



## ADVISORY NO. 481

**TOPIC: DIVISION ADOPTS NEW MEDICAL DISPUTE RESOLUTION RULES**

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On May 11, 2012, Commissioner of Workers' Compensation Rod Bordelon adopted amendments to Division of Workers' Compensation Rules 133.307, 133.308, 144.1–144.7 and 144.9–144.16.

The adopted amendments to Rules 133.307 and 133.308 relate to medical fee and medical necessity dispute resolution. The adopted amendments to Rules 144.1–144.7 and 144.9–144.16 relate to arbitration, including arbitration of medical fee dispute cases.

The primary purpose of these adopted amendments is to conform these rules to recent legislation in House Bill 2605 and Senate Bill 809 enacted by the 82nd Legislature, Regular Session, effective September 1, 2011 that alters the manner in which a party appeals a Division of Workers' Compensation decision in a medical fee dispute and an Independent Review Organization decision in a medical necessity dispute. Those legislative provisions amended the act to provide for centralized administrative review of medical fee disputes and decentralized administrative review of medical necessity disputes.

### **Medical Fee Disputes under the new Rules**

Under the amendments found in Texas Lab. Code Ann. § 413.0312, medical fee disputes will first be set for a benefit review conference in the appropriate field office managing the injured workers' claim (typically the field office that is nearest the affected health care provider). If the parties are unable to resolve the dispute, they may request binding arbitration or a contested case hearing conducted by the State Office of Administrative Hearings in Austin. A party who has exhausted all administrative remedies and who is aggrieved by a final decision of SOAH may seek judicial review of the decision in the manner provided for judicial review of a contested case under Chapter 2001, Subchapter G Government Code and Labor Code §413.031(k-1).

In addition to altering the appellate process applicable to medical fee disputes, Texas Lab. Code Ann. § 413.0312 also requires reimbursement to the Division for the costs for services provided by SOAH in a contested case hearing involving a medical fee dispute. Except in cases where the injured employee is the nonprevailing party, Labor Code §413.0312(g) requires the nonprevailing party in the contested case hearing to reimburse the Division for the costs of a

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SOAH proceeding. If an injured employee is a nonprevailing party, Labor Code §413.0312(g) requires the insurance carrier to reimburse the Division for the SOAH costs unless otherwise agreed by the parties.

Reimbursement of SOAH costs must be remitted to the Division not later than the 30th day after the date of receiving a bill or statement from the Division. The new rules establish a procedure that will enable the Division to charge a party to a medical fee dispute, other than an injured employee, for the costs of services provided by SOAH in medical fee dispute cases.

These amendments apply only to the appeal of a medical fee dispute that is based on a review conducted by the Division on or after June 1, 2012. An appeal of a medical fee dispute that is based on a review conducted by the Division before that date is governed by the prior law.

### **Medical Necessity Disputes under the new Rules**

Under the new rules, medical necessity disputes will be scheduled for benefit review conference in the field office managing the injured worker's claim. However, unlike fee disputes, if a contested case hearing is needed, that hearing will remain in the Division's local field office.

The new rules implement legislative changes to the manner in which a person appeals a decision by an independent review organization. The legislative changes are found in amended Insurance Code §1305.355 and added §1305.356 (which concerns the appeal of an IRO decision involving health care in a certified workers' compensation network); (2) amended Labor Code §413.031(k) and (k-1) (which concerns the appeal of an IRO decision involving health care provided outside of a certified network); and (3) enacted Labor Code §504.054 )which concerns the appeal of an IRO decision involving health care provided by a political subdivision in accordance with Labor Code §504.053(b)(2)).

These statutory amendments provide that a party to a medical necessity dispute that remains unresolved after review by an IRO is entitled to a contested case hearing conducted by a Division hearing officer in accordance with Labor Code §413.0311. Additionally, the new provisions require that in cases involving health care in a certified network, the hearing officer conducting the hearing shall consider evidence-based treatment guidelines adopted by the certified network. In a similar manner, the new statutory provisions in the Labor Code require that in cases involving health care provided by a political subdivision under Labor Code §504.053(b)(2), the hearing officer conducting the hearing shall consider any treatment guidelines adopted by the political subdivision or pool if those guidelines meet the standards provided by Labor Code §413.011(e). A party who has exhausted all administrative remedies and who is aggrieved by a final decision of the Division's hearing officer may seek judicial review of the decision in the manner provided for judicial review of a contested case under Chapter 2001, Subchapter G Government Code.

The new rules also implement provisions which concern a party's right to seek judicial review after exhausting the applicable administrative remedies in the medical fee dispute or review of the IRO decision and specifies the time frames for a party seeking judicial review.

In a medical fee dispute, Texas Lab. Code Ann. § 413.031(k-1) provides that the party seeking judicial review of a SOAH decision must file suit not later than the 45th day after the date on which SOAH mailed the party the notification of the decision. For purposes of Labor Code §413.031(k-1), the mailing date is considered to be the fifth day after the date the decision was issued by SOAH.

In an appeal of an IRO decision, Texas Lab. Code Ann. § 413.0311(d) provides that a party seeking judicial review of a decision of a Division hearing officer must file suit not later than the 45th day after the date on which the Division mailed the party the decision of the hearings officer. The mailing date is considered to be the fifth day after the date the decision of the hearings officer was filed with the Division.

### **First Responder Changes**

The adopted amendments also incorporate into these rules provisions in HB 2605 that require the TDI-DWC to accelerate a contested case hearing requested by or an appeal submitted by certain first responders who sustain a serious bodily injury. Finally, the adopted amendments include changes not related to HB 2605 and SB 809 that are intended to clarify and update these rules governing medical dispute resolution and arbitration.

The adoptions were filed with the Office of the Secretary of State on May 11, 2012 for publication in the May 25, 2012 issue of the Texas Register. The adopted rules are effective May 31, 2012.

### **Rule-By-Rule Analysis of the new Rules**

#### **Adopted Rule 133.307**

This rule contains the requirements and process for: (1) the request for medical fee dispute resolution by the Division, including the acceleration of first responder requests; (2) a party to respond to a request for medical fee dispute resolution; (3) a party to appeal the decision of the MFDR Section; (4) a party to seek judicial review; and (5) the billing of a non-prevailing party, other than an injured employee, for the costs of services provided by SOAH.

#### **Adopted Rule 133.308**

This rule contains requirements for: (1) the Division's monitoring activities of IROs; (2) the certification and professional licensing of independent review organizations (IROs); (3) who may request a decision by an IRO; (4) the information that must be included with the request; (5)

the timeframe for the IRO decisions and the information that must be included in the IRO decisions; and (6) IRO fees. Additionally, this rule also sets forth the process and requirements necessary to: (1) appeal a medical necessity (IRO) dispute through the Division; (2) seek judicial review; and (3) accelerate and give priority to a request by a first responder's request for an appeal regarding the denial of a claim for medical benefits. Last, this rule provides that the Department or the Division may initiate appropriate enforcement proceedings under 28 TAC Chapter 12 or Labor Code, Title 5 and Division rules against an IRO or a person conducting independent reviews.

#### **Rule 144.1**

This rule describes the authority and duties of arbitrators. Rule 144.1(a) allows the arbitrator to perform specific enumerated tasks relevant to the arbitration of eligible disputes. Rule 144.1(b) states the duties of an arbitrator in an eligible dispute.

#### **Rule 144.2**

This rule prohibits the arbitrator from communicating with any party outside of the arbitration regarding the substantive facts, issues, law, or rules unless the communication is in writing and a copy must be delivered to all parties to the arbitration. This section allows parties to communicate with the arbitrator about any procedural matter.

#### **Rule 144.3**

This rule provides that a party to an arbitration that sends any information to the chief clerk of proceedings or arbitrator must also deliver a copy of that information to all the other parties or their representatives, and specifies the manner by which that information can be sent. This section also requires a statement certifying such delivery to be included on any document sent by a party to the division's chief clerk of proceedings or arbitrator.

#### **Rule 144.4**

This rule contains the rules that attach when parties mutually agree to engage in arbitration.

#### **Rule 144.5**

This rule states the contents and requirements for a statement of disputes. This rule states the procedure by which parties may, by unanimous consent, submit additional disputes not included in the benefit review officer's report or the responses of the parties. This rule also provides that a statement of dispute in the arbitration of a medical fee dispute may not include a dispute regarding compensability, extent of injury, liability, or medical necessity for the same service for which there is a medical fee dispute. If a party provides the arbitrator with documentation listed in §133.307(d)(2)(H) or (I) of this title (relating to MDR of Fee Disputes) that shows unresolved issues regarding compensability, extent of injury, liability, or medical necessity for the same service subject to the fee dispute, then the arbitrator shall abate the arbitration proceedings until

those issues have been resolved.

**Rule 144.6**

This rule provides that the Division will maintain a list of qualified arbitrators and provides procedures for assignment of an arbitrator by the Division and how a party may reject an assigned arbitrator.

**Rule 144.7**

This rule sets forth the procedure for setting an arbitration proceeding. This section also contains restrictions regarding the setting of an arbitration.

**Rule 144.9**

This rule contains requirements related to the exchange of evidence and the proposed resolution of the dispute. This rule also provides that the failure to comply with this rule without good cause as determined by the arbitrator is an administrative violation.

**Rule 144.10**

This rule sets forth how parties may enter into stipulations and also contains some limits on what stipulations can contain. This rule also prohibits parties to a medical fee dispute from negotiating fees that are inconsistent with any applicable fee guidelines adopted by the Commissioner.

**Rule 144.11**

This rule sets out how a continuance may be requested. This rule provides that a continuance may be granted for up to 30 days only upon a determination of good cause. This rule also limits each party to one continuance.

**Adopted Rule 144.12**

This rule provides that failure to attend any session of the arbitration is an administrative violation unless the arbitrator determines that the party had good cause not to attend.

**Adopted Rule 144.13**

This rule states the rights of parties during Division arbitration.

**Adopted Rule 144.14**

This rule states the usual order of proceedings in an arbitration and provides that an electronic recording of the proceedings will be made by the arbitrator.

**Adopted Rule 144.15**

This rule contains requirements for the awards by arbitrators.

**Adopted Rule 144.16**

This rule provides that a party may request a copy of the record of the arbitration and the cost for the record is assessed by the Division.

The Division has also revised existing forms related to medical fee dispute resolution and arbitration and created new forms that are to be used by workers' compensation system participants in conjunction with these adopted amendments. Specifically, the Division has revised the DWC Form-060, Medical Fee Dispute Resolution Request, and DWC Form-044, Election to Engage In Arbitration. The TDI-DWC has created new DWC Form-045M, Request to Schedule, Reschedule, or Cancel Benefit Review Conference for Medical Fee Dispute, and new DWC Form-049, Request to Schedule Medical Contested Case Hearing. The DWC Form-045A will be replaced by the newly adopted DWC Form-049 effective June 1, 2012. Workers' compensation system participants are to use the revised and new forms for disputes filed on or after June 1, 2012." These forms will be posted on the TDI website at [www.tdi.texas.gov/forms/form20.html](http://www.tdi.texas.gov/forms/form20.html) in the near future.

If there are any questions regarding these rule changes, please contact Steve Tipton, James Sheffield or Bobby Stokes.