



ADVISORY NO. 493

TOPIC: New SOAH Rules Effective August 7, 2014 —Some Problematic Issues Require Consideration

The Division has repealed the existing rules and issued new Chapter 148 rules governing the conduct of SOAH hearings authorized by the Texas Workers' Compensation Act. This Advisory discusses some of the new rule changes. Problems arising from some conflicts and gray areas are also discussed, along with some recommendations for addressing these problematic issues.

Recommended Action: As explained more fully below, the new Chapter 148 rules appear to conflict with the Labor Code and Gov't Code in some respects, and are at best unclear. The new rules create at least three distinct problems related to a new motion for rehearing process, finality of the SOAH decision and appeal deadlines, and the effective date of certain rule provisions. Our current recommendations are based upon the most literal and conservative reading of the statutes, codes and rules. Until we are instructed by the Division and SOAH to do otherwise, if you are considering filing a request for judicial review, or need to request corrections, additions, clarifications or modifications of a SOAH Decision and Order, or the Division's Decision & Order (D&O) following a SOAH proposal for decision, FOL recommends for any D&O dated August 7, 2014 and after:

1. In all SOAH disputes covered by Chapter 148 rules, file a Motion for Rehearing with SOAH and the Division's Chief Clerk of Proceedings within 20 days of notice of the D&O (Notice is deemed 5 days after mailing). In Medical Fee Disputes, that Motion should be filed as soon as possible;
2. For purposes of requesting judicial review of a Medical Fee Dispute, we recommend you contact Steve Tipton at 512-435-2162 or smt1@fol.com. The algorithms for the circumstances, timing, possible outcomes and risks associated with filing choices for judicial review are too complex to detail here.

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The New Rules in a Nutshell

The new rules are designed to implement various statutory changes, especially HB 2605, 82nd Legislature, Reg. Session, effective September 1, 2011. Those amendments and additions included provisions that...

- the loser at SOAH must pay SOAH's administrative costs for the hearing;
- SOAH will continue to enter a final decision on behalf of the Division in medical fee disputes and medical interlocutory orders, but will enter proposals for decisions to the Commissioner in all other cases;
- the Division may now issue emergency cease and desist orders; and
- SOAH will continue to conduct CCHs in medical fee disputes, but the Division will conduct BRCs/CCHs in medical necessity (IRO) reviews.

The new rules are complex, extensive, and reflect some substantial changes in previous practice and authority. The following is a non-exhaustive list of some of the more important provisions. This list should not be used as substitute for reading the new rules and the accompanying 57-page Preamble in their entirety. The Division website provides some details, along with links to the official version of the rules and the Preamble.

- ❖ The entire Administrative Procedure Act ["APA", Chapter 2001 of the Gov't Code] applies to:
 1. Medical fee dispute resolution [not medical necessity disputes] [§§ 413.031, 413.0312];
 2. Medical Interlocutory Orders [§ 413.055];
 3. Administrative Violations [§ 415.034];
 4. Revocation of Certificate of Authority [§ 407.046];
 5. Group Self-Insurance [§ 407A.007]; and
 6. Emergency Cease and Desist Orders [§ 415.0211].

The APA as limited by Labor Code § 401.021(1) applies to all other SOAH CCHs. The problems related to this provision are discussed below.

- ❖ The SOAH Judge (ALJ) renders the final decision in medical fee disputes and medical interlocutory orders. The ALJ issues a proposal for a decision to the Commissioner under Gov't Code § 2001.062, and the commissioner renders the final decision in all other cases. See Labor Code § 402.073(b) and (c).

- ❖ Requests for SOAH hearings are addressed to and filed with the Division’s Chief Clerk of Proceedings. Requests to withdraw a dispute are filed with both SOAH and the Chief Clerk of Proceedings.
- ❖ Rule 148.3(d) sets out the triggering event and time deadline for the various kinds of SOAH hearing requests. Twenty days after notice of the Division’s action is the standard deadline for requesting SOAH hearings, other than cease and desist orders (30 days). These deadlines may be trumped by a more specific deadline in a statute or rule.
- ❖ Rule 148.3(e) sets out the requirements of a request for SOAH hearing.
- ❖ There is now a “good cause” exception to dismissal for late filing of a request for hearing. Rule 148.3(g).
- ❖ A person receiving a notice of violation must file an answer and pay the sanction, or file an answer and request a hearing. If no answer is filed, the Division will schedule a SOAH hearing. Rule 143.3(f)(1),(2).
- ❖ Rule 148.4 clarifies the circumstances and time frames in which the Division may correct clerical errors. The Division may correct its clerical errors at any time; but a request to correct such errors must come before a D&O becomes final.
- ❖ Rule 148.15 concerns D&Os rendered by the ALJ in medical fee disputes and medical interlocutory orders, which decisions may become final. If the D&O requires any action or compliance, it must contain a period of time not exceeding 30 days for such action to be taken. The APA governs post-decision procedures, including motions for rehearing and prerequisites for judicial review.
- ❖ Rule 148.15 (e) provides that a motion for rehearing is a prerequisite for requesting judicial review, and that a D&O will become final if a motion for rehearing is not filed within 20 days of notice. A reply to another party’s motion for rehearing must be filed within 30 days of notice of the D&O.
- ❖ Rule 148.15(f) provides that finality of a SOAH D&O is determined by the motion for rehearing procedures in §2001.144 of the APA; except medical fee disputes, the finality of which are said to be governed by Labor Code § 413.031 and Rule 133.307.

[Note: Section 413.031 of the Labor Code does not directly address finality of a medical fee dispute Findings and Decision or of a SOAH D&O. Rule 133.307 does restate the 5 + 45-day from mailing deadline for the filing for judicial review of a medical fee dispute; but it otherwise does not state when a SOAH D&O becomes final--except by its reference to the APA, in which case we are back to the motion for rehearing procedures in the APA, but which the new rule says does not apply].

- ❖ Rule 148.16 concerns the proposal for decision issued by the ALJ in all cases not covered by Rule 148.15. The rule sets out the required elements of a proposal, the filing of briefs and exceptions to a proposal, and the commissioner's discretion to hold a hearing on a proposal.
- ❖ The Commissioner issues a decision that may become final in cases of administrative violations, emergency cease and desist orders, revocation of authority to self-insure and group self-insurance coverage. A motion for rehearing is a prerequisite to filing an appeal, and must be filed with SOAH within 20 days of notice of the D&O.
- ❖ In all other cases, the Commissioner issues a final D&O. No motion for rehearing will be entertained.
- ❖ Administrative penalties must be paid to the Chief Clerk of Proceedings not later than 30 days after the party receives notification of the assessment. Payable by cashier's check, certified check, certified draft, or a bond as described in Rule 148.17.
- ❖ Failure by any party or person within SOAH's jurisdiction to comply with any order of the ALJ, including final orders, is an administrative violation. Rule 148.22.
- ❖ The Division may enforce any final SOAH order, including orders to pay medical costs, administrative fines, refunds, attorney fees, costs and discovery sanctions.

Problem 1: The Motion for Rehearing Process

The problem starts with Labor Code § 413.031. For years, subsection (k) of that section granted entitlement to a SOAH hearing "in the manner provided for a contested case under Chapter 2001, Government Code" (the Administrative Procedure Act, "APA"). In 2011, the 82nd Legislature amended subsection (k) by referring to two new sections. New § 413.0311 redirected medical necessity (IRO) disputes to the Division's BRC/CCH process. New § 413.0312 continued to route medical fee disputes to SOAH. Subsection (e) of § 413.0312 left unchanged the previous general reference to SOAH hearings "conducted...in the manner provided for a contested case under [the APA]."

So, SOAH hearings have always been conducted under the APA, excepting some sections of the APA. Going back to the 1989 Act, Labor Code § 401.021 and its predecessor provisions, have always listed the sections of the APA that "govern" hearings arising from the Labor Code. While § 2001.141(c) of Subchapter F of the APA is listed in Labor Code § 401.021, the remainder of Subchapter F of the APA is not listed. That omission includes §§ 2001.144 through 2001.146 of the APA which provide for the rehearing process, which in turn governs the date of finality of any SOAH decision. The finality issue, in turn, governs the deadlines for requesting judicial review.

In recognition of the fact the rehearing process did not apply to Division medical fee disputes, now-repealed Rule 148.15(e) provided that SOAH would not entertain motions for rehearing. The new rules require such motions.

The new Chapter 148 rules cover only SOAH hearings. In conflict with the limitations of Labor Code §401.021 and previous practice, new Rule 148.2(a) applies the entire APA to contested case hearings regarding:

1. Medical fee dispute resolution [not medical necessity disputes] [§§ 413.031, 413.0312];
2. Medical Interlocutory Orders [§ 413.055];
3. Administrative Violations [§ 415.034];
4. Revocation of Certificate of Authority [§ 407.046];
5. Group Self-Insurance [§ 407A.007]; and
6. Emergency Cease and Desist Orders [§ 415.0211].

The next subsection, Rule 148.2(b), acknowledges the existence of the limited list of the APA sections that shall govern Division hearings found in Labor Code § 401.021, even applying the limited list to “all other hearings.”

The Preamble incorrectly states that a requirement to use the motion for rehearing practice arose from HB 2605 from the 82nd Leg, Reg. Session, 2011. But, HB 2605 does not mention the motion for rehearing process. The Division’s working presumption appears to be that HB 2605 amended Labor Code §413.031(k), and added §§413.031(k-1) and 413.0312, which all impliedly required the rehearing process by the general statement that such hearings would be conducted under the APA. But that general reference to the conduct of medical dispute hearings under the APA has always been in the 1989 Act. This general application of the APA was not new.

That oversight, along with the fact the Division missed the omission of Subchapter F [regarding motions for rehearing] from the list of sections of the APA that are to govern Division hearings, led the Division to incorrectly conclude that a motion for rehearing is a new a statutory prerequisite for appealing a SOAH D&O under this section [new Rule 148.15(e)].

The motion for rehearing process and the filing for judicial review timetables that derive from that process have never before been followed at SOAH. There does not appear to be any change in the law to now require a change in this practice, or a rule change. The rule change appears to create conflicting obligations and timetables, leaving much to interpretation and causing more uncertainty.

Problem 2: Finality and the Deadlines for Requesting Judicial Review In Medical Fee Disputes

This problem is tied into and arises from the new rules' adoption of the Motion for Rehearing process described in Subchapter F of the APA. Before these changes to Chapt. 148 rules, it was unclear when a SOAH medical fee dispute decision was final. Finality is important, as Subchapter G of the APA governs judicial review under the Labor Code and requires the filing of a petition for judicial review within 30 days of the SOAH decision becoming final.

Generally under the APA, finality is tied to the failure to file a motion for rehearing, or to the ruling upon a motion for rehearing, under Subchapter F. But since the Labor Code omitted the Subchapter F Motion for Rehearing process from the governing sections of the APA, it was assumed in the past that a SOAH decision became final when it was signed, or perhaps upon notice—starting the 30-day clock for requesting judicial review. No motions for rehearing were entertained.

But new Rule 148.2(c)(1) applies the “entire APA” to numerous Labor Code Sections, including §§ 413.031 and 413.0312, regarding medical fee disputes. Rule 148.2(c)(2) acknowledges the limitations found in § 401.021, but applies the entire APA to “all other” CCHs under Chapter 148 rules.

The new rules, without any qualification, now require the filing of a motion for rehearing as a prerequisite for appeal. The D&O will become final if a motion for rehearing is not filed within 20 days of notice of the D&O. Rule 148.15(e). As § 2001.144 of Subchapter F of the APA is said by the new rules to apply, with some exceptions, the D&O will become final:

1. On the 20th day after notice of the D&O (The party is deemed to have received notice the 3rd day after mailing), if no motion for rehearing is filed;
2. If a timely motion is filed:
 - a. On the date the order overruling the motion is rendered, or
 - b. On the date the motion is overruled by operation of law (90 days after notice of the D&O, or a date fixed by the Order).

Under the APA, the agency must act on the motion for rehearing no later than 45 days after the parties have been notified of the D&O. If the agency does not act within that timeframe, the motion is overruled by operation of law 90 days after notice of the D&O. A party or attorney of record notified by mail of the agency's final action is presumed to have been notified on the third day after the date on which the notice was mailed. A party may rebut the presumption of notice with contrary evidence, which may render the motion for rehearing timely. An agency is not required to notify a party that the motion for rehearing has been overruled by operation of

law. Lack of notice that a D&O is overruled by operation of law does not toll the deadline for filing an appeal.

Under the APA, the appealing party would have 30 days from the date the D&O becomes final to file for judicial review.

New Rule 148.15(f) ties finality of the D&O to the motion for rehearing provisions of § 2001.144 of the APA, except as provided in Labor Code § 413.031 and Rule 133.307 (regarding Medical Fee Dispute Resolution). This exception is a nod to the 5 + 45-day filing deadline from § 413.031(k-1)(the SB 809 version) for Medical Fee Disputes.

But § 413.031(k-1) does not clearly establish the date of finality of the D&O. It provides a filing deadline 50 days after the D&O is mailed to the parties. If the Division/SOAH issues a ruling on the motion for rehearing on the on the 48th day after issuance of the D&O (making the D&O final on the 48th day after mailing, per the APA), a party would only have 2 days under § 413.031(k-1) to timely file for judicial review—although the APA would give the party an additional 30 days. If no timely ruling is made, the motion is generally overruled by operation of law 90 days after notice of the D&O, and the filing deadline for judicial review under the APA would be 30 days after that—long after the 5 +45-day filing deadline for medical fee disputes.

New rule 148.15(h) assumes a D&O has become final. It ties judicial review of that final decision to the requirements of APA Subchapter G (must file within 30 days of the D &O becoming final—under Subchapter F motion for rehearing provisions) AND to Labor Code § 413.031 and Rule 133.307 (must file within 45 days of mailing the D&O, and presumably mailed 5 days after SOAH issues the decision).

Some of the questions: How does the blanket incorporation of the “entire APA” in subsection Rule 148.2(c)(1) jibe with the exclusion by omission in Labor Code § 401.021 of numerous sections of the APA, including §§ 2001.144 - 2001.146 regarding motions for rehearing, which then determines finality? How do these conflicts affect the issue of finality, and the deadlines for requesting judicial review? If a motion for rehearing must be filed as a prerequisite for judicial review of a medical fee dispute, what is the status of the SOAH case, the motion for rehearing and the judicial review case where the motion has not been ruled upon within the 5 + 45-day filing deadline for judicial review of the medical fee dispute D&O? Is § 413.131(k-1)(the SB 809 version) to be interpreted to make the date of notice (5 days after mailing) the date a medical fee dispute D&O becomes final; and if so, how does that interact with the required motion for rehearing process? What is the effect, if any, on exhaustion principles if compliance with one of the filing deadlines requires filing before the final action on the motion for rehearing? Would the filing for judicial review before the ruling on the motion for rehearing strip the Division of jurisdiction over the dispute, and therefore, the pending

motion for rehearing? In the absence of a final ruling on the motion for rehearing, would the appealing party be said to have failed to exhaust its remedies? Would the filing for judicial review before the ruling on the motion for rehearing constitute a premature and void filing; and if so, would that allow a refile after the Division's final action on the motion for rehearing? Or would the filing for judicial review before the ruling on the motion for rehearing create concurrent jurisdiction between the Division/SOAH and the court, allowing the filing for judicial review to relate forward to the day after final action on the motion for rehearing; or would the appealing party have to refile for judicial review?

The problem: In the appeal of any SOAH decision in a Medical Fee Dispute, the new rules set up two separate pathways with multiple branches to determine the deadline for filing for judicial review. The overlapping deadlines create unanswered questions of the applicable deadlines, waiver of the right to appeal, jurisdiction and exhaustion.

Problem 3: The Triggering Events for the August 7, 2014 Effective Date Are Unclear

While there are no specific effective dates stated in these new rules, the Division website states the effective date is August 7, 2014. For purposes of this Advisory, we have assumed the motion for rehearing process described in these rules will apply to any D&O issued on and after August 7, 2014. But as the Division purports to rely upon HB 2605 as the basis for these changes, the rehearing process may be applied to any SOAH D&O issued on a medical fee dispute, the basis for which is any Division Medical Fee Dispute Findings and Decision issued on or after June 1, 2012, as stated in HB 2605.

Although unlikely, it may be that some rules will be applied only to requests for SOAH hearings filed on and after the August 7, 2014 effective date of the rules. The answer to that question is unclear.

The new Chapt. 148 rules follow the deadline for filing judicial review of SOAH medical fee disputes (the 5 + 45-day rule) that derives from Labor Code § 413.031 (k-1)(the SB 809 version). And while the rule change is said to be effective August 7, 2014, Section 6 of SB 809 states that the change in the law made by the bill applies only to a suit for judicial review filed on or after September 1, 2011. So, the triggering event for application of the 5 + 45-day deadline is the date of filing of the suit for judicial review, and the real effective date is September 1, 2011.

The Preamble bases many of the rule changes on HB 2605. That bill establishes the actual effective date for many of the actions and obligations reflected in the new Chapt. 148 rules. For example:

- The requirement for the non-prevailing party to pay SOAH's administrative costs applies to an appeal of a Division review conducted on or after June 1, 2012.

- The requirement for the ALJ to issue a proposal for decision in certain cases applies to a SOAH CCH conducted on or after September 1, 2011.
- The requirement to first request a BRC on unresolved medical fee disputes after issuance of the Divisions Findings and Decision was applicable to Findings and Decisions issued on or after June 1, 2012.
- The other changes related to disposition of the SOAH case found in the amendments to Labor Code 413.031 are generally applicable to any request for review of a medical fee dispute Findings and Decision issued on or after June 1, 2012.

Summary

The new Chapt. 148 rules appear to conflict with the Labor Code and Gov't Code in some respects, and are at best unclear. If you are responsible for oversight of your medical review cases, and have questions regarding these rules or this Advisory, please contact Steve Tipton at smt1@fol.com or 512-435-2162.