

## **TITLE 28. INSURANCE**

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

#### **CHAPTER 133: GENERAL MEDICAL PROVISIONS**

##### **Title 28 Texas Administrative Code (TAC) §133.308**

**1. INTRODUCTION.** The Texas Department of Insurance, Division of Workers' Compensation (division) proposes to amend 28 TAC §133.308. The proposed change replaces "hearing officer" with "administrative law judge." An informal working draft of the rule text was published on the division's website on April 9, 2018, and the division received two comments.

**2. BACKGROUND AND PURPOSE.** House Bill (HB) 2111, enacted by the 85th Texas Legislature, Regular Session, replaced all references to "hearing officer" in the Texas Workers' Compensation Act with "administrative law judge." The purpose of this proposal is to make conforming changes to the division's rules.

**3. FISCAL NOTE.** Mr. Kerry Sullivan, deputy commissioner for Hearings, has determined that for each year of the first five years the amendments will be in effect, there will be no fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. There will be no measurable effect on local employment or the local economy as a result of the proposal.

**4. PUBLIC BENEFIT.** Mr. Sullivan has also determined that, for each year of the first five years amended §133.308 is in effect, the public benefit will be harmonization of the division's rule language with that of the Texas Labor Code.

**5. ANTICIPATED COSTS TO COMPLY WITH THE PROPOSAL.** Mr. Sullivan anticipates that there will be no costs to comply with these amendments.

Government Code §2001.0045 requires a state agency to offset any costs associated with a proposed rule by: (1) repealing a rule imposing a total cost that is equal to or greater than that of the proposed rule; or (2) amending a rule to decrease the total cost imposed by an amount that is equal to or greater than the cost of the proposed rule. As stated, the division has determined that the proposed amendment will have no cost to system participants.

**6. ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS.**

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

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

**7. GOVERNMENT GROWTH IMPACT STATEMENT.** Government Code §2001.0221 requires that a state agency prepare a government growth impact statement describing the effects that a proposed rule may have during the first five years that the rule would be in effect. The division has determined that the proposed rule will not create or eliminate a government program and will not require an increase or decrease in fees

paid to the division. Implementation of the proposal will not require the creation or elimination of employee positions and will not require an increase or decrease in future legislative appropriations to the division.

The proposal does not create a new regulation, expand an existing regulation, limit an existing regulation, or repeal an existing regulation. The number of individuals subject to the rule's applicability is neither increased nor decreased by the proposal, and the proposal has no impact on the state's economy.

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

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

**10. STATUTORY AUTHORITY.** Amended §133.308 is proposed under the authority of Labor Code §§402.00111, 402.00116, 402.00128, and 402.061.

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

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

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

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

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

## **11. TEXT.**

### **§133.308. MDR of Medical Necessity Disputes**

(a) – (r) (No change.)

(s) Appeal of IRO decision. A decision issued by an IRO is not considered an agency decision and neither the department nor the division is considered a party to an appeal. In a division Contested Case Hearing (CCH), the party appealing the IRO

decision has the burden of overcoming the decision issued by an IRO by a preponderance of evidence based medical evidence. A party to a medical dispute that remains unresolved after a review under Labor Code §504.053(d)(3) or Insurance Code §1305.355 is entitled to a contested case hearing in the same manner as a hearing conducted under Labor Code §413.0311. A party to a medical necessity dispute may seek review of a dismissal or decision at a division CCH as follows:

(1) A party to a medical necessity dispute may appeal the IRO decision by requesting a division CCH conducted by a division administrative law judge [~~hearing officer~~]. A benefit review conference is not a prerequisite to a division CCH under this subsection.

(A) – (C) (No change.)

(D) At a division CCH, the administrative law judge [~~hearing officer~~] shall consider the treatment guidelines:

(i) – (iii) (No change.)

(E) (No change.)

(F) A party to a medical necessity dispute who has exhausted all administrative remedies may seek judicial review of the division's decision. Judicial review under this paragraph shall be conducted in the manner provided for judicial review of contested cases under Chapter 2001, Subchapter G Government Code, and is governed by the substantial evidence rule. The party seeking judicial review under

this section must file suit not later than the 45th day after the date on which the division mailed the party the decision of the administrative law judge [~~hearing officer~~]. The mailing date is considered to be the fifth day after the date the decision of the administrative law judge [~~hearing officer~~] was filed with the division. A decision becomes final and appealable when issued by a division administrative law judge [~~hearing officer~~]. If a party to a medical necessity dispute files a petition for judicial review of the division's decision, the party shall, at the time the petition is filed with the district court, send a copy of the petition for judicial review to the division's Chief Clerk of Proceedings. The division and the department are not considered to be parties to the medical necessity dispute pursuant to Labor Code §413.031(k-2) and §413.0311(e).

(G) (No change.)

(2) (No change.)

(t) – (v) (No change.)

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

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

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General Counsel  
Texas Department of Insurance,  
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