



ADVISORY NO. 462

TOPIC: SUBSTANTIAL CHANGES TO BRC RULES

On October 1, 2010, new DWC rules will become effective. The rule changes are as follows:

- Rule 141.1 Requesting and Setting a BRC
- Rule 141.2 Canceling or Rescheduling a BRC
- Rule 141.4 Sending and Exchanging Pertinent Information
- Rule 141.7 Division Actions Following a BRC

Some of the changes will substantially affect your actions in requesting BRCs, in making exchanges and in handling the BRC process.

Most Significant Changes:

1. There is a new DWC-45 form that is required to be used on or after October 1, 2010. It is on the Division's website. This new form has more required fields than the prior form. The form must be completed, or DWC will deny the request for the BRC.
2. The new DWC-45 form requires documentation of the parties' efforts to resolve the issues. This will include:
 - a. Providing the date that the opposing party was notified of the disputed issues;
 - b. Description of all efforts that have been made to resolve the disputed issues; and
 - c. Supporting documentation of those efforts.
3. The failure to provide that information and supporting documentation will render the DWC-45 form incomplete.

Examples of Supporting Documentation (to be submitted with DWC-45)

Correspondence
Emails
Faxes
Telephone contact
Summaries of conferences

4. The party filing the DWC-45 must send a copy not only to DWC, but also to all of the parties.
5. Prior to requesting the BRC (filing the DWC-45), the requesting party must exchange pertinent information with all of the other parties. "Pertinent information" means all information relevant to the resolution of the disputed issue or issues to be addressed at the BRC, including, but not limited to reports regarding the compensable injury, the injured employee's wage records and the injured employee's medical records.
6. All parties receiving a DWC-45 form must make an exchange with all other parties within ten working days following the party's receipt of the DWC-45 form. Thus, the exchange by the opposing party will almost always be made prior to the receipt of a set notice of the BRC for which the DWC-45 has been filed.
7. All parties must make an exchange with the DWC at least fourteen days prior to the BRC. If the BRC is set on an expedited basis, the exchange deadline with DWC is at least five days prior to the scheduled BRC. Additionally, any pertinent information that was not previously exchanged with the other parties should be exchanged with those parties no later than fourteen days prior to the BRC (five days if the BRC is expedited). Any additional pertinent information not previously exchanged should be brought to the BRC for exchange at that point.
8. The request for the BRC (DWC-45 form) must be complete and otherwise appropriate. The failure to be complete or otherwise appropriate, will result in a denial of the BRC by DWC. The DWC is required to give the parties notice of the denial and to state the reasons for the denial. However, the DWC will not be required to identify the documents that are needed to complete the DWC-45 form.
9. If a DWC-45 form is denied, the requesting party may pursue an administrative appeal to a Contested Case Hearing, or the requesting party may submit a new request for a BRC that meets DWC's requirements.

10. If the DWC denies the DWC-45, this could affect the carrier's defenses in three specific areas:
 - a. The 90-Day Rule;
 - b. Change of Treating Doctor; and
 - c. Entitlement to SIBs

11. A DWC-45 is used by carriers to:
 - a. Deny DWC approvals of a request for change of treating doctors,
 - b. DWC initial determination of SIBs; and
 - c. A claimant's filing of a request for entitlement to SIBs.

The 90-Day Rule may be disputed by filing a DWC-32 form that requests the appointment of a designated doctor (if the first certification of MMI and assignment of the impairment rating is not from a designated doctor). If the first certification of MMI and assignment of an impairment rating is from the designated doctor, the only instrument for disputing the certification and impairment rating is with a DWC-45. The time deadline for disputing change of treating doctor and for disputing SIBs is ten days. In those two situations, the re-filing of a DWC-45 following the carrier's receipt of the DWC denial of the DWC-45 is probably not an option as the deadline most likely will have passed. For those issues, a request for a Contested Case Hearing is the only option. The carrier would pursue this option to obtain a finding that either the DWC-45 was complete, or it had good cause for filing an incomplete request for a BRC and retain the original date for filing the request for a BRC.

12. The DWC may cancel or reschedule a BRC on its own motion or at the request of the party who requested the BRC or at the mutual request of the parties. Cancellation or rescheduling requests made within ten days of the notice of the setting are unrestricted unless a pattern of abuse is detected. Cancellation or rescheduling requests made after the 10-day period shall be in writing unless waived by the Division. A copy is to be forwarded to the opposing parties.

13. The Division will no longer retain the pertinent information received for the BRC after the parties have reached an agreement on the issues, or have set the unresolved issues for a CCH or have failed to schedule a second BRC within at least ninety days after the first BRC. Under these circumstances, the parties will be required to make a new exchange with the Division that includes previously exchanged pertinent information.

14. The current rule requires the DWC to provide written notice of the BRC date, time and location to the parties and to the employer at least thirty days before a BRC and at least ten days before an expedited BRC. However, the new rule while requiring the DWC to provide notice of the date, time and location of the BRC to the parties and the employer, does not set out the number of days of notice required. In fact, the DWC, in response to comments in the preamble, ignores the prior rule while taking the position that “the time periods are internal administrative functions and will be addressed through administrative policies, not by rule.”
15. Similarly, the current rule requires that the DWC, not later than the 8th day after receiving the Benefit Review Officer’s report, provide a copy of the BRO Report to the parties. Under the new rule, the DWC is still required to provide the BRO Report to the parties, but the language requiring that it be provided within eight days has been removed.

These New Rules Become Effective October 1, 2010.

The DWC will most likely have a strict interpretation of the rules. A violation of a rule by a carrier is an administrative violation under Sec.415.002(a)(20).

Flahive, Ogden and Latson currently assists carriers in the exchange process. However, this exchange process will change effective October 1, 2010. Our procedures will also change on this date. Please see our flyer attached.

If you have any questions about this advisory, please contact Bobby Stokes or James Sheffield.

If you would prefer to use FOL for your exchanges, please contact:

Cindi Friedel - caf@fol.com – (512) 435-2244

If you need assistance in any other part of the BRC process, please contact the assigned General Question Attorney.