

TITLE 28. INSURANCE

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

CHAPTER 141. DISPUTE RESOLUTION--BENEFIT REVIEW CONFERENCE

28 TAC §141.2 and §141.3

ADOPTION

1. INTRODUCTION.

The Commissioner of Workers' Compensation (Commissioner), Texas Department of Insurance, Division of Workers' Compensation (Division) adopts amendments to §141.2 and §141.3, relating to Canceling or Rescheduling a Benefit Review Conference and Failure to Attend a Benefit Review Conference. The Division adopts the amendments to §141.2 and §141.3 with changes to the proposed text as published in the September 2, 2011, issue of the *Texas Register* (36 TexReg 5624). These changes, which are more fully discussed below, are in response to public testimony and written comment provided on the proposed amendments. These changes, however, do not materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

In accordance with Government Code §2001.033, the Division's reasoned justification for the amendments is set out in this order, which includes the preamble. The preamble contains a summary of the factual basis for the rule, a summary of the comments received from interested parties, the names of entities that commented and whether they were in support of or in opposition to the adoption of the rule, and the reasons why the Division agrees or disagrees with the comments and recommendations.

During the development of these rules, the Division published an informal draft of the adopted amendments on the Division's website from June 27, 2011 until July 18, 2011. The Division received 10 informal comments. The Division made several changes to the proposal as a result of the informal comments.

After the publication of the proposal in the Texas Register, the Commissioner conducted a public hearing on the proposed amendments on September 20, 2011. Six individuals provided public testimony at this hearing. The public comment period for the proposed amendments ended on October 3, 2011. The Division received 11 written public comments.

2. REASONED JUSTIFICATION.

The rule revisions to §141.2 and §141.3 are necessary to implement certain amendments in House Bill 2605, enacted by the 82nd Legislature, Regular Session, effective September 1, 2011 (HB 2605) that affect benefit review conferences (BRCs).

Section 15 of HB 2605 made several amendments to Labor Code §410.028. First, HB 2605 amended Labor Code §410.028 to require the Commissioner to adopt rules necessary to implement and enforce Labor Code §410.028, including rules that define "good cause" and establish deadlines for requesting that a BRC be rescheduled. Second, HB 2605 amended Labor Code §410.028 to require a request to reschedule a BRC under that section to be submitted by the party and evaluated by the Division in the same manner that the initial request for a BRC was submitted and evaluated under Labor Code §410.023. Finally, HB 2605 amended Labor Code §410.028 to provide that a party forfeits the party's entitlement to attend a BRC on the issue in dispute if the party fails to request that a BRC be rescheduled in the time required by Commissioner rule or fails to attend a BRC without good cause as defined by Commissioner rule. This amendment further provides that

there will not be a forfeiture of the entitlement to attend a subsequent BRC on the issue in dispute if the benefit review officer is authorized to schedule an additional BRC under Labor Code §410.026(b).

These adopted amendments amend §141.2 and §141.3. Section 141.2 governs the canceling or rescheduling of a BRC, and §141.3 governs the failure to attend a BRC. These amendments divide each rule into a subsection (a) and a subsection (b). Adopted subsection (a) of each rule is the previous rule which will apply to a request for a BRC filed before December 1, 2011. Adopted subsection (b) of each rule is the new rule which will apply to a request for a BRC filed on or after December 1, 2011. Adopted subsection (b) of each rule continues many of the provisions contained in the previous rule but also contains provisions that are designed to implement Section 15 of HB 2605 such as provisions defining "good cause" and provisions establishing deadlines for requesting that a BRC be rescheduled. The Division has divided the rules in this manner in order to provide a clear transition point at which the new rule will be applied to requests to cancel or reschedule a BRC. This will ensure clarity to the system on which rules will apply to any given situation.

These adopted amendments comply with the requirement of HB 2605 to define "good cause" for cancelling or rescheduling a BRC. Adopted §141.2(b)(1) defines "good cause" for cancelling or rescheduling a BRC prior to the scheduled BRC, and adopted §141.3(b)(1) defines "good cause" for rescheduling a BRC when a party has failed to attend the scheduled BRC. Under adopted §141.2(b)(1), "good cause" is defined to mean objective facts beyond the control of a party, which reasonably prevent a party from attending the BRC, or would prevent the BRC from accomplishing its purpose, such as the need for a reasonable amount of additional time to secure necessary evidence for the dispute; or objective facts which make the BRC unnecessary. Under adopted

§141.3(b)(1), "good cause" is defined to mean objective facts beyond the control of a party, which reasonably prevented the party from attending the BRC, prevented the party from requesting the Division to cancel or reschedule in advance of the BRC, and, if applicable, prevented the party from filing a request to reschedule within the third-business day after failing to attend the scheduled BRC and justifies the subsequent delay in filing the request to reschedule. These adopted amendments provide that a determination of "good cause" will be at the discretion of the benefit review officer and will be determined on a case-by-case basis. For requests to cancel or reschedule under adopted §141.2(b)(1), the benefit review officer will also take into consideration prejudice to the parties.

There are many references and definitions of "good cause" and "just cause" in the legal literature. They tend to fall into one of two categories. One, the definitions are very general and require the Judge to apply the general language to a specific circumstance on a case by case basis. Two, the definitions are very specific to a particular context, such as contract employment termination, and are not generally applicable outside of that context. However, there are common elements to many of the definitions. They usually require a sense of equity, a circumstance outside of a party's control and a reasonable relationship to the legal benefit requested.

The Division did not find an existing definition that fit the BRC context well. The Division developed the "good cause" definitions in these adopted rules using a "reasonable person" standard and common elements in other "good cause" definitions. The elements of the definitions were selected for the following reasons. The Division chose "objective facts" because they are subject to verification. The Division chose "beyond the control of a party" because a party should not benefit from circumstances they created or could have reasonably avoided or prevented. "Reasonably prevent a party from attending the BRC," "prevent the BRC from accomplishing its purpose," "make the BRC unnecessary," "prevented the party from attending the benefit review conference,"

"prevented the party from requesting the Division to cancel or reschedule in advance of the benefit review conference," and "prevented the party from filing a request to reschedule within the third-business day after failing to attend the scheduled benefit review conference and justifies the subsequent delay in filing the request to reschedule" were chosen to create a logical nexus between the "objective facts" and the consequences in terms of attendance at the BRC.

The adopted amendments also comply with the requirements in HB 2605 to establish deadlines for requesting that a BRC be rescheduled. First, adopted §141.2(b) establishes deadlines for requesting to reschedule or cancel a BRC prior to the time of the scheduled BRC. Adopted §141.2(b)(3) continues the provisions in the previous §141.2 that give the parties the unrestricted right to cancel or reschedule a BRC within 10 days of the date the notice of setting is received. After this 10 day period, adopted §141.2(b)(4) requires the parties to establish "good cause" in the request to cancel or reschedule. The Division has continued these time deadlines because they have been in use by the system for many years and they have proven to be a workable time deadlines.

Second, adopted §141.3(b) establishes time deadlines for filing a request to reschedule a BRC when there is a failure to attend. Adopted §141.3 (b)(3) provides that a request to reschedule when there is a failure to attend a BRC must be in writing and in the form prescribed by the Division, and filed with the Division as soon as practicable, but no later than the close of the third business day after the scheduled BRC. A three-business-day deadline is necessary because it provides the requestor a sufficient amount of time to prepare the request to reschedule the BRC. It also helps prevent an undue delay in the resolution of the disputed issue because it requires the party who failed to attend the scheduled BRC to promptly submit a request to reschedule if the party wants the opportunity to attend the BRC. The adopted rule also takes into account that there may be situations, such as incapacitation, where a party may not be able to submit a request to reschedule the BRC within the

three-business-day deadline. A party in this situation must justify in its showing of “good cause” why the party failed to meet the three-day timeframe and must also justify the subsequent delay in filing the request.

The adopted amendments, specifically adopted §141.2(b)(5), also clarify the status of a dispute when a party cancels a BRC without simultaneously rescheduling the conference. The adopted amendments provide that under these circumstances the dispute will be considered withdrawn. There is an additional requirement for a request to cancel a BRC that is subject to §130.12 of this title (relating to Finality of the First Certification of Maximum Medical Improvement and/or First Assignment of Impairment Rating). The requestor must obtain the agreement of the other party in accordance with the provisions of §130.12(b)(3). These adopted amendments are necessary because they further the prompt and efficient resolution of disputes that arise in the workers' compensation system, which is consistent with the stated legislative goals for the system under §402.021(b)(5) to “minimize the likelihood of disputes and resolve them promptly and fairly when identified.” The Division, by statute, is responsible for administering the dispute resolution process and ensuring that disputes raised by the parties are resolved promptly and fairly. The Division sets the date for a BRC, and the statutes that govern the BRC process allow the Division some flexibility for rescheduling the BRC if the party requesting to reschedule the BRC can show “good cause” for why the BRC should be rescheduled. However, the dispute resolution process prescribed by statute and adopted rules contemplates that disputes will be resolved and not allowed to linger in the system with an indefinite status. The amendments made by these rules support the clear legislative goals in the Labor Code to require the prompt and fair resolution of claim disputes through the use of an administrative dispute resolution process administered by the Division (i.e., BRCs, Contested Case Hearings, Appeals Panel). Additionally, these legislative goals are

supported by the statutory requirements for parties to show documentation of their efforts to resolve disputes prior to initiating the process; to exchange necessary information with the opposing party and be prepared at the BRC; to continue to hold a BRC if a party fails to attend; and to show "good cause" to cancel or reschedule a BRC. Altogether, these statutory and rule requirements provide a mechanism for parties to resolve claim disputes quickly and fairly through an administrative dispute resolution process rather than through costly and time-consuming litigation.

3. HOW THE SECTIONS WILL FUNCTION.

Adopted amendments to §141.2. The adopted amendments to §141.2 divide the section into a new subsection (a) and (b). Subsection (a) is previous §141.2 renumbered to conform to the new section organization, is adopted to apply to BRCs requested before December 1, 2011, and is intended to maintain the status-quo for requests submitted before December 1, 2011. Adopted subsection (b) contains adopted new amendments that will govern requests to cancel or reschedule a BRC in cases where the BRC was requested on or after December 1, 2011.

Adopted new subsection (b)(1) defines "good cause" for cancelling or rescheduling a BRC prior to the scheduled BRC. "Good cause" is defined to mean objective facts beyond the control of a party, which reasonably prevent a party from attending the BRC, or would prevent the BRC from accomplishing its purpose, such as the need for a reasonable amount of additional time to secure necessary evidence for the dispute; or objective facts which make the BRC unnecessary. These adopted amendments provide that a determination of "good cause" will be at the discretion of the benefit review officer and will be determined on a case-by-case basis, taking into account prejudice to the other party. These adopted amendments are necessary to comply with the HB 2605 requirement to define "good cause" for rescheduling a BRC.

Adopted new subsection (b)(2) provides that the Division may cancel or reschedule a BRC at any time before the BRC on its own motion, at the request of the party who requested the conference, or at the mutual request of the parties.

Adopted new subsection (b)(3) provides that the party who requested the BRC, or both parties by mutual request, have the right to an unrestricted cancellation or rescheduling during the 10 day period after receiving the notice of setting. The notice of setting is deemed received on the fifth day after the date of the notice. This adopted subsection carries forward the 10-day unrestricted right to cancel or reschedule that was in previous §141.2(c).

Adopted new subsection (b)(4) sets out the procedure the parties must follow when requesting to cancel or reschedule a BRC after the 10-day unrestricted period. It provides that a request to cancel or reschedule a BRC must be in writing in the form prescribed by the Division, must demonstrate "good cause" as defined in adopted new subsection (b)(1), and must be sent to the Division and opposing party or parties.

Adopted new subsection (b)(5) provides that a cancellation without simultaneous rescheduling constitutes a withdrawal of the dispute on the issue. In addition, this adopted new subsection provides that a request to cancel a BRC subject to §130.12 of this title (relating to Finality of the First Certification of Maximum Medical Improvement and/or First Assignment of Impairment Rating) must comply with the provisions of §130.12(b)(3) of this title, which requires agreement of the parties to cancel. This clarification prevents a conflict between §141.2(b)(5) and §130.12(b)(3) and is necessary in order to clarify the status of a disputed issue when the requestor of the BRC cancels the BRC without requesting a new setting.

Adopted new subsection (b)(6) provides that the Division will notify the parties of a cancellation or rescheduling of a BRC in a timely manner. This adopted subsection carries forward provisions that were in previous §141.2(d).

Adopted new subsection (b)(7) provides that, if the benefit review officer denies a request to reschedule a BRC, the benefit review officer will notify the parties in writing and state the reasons for the denial. This is necessary to clarify due process considerations, in response to comments, as more fully discussed below.

Adopted amendments to §141.3. The adopted amendments to §141.3 divide the section into a new subsection (a) and (b). Subsection (a) is previous §141.3 renumbered to conform to the new section organization. The adopted amendment provides that subsection (a) will apply to a BRC that is requested before December 1, 2011. An additional amendment is also adopted which would require the benefit review officer to hold a scheduled BRC when a party fails to attend without "good cause." This latter amendment conforms this rule with Labor Code §410.028(a) which requires the benefit review officer to hold the BRC when a party fails to attend without good cause. Adopted new subsection (b) contains adopted new amendments that will govern BRCs and requests to reschedule a BRC in cases where the BRC was requested on or after December 1, 2011.

Adopted new subsection (b)(1) defines "good cause" for rescheduling a BRC when the party failed to attend the scheduled BRC. This adopted amendment is necessary in order to comply with HB 2605 which requires the Division to define "good cause." "Good cause" in these cases will mean objective facts beyond the control of a party, which reasonably prevented the party from attending the BRC and from notifying the Division in advance of the BRC to cancel or reschedule. If the party failed to file the request to reschedule within the third business day after the BRC as required by adopted §141.3(b)(3)(A), the party in its showing of "good cause" must also justify that failure and

any subsequent delay in filing the request to reschedule. This "good cause" definition is different from the "good cause" definition in adopted §141.2(b)(1) in that, in addition to justifying the failure to attend the BRC, the party who failed to attend must also justify the failure to file a request to reschedule or cancel prior to the BRC. Additionally, if the party failed to file the request to reschedule within three business days after the BRC as required by adopted §141.3(b)(3)(A), the party must also justify that delay.

Adopted new subsection (b)(2) provides that the benefit review officer shall hold the BRC as scheduled if a party fails to attend the BRC without good cause as determined by the benefit review officer. This adopted new subsection is consistent with statutory requirements in Labor Code §410.028(a).

Adopted new subsection (b)(3) provides the procedure for rescheduling a BRC when a party fails to attend a scheduled BRC. The request to reschedule must be in writing in the form prescribed by the Division and filed with the Division as soon as practicable, but no later than the close of the third-business day after the scheduled BRC. A copy of the request must be provided to the opposing party or parties. In the request, the requestor must show "good cause" as that term is defined in adopted new subsection (b)(1).

Adopted new subsection (b)(4) provides that, except as provided in paragraph (5) of this subsection, a party who fails to attend a BRC without "good cause" forfeits the party's entitlement to attend a subsequent BRC on the issue in dispute and the Division will not reschedule the conference.

Adopted new subsection (b)(5) provides that a party who fails to attend a BRC without "good cause" will not forfeit the party's entitlement to attend a subsequent BRC on the issue in dispute if the benefit review officer is authorized to schedule an additional BRC under Labor Code

§410.026(b). Adopted subsection (b)(4) and (5) are consistent with Labor Code §410.028(c) as added by HB 2605.

Adopted new subsection (b)(6) provides that a party who forfeits the party's entitlement to a BRC on the issue in dispute does not forfeit the party's right, as provided by the Texas Workers' Compensation Act (Act) and Division rules, to a contested case hearing on the issue in dispute. This adopted amendment is necessary to clarify that a party's forfeiture of the entitlement to attend a BRC on the issue in dispute does not result in the forfeiture of any right to a contested case hearing on the issue in dispute that is granted by the Act or Division rules. This provision is intended to help streamline the dispute resolution process by eliminating unnecessary delays, while preserving parties' rights to dispute resolution under the Act and Division rules.

Adopted new subsection (b)(7) provides that, notwithstanding a party's entitlement to reschedule a BRC under adopted subsection (b)(3), the Division may refuse to reschedule the BRC and direct the parties to a contested case hearing if authorized under §142.5(b) of this title (relating to Sequence of Proceedings to Resolve Benefit Disputes). This adopted new subsection is necessary because there may be cases where, under the circumstances, proceeding directly to a contested case hearing will be more effective than rescheduling the BRC. Section 142.5(b) of this title lists those situations where the Division may direct the parties to proceed directly to a contested case hearing without attending a BRC.

Adopted new subsection (b)(8) provides that any party who fails to attend a BRC without "good cause" commits an administrative violation. Labor Code §415.021(a) states that a person commits an administrative violation if the person violates, fails to comply with, or refuses to comply with the Texas Workers' Compensation Act or a rule, order, or decision of the Commissioner.

Adopted new subsection (b)(9) provides that if the benefit review officer denies a request to reschedule a BRC, the benefit review officer will notify the parties in writing and state the reasons for the denial. This is necessary to clarify due process considerations, in response to comments, as more fully discussed below.

4. SUMMARY OF COMMENTS AND AGENCY RESPONSES.

General: A commenter supports the adoption of these amendments. Other commenters state that the proposed changes are consistent with the legislative directives. However, commenters have concerns over how the Division will apply the adopted rules in the field offices. Another commenter states that there is a need for uniformity in how the rules are applied in the Division's field offices, and states that the Division should train staff on the application of the rules and monitor BRC requests.

Agency Response: The Division appreciates the supportive comments and agrees that the adopted amendments are consistent with the legislative directives. The commenters make several comments regarding the Division's implementation and application of these adopted amendments and the Division notes that these comments are outside the scope of this adoption. The Division notes that determinations of "good cause" under these adopted amendments are fact intensive questions and, as provided by these adopted amendments, will be determined by the benefit review officers on a case-by-case basis.

General: A commenter states that Labor Code §408.123(e) does not require a party to dispute a certification of Maximum Medical Improvement (MMI) and impairment rating (IR) by filing a DWC-45 requesting the setting of a BRC. The commenter states that as a substantive matter, §408.123

does require a party to file a dispute within 90 days after receiving a certification of MMI and IR, but does not require a party to file a DWC-45. The commenter states that it is hard to understand, particularly in the absence of any express statutory requirement, why the Division is imposing an additional burden upon an injured worker to not only file a dispute, but to activate and participate in the dispute resolution process. The commenter urges the Division to modify its current policy to allow injured workers to dispute their impairment rating without placing upon them the additional burden of forcing them to activate and participate in the dispute resolution process.

Agency Response: The Division notes that this comment concerns issues that relate to how a party disputes a certification of MMI and IR. This issue is governed by §130.12 and §141.1 of this title and is outside the scope of these rules.

General: Commenters state that it would improve efficiencies if the Division moved towards an electronic communication and BRC request format. Commenters state that when they submit multiple DWC 45 forms, they must send each form in a separate envelope. Commenters state internet form submission would streamline the request process, enhance timeliness of communication, promote settlements prior to conducting BRCs, and further reflect Division compliance with Labor Code §410.023(c)(2).

Agency Response: The Division notes that these adopted amendments relate to requirements for rescheduling and canceling a BRC, including defining “good cause” for those purposes and establishing time deadlines for rescheduling a BRC. These comments relate to procedures for requesting an initial BRC and therefore are outside the scope of these rules. However, the Division has noted the commenters’ desire for electronic submission of BRC requests for future consideration.

General: A commenter states that, an interpretation of the word “documentation” that includes a weighing of the sufficiency of the evidence by a Division employee who is not necessarily a licensed attorney without a hearing, is unconstitutional, and that a determination of the term “documentation” is limited to attempts to confer with the other side regarding possible resolution similar to a certificate of conference required in the civil litigation system. The commenter states that, any interpretation of the word “documentation” that includes the weighing of the sufficiency of supporting evidence by a Division employee who is not necessarily a licensed attorney, without a hearing, that acts to stop an injured employee from exhausting his/her administrative remedies and proceed to the courthouse because a Division employee is not necessarily a licensed attorney has determined there is not enough supporting evidence in the form of documentation to trigger the dispute resolution process necessary is clearly unconstitutional under both due process and equal protection principles.

Agency Response: The Division notes that this comment relates to the documentation requirements that apply to a person who requests a BRC. These adopted amendments do not address the provisions relating to requesting a BRC. The amendments relate to requirements for rescheduling and canceling a BRC, including defining “good cause” for those purposes, and establishing time deadlines for rescheduling a BRC. These comments are therefore outside of the scope of these rules. The Division notes, however, that Labor Code §410.023 requires the Commissioner to adopt, by rule, guidelines regarding the type of information necessary for a party to document the party’s efforts to resolve the disputed issue prior to a BRC request as well as a process through which the Division evaluates the sufficiency of the documentation provided. Labor Code §410.023(b) further clarifies that the Division may deny a BRC request if the party requesting the BRC does not provide sufficient documentation. The Division’s rule governing the process for

requesting and scheduling an initial BRC is §141.1 of this title (relating to Requesting and Setting a Benefit Review Conference), which is not included in these adopted amendments.

§141.2(a)(3)(C): A commenter states that where there is a true and permanent lack of desire to pursue a BRC, some kind of formal recitation or waiver should be required to safeguard the standard for rescheduling or cancelling a BRC from potential abuse.

Agency Response: The Division declines to make the requested change because the language of §141.2(a)(3)(C) is language in the previous rule and, under this adoption, these provisions will continue to apply to requests for BRCs filed before December 1, 2011 and is meant to maintain the status quo for requests made under the previous rule.

The Division notes that this comment involves issues that impact the application of other Division rules that are not included in the proposed amendments and this adoption, such as issues that relate to disputes involving the first certification of MMI and IR and other Division rules relevant to those types of disputes. To the extent this comment addresses these other issues and Division rules, this comment is outside the scope of this rule.

§141.2(a)(3): A commenter requests a clarification as to how a requesting party will show in §141.2(a)(3) that notice of an unwritten rescheduling or cancellation request was indeed "sent" by one party to an opposing party after the Division waives the requirement that such requests be written.

Agency Response: The Division disagrees that any changes to §141.2(a)(3) are necessary in order to clarify how a requesting party will show that an unwritten request was "sent" to an opposing party. BROs are capable of resolving any issue of fact that arises in any particular case regarding

whether a requestor sent an unwritten request to the opposing party. Further, the language in §141.2(a)(3) authorizing the Division to waive the requirement of written notice to the other party is language in the previous rule and, under this adoption, will continue to apply only to requests for a BRC filed before December 1, 2011. This provision therefore has limited continued applicability. Adopted §141.2(b) will apply to a request for a BRC filed on or after December 1, 2011, and §141.2(b)(4) provides that cancellation or rescheduling requests made after the unrestricted cancellation period must be in writing, in the form prescribed by the Division, and be sent to the Division and opposing party or parties. There is no provision in adopted §141.2(b) that authorizes the Division to waive the requirement that requests to cancel or reschedule be in writing.

§141.2(a)(4) and (b)(6): A commenter states that these adopted subsections do not define “timely manner” for the Division to provide notice of cancellation or rescheduling of a BRC, either inside or outside of the 10-day unrestricted period. The commenter suggests that “there be a specific time frame defined in the rule on what is considered timely receipt of notice of a BRC cancellation, i.e., within one business day of the scheduled BRC.” The commenter states lack of sufficient notice of cancellation or rescheduling can be especially problematic in cases of settings for expedited proceedings. The commenter suggests that the Division adopt standards for specific methods of giving notice of short-noticed cancellations, i.e., by Division telephone or electronic mail contact with the party representative slated to attend the BRC, as opposed to in person when attending at the canceled hearing or by regular mail.

Agency Response: The Division disagrees that the adopted rule should contain a specific time frame on what is considered a party’s timely receipt of notice of a BRC cancellation or rescheduling from the Division or a standard for specific methods of giving notice of short-noticed cancellations by

the Division. When a notice of a rescheduled or cancelled BRC is considered timely and what method the Division should use in providing the notice to parties is dependent on the facts and circumstances of each individual case.

§141.2(b)(1): Commenters state that the definition of “good cause” to cancel or reschedule in §141.2(b)(1) is vague and should be clarified to include situations where a party needs additional time to obtain needed evidence. Specifically, the commenters suggest adding additional language to state that “good cause” includes a reasonable showing that additional time is necessary to secure necessary evidence for the dispute. Another commenter states that the current language in this rule is preferable to any attempt to further define and tighten the definition as long as the Division provides training and direction to the benefit review officers and promotes a consistent application of the “good cause” measure.

Agency Response: Although it was the Division’s intent for “good cause” under §141.2(b)(1) to include situations where a party needs additional time to obtain needed evidence for the dispute, the Division agrees that clarification is necessary. The Division therefore has added language to adopted §141.2(b)(1)(A)(ii) that states “good cause” under that subparagraph includes a reasonable showing that additional time is necessary to secure necessary evidence for the dispute.

§141.2(b)(1): A commenter recommends that the Division clarify that the benefit review officer will only make a determination of whether rescheduling or canceling the BRC will unduly prejudice the rights of the other party in those instances where the party objects to the request to reschedule or cancel. The commenter states that if the benefit review officer were to consider and make a determination on such an issue based on his or her own understanding of the potential prejudice

imposed by that decision, he or she would be abandoning his or her role as a mediator and would take on the role of an advocate.

Agency Response: The Division disagrees that clarification is necessary. These adopted amendments provide that a determination of "good cause" will be at the discretion of the benefit review officer and will be determined on a case-by case basis, taking into account prejudice to the other party. Under the definition of "good cause" in adopted §141.2(b)(1), the benefit review officer will make his or her determination of "good cause" on a case-by-case basis, including prejudice to the other party, based on all the evidence provided to the benefit review officer.

§141.2(b)(5): A commenter has "serious concerns about equating cancellation of the BRC without simultaneous rescheduling with withdrawal of the dispute." The commenter states their "concern is exacerbated by the inclusion of the requirement that a request to cancel a BRC subject to §130.12 must comply with the provisions of §130.12(b)(3)." The commenter states that it "appears that the second sentence of §141.2(b)(5) requires the parties to agree that the first certification is final before a BRC concerning a dispute of a first certification of MMI and IR can be canceled." The commenter states that "in most instances, the request to cancel a BRC that is requested to avoid finality under Texas Labor Code §408.123(e) and Rule 130.12 is not being made because the party agrees with the certification." "Rather, the party with the burden of proof in challenging the first certification is requesting a cancellation to have more time to obtain the evidence necessary to pursue the dispute." "Typically, the only reason the BRC was requested is because it was the only mechanism available to prevent finality of the first certification of MMI and IR." The commenter states they are "baffled by the Division's belief that the Legislature has mandated expeditious resolution of a dispute of a first certification of MMI and IR at the expense of correct resolution." The commenter states that the

“legislative focus is that the parties be prepared when they pursue dispute resolution, not that they be prematurely pushed into dispute resolution.” Finally, the commenter believes that injured employees should be able to avoid finality and protest their right to pursue the dispute of the first certification of MMI and IR without having to request a BRC.

Commenters state that §141.2(b)(5) should be stricken because it prevents a person from preserving a dispute in cases such as 90-day finality of a certification of MMI or an IR where there is a defined timeframe to dispute a determination on those issues. The commenters state that they wish to preserve their dispute and pursue a BRC at some undetermined time in the future.

Agency Response: The Division disagrees. Section 141.2(b)(5) is necessary to prevent a conflict between §141.2 (b) and §130.12(b)(3) which states that “A dispute may not be revoked or withdrawn to allow the first valid certification of MMI and/or the first valid assignment of IR to become final except by agreement of the parties.” The purpose of requesting a BRC is to resolve a dispute and a party submitting a BRC request should be prepared to move forward with the BRC at the time the request is made. The purpose of these rules is to provide a timely and efficient mechanism to parties who need to resolve disputes regarding certain aspects of a workers’ compensation claim, which is consistent with the stated legislative goals for the system under Labor Code §402.021(b)(5) to “minimize the likelihood of disputes and resolve them promptly and fairly when identified.” Consequently, if a party wants to dispute the first certification of MMI or IR on a claim, then §130.12 of this title requires a party to either request a BRC or request a designated doctor examination. Accordingly, once a BRC is requested, the Division will proceed with the dispute resolution process and schedule a BRC on the issue. The Division will consider a request to cancel or reschedule a BRC as long as the party submits the request to cancel or reschedule in accordance with the adopted amendments and shows “good cause” if “good cause” is required.

The Division notes that the adopted definition of “good cause” addresses the commenter’s concern about situations where a party needs additional time after a BRC request to obtain necessary evidence. The Division intended when defining “good cause” under §141.2(b)(1) to include situations where a party needs additional time to obtain needed evidence for the dispute. In response to other comments, the Division added language to adopted §141.2(b)(1)(A)(ii) that clarifies this issue. This additional language states that “good cause” under that subparagraph will include situations “such as the need for a reasonable amount of additional time to secure necessary evidence for the dispute.” Thus, the adopted rules will allow a party who meets this definition of “good cause” to request a rescheduling of the BRC so that the party may obtain the necessary evidence to pursue the dispute.

The Division notes that the commenter’s comments that relate how a party is to dispute the first certification of MMI and IR is governed by §130.12 and §141.1 of this title and is outside the scope of these rules.

§141.2: Commenters support the cancellation time restrictions and “good cause” requirements and state that the rule enhancements will increase system efficiencies and produce overall cost savings to all stakeholders.

Agency Response: The Division appreciates the supportive comment.

§141.2(b)(1) and (2): Commenters state that the adopted rules violate due process because benefit review officers may not have a formal legal education or licensure by the state bar, there is no opportunity for a hearing, no opportunity to present witnesses and evidence, and no opportunity to cross-examine, and there is no appeals process. Commenters suggest that the rule should be

amended to include notice, structured oversight and a hearing. A commenter also states there must be some form of appeal with procedural due process considerations regarding any determination by a benefit review officer that a party is not entitled to a BRC on a particular issue.

Agency Response: The Division disagrees that the rule violates due process, that it should be amended to include notice, structured oversight and a hearing, or that there needs to be some form of avenue to appeal a benefit review officer's determination of "good cause."

The BRC process is set by statute and the legislature has determined how the BRC process works. Labor Code §410.028 designates the benefit review officer as the person who determines whether there exists "good cause" as that term is used in that section. Labor Code §410.022 sets out the qualifications a benefit review officer must hold and there is no requirement in this section that a benefit review officer must possess a formal legal education or be licensed by the State Bar of Texas. This adopted rule incorporates the statutory requirement that the benefit review officer make the determination of "good cause" under that section.

Further, adopted §141.2(b) already provides for notice to the parties and an opportunity to provide the benefit review officer with evidence relevant to the request to determine whether there exists "good cause" to reschedule or cancel. In addition, the Division has added §141.2(b)(7) and §141.3(b)(9) to require a benefit review officer to issue a written response to a request to cancel or reschedule a BRC, if the request is denied. This adopted rule requires a party seeking to reschedule or cancel a BRC to make the request in writing and to demonstrate "good cause" in that request. The adopted rule also requires the requestor to provide a copy of the written request to each opposing party or parties. Under this adopted rule, all parties are free to submit to the benefit review officer any evidence it may have on the determination of "good cause." The benefit review officer, a neutral party, will then decide whether "good cause" exists to reschedule or cancel the BRC.

Finally, the adopted rule should not contain a process by which a party may appeal a benefit review officer's determination of "good cause." With regard to "good cause" determinations, Labor Code §410.028(a) specifically provides that the benefit review officer has the authority to determine whether "good cause" exists to reschedule a BRC. This statute does not provide a mechanism by which this determination may be appealed. While the Division authorizes a request for an expedited Contested Case Hearing on a denial of an incomplete BRC request in §141.1(g) of this title, that rule does not authorize an appeal of a denial to cancel or reschedule the BRC.

As stated, the Division disagrees with the commenter that the adopted rule violates the due process rights of the parties in a BRC. However, for purposes of ensuring that the parties are notified by the benefit review officer when the officer denies a request to cancel or reschedule a BRC, the Division has added language to adopted §141.2 and §141.3 that states that the benefit review officer will notify the parties in writing when a request is denied and will state the reasons for the denial. Specifically, the Division has added a subsection (b)(7) to adopted §141.2 which states that, "If the benefit review officer denies a request to cancel or reschedule a benefit review conference under this section, the benefit review officer will notify the parties in writing and state the reasons for the denial." The Division has added a subsection (b)(9) to adopted §141.3 which states, "If the benefit review officer denies a request to reschedule a benefit review conference under this section, the benefit review officer will notify the parties in writing and state the reasons for the denial."

§141.2(b)(1) and §141.3(b)(1): Commenters state that the definitions of "good cause" and "pattern of abuse" are vague.

Agency Response: The Division disagrees. The “good cause” definition is basically a “reasonable person” standard and includes common elements in other “good cause” definitions, which are commonly used throughout Western jurisprudence. It is not possible to delineate all of the possible examples of “good cause” to cancel or reschedule a BRC or for failure to attend a BRC that would be applicable to every situation. This determination must be made on a case-by-case basis using all of the evidence provided to the benefit review officer at the time the request to cancel or reschedule the BRC is made.

The term “pattern of abuse” came from language in previous §141.2(b). This is not a new term to the system and historically has been commonly understood.

§141.3(b)(1): A commenter supports the addition of §141.3(b)(1).

Agency Response: The Division appreciates the supportive comment.

§141.3(b)(1)(B) and (C), and §141.3(b)(3)(A): A commenter states that “it appears that §141.3(b)(3)(A) permits filing for rescheduling within three days of the BRC in every case, §141.3(b)(1)(B) notwithstanding, and furthermore permits filing after the three day period.” The commenter requests clarification that a party is expected to request to reschedule in advance unless good cause for the delay is shown, up to a maximum of three days after the BRC. Otherwise, there is no quantifiably expressed time limit on BRC rescheduling requests in the rule.

Agency Response: The Division clarifies that the three-business-day timeframe to reschedule a BRC in adopted §141.3(b)(3) applies to situations where the party has failed to attend a scheduled BRC and has failed to cancel or reschedule the BRC prior to the date the

BRC was scheduled to be held. This timeframe is necessary in order to establish a deadline for requesting to reschedule a BRC as required by HB 2605. A three-business-day deadline is necessary because it both provides the requestor a sufficient amount of time to prepare the request to reschedule the BRC and helps prevent an undue delay in the resolution of the disputed issue. It is important to note that a party who fails to attend a BRC and fails to request to reschedule the BRC within the three-business-day deadline established by this rule may still request to reschedule the BRC. However, a party in this situation will have to meet a higher "good cause" burden to show why the party failed to meet the three-day timeframe in addition to showing why the party failed to attend and failed to previously cancel or reschedule the BRC. Allowing parties to file a request to reschedule a BRC after the three-business-day deadline is necessary because there may be situations, such as cases where the party is incapacitated, where there may be good cause as to why the party failed to attend the BRC and failed to reschedule the BRC within the three-business-day deadline. The Division also notes that there are separate timeframes for canceling or rescheduling a BRC prior to the date the BRC is scheduled to be held and those timeframes are described in §141.2(b)(3).

§141.3(b)(2): A commenter states §141.3(b)(2) only allows the benefit review officer to hold the BRC as scheduled if the benefit review officer has made a determination that a party has failed to attend without good cause. The commenter recommends adding the following text to the proposal: "Evidence that the party was notified of the benefit review conference and failed to timely request that the conference be canceled or rescheduled shall create a rebuttable presumption that there is no good cause for the failure to attend the conference."

Agency Response: The Division disagrees that the suggested language is necessary and declines to make the suggested change. The Division clarifies that if a party does not attend a scheduled BRC and has not established good cause for failure to attend the BRC, the BRC will proceed accordingly as required by statute. If the party who failed to attend wants to reschedule the BRC, the adopted rule requires the party to submit evidence of "good cause." Therefore, the commenter's recommended language is not necessary.

§141.3(b)(3): Commenters state that a "one business day" deadline to file a request to reschedule after a party misses a BRC is "insufficient," and is "unique and unjustified when considering all other substantive deadlines found in the Texas Workers' Compensation Act and Division rules.

Commenters recommend a 10-day deadline, the same amount of time an injured worker has to contest a Division denial of an injured employee's request to change treating doctors or a denial of an insurance carrier's request to dispute an injured employee's entitlement to Supplemental Income Benefits (SIBs). Another commenter also suggests a 15-day deadline, the time to contest a Division order for attorneys' fees, or a 90-day deadline the same amount of time to contest an injured employee's certification of MMI and IR.

Agency Response: The Division clarifies that the proposed amendments and the adopted amendments set a three-business-day deadline to file a request to reschedule when the party has failed to attend the BRC. The Division disagrees with the deadlines suggested by the commenters. Adopted §141.3(b)(3) is necessary in order to establish a deadline for requesting to reschedule a BRC as required by HB 2605. Imposing a three-business-day deadline upon a party who has failed to attend the BRC is necessary because it both provides the requestor a sufficient amount of time to prepare the request to reschedule the BRC and helps prevent an undue delay in the resolution of the

disputed issue. It is important to note that a party who fails to attend a BRC and fails to request to reschedule the BRC within the three-business-day deadline established by this rule may still request to reschedule the BRC. However, a party in this situation will have to meet a higher "good cause" burden to show why the party failed to meet the three-day timeframe in addition to showing why the party failed to attend and failed to previously cancel or reschedule the BRC. The provision allowing a party to submit a request to reschedule after the three-business-day deadline was included in the rule because there may be situations, such as incapacitation, where the party may have good cause as to why the party failed to attend the BRC and failed to file the request to reschedule with the three-business-day time period.

§141.3(b)(4): The provisions of §141.3(b)(4), which provide for a forfeiture of any further BRCs on the issues propounded because the injured employee did not come up with a valid excuse is way too harsh. The commenter proposes that this rule be amended to find a less harsh manner to handle BRC cancellations and/or changes than what is being proposed.

Agency Response: The Division disagrees . The adopted rule mirrors a new statutory requirement. Specifically, Labor Code §410.028(c), as amended by HB 2605, provides that "If a party ... fails to attend a benefit review conference without good cause as defined by commissioner rule, the party forfeits the party's entitlement to attend a benefit review conference on the issue in dispute, unless a benefit review officer is authorized to schedule an additional benefit review conference under Section 410.026(b)."

§141.3(b)(8): A commenter supports the addition of §141.3(b)(8).

Agency Response: The Division appreciates the supportive comment.

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

For: Concentra, Insurance Council of Texas, Texas Mutual Insurance Company.

For, with changes: Law Offices of Jane A. Clark, J. A. Davis & Associates, LLP, Injured Workers' Pharmacy, Office of Injured Employee Counsel, Property Casualty Insurers Association of America, State Office of Risk Management, and Texas Workers' Advocates.

Against: None.

Neither for or Against: None.

6. STATUTORY AUTHORITY.

The amendments are adopted under the Labor Code §§410.024, 410.025, 410.026, 410.027, 410.028, 408.123, 408.147, 402.00116, 402.00111, 402.061, 402.00128, 402.021, 410.021, 410.023 and 415.021. Section 410.024 requires the Commissioner by rule to adopt guidelines relating to claims that do not require a BRC and may proceed directly to a contested case hearing. Section 410.025 authorizes the Commissioner to prescribe the scheduling of BRCs and expedited hearings, and the required notice related to the scheduling. Section 410.026 denotes the powers and duties of a benefit review officer. Section 410.027 specifies that the Commissioner shall adopt rules for conducting BRCs. Section 410.028 sets forth consequences for failing to attend a scheduled BRC and provides for procedures to reschedule a BRC. Section 408.123 provides that an employee's first certification of maximum medical improvement or assignment of an impairment rating becomes final if not disputed within 90 days after notice. Section 408.147 states that if an insurance carrier

fails to make a request for a BRC within 10 days after the date of the expiration of the impairment income benefit period or within 10 days after receipt of the injured employee's statement, the insurance carrier waives the right to contest entitlement to SIBS and the amount of SIBs for that period of SIBs. Section 402.00116 grants the powers and duties of chief executive and administrative officer to the Commissioner and the authority to enforce the Labor Code, Title 5, and other laws applicable to the Division or Commissioner. Section 402.00111 provides that the Commissioner shall exercise all executive authority, including rulemaking authority, under the Labor Code, Title 5. Section 402.061 provides the Commissioner the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act. Section 402.00128 vests general operational powers to the Commissioner including the authority to delegate, and assess and enforce penalties as authorized by the Labor Code, Title 5. Section 402.021 sets forth the legislative goals of the workers' compensation system, including minimizing the likelihood of disputes and resolving them promptly and fairly when identified. Section 410.021 sets forth the purpose of the BRC as a nonadversarial and informal proceeding within the dispute resolution process which is designed to explain, discuss, mediate and resolve disputed issues by agreement of the parties. Section 410.023 requires the party requesting a BRC to provide documentation of efforts made to resolve the dispute before the request was submitted. Section 415.021 provides for assessment of administrative penalties if a person violates, fails to comply with, or refuses to comply with a rule or the Texas Workers' Compensation Act.

7. TEXT

§141.2. Canceling or Rescheduling a Benefit Review Conference.

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

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

(A) on its own motion;

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

(C) at the mutual request of the parties.

(2) A request for cancellation or rescheduling under paragraph (1) of this subsection shall be made by notifying the division within 10 days of the date the notice of setting is received. The date the notice of setting is received is deemed to be the fifth day after the date of the notice. Cancellation or rescheduling requests made during this 10-day period are unrestricted unless a pattern of abuse is detected.

(3) Cancellation or rescheduling requests made after the unrestricted cancellation period defined in paragraph (2) of this subsection shall be in writing unless waived by the division and sent to the division and opposing party or parties. The request shall be granted only on a showing of good cause. Good cause may include, but is not limited to, the following:

(A) the parties independently resolved the disputed issue or issues

by agreement or settlement, as provided by Chapter 147 of this title (relating to Dispute Resolution--Agreements, Settlements, Commutations);

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

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

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

(E) illness of a party.

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

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

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

(A) objective facts beyond the control of a party, which reasonably:

(i) prevent a party from attending the benefit review conference; or

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

(B) objective facts which make the benefit review conference unnecessary.

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

(A) on its own motion;

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

(C) at the mutual request of the parties.

(3) A request for cancellation or rescheduling under paragraph (2)(B) or (C) of this subsection shall be made by notifying the division within 10 days of the date the notice of setting is received. The date the notice of setting is received is deemed to be the fifth day after the date of the notice. Cancellation or rescheduling requests made during this 10-day period are unrestricted unless a pattern of abuse is detected.

(4) Cancellation or rescheduling requests under paragraph (2)(B) or (C) of this subsection made after the unrestricted cancellation period defined in paragraph (3) of this subsection must:

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

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

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

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

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

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

§141.3. Failure to Attend a Benefit Review Conference.

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

(1) When a party fails to attend a benefit review conference without good cause, as determined by the benefit review officer, the benefit review officer:

(A) shall hold the conference as scheduled; and

(B) may recommend the issuance of an administrative violation.

(2) A representative who fails to attend a benefit review conference without good cause commits an administrative violation.

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

(1) In this subsection, "good cause" will be determined at the discretion of the benefit review officer on a case-by-case basis and means objective facts beyond the control of a party, which reasonably:

(A) prevented the party from attending the benefit review conference;

(B) prevented the party from requesting the division to cancel or reschedule in advance of the benefit review conference; and

(C) if applicable, prevented the party from filing a request to reschedule within the third business day after failing to attend the scheduled benefit review conference and justifies the subsequent delay in filing the request to reschedule.

(2) When a party fails to attend a benefit review conference without good cause, as determined by the benefit review officer, the benefit review officer shall hold the conference as scheduled.

(3) A party who fails to attend a scheduled benefit review conference may request to reschedule the benefit review conference under the provisions of this subsection. The request to reschedule must:

(A) be filed with the division as soon as practicable, but no later than the close of the third business day after the scheduled benefit review conference, unless good cause exists for further delay;

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

(C) establish good cause in accordance with paragraph (1) of this subsection; and

(D) be sent to opposing party or parties.

(4) Except as provided by paragraph (5) of this subsection, if a party fails to attend a benefit review conference without good cause, the party forfeits the party's entitlement to attend a benefit review conference on the issue in dispute. If a party forfeits this entitlement, the division will not reschedule the benefit review conference on the issue in dispute.

(5) A party will not be considered to have forfeited the party's entitlement to attend a benefit review conference on the issue in dispute under paragraph (4) of this subsection if a benefit review officer is authorized to schedule an additional benefit review conference under Labor Code §410.026(b).

(6) A party who forfeits the party's entitlement to attend a benefit review conference on the issue in dispute does not forfeit the party's right, as provided by the Workers' Compensation Act and division rules, to a contested case hearing on the issue in dispute.

(7) Notwithstanding paragraph (3) of this subsection, the division may refuse to reschedule a benefit review conference under this section and may direct the parties to proceed to a contested case hearing, if authorized under §142.5(b) of this title (relating to Sequence of Proceedings to Resolve Benefit Disputes).

(8) A party who fails to attend a benefit review conference without good cause commits an administrative violation.

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

8. CERTIFICATION.

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

Issued at Austin, Texas, on _____, 2011.

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 §141.2 and §141.3 specified herein, concerning Canceling or Rescheduling a Benefit Review Conference, and Failure to Attend a Review Conference, are adopted.

AND IT IS SO ORDERED.

X

ROD BORDELON
COMMISSIONER OF WORKERS' COMPENSATION

TITLE 28. INSURANCE
Part 2. Texas Department of Insurance,
Division of Workers' Compensation
Chapter 141. Dispute Resolution--Benefit Review Conference

ATTEST:

X

Dirk Johnson
General Counsel

COMMISSIONER ORDER NO.