



TEXAS DEPARTMENT OF INSURANCE

Division of Workers' Compensation

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memo

To: Workers' Compensation System Participants

From: Kerry Sullivan, Deputy Commissioner for Hearings and Daniel Barry, Appeals Panel Director

Date: July 5, 2016

RE: Communications with Hearings management and the Appeals Panel while a dispute is pending

This memorandum reminds system participants that, while a contested case hearing is pending at the Division of Workers' Compensation (DWC), they are not allowed to contact DWC managers or other staff for the purpose of indirectly or directly influencing the hearing officer or the Appeals Panel in the performance of their duties.

The presiding hearing officer is the sole judge of the relevance and appropriate weight to be given to evidence offered at a hearing. Texas Labor Code § 410.165(a). To ensure that the parties have an equal and fair opportunity to present their evidence, "No person . . . may communicate, either directly *or indirectly*, with the hearing officer regarding any facts, issues, law or rules" relating to the hearing until the decision is issued and all appeals have been exhausted. The only authorized private communications are for procedural matters and for the hearing officer to communicate with other division employees to utilize their special skills and knowledge in evaluating the evidence. 28 Texas Administrative Code (TAC) 142.3(a).

Private communication by attorneys is also restricted by Rule 3.05 of the Texas Disciplinary Rules of Professional Conduct. This rule specifies that, with limited exceptions, "a lawyer shall not communicate or cause another to communicate *ex parte* with a tribunal for the purpose of influencing that entity or person concerning a pending matter. . . ." The term "tribunal" is defined broadly in the "Terminology" section of the Disciplinary Rules and includes hearing officers and management as well as the division's Appeals Panel. An attorney's violation of the State Bar Disciplinary Rules is also an administrative violation of the Texas Workers' Compensation Act. Texas Labor Code §§ 415.001(8) and 415.002(a)(20); 28 TAC 150.1(a)(2).

These prohibitions bar attorneys from communicating with division staff for the purpose of encouraging staff to intervene with the hearing officer. They also bar attorneys from communicating informally with the Appeals Panel in an effort to influence the Appeals Panel's action on an appeal—including its decision whether to write on a case or to allow it to go final administratively.

In summary, the law provides that hearing officers are the sole decision-makers on all factual and legal matters while a case is pending. System participants may not attempt to circumvent or change a hearing officer's ruling through communication with other DWC staff or managers. The mechanism to correct errors by a hearing officer is to file a written appeal with the Appeals Panel in accordance with Section 410.202 of the Texas Labor Code, with a copy provided to the other party. The parties may not communicate informally with the Appeals Panel in an effort to influence the Appeals Panel's review.