection (f).

Subsection (h) provides for the Chief Clerk of Proceedings to notify the parties of the final decision or order of the commission in their case.

Subsection (i) provides that notification to a party of the commissioner's final decision constitutes exhaustion of administrative remedies.

Subsection (j) provides for judicial review of a decision or order.

Section 148.17 requires parties who have been assessed a sanction to pay the sanction or post a bond within 30 days after notification of the assessment of the sanction.

Section 148.19 provides for a party to obtain a transcript or tape of the hearing upon request and payment.

Section 148.20 provides for reimbursement of expenses and payment of fees for witnesses and deponents.

Section 148.21 provides for payment of expenses by a party of the cost of preparing a certified record of a proceeding.

Section 148.22 provides that a party or witness commits an administrative violation if they fail to comply with an order of the ALJ.

Section 148.23 provides that a final order of SOAH is a final order of the Division and may be enforced accordingly.

Section §148.24 provides for the confidentiality of records and proceedings at SOAH.

4. SUMMARY OF COMMENTS AND AGENCY RESPONSES

General

COMMENT: A commenter stated that they are generally supportive of the proposed changes to the SOAH rules.

RESPONSE: The Division appreciates the supportive comment.

28 TAC §148.3(c)

COMMENT: A commenter stated that §148.3(c) should be changed to remove the distinction between a request addressed to the Chief Clerk of Proceedings and one not addressed to the Chief Clerk that is filed in an office other than the Chief Clerk's office.

RESPONSE: The Division disagrees and declines to make the suggested change. Section 148.3(c) mirrors existing §148.3(b). The terminology is updated, but no substantive changes have been made. The specific provisions are necessary to efficiently process requests for hearings within the time limits to request a SOAH hearing.

28 TAC §148.3(d)(1) and (e)

COMMENT: A commenter stated that §148.3(d)(1) and (e) should not require a request for hearing to be filed with the Chief Clerk of Proceedings to proceed to a hearing at SOAH. The parties will have been in a benefit review conference and should be able to proceed directly to a hearing without the need to file a request with the Chief Clerk of Proceedings. Since the Division will need to send SOAH a statement of matters asserted, the benefit review officer could have the parties agree on the undisputed facts and the Chief Clerk of Proceedings could submit this information as part of the statement of matters asserted when the Division requests the SOAH setting.

RESPONSE: The Division disagrees and declines to make the suggested change. The Division needs a request for a hearing in writing to be filed with the Chief Clerk. (1) Parties do not always know at the time of a BRC that they want a SOAH hearing. (2) The Division is required by Labor Code §413.002 to monitor participants in the workers' compensation system for compliance with rules and quality and timeliness of decisions. In some cases, such as provided by Labor Code §412.0312, the Division may participate in a contested case hearing if the hearing involves interpretation of fee guidelines. Central filing with the Chief Clerk allows closer tracking of request for hearing activity for monitoring and participation. (3) Title 1 TAC §155.51 provides that only the agency can refer a case to SOAH. (4) SOAH rules, Title 1 TAC §155.51 and §155.53, have very specific requirements in order for it to acquire jurisdiction. Section 155.51 of the SOAH rules provides that SOAH acquires jurisdiction when a referring agency files a Request to Docket Case form and the necessary documents. Those requirements can be

handled more efficiently by one Chief Clerk of Proceedings than it can by many separate benefit review officers.

28 TAC §148.3(d)(1) and (e)

COMMENT: A commenter proposed that §148.3(d)(1) and (e) should allow a request for hearing when the parties receive the copy of the findings and decision of the medical fee dispute rather than the conclusion of the benefit review conference. The commenter stated that the Division often takes a long time to issue the findings and decision. The commenter stated that the amount of time between the Division's request to set a hearing with SOAH and the initial SOAH set date is normally a minimum of 60 days. The commenter stated that the dispute resolution process is unnecessarily lengthened by the extra step of requiring the parties to file a written request for hearing after a benefit review conference.

RESPONSE: The Division disagrees and declines to make the suggested change. The commenter's proposal conflicts with the Labor Code procedure for resolving medical fee disputes. The findings and decision of the medical fee dispute is the documentation required to initiate a benefit review conference. The procedure required by Labor Code §413.031 and §413.0312 is to conduct a benefit review conference and then, if issues remain unresolved, to request a hearing with SOAH. Many issues are resolved in benefit review conferences.

28 TAC §148.3(d)(3) and (6)

COMMENT: A commenter stated that §148.3(d)(3) and (6) are inconsistent with the request for hearing deadlines for the rest of the rule. Most of the deadlines are tied to receipt of notification of the action appealed. The deadline in §148.3(d)(3) is tied to the date the interlocutory order is issued. The commenter stated that §148.3(d)(3) should be revised to provide that the time for requesting a hearing begins after the date of receipt of notice that the interlocutory order has been issued. The commenter

further stated that the deadline in §148.3(d)(6) should be revised to provide that the time for requesting a hearing begins after the date of receipt of notice of the action that the party is requesting a hearing on.

RESPONSE: The Division agrees. The deadline in §148.3(d)(3) is revised to 20 days after receipt of an interlocutory order. The deadline in §148.3(d)(6) is revised to 20 days after receipt of a notice of the action that the party is requesting a hearing on.

28 TAC §148.3(h)

COMMENT: A commenter stated that the proposed increase from 20 days to 30 days for the Chief Clerk of Proceedings to request a hearing from SOAH is excessive and would cause unnecessary delay in the dispute resolution process. The commenter suggests that at most the Chief Clerk of Proceedings should be given 10 business days to request the hearing.

RESPONSE: The Division agrees not to lengthen the time period for the Chief Clerk of Proceedings to request a hearing from SOAH. The adopted text retains the current 20-day time period.

28 TAC §148.5(a)

COMMENT: A commenter stated that they do not understand why the Division's Chief Clerk of Proceedings is sending out a notice of setting of a SOAH proceeding, instead of SOAH.

RESPONSE: SOAH rules, Title 1 TAC §155.401, require the referring agency to send the notice of hearing to all parties. See also previous responses to similar comments.

28 TAC §148.5(a)

COMMENT: A commenter stated that §148.5(a) requires that the parties be given a minimum of 10 calendar days notice of a hearing. The commenter stated that parties need more than 10 calendar days notice to exchange evidence, conduct additional discovery, as necessary, and to schedule witnesses. The commenter stated that additional notice is of particular importance to permit the parties to schedule the expert witnesses that are essential to the resolution of a fee dispute. The commenter suggests that

these cases should be set along the lines of indemnity contested case hearings (40 days for regular hearings and 20 days for expedited hearings).

RESPONSE: The Division declines to make the suggested change. The ten-day minimum notice is required by Government Code §2001.051(1). SOAH notifies the Division of a hearing date, and the Division notifies the parties. Normally, SOAH sets cases 60 days in advance. The 10 day minimum notice requirement is in existing §148.5(a). Some cases, such as those involving first responders, can be set in an expedited manner requiring shorter notice. Title 1 TAC §155.251 provides that discovery begins when SOAH acquires jurisdiction. Title 1 TAC §155.153(b)(4) provides that the SOAH judge has the power to rule on discovery issues. Title 1 TAC §155.155 provides that the SOAH ALJ has the authority to control the conduct and scope of a proceeding, rule on motions, establish deadlines, and take other steps conducive to a fair and efficient contested case process. Therefore, problems with discovery time, witnesses, etc. can be addressed and resolved fairly at SOAH.

28 TAC §148.10(b)

COMMENT: A commenter stated that §148.10(b) should provide a mechanism for review of the Chief Clerk of Proceedings' denial of a party's subpoena request.

RESPONSE: The Division declines to make the suggested change. There is a mechanism for review. The aggrieved Party can file a motion to compel with SOAH to the extent provided by Title 1 TAC §155.251.

28 TAC §148.10(b)(3)

COMMENT: A commenter stated that an injured employee should not be required by §148.10(b)(3) to make a deposit and any fees or expenses incurred by an injured employee for a subpoenaed witness should be paid by the carrier. The commenter stated that this is consistent with other provisions that require the carrier to pay the costs of going to a SOAH hearing for the injured employee.

RESPONSE: The Division disagrees and declines to make the suggested change. Government Code §2001.089(2) requires the deposit of an amount that will reasonably ensure payment of the expenses of a witness or deponent. No statutory exception exists for the person requesting the subpoena not to pay the expenses of a witness. The language in §148.10(b)(3) has been in the rule since 2005, as found in (30 *TexReg* 3247).

28 TAC §148.11(d)

COMMENT: A commenter stated that §148.11(d) should provide a mechanism for review of the Chief Clerk of Proceedings' denial of a party's request for a deposition.

RESPONSE: The Division declines to make the suggested change. There is a mechanism for review. An aggrieved Party can file a motion to compel with SOAH to the extent provided by Title 1 TAC §155.251.

28 TAC §148.24(d), §148.5(a)

COMMENT: A commenter stated that the combination of (1) the requirement in §148.24(d) that a party request that a hearing be open to the public seven days prior to the hearing and (2) the requirement in §148.5(a) that the parties be given at least 10 days notice of the hearing, could result in a party having only three days to request that a hearing be open to the public. The commenter submits that this problem could be easily resolved by amending §148.5(a) to require that the parties be given more than 10 calendar days notice of a hearing.

RESPONSE: The Division disagrees and declines to make a change. The Division gives notice of a hearing when notified of a hearing date by SOAH. The ten day minimum notice requirement is set by Government Code §2001.051. In the experience of the Division, 60 days notice is typical. Lesser notice would normally occur with an expedited hearing. The seven day deadline to request an open hearing has been in 28 TAC §149.6(d) since 2005 as found in (30 *TexReg* 3250).

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

Texas Mutual Insurance Company – For

Property Casualty Insurers (PCI) – For, with changes

Office of Injured Employee Counsel (OIEC) – For, with changes

6. STATUTORY AUTHORITY.

The amendments and new rules are adopted under the authority of Labor Code §§402.00111, 402.00128, and 402.061.

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 §402.00128 grants various powers to the Commissioner including the power to hold hearings.

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.

7. TEXT.

§148.1. *Definitions.*

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Act--The Texas Workers' Compensation Act, Labor Code, §§401.001 et seq.

(2) ALJ--The administrative law judge designated by the State Office of Administrative Hearings to preside over the hearing.

(3) APA--The Administrative Procedure Act, as specified in the Government Code, Chapter 2001.

(4) Chief Clerk of Proceedings--The Chief Clerk of Proceedings within the hearings section in the central office of the Texas Department of Insurance, Division of Workers' Compensation.

(5) Contested Case--A proceeding held by the State Office of Administrative Hearings in which the legal rights, duties, or privileges of a party are to be determined by an agency after an opportunity for adjudicative hearing as defined in Government Code, §2001.003.

(6) Division Representative--The attorney or any representative that may be designated by the commissioner or his designee to represent the division.

(7) Party--A person or state agency named or admitted as a party.

(8) Person--An individual, partnership, corporation, association, governmental subdivision, or public or private organization that is not a state agency as defined in the APA.

(9) Petitioner--

(A) The division is the petitioner in a contested case in which the division seeks to impose a sanction or has issued an emergency cease and desist order.

(B) In all other cases, the petitioner is the person who has filed a written request for a hearing in accordance with these procedures.

(10) Respondent--

(A) The respondent is the opposing party to the division in a contested case in which the division seeks to impose a sanction or has issued an emergency cease and desist order.

(B) In all other cases, the respondent is the person responding to the petitioner's request for a hearing.

(11) SOAH--The State Office of Administrative Hearings.

§148.2. Scope and Applicability.

(a) Scope. This chapter governs contested case hearings, which adjudicate disputes before SOAH as authorized under the Act.

(b) Coordination with SOAH's Procedural Rules. This chapter governs the following procedural matters and also provides related policies of the division on the following:

- (1) matters arising before a case is transferred by the division to SOAH;
- (2) matters arising after a proposal for decision or after the entire case is received from SOAH;
- (3) requests for the issuance of a subpoena and related matters; and
- (4) requests for issuance of a commission requiring deposition and related matters.

(c) Applicability of the APA.

(1) The entire APA applies to contested case hearings under Labor Code §§407.046, 407A.007, 413.031, 413.0312, 413.055, 415.0211, and 415.034.

(2) The sections of the APA enumerated in Labor Code §401.021(1) apply to all other contested case hearings governed by this chapter.

(3) The ALJ renders the final decision in hearings conducted pursuant to Labor Code §§413.031, 413.0312, and 413.055.

(4) The commissioner renders the final decision in all other cases not specified in paragraph (3) of this subsection pursuant to Government Code §2001.062.

§148.3. Requesting a Hearing.

(a) Hearings Requested by the Division. The division may request a hearing before SOAH as permitted by the APA, the Act, and division rules.

(b) Requests for Hearing by Other Parties. Other Parties may file requests for hearings before SOAH as permitted by the APA, the Act, and division rules. The request for hearing must be in writing. The request for hearing must be filed with the Chief Clerk of Proceedings.

(c) Date Deemed Filed or Received. When a request for a hearing is addressed to the Chief Clerk of Proceedings but is sent to an office other than the Chief Clerk of Proceedings, the date filed or received shall be the date the request is received by the division. The request for hearing will be forwarded to the division's Chief Clerk of Proceedings, but this may result in delay of processing the request. When a request for a hearing is not addressed to the Chief Clerk of Proceedings, it will not be considered filed or received by the division unless it is actually received by the Chief Clerk of Proceedings. Otherwise, a request for a hearing is deemed filed as of the date of the division date stamp placed on the document or other evidence of receipt.

(d) Deadlines for Filing. A request for hearing before SOAH must be filed with the Chief Clerk of Proceedings within the following time periods:

(1) medical fee dispute under Labor Code §413.031 and §413.0312: 20 days after the conclusion of the benefit review conference under Chapter 141 of this title (concerning Dispute Resolution--Benefit Review Conference);

(2) administrative violation: 20 days after receipt of a notice of possible administrative violation under Labor Code §415.032 and §180.8 of this title (concerning Notices of Violation; Notices of Hearing; Default Judgments);

(3) interlocutory order: 20 days after receipt of an interlocutory order for payment under Labor Code §413.055;

(4) emergency cease and desist order: not later than the 30th day after the date the affected person receives the order;

(5) division audit or review: 20 days after receipt of a division refund order issued

pursuant to a division audit or review; or

(6) requests for hearing not specified in this subsection: the time for filing a request for hearing before SOAH is 20 days after receipt of a notice of the action that the party is requesting a hearing on, unless specified in other law.

(e) Requests for Hearing Under Labor Code §413.031 and §413.0312. If the request for hearing is based on Labor Code §413.031 and §413.0312, the request must be in the form and manner specified by the division and must:

(1) contain a statement indicating that it is a request for hearing;

(2) include a copy of the findings and decision on which a hearing is being requested;

(3) include verification of the date of the conclusion of the Benefit Review Conference;

(4) be signed by a requestor or respondent as defined by §133.305 of this title

(concerning MDR--General), or its representative; and

(5) include a certificate of service demonstrating that the request has been sent to the other party in accordance with the requirements of §133.307 of this title (concerning MDR of Fee Disputes), in substance as follows: "I hereby certify that I have on this ___ day of _____, 20 __, served a copy of the attached instrument on (state the name of the other parties on whom a copy was served) by (state the manner of service.)"

(f) Notice of Violation.

(1) If a person receives a notice of violation, the person charged must file an answer not later than the 20th day after the date of receipt of the notice. The answer must either:

(A) remit the amount of the sanction to the division or otherwise consent to the imposed sanction; or

(B) request a hearing.

(2) If the person charged does not file an answer to the notice of violation, the division shall schedule a hearing at SOAH, pursuant to §180.8(c) of this title (concerning Notices of Violation; Notices of Hearing; Default Judgments).

(g) Dismissal of Late Filings. The division, or the ALJ pursuant to paragraph (3) of this subsection, shall dismiss a request for hearing filed later than the deadline date. This subsection does not apply to requests for hearing submitted in response to a Notice of Violation pursuant to §180.8 of this title.

(1) The division shall send a letter to the requestor informing the requestor that the untimely request will be dismissed unless the requestor provides information about timely filing or good cause for untimely filing within 10 working days of the date of the letter.

(2) If the requestor responds with information about timely filing or good cause, the Chief Clerk of Proceedings will send the request for hearing and the additional filing or good cause information to SOAH.

(3) The SOAH ALJ will dismiss a request for hearing that the ALJ determines to be filed later than the deadline date without good cause.

(h) Division Delivery of Request for Hearing to SOAH. The Chief Clerk of Proceedings shall send the request for a hearing to SOAH within 20 working days of receipt, unless:

(1) the decision has been withdrawn under the provisions contained in §148.8 of this title (concerning Withdrawal of Hearing Request);

(2) the request for hearing has been dismissed under subsection (g) of this section;

(3) the division has notified the parties of a proposed clerical correction to the order or decision; or

(4) a party has requested a correction of clerical error with the division.

§148.4. Correction of Clerical Error.

(a) Correction of Clerical Error Discovered by the Division. The division may at any time revise an order or decision to correct a clerical error. The division may enter a nunc pro tunc order after an order or decision has become final. To initiate the correction, the division will notify the parties to the order or decision of the proposed correction. If a party objects to the proposed clerical correction, it must do so by the date and time specified by the division. The date and time specified by the division may not exceed the point at which the order or decision becomes final.

(b) Request for Correction of Clerical Error Discovered by a Party.

(1) A party to an order or decision may request the correction of a clerical error from the division prior to the point at which the order or decision becomes final.

(2) To initiate the correction, the division will notify the parties of the proposed correction. If a party objects to the proposed clerical correction, it must do so by the date and time specified by the division. The date and time specified by the division may not exceed the point at which the order or decision becomes final.

(c) Notification. The division will notify the parties to an order or decision that a clerical correction was made by issuing a letter that includes the:

- (1) date of the original order or decision;
- (2) erroneous portion as originally stated;
- (3) corrected portion as it reads; and
- (4) signature of the authorized division personnel.

§148.5. Notice of Hearing.

(a) Notice of Hearing. The Chief Clerk of Proceedings shall notify the parties in writing, by verifiable means, of the date, time, place, and nature of the hearing no later than 10 days before the hearing date.

SOAH shall notify the parties of a hearing no later than 30 days before the hearing date for a hearing under Labor Code §407.046(b).

(b) Contents. The notice of hearing must include:

- (1) a statement of the time, place, and nature of the hearing;
- (2) the docket number;
- (3) the legal authority and jurisdiction under which the hearing will be held;
- (4) a reference to the particular sections of the statutes and any rules involved;
- (5) a notice regarding failure to appear and default judgments; and
- (6) a short, plain statement of the matters asserted.

(c) Alternative Submission. In lieu of the Chief Clerk of Proceedings, the division's representative may provide the reference to the statutes and any rules involved, nature of the hearing, and the short, plain statement of the matters asserted.

(d) Administrative Violation Notice of Hearing; Default.

(1) A person who receives a notice of hearing under §180.8(c) of this title (relating to Notices of Violation; Notices of Hearing; Default Judgments) must file a written answer or other responsive pleading with the Chief Clerk of Proceedings within 20 days of receipt of the notice as required by §180.8(c) of this title.

(2) Failure to file the required answer or pleading constitutes a default, and the division may seek informal disposition by default under §180.8(f) and (g) of this title.

(e) Notice of Hearing under Labor Code §407.046(b) from SOAH.

(1) SOAH shall notify, in writing, a certified self-insurer and the Chief Clerk of Proceedings of the date, time, place, and nature of a hearing concerning the intent of the division to revoke a certificate of self-insurance under Labor Code §407.046.

(2) The notice must be sent no later than 30 days before the hearing date.

(3) The notice must include:

(A) the notice required under Government Code §2001.052, and

(B) a notice regarding failure to appear and default judgment.

§148.6. Venue.

Hearings under this chapter are held in Austin, Travis County, Texas.

§148.7. Representation.

(a) Representation of Injured Employees or Insurance Carriers. Pursuant to Labor Code §402.071 and §150.3 of this title (relating to Representatives: Written Authorization Required), a person representing an injured employee or insurance carrier in a contested case hearing shall not receive a fee for providing representation under this subtitle unless the person is an adjuster representing an insurance carrier or licensed to practice law.

(b) Fee Defined. For the purposes of this section, "fee" means any remuneration received directly or indirectly, in cash or in kind. It includes voluntary contributions. The provision of representation before SOAH as an extension of, or in addition to, other services for which a fee was paid shall be considered receipt of a fee for providing representation as specified in Labor Code §401.011(37) and §402.071 and §150.3 of this title.

(c) Representation by Employee. The prohibitions in subsections (a) and (b) of this section do not preclude representation by a person who receives a salary as an employee of the person represented to perform services in the usual course and scope of the employer's business.

(1) For the purposes of this subsection, "employee" means a person in the service of another under a contract of hire, whether express or implied, or oral or written.

(2) The term "employee" does not include:

(A) an independent contractor or the employee of an independent contractor; or

(B) a person whose employment is not in the usual course and scope of the

employer's business.

(d) Ombudsman Program. Nothing in this subsection shall be construed to limit assistance pursuant to Labor Code §404.105.

(e) Administrative violation. A person commits an administrative violation if that person receives a fee for providing representation under circumstances prohibited by this section.

§148.8. *Withdrawal of Hearing Request.*

(a) The petitioner may, at any time before the decision or order is signed, submit a written request to withdraw the request for a hearing. The request must be sent to the Chief Clerk of Proceedings and to SOAH in accordance with its procedural rules in Title 1 TAC Chapter 155 (relating to Rules of Procedure).

(b) Notwithstanding the provisions of subsection (a) of this section, a decision of the division's medical fee dispute resolution section in a review of a medical fee under the Act may be withdrawn by the division within 15 working days after the division receives the request for hearing before SOAH if the request has not yet been delivered to SOAH.

§148.10. *Hearings Subpoenas to Compel Attendance and Subpoenas Duces Tecum.*

(a) Issuance of Subpoena. A request for issuance of a subpoena shall be directed to the Chief Clerk of Proceedings in the division's central office. On the written request of any party in compliance with the requirements set forth below and upon a showing of good cause, the division shall issue a subpoena addressed to the sheriff or any constable to require the attendance of a witness and production of books, records, paper, or other objects that may be necessary and proper for the purpose of the proceedings.

The determination of good cause under this section shall include consideration of whether the issuance of the subpoena would cause undue burden or expense to the person served.

(b) Request for Subpoena. A request for issuance of a subpoena must be in writing, addressed to the Chief Clerk of Proceedings, contain a showing of good cause, and comply with the following:

(1) The request must include the subpoena sought to be issued and be prepared for the signature of the Chief Clerk of Proceedings.

(2) The subpoena must be addressed to a sheriff or constable for service in accordance with Government Code §2001.089. The request must contain the name and address of the applicable sheriff or constable.

(3) The request must include a good faith, itemized estimate of the amount likely to accrue under §148.20 of this title (relating to Reimbursement, Travel Expenses, and Fees for Witnesses and Deponents) and include a deposit of the same amount as required by Government Code §2001.089(2) (relating to Issuance of Subpoena). The deposit must be made by certified check, money order, or other negotiable instrument satisfactory to the division.

(4) If the subpoena is for the attendance of a witness, the written request and accompanying subpoena must contain:

(A) the name, address, and title, if any, of the witness;

(B) the date, time and place where the person is to appear and give testimony;

(C) the docket number of the SOAH proceeding; and

(D) a statement showing date of execution and return of the subpoena to the Chief

Clerk of Proceedings.

(5) If the subpoena is for the production of books, records, writings, or other tangible items, the written request and accompanying subpoena sought must contain:

(A) a specific, detailed description of the items sought to be produced;

(B) the date, time, and place where the person is to appear and give testimony and produce the requested items;

(C) the docket number of the proceeding; and

(D) a statement showing date of execution and return of the subpoena duces tecum to the Chief Clerk of Proceedings.

(6) The request must contain a description of the reasonable steps taken to avoid imposing undue burden or expense on the person served.

(c) Failure to Comply with Subpoena. If a person fails to comply with a subpoena, the division, acting through the attorney general, or the party requesting the subpoena, may bring suit to enforce the subpoena in a district court in Travis County. This remedy is not exclusive. The division may enforce the subpoena in any manner permitted by the Act, the APA, or division rules.

§148.11. *Commissions to Compel Attendance for Deposition.*

(a) Issuance of Commission Requiring Deposition. A request for issuance of a commission requiring deposition must be directed to the Chief Clerk of Proceedings in the division's central office. On the written request of any party in compliance with the requirements set forth below, the division must issue a commission addressed to the several officers authorized by statute to take depositions in accordance with the requirements of Government Code §2001.094. On the written request of any party in compliance with the requirements set forth below the Chief Clerk of Proceedings shall issue a commission to require that the witness appear and produce, at the time the deposition is taken, books, records, papers, or other objects that may be necessary and proper for the purpose of the proceeding.

(b) Commission Not Required for a Party. The issuance of a commission requiring deposition is not required if the witness is a party or is retained by, employed by, or otherwise subject to the control of a party. Service of the notice of oral deposition upon the party or the party's representative is sufficient.

(c) Deposition of a Member of an Agency, Board, or Division. A member of an agency, board, or division shall not be deposed after a hearing date has been set.

(d) Requests for Commissions Requiring Deposition. A request for a commission requiring deposition must be in writing addressed to the Chief Clerk of Proceedings and comply with the following:

(1) The request must include the commission requiring deposition sought to be issued prepared for the signature of the Chief Clerk of Proceedings.

(2) The commission requiring deposition must be addressed to an officer authorized by statute to take a deposition in accordance with Government Code §2001.094. The request must contain the name and address of the applicable officer authorized to take the deposition, the date, time and place where either the witness is to appear and give testimony or where the written deposition responses are to be sent, a detailed description of any items the witness will be required to produce, and a statement showing date of execution and return of the commission requiring deposition to the Chief Clerk of Proceedings.

(3) The request must include a good faith itemized estimate of the amount likely to accrue under §148.20 of this title (relating to Reimbursement, Travel Expenses, and Fees for Witnesses and Deponents) and include a deposit of the same amount as required by Government Code §2001.094(a). The deposit must be made by certified check, money order, or other negotiable instrument satisfactory to the division.

(4) The party seeking the commission requiring deposition shall coordinate with the other party or parties and with the witness to determine a mutually agreeable location and time for the

attendance of the witness. The request for commission requiring deposition must state whether such coordination has been made and whether the proposed location and time is by mutual agreement of the parties and witness.

(5) The party seeking the commission requiring deposition that includes a requirement for production should coordinate with the other party or parties, and with the person from whom production is sought, to determine a mutually agreeable location and time for the requested production. The request for the commission requiring deposition must state whether such coordination has been made and whether the proposed location and time is by mutual agreement with the parties and the person from whom production is sought.

(e) Application of the APA. Matters related to deposition conduct, use, opening, and any other matters relating to depositions not covered by these rules shall be in accordance with the requirements of the APA.

(f) Failure to Comply with Commission Requiring Deposition. If a person fails to comply with a commission requiring deposition, the division acting through the attorney general, or the party requesting the subpoena or commission, may bring suit to enforce the subpoena or commission in a district court in Travis County. This remedy is not exclusive. The division may enforce the subpoena or commission requiring deposition in any manner permitted by the Act, the APA, or division rules.

§148.13. *Recording the Hearing.*

(a) Arrangement for Court Reporter and Costs. In cases in which a court reporter is required, on the division's initiative, at the request of a party, or when required by SOAH rules or the ALJ of a case, the division will arrange for a court reporter. The Petitioner is responsible for all associated costs including the costs of the court reporter at the hearing and the costs associated with preparation of a verbatim record if one is required. In cases in which more than one party is seeking affirmative relief, the costs will

be assessed equally. Nothing in this section precludes the parties from entering into their own agreement regarding arrangements for a court reporter or allocation of associated costs.

(b) Recording by a Party. A party electing to use a means of making a record that is in addition to the means specified in SOAH's rules or by the ALJ is responsible for all associated costs. If a verbatim record is made, the party shall provide the division and SOAH with a copy of the audiotape or videotape free of charge. If a transcript is made, the party shall provide the division with the original of the transcript free of charge.

§148.14. Burden of Proof.

(a) Burden of Proof on the Division. The division has the burden of proof in a contested case in which the division seeks to impose a sanction or has issued an emergency cease and desist order.

(b) Burden of Proof on Party Seeking Relief. The burden of proof rests with the party seeking relief in hearings conducted pursuant to Labor Code §§408.024, 413.031, 413.0312, and 413.055.

(c) Burden of Proof on the Certified Self-Insurer. The burden of proof rests with the certified self-insurer in hearings conducted pursuant to the following sections of the Labor Code:

(1) Section 407.043;

(2) Section 407.046;

(3) Section 407.133; and

(4) Section 407.066. The certified self-insurer has the burden of proof if they request the hearing to challenge the position of the division.

(d) Burden of Proof on the Employer. The burden of proof of showing timely filing or good cause when an allegation of untimely filing has been made rests with the employer in issues under §120.2 of this title (relating to Employer's First Report of Injury).

§148.15. *Final Decision by the ALJ.*

(a) Decision or Order. The ALJ shall adjourn the hearing after all evidence has been received in contested cases held under Labor Code §§413.031, 413.0312, and 413.055.

(b) Decision or Order that May Become Final. The ALJ shall issue a decision or order that may become final.

(c) Contents of Decision or Order that May Become Final. The decision or order that may become final must include orders that are necessary to implement the decision or order. When the decision or order requires any action or compliance, it must contain a period of time for such action to be completed, normally not to exceed 30 days from the date the decision or order is received, for such action or compliance to be completed.

(d) Furnishing the Decision or Order that May Become Final.

(1) The decision or order that may become final will be sent immediately to the parties or their representatives by verifiable means that shall be documented in the hearing file.

(2) If the decision or order that may become final is furnished by personal delivery, a receipt verifying personal delivery and containing the date of delivery and the person, any business title, and person's business address that received the delivery shall be made by the person who makes the personal delivery, and shall be date-stamped and placed in the hearing file.

(e) Procedures for Motion for Rehearing. The decision or order that may become final will become final if a motion for rehearing is not filed with SOAH within 20 days after receipt of the decision or order. The procedures for a motion for rehearing are governed by the Government Code, Chapter 2001, Subchapter F, and a motion for rehearing is a prerequisite for appealing a decision or order under this section.

(f) Finality of Decision or Order. The finality of the ALJ's decision or order is determined by Government Code §2001.144, except as provided by Labor Code §413.031 and §133.307 of this title (relating to MDR of Fee Disputes).

(g) Exhaustion of Administrative Remedies. The notification to a party of the ALJ's decision or order that has become final under Government Code §2001.144 constitutes exhaustion of all administrative remedies, except as provided by Labor Code §413.031 and §133.307 of this title.

(h) Judicial Review. A party dissatisfied with a final decision or order of the ALJ may seek judicial review as provided by the Act in accordance with the Government Code, Chapter 2001, Subchapter G, Labor Code §413.031 and §133.307 of this title.

§148.16. Proposal for Decision or Order by the ALJ.

(a) Proposal for Decision or Order. The ALJ shall adjourn the hearing after all evidence has been received in contested cases held under the Act not governed by §148.15 of this title (relating to Final Decision by ALJ).

(b) Description of Proposal for Decision or Order. The proposal for decision or order must be based solely upon the record of the individual case. It must be in writing and include:

(1) a statement of the reasons upon which the decision is based;

(2) findings of fact based on the evidence presented and matters officially noticed. If there is evidence presented regarding the ability of a party to pay the amount of a proposed sanction or bonding amount in a hearing involving assessment of sanctions under Labor Code §415.021, the ALJ shall make findings of fact on those issues;

(3) conclusions of law based on the findings of fact and other legal requirements of the law;

(4) the sanction or order recommended by the ALJ;

(5) a conclusion of whether the division is authorized by the Act or division rules to take disciplinary or sanction action against the petitioner; and

(6) the proposal for decision or order may also contain:

(A) a summary of the evidence presented by each party; and

(B) a list of all mitigating circumstances and a list of all aggravating circumstances, separately stated, which are necessary for the commissioner to have a complete understanding of the case.

(c) Furnishing Proposal for Decision or Order. SOAH shall furnish the proposal for decision or order to:

(1) the Chief Clerk of Proceedings; and

(2) the parties of the hearing. SOAH shall furnish the proposal for decision or order by verifiable means and retain information on the date, address, person or entity served, and the means of service.

(d) Filing of Briefs and Exceptions. If a party files a brief or exception to the proposal for decision or order or replies to the exceptions or brief with SOAH, it must also file a copy with the Chief Clerk of Proceedings.

(e) Commissioner's Hearing on the Proposal for Decision or Order.

(1) A party may submit a request for a commissioner's hearing to consider arguments with the Chief Clerk of Proceedings within 10 days after SOAH issues the proposal for decision or order.

(2) The commissioner may determine if a hearing is necessary to consider arguments, whether or not a request for a hearing has been filed. If such a determination is made, the commissioner shall consider the case at a posted hearing of the division, no later than 120 days after:

(A) SOAH provides the division with the proposal for decision or order;

(B) the date of the ALJ's comments or response to any exceptions or briefs and any replies to such exceptions or briefs; or

(C) the expiration of the ALJ's deadline for such response in accordance with Title 1 TAC §155.507 (relating to Proposal for Decision).

(3) If the commissioner determines that a hearing is not necessary, the division will notify any requestors and the commissioner shall consider the case after the later of:

(A) the issuance of the proposal for decision or order;

(B) the date of the expiration of the ALJ's comments or response to any exceptions or briefs and any replies to such exceptions or briefs; or

(C) the expiration of the ALJ's deadline for such response in accordance with Title 1 TAC §155.507.

(f) Issuance of Decision or Order That May Become Final. The commissioner shall issue a decision or order that may become final in contested cases under this section pursuant to Labor Code §§407.046, 407A.007, 415.0211, and 415.034. A decision or order that may become final will become final in accordance with Government Code §2001.144. In all other cases, the commissioner shall issue a final decision or order and no motion for rehearing will be considered.

(g) Motion for Rehearing. A motion for rehearing may be filed in contested cases under this section pursuant to Labor Code §§407.046, 407A.007, 415.0211, and 415.034. The procedures of the Government Code, Chapter 2001, Subchapter F govern a motion for rehearing under this section. A motion for rehearing is a prerequisite for filing an appeal of a decision or order under Labor Code §§407.046, 407A.007, 415.0211, or 415.034.

(h) Notification. The Chief Clerk of Proceedings shall notify the parties to a contested case of the final decision or order of the commissioner by verifiable means.

(i) Exhaustion of Administrative Remedies. The notification to a party of the commissioner's final decision or order constitutes exhaustion of all administrative remedies.

(j) Judicial Review. A party dissatisfied with a decision or order of the commissioner may seek judicial review as provided in the Act in accordance with the APA. Judicial review will be in accordance with the Act and the Government Code §§2001.171, 2001.172, and 2001.174.

§148.17. *Special Provisions for Administrative Penalties.*

Required Response to Assessment of Sanctions. Not later than the 30th day after a party receives notification of an assessment of a sanction, the charged party shall file with the Chief Clerk of Proceedings:

- (1) the amount of the sanction, in the form of a cashier's check, a certified check, or a certified draft; or
- (2) a bond for the amount of the sanction. The bond must be:
 - (A) executed by a licensed surety company authorized to do business in Texas;
 - (B) approved by the division;
 - (C) made payable to the Texas Department of Insurance; and
 - (D) must be effective until all judicial review is final.

§148.19. *Transcript or Duplicate of the Hearing Audiotape or Videotape.*

(a) A party may submit a request to the division for a transcript of the hearing audiotape or videotape. The requestor shall pay the cost of the transcript, as established by the division.

(b) A party may submit a request to the division for a duplicate of the hearing audiotape or videotape. The requestor shall pay the cost of the duplication, as established by the division.

§148.20. *Reimbursement, Travel Expenses, and Fees for Witnesses and Deponents.*

(a) Reimbursement of Witness or Deponent. A witness or deponent who is not a party and who is served with a subpoena or otherwise compelled to attend any hearing or proceeding to give a deposition or to produce books, records, papers, or other objects that are necessary for the proceeding is entitled to receive reimbursement for travel, meals, lodging, and other amounts as specified and limited in the Government Code §2001.103.

(b) Reasonable and Necessary Expenses and Service. The party requesting the subpoena or commission or otherwise compelling the attendance of a witness at any hearing or proceeding to give a deposition or produce books, records, papers, or other objects shall be responsible for the payment, of any expense, incurred in serving the subpoena, as well as reasonable and necessary expenses incurred by a nonparty witness who appears in response to the subpoena.

(c) Failure to Pay Expenses. The party requesting the subpoena or commission or otherwise compelling the attendance of a witness at any hearing or proceeding to give a deposition or produce books, records, papers, or other objects shall pay the witness the amount accrued under this section. Failure to pay the witness the amount accrued when sought is an administrative violation.

(d) Return of Deposit. After the Chief Clerk of Proceedings has received, from the party requesting the subpoena or commission to take deposition, sufficient documentation of all requests by the witness for payment of witness expenses and sufficient proof of payment of all amounts due to the non-party witness or deponent, the division will return the amount of any deposit required under §148.10(b)(3) and §148.11(d)(3) of this title (relating to Hearings Subpoenas To Compel Attendance and Subpoenas Duces Tecum and Commissions To Compel Attendance For Deposition), respectively.

§148.21. *Expenses to be Paid by Party Seeking Judicial Review.*

(a) Upon receiving a copy of a petition filed in district court which seeks judicial review of a final decision in a contested case decided under this chapter, the division shall prepare a certified copy of the entire record of the proceeding under review, including a transcript of the hearing audiotape, and transmit it to the reviewing court.

(b) The division shall assess to the party seeking judicial review, expenses incurred by the division in preparing this copy, including transcription costs, in accordance with the Government Code §2001.177. Upon request, the division shall consider the financial ability of the party to pay the costs or any other factor that is relevant to a just and reasonable assessment of costs. If the party seeking judicial review is an injured employee, the division shall not charge for duplicating the record.

§148.22. *Failure to Appear or Comply with Order or Decision, Administrative Violation.*

A person commits an administrative violation if that person in the status of a party, or otherwise within the jurisdiction of SOAH (for example, a witness), in a contested case hearing or proceeding before SOAH, fails to comply with an order of the ALJ to include any final decisions issued.

§148.23. *Division Enforcement of Orders.*

Any final order of SOAH is a final order of the division and may be enforced by the division in any manner permitted by the Act, the APA, or division rules. After conclusion of the administrative process, any SOAH order which survives the entry of a final order, the sending of a proposal for decision to the division, or the dismissal or withdrawal of the case from the SOAH docket, regardless of upon whose motion the dismissal or withdrawal was granted, is an order of the commissioner and may be enforced by the division in any manner permitted by the Act, the APA, or division rules. Examples of enforceable orders include, but are not limited to, orders to reimburse, orders to pay reasonable and necessary

medical costs, orders to pay administrative fines, orders to refund, orders assessing attorney fees, orders assessing costs, and orders imposing discovery sanctions.

§148.24. Confidentiality of Records.

(a) SOAH shall ensure that the confidentiality provisions of Labor Code, §§402.082 - 402.092, 411.034, 413.0513, and 413.0514 and the Code of Federal Regulations, Title 20, §603.6 and §603.7 (for information obtained from the Texas Workforce Commission or its successor agencies) will be followed, including requests for release of documents or information made confidential under the Act or other applicable law.

(b) Unless authorized by law, SOAH will not identify the name of a claimant for workers' compensation coverage under the Act or other information contained in or derived from the division's claim file for such a claimant in listings of docketed cases or in other documents distributed to persons other than to the division and the parties to a contested case involving that claimant.

(c) If a party or a member of the public files a written request with the Chief Clerk of Proceedings and with SOAH that a hearing be conducted as a hearing open to the public, the ALJ shall consider that request and issue a ruling prior to the opening of the hearing to the public.

(d) Any request for a hearing open to the public shall be filed with the Chief Clerk of Proceedings and with SOAH at least seven days prior to the first day of the hearing unless the ALJ allows a shorter filing period upon a showing of good cause.

(e) When considering a request that a hearing be open to the public, the ALJ's considerations shall include, but are not limited to, whether the hearing would contain information made confidential under the Act or other applicable laws. If confidential information would be included, then the ALJ may consider whether any procedure could be devised and utilized which would allow a hearing to be open to the public without violating the confidentiality provisions of the Act, other applicable laws, other applicable

regulations, and agreements required by those laws or regulations or without causing an undue burden on the division or the parties to the hearing.

(f) While SOAH will have temporary custody of the hearing records, the commissioner retains statutory authority as custodian of records and is ultimately responsible, as the originating agency, for the release or non-release of the information. Therefore, should any information, which may be confidential under the Act, division rules, or other law, be requested from SOAH by any person or entity, SOAH shall follow all legal requirements necessary to ensure that the confidential information or document is not released, unless specifically required by law, and shall provide such request to the commissioner immediately upon receipt.

(g) Pursuant to Labor Code §413.031(c), the division shall be responsible for publishing any SOAH decisions required to be published by that section on the department's website. SOAH shall as soon as practicable deliver to the division a version of the decision in an electronic format.

(h) SOAH and the division have responsibilities for compliance with the Texas Public Information Act, Government Code, Chapter 552. Each agency maintains information that may be considered confidential or exempt from disclosure under laws administered by that agency. To the extent required by law, each agency is responsible for replying to all public information requests for information maintained by that agency. Each agency will promptly notify the other agency of the receipt of a Texas Public Information Act request relating to confidential or exempt records obtained from the other agency and will coordinate responses as necessary.

10. CERTIFICATION.

The agency certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas, on July 3, 2014.

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 28 TAC §148.1, concerning Definitions; §148.2, concerning Scope and Applicability; §148.6, concerning Venue; §148.7, concerning Representation; §148.8, concerning Withdrawal of Hearing Request; §148.10, concerning Hearings Subpoenas to Compel Attendance and Subpoenas Duces Tecum; §148.11, concerning Commissions to Compel Attendance for Deposition; §148.13, concerning Recording the Hearing, §148.14, concerning Burden of Proof; §148.15, concerning Final Decision by the ALJ; §148.16, concerning Proposal for Decision by the ALJ; §148.17, concerning Special Provisions for Administrative Penalties; §148.19, concerning Transcript of Duplicate of the Hearing Audiotape or Videotape; §148.20, concerning Reimbursement, Travel Expenses, and Fees for Witnesses and Deponents; §148.21, concerning Expenses to be Paid by Party Seeking Judicial Review; §148.22, concerning Failure to Appear or Comply with Order or Decision, Administrative Violation; §148.23, concerning Commission Enforcement of Orders and new §148.3, concerning Requesting a Hearing; new

§148.4, concerning Correction of Clerical Error; new §148.5, concerning Notice of Hearing; and new §148.24, concerning Confidentiality of Records, are adopted.

AND IT IS SO ORDERED.

X

ROD BORDELON
COMMISSIONER OF WORKERS' COMPENSATION

ATTEST:

X

Dirk Johnson
General Counsel

COMMISSIONER ORDER NO