

**§§141.5 – 141.7**

1. **INTRODUCTION.** The Commissioner of the Division of Workers' Compensation, Texas Department of Insurance, adopts amendments to §§141.5 - 141.7 concerning requesting and issuing interlocutory orders. Sections 141.5 - 141.7 are adopted with changes to the proposed text as published in the February 17, 2006 issue of the *Texas Register* (31 TexReg 967).

2. **REASONED JUSTIFICATION.** The amendments are necessary to implement House Bill (HB) 7 amendments to Labor Code §410.032 and §410.033, which establish requirements for requesting and issuing interlocutory orders (IOs) for the payment of benefits pending final resolution of a dispute. HB 7 amended Labor Code §410.032 to prohibit a Benefit Review Officer (BRO) who presides over a dispute from issuing an interlocutory order in that dispute. HB 7 amended Labor Code §410.033 to authorize the Commissioner to issue an IO directing each insurance carrier to pay a proportionate share of benefits in disputes involving two or more insurance carriers over the liability for the injured employee's compensable or work-related injuries. The amendments provide a process for requesting an IO that does not allow the BRO that presides over a dispute to issue an IO in the dispute. The process specifies time limits for requesting and responding to a request for IO and a time period for the Division to issue a decision on the request. The amendments allow an insurance carrier to request an IO only for the purpose of ordering multiple carriers to share in the payment of benefits pending a

final decision regarding liability. The Division has made changes to the rules as proposed as a result of public comment which are more fully described in the following sections of this preamble.

**3. HOW THE SECTIONS WILL FUNCTION.** Amended §141.5 deletes subsection (f), removing the ability of the BRO that presided or will preside at a Benefit Review Conference (BRC) to issue an IO in that same case during or at the conclusion of a BRC. Amended §141.6 establishes the method and timeframes for requesting IOs. Within 10 days after a BRC in which the dispute is scheduled for a Contested Case Hearing (CCH), a person seeking benefits may send a request for an IO, using a Division form, to the Division's central office in Austin. The requester will also be required to send a copy of the request to the individual that represented the insurance carrier at the BRC. The insurance carrier is allowed five days to respond to the request. If no response is received within five days, the Division will contact the carrier's representative who was at the BRC to request a response to the request for IO. Division staff designated by the Commissioner will consider the request, along with any response by the insurance carrier, and either deny the request or issue an IO. The amended section also gives the designated Division staff the option of conducting a teleconference with the parties prior to acting on a request. Amended §141.7 removes the reference to a BRO sending an IO to Austin as part of the BRO's report. Changes to the rules as proposed include clerical and grammatical corrections, clarification that

an insurance carrier can request an IO only for the purpose of ordering multiple carriers to share in the payment of benefits pending a final decision regarding liability, and adding a time limit of 5 days for copies of an IO to be sent to the parties after a teleconference.

#### **4. SUMMARY OF COMMENTS AND AGENCY'S RESPONSE TO COMMENTS.**

**Cost Note:** A commenter contends there is no justification in the cost note to substantiate that the number of Interlocutory Order (IO) requests will be reduced and provide a cost savings for injured employees

**Agency Response:** Historically, most IOs were issued by BROs when resetting a second BRC. HB 7 no longer allows the BRO to issue an IO at the conclusion of a BRC and allows only one BRC in most disputes which results in an expedited process since there will not be multiple BRCs. The fact that the process has been expedited and centralized will result in efficiencies in the workers' compensation system which, ultimately results in savings for all participants in the system, including injured employees.

**General:** A few commenters discussed the BRC process generally regarding injured employee education, the availability of certified interpreters, decorum during BRCs, injured employee and subclaimant participation in BRCs, and making a record of BRCs.

A commenter suggested language to add requirements for specific actions in the BRC process.

**Agency Response:** The Division declines to add requirements to the BRC process. Because BRCs are informal mediation forums, the Division believes that §141.5 should provide general guidance to BROs in mediating disputes rather than prescribing specific actions for every BRC. Section 140.2 requires the Division to provide special accommodations for non-English speaking participants. Additional detail in the description of the BRC process is not necessary.

**Comment:** A commenter stated that the proposed rule contradicts statements in the preamble that the rule “expedites the process to alleviate financial hardships.”

**Agency Response:** The rule provides that a request for an IO will be acted on within 10 days of receiving the request. This provides a maximum time frame for action. In the last six months the Division has acted on requests for IOs in an average of 9.1 days.

**§141.5(a):** A commenter suggests that the words “participants include” be changed to “participants may include” and that subclaimant should be included.

**Agency Response:** The Division does not believe that it is necessary to add the word “may” because any person listed will be allowed to participate if attending a BRC.

**§141.6:** A commenter asked whether the term “day” means “working day” or “calendar day.”

**Agency Response:** The Division directs the commenter to §102.3(b) which provides that the use of the term "day" refers to a "calendar day" rather than a "working day."

**§141.6(a):** A commenter questioned whether a request for an IO can be filed at a BRC.

**Agency Response:** A requesting party may file a request for an IO as soon as a BRC is concluded and a CCH has been scheduled. If the request is filed at a field office, it will be forwarded to the Central Office in Austin for processing.

**Comment:** Several commenters suggested that carriers and employers should be allowed to request an IO.

**Agency Response:** The Division agrees that insurance carriers need to be able to request an IO under Labor Code §410.033 to get an order for another carrier to share in the payment of benefits when there is a question as to which carrier is liable and this has been added to §141.6(a). Labor Code §410.033 provides the only situation when a carrier or employer would need to request an IO and that is not suspension (or non-payment) of benefits.

**Comment:** One commenter believes there is no authority for a subclaimant to request an IO, particularly a health care provider.

**Agency Response:** Labor Code §409.009 provides that a person may file a written claim with the Division as a subclaimant if the person has: (1) provided compensation,

including health care provided by a health care insurer, directly or indirectly, to or for an employee or legal beneficiary; and (2) sought and been refused reimbursement from the insurance carrier. Based on this provision, the Division believes that providing health care treatment equates to providing compensation; therefore, a health care provider is entitled to be a subclaimant and as a party to a claim, a subclaimant is not prohibited from requesting an IO.

**Comment:** Several commenters suggested that 10 “working days” should be allowed to request an IO. Another commenter questioned whether requests for IOs would be considered if received beyond 10 days following the BRC.

**Agency Response:** The Division believes that 10 calendar days is adequate time to prepare and submit a request following a BRC. An injured employee, with either ombudsman assistance or attorney representation, should already have all supporting documentation in their possession and 10 calendar days should be sufficient time to file the request. Requests received more than 10 days after conclusion of a BRC will not be considered. It is anticipated that most requests will be provided to the carrier’s representative at the conclusion of an unsuccessful BRC and submitted to the Austin Central Office immediately following the BRC.

**Comment:** A commenter believes the Division should be able to issue IOs between a first and a second BRC, without the dispute being set for a CCH, while the parties continue to work on the issues. The commenter feels that only allowing a request for an

IO when a CCH has been scheduled will force disputes to CCH that should be resolved at the BRC level.

**Agency Response:** Amendments to Labor Code §410.023 by HB 7 support the parties making bona fide efforts to resolve disputes prior to asking for a BRC. The Division believes that if the parties make bona fide resolution efforts prior to requesting a BRC, disputes are likely to be resolved at the BRC level and will not go to a CCH. A party should only request an IO after all attempts at resolving the issues through mediation at a BRC have failed.

**§141.6(b):** A commenter suggested that the simplest way for an injured employee to request an IO is to do so verbally rather than being required to complete a form.

**Agency Response:** The Labor Code requires that someone other than the BRO that conducted the BRC must act on a request for an IO, and as a result, verbal requests are not practical. The party needs to provide written evidence with the request that can be forwarded to the person making the decision regarding the issuance of an IO.

**§141.6(c) and (d):** Several commenters requested that the rule be changed to provide that while the copy of the request for IO shall be provided to the carrier's representative at the BRC, the insurer shall be responsible for determining who will file the response on its behalf. Several commenters felt that subsection (d) requires that the response to a request for IO be filed by the carrier's representative that appeared at the BRC. One

commenter suggested that the rule require the request for IO be provided to both the carrier and the carrier's representative at the BRC to expedite communication, while another commenter felt that only a copy to the carrier's representative was necessary.

**Agency Response:** The Division believes that provision of the request for IO to the person that represented the carrier at the BRC is the most efficient way to provide notice to the carrier. The person who appeared at the BRC on behalf of the carrier will be known to the requestor and the carrier's representative can easily provide notice to the appropriate carrier employee. The rule does not require the same person that represented the carrier at the BRC to file the response. That is the carrier's decision. The rule provides that "a carrier representative" shall file a response. The carrier may choose the same person that represented it at the BRC, or another representative. A Division form will be available for requesting an IO. The form will require the requester to identify when, how, and to which carrier's representative the request was sent.

**§141.6(c):** A commenter recommends that "may" be changed to "shall" to clearly reflect that a delay will occur.

**Agency Response:** The Division disagrees. A delay in processing of a request is very likely if a copy of a request for IO is not sent to the carrier's representative; however, a delay in every situation is not inevitable.

**Comment:** One commenter states that requiring all requests to go to the Central Office delays the process. The commenter recommends that the Division either allow the party to request an IO from the field office after the BRC or allow the party to request an IO at the BRC and have the BRO document the request and the response for someone else to consider. A commenter feels the prolonged process nullifies IOs as a viable remedy in situations where the carrier totally fails to justify the denial of benefits.

**Agency Response:** The Division disagrees that centralized processing unduly delays the process. The process was centralized for consistency purposes. Electronic or facsimile transmission should be available to all requesters, but any request can be submitted in a field office, where it will be immediately forwarded to the designated staff in the Austin Central Office. The rule provides that a request for an IO will be acted on within 10 days of receiving the request and the Division disagrees that this timeframe removes IOs as a viable remedy.

**Comment:** Several commenters felt that requiring an "immediate" response from the carrier's representative is unclear and not a reasonable timeframe due to the schedules of carrier representatives. A commenter stated that claimants are allowed 10 days to prepare a request for IO and requested that the carrier's representative be allowed at least 10 working days to file a response. Another commenter suggested that three business days or five calendar days to respond is sufficient. Some commenters additionally asked that the rule include where and to whom the response is to be filed.

Another commenter suggested changing the word “shall” to “may” to allow carrier representatives the option to not respond if they wish.

**Agency Response:** The rule requires that the carrier file an “immediate” response, which the Division believes should be within 5 days of receiving the request for IO, otherwise the Division will contact the carrier by telephone if no response has been filed. The main purpose of this phone contact is for the Division to ascertain if the carrier received a copy of the request for IO. The Division believes that all information needed to respond to a request will have been produced and discussed at the BRC and five calendar days is ample time for a carrier to respond. If a carrier prefers to not present evidence to rebut a request for IO, the carrier should communicate this information to the Austin Central Office within the allotted 5 days. The Division form used by the requester will inform the carrier where to send its response to a request for IO.

**§141.6(d):** A commenter suggested changing the subsection to require the Division to provide a copy of the request to the carrier if necessary, rather than it being permissive.

**Agency Response:** The Division agrees and has changed the language.

**§141.6(e):** One commenter suggests that the rule provide that a request is not considered “received” for the purposes of §141.6(e) until copies are provided to the carrier.

**Agency Response:** “Within 10 days of receiving a request” in §141.6(e) refers to the Division’s receipt of an IO request. Because the Division will contact the carrier’s representative if no response is received within five days, the carrier’s representative will be provided a copy of the request at that time, if they did not receive one earlier. This allows sufficient time for the carrier’s representative to file a response before the Division must act on the request.

**Comment:** A commenter felt the Division should be able to act on a request for an IO within three days. Another commenter felt that in a situation where a request for IO is made at a BRC and a carrier responds the next day, 10 days is too long for the Division to act on the request – five days is sufficient. Other commenters asked that 10 working days be allowed for the Division to act. One commenter suggested that an exception to the 10-day requirement be added. Some commenters noted that the rule should allow additional time for the Division to issue an IO when the requesting party fails to send a copy of the request to the carrier. Another commenter felt the 10-day timeframe is appropriate.

**Agency Response:** Depending on the complexity of the dispute, the Division anticipates acting on most requests within two working days of receiving a response or receiving confirmation that no response will be filed. Unless a teleconference is scheduled, this rule provides for a request for an IO to be acted on by the Division within 10 days of receiving the request. If no response is received from the carrier within five

days of receiving a request, the Division will request one from the carrier, with the understanding that the request will be acted upon within the allotted time, whether or not a response is received. The Division believes that if the requesting party does not provide a copy of the request to the carrier, five days is adequate time for the Division to seek a response from the carrier and act on the request.

**Comment:** One commenter felt that, with credibility issues, it would be beneficial to have someone in the field office acting on requests for IOs.

**Agency Response:** While face-to-face proceedings are best for the evaluation of witness demeanor, it is not practical in this situation. The staff designated by the Commissioner will have a great deal of experience in evaluating IO requests. In addition, if the Division deems it necessary for a fair evaluation, a teleconference can be scheduled.

**§141.6(e) and (f):** Several commenters felt teleconferences should not be necessary; they cause delay and add costs and request the deletion of subsections (e)(3) and (f). Other commenters think a teleconference should be conducted if requested.

**Agency Response:** The Division anticipates that most of the decisions will be based on written documentation, but unusual circumstances could arise requiring the Division staff to seek clarification of the issues and positions from the parties. In those situations, communication among the parties via a teleconference may result in

additional time but will be necessary to assure all issues are addressed. The Division will consider all requests for a teleconference and will schedule one if a legitimate need is identified. The need for a teleconference must be balanced with the cost and additional time required.

**§141.6(f):** One commenter suggested that if a teleconference is scheduled, the Division should be required to act on the request within five days of the teleconference.

**Agency Response:** The Division agrees and a limit of five days has been included.

**§141.6(g):** Several commenters contend that the Division has the authority to issue an IO to suspend benefits and suggested this addition to subsection (g).

**Agency Response:** The Division believes there is no authority to issue an IO to suspend the payment of benefits. In 1999 the 76th Legislature amended Labor Code §410.032 to delete the BRO's authority to issue an IO to suspend the payment of benefits. While HB 7 made some changes to this section, it did not change the language regarding what an IO could address. If reasonable grounds exist, an IO is not required for a carrier to suspend benefits.

**§141.6(i):** Several commenters think carriers should be allowed 10 "working" days to comply with an order. Another commenter suggested five "working" days.

**Agency Response:** Based on its experience, the Division believes that five calendar days is sufficient time for a carrier to comply with an order. This timeframe has not been changed from the previous rule and the Division's experience has shown that this is a sufficient amount of time. The Division reminds carriers that orders should be complied with as soon as possible and five calendar days is the maximum time allowed.

**§141.6(l):** A commenter suggested inclusion of an explanation of how a participant can request an IO prior to a BRC.

**Agency Response:** A request for an order will not be considered prior to the parties attempting to mediate their differences at a BRC. This rule addresses the process utilized by designated staff to issue IOs after a BRC, pending a CCH.

**§141.7(d):** A commenter suggested that subclaimants be added to the persons who should be furnished with the BRO's report.

**Agency Response:** The Division agrees and has added subclaimants to the list of individuals that shall receive a copy of the BRO's report.

## **5. NAMES OF THOSE COMMENTING FOR AND AGAINST THE SECTIONS.**

**For, with changes:** State Office of Risk Management; Insurance Council of Texas; Zenith Insurance Company; Office of Injured Employee Counsel; American Insurance Association; The Boeing Company; Texas Mutual Insurance Company; Property and

Casualty Insurers Association of America; SAFRISK; Center for Injured Workers; and various individuals.

**Against:** None.

**6. STATUTORY AUTHORITY.** The amendments are adopted under Labor Code §§410.027, 410.032, 410.033, 402.00111, and 402.061. Section 410.027(a) provides that the commissioner shall adopt rules for conducting benefit review conferences. Section 410.032 provides that, as designated by the Commissioner, Division staff, other than the benefit review officer who presided or will preside at the benefit review conference, shall consider a request for an interlocutory order and shall issue an interlocutory order if determined to be appropriate. The order may address accrued benefits, future benefits, or both accrued benefits and future benefits. Section 410.033 provides if there is a dispute in which two or more insurance carriers are liable for compensation for one or more compensable injuries, the Commissioner may issue an interlocutory order directing each insurance carrier to pay a proportionate share of benefits due pending a final decision on liability. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code. Section 402.061 provides the Commissioner the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

**7. TEXT.**

**§141.5. Description of the Benefit Review Conference.**

(a) Definitions. As used in this section, "participant" means an individual entitled or permitted to attend and take part in a benefit review conference. Participants include:

(1) the parties;

(2) the parties' representatives;

(3) the employer exercising the right to present evidence relevant to the disputed issue or issues; and

(4) any other individual, at the discretion of the benefit review officer.

(b) Overview of the benefit review conference. The benefit review conference consists of three parts: opening, mediation, and closing.

(c) Opening. The benefit review officer shall:

(1) identify the case and introduce the parties and other participants;

(2) thoroughly inform the parties and participants of their rights and responsibilities under the Texas Workers' Compensation Act;

(3) explain the purpose of the conference and the procedures and time frame to be observed;

(4) identify and describe the disputed issues to be mediated; and

(5) elicit each party's statement of position regarding each disputed issue.

(d) Mediation. The benefit review officer shall:

(1) ask and answer questions of the parties and other participants;

(2) encourage the parties to discuss the disputed issues and ask and answer questions;

(3) permit the employer to present evidence relevant to the disputed issues;

(4) permit other participants to discuss the disputed issues and ask and answer questions, to the extent the benefit review officer deems appropriate;

(5) if necessary, caucus individually with each party;

(6) assist the parties to agree on specific options for resolution; and

(7) assist the parties in resolving disputed issues by agreement or settlement.

(e) Closing. The benefit review officer shall:

(1) assist the parties in reducing agreements or settlements to writing;

(2) identify any issues left unresolved; and

(3) if available information pertinent to the resolution of the disputed issue(s) was not produced at the benefit review conference, require a second benefit review conference to be scheduled if a second one has not already been conducted.

**§141.6. Requesting Interlocutory Orders.**

(a) An injured employee, subclaimant, or beneficiary may request from the Division an interlocutory order for the payment of accrued and/or future benefits within 10 days of the conclusion of a benefit review conference in which the unresolved issues

were scheduled for a contested case hearing. An insurance carrier may only request an interlocutory order pursuant to Labor Code §410.033, for the purpose of requesting an order for multiple carriers to share in the payment of benefits pending a final decision regarding liability.

(b) The request shall be in writing in the form and manner prescribed by the Division and shall be specific as to the benefits being sought. All supporting documentation shall accompany the request.

(c) When a request is filed with the Division, the party making the request shall provide a copy of the request with all supporting documentation directly to the representative that appeared for the carrier at the benefit review conference. Failure to provide a copy to the carrier's representative may result in a delay of the processing of the request.

(d) Upon receipt of a request for an interlocutory order, a carrier's representative shall file an immediate response and submit any additional documentation for consideration. The Division shall contact the carrier's representative that appeared at the benefit review conference, electronically or by telephone, to request a response if one has not been received within five days. The Division shall provide a copy of the request to a carrier's representative if necessary.

(e) Within 10 days of receiving a request for an interlocutory order, Division staff, as designated by the Commissioner, shall either:

- (1) deny the request for an interlocutory order;

(2) issue an interlocutory order as provided for in subsection (g) of this section, or;

(3) schedule a teleconference to take place within five days to consider written documentation and arguments of the parties regarding the request for an interlocutory order.

(f) If the Division schedules a teleconference, the Division shall provide the parties with the date and time of the teleconference by electronic transmission, personal delivery, or telephone. Other benefit review conference participants may participate in the teleconference at the discretion of the Division. Testimony will not be accepted and no official record will be made of a teleconference. Copies of any interlocutory order entered after a teleconference shall be sent to the parties within five days following the teleconference.

(g) Upon a determination that the issuance of an interlocutory order is appropriate, the Division may enter interlocutory orders as follows:

(1) when the benefit dispute involves payment of benefits, the Division may order the carrier to pay all or part of death, burial, medical, or income benefits. The order may address either or both accrued and future benefits. Such an order is binding until reversed or modified by an agreement or settlement, as provided by §147.7 of this title (relating to Effect on Previously-Entered Decisions and Orders), by an interlocutory order or by a decision rendered after a subsequent Division proceeding;

(2) when the benefit dispute involves the liability of two or more carriers for compensation for one or more compensable injuries, the Commissioner or Commissioner's designee may order each carrier to pay a proportionate share, determined by dividing the compensation due by the number of carriers potentially liable for benefits.

(h) An interlocutory order for payment of death, burial, income, or medical benefits shall be effective on the date signed by the designated Division staff.

(i) An insurance carrier shall comply with an interlocutory order to pay accrued benefits by issuing and delivering payment for income benefits accrued and unpaid no later than the fifth day after receiving the order and shall pay benefits in accordance with the order as and when they accrue.

(j) Payment of accrued and unpaid income or death benefits paid in accordance with an interlocutory order shall include interest pursuant to the Labor Code §408.064 and §408.081.

(k) Payment of medical benefits pursuant to an interlocutory order shall be made in accordance with Chapters 408 and 413 of the Labor Code.

**§141.7. Division Actions After a Benefit Review Conference.**

(a) If all disputed issues are resolved at the benefit review conference by agreement, the benefit review officer shall make the agreement part of the claim file.

(b) If all disputed issues are resolved at the benefit review conference by settlement, the benefit review officer shall submit the signed settlement to the Commissioner or Commissioner's designee for handling as provided by Chapter 147 of this title (relating to Dispute Resolution by Agreement or Settlement). If the Commissioner or Commissioner's designee rejects the settlement, the parties may request a subsequent benefit review conference as provided by §141.1 of this title (relating to Requesting and Setting a Benefit Review Conference).

(c) If all disputed issues are not resolved at the benefit review conference, no later than the fifth day after the close of the benefit review conference the benefit review officer shall submit a written report, as provided by Labor Code §410.031 and any signed agreement to the Division's central office in Austin.

(d) No later than the eighth day after receiving the benefit review officer's report, the Division shall furnish, by first class mail, electronically, or personal delivery, to the injured employee; injured employee's representative, if any; the insurance carrier; subclaimants; and the employer the following:

- (1) a file-stamped copy of the report; and
- (2) notice of the date, time, and location of the contested case hearing.

**CERTIFICATION.** This agency hereby certifies that the adopted sections have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

**DWC-06-0038**

TITLE 28. INSURANCE

Part 2. Texas Department of Insurance,

Division of Workers' Compensation

Chapter 141. Dispute Resolution--Benefit Review Conference

Adopted Sections  
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Issued at Austin, Texas, on \_\_\_\_\_, 2006.

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Norma Garcia  
General Counsel  
Division of Workers' Compensation  
Texas Department of Insurance

IT IS THEREFORE THE ORDER of the Commissioner of Workers' Compensation that amendments to §§141.5 - 141.7, concerning requesting and issuing interlocutory orders, are adopted.

AND IT IS SO ORDERED.

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ALBERT BETTS  
COMMISSIONER OF WORKERS' COMPENSATION  
TEXAS DEPARTMENT OF INSURANCE

ATTEST:

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Norma Garcia  
General Counsel

COMMISSIONER'S ORDER NO. DWC-06-0038