STATE BAR of TEXAS

WORKERS' COMPENSATION Section Newsletter

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Texas Independence Day Edition

"All new states are invested, more or less, by a class of noisy, second-rate men who are always in favor of rash and extreme measures, but Texas was absolutely overrun by such men." —

Sam Houston

What's Going on in Our Comp World?

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- The New Rulebook Supplement is Here!

Section Chairman's Letter

Happy Texas Independence Day! As we commemorate the 176th anniversary of the Texas Declaration of Independence at Washington-on-the-Brazos, I would like to think that we, in the Workers' Compensation Section of the State Bar, share something in common with our Texian forbearers, namely our ability to work hard, play hard, and be dedicated to our cause. To that end, I would like to announce that the Ninth Annual Advanced Workers' Compensation Seminar is scheduled for August 2 and 3, 2012, at the Radisson Town Lake in Austin. Again, this year will coincide with the TDI/DWC Hearing Officers' Conference, so there should be no hearings after Monday of that week, so there are no excuses for not attending. Also, this year, there will be a "beginners" course "Workers' Comp 101" for the "newbies" among us. And, "yes," there will be a golf tournament in the hot Texas sun, so the fun will not be limited to just "mad dogs and Englishmen." I strongly encourage everyone to attend since we will have a great action-packed program, so mark your calendars accordingly.

Also, again I would like to thank Ken Wrobel, our intrepid editor, for working hard in putting together this newsletter. I encourage everyone who reads this to volunteer to write an article or provide some literary fodder for its publication.

Your friend and colleague,
Joe R. Anderson

LETTER FROM THE VICE-CHAIR

By Mike Sprain

Greetings,

What a great day March 2nd is for all Texans. For on this day in 1836 the Texas Declaration of Independence was signed. The Declaration of Independence was a document that did not take years or even months to write and ratify. In fact, it only took one day to create and sign. Urgency was a priority because the Alamo in San Antonio was under siege by Santa Anna's army from Mexico. When the convention of 1836 met, five members were appointed to create the Texas Declaration of Independence. The five members drafted the document overnight and it was adopted the following day.

The Texas Declaration of Independence's concluding paragraph declared that our political connection with Mexico had ended forever and that as of March 2, 1836, the people of Texas constituted a free, sovereign and independent republic. This forceful statement showed the strength, fearlessness, and determination of the sixty men who signed the document as the carnage at the Alamo was occurring.

Take a moment today to step back from our busy lives to remember and honor our forefathers that forged our existence. Where would we be today, but for the courage and stamina exhibited by these brave individuals? Consider the legacy these men have left, which we take for granted each and every day.

Now that you have received a brief history lesson on Texas Independence Day, sit back and enjoy another superb newsletter. A significant amount of time and effort has been expended to produce this newsletter with information that is helpful to all practitioners in workers' compensation. As always, your input is appreciated so if you have any ideas for future topics, please let us know.

Finally, Joe and I look forward to seeing you at the 9th Annual Advance Workers' Compensation Law Course on August 2–3, 2012, in Austin, Texas. This year's course promises to have great topics, excellent speakers, and as always is sure to be the social event of the year. In addition, don't forget to register for the 4th Annual Advance Workers' Compensation Golf Tournament being held on Wednesday, August 1, 2012. This will surely be another memorable occasion with proceeds being donated to several great charitable organizations.

LETTER FROM THE EDITOR

Seems like only three months ago and I was doing this editor thing for the first time. Now – look Ma, no hands! It helps immensely to know how to cut/paste and save.

I do have one little rant to get off my fingers. I know how busy all of us are. And my motto for 25 years has been, "I never complain about being busy." To paraphrase Michael Douglas – Busy is good. But – (you knew a "but" was coming) – I really need some help doing this newsletter. I need your articles. I had one submission of prose. I'll take it. Early on, before the articles got to me, I even thought about throwing in my amazing chili recipe just to see that spark some debate. (I make great chili.) This newsletter is our newsletter and represents the entire work comp community. It casts a net over claimant's bar, carrier's bar and the Division/OIEC attorneys and hauls us all in. I want all of those segments to feel they are part of the whole of this newsletter. If something comes up you feel will impact the arena of law we all revere, for better or worse, write it and send it. I'll edit out the dirty parts, but chances are I'll find room for it.

But that does lead me into staying busy. John Molinar sent in "The Drive To Work." I hope you'll read it. It's about an attorney remembering why he's going to work at 7:00AM. I know we love the drive of being attorneys and there are few of us who are not workaholics. I love my job. I love to work. I even enjoy the drive to work. But never forget why we do what we do. On February 01, 2012, I was able to experience one of the proudest moments of my entire life when my son signed his National Letter of Intent for his running scholarship to college. Last night I got to watch my daughter perform her best gymnastics beam routine of her high school career. Later I got to help my youngest son learn where to place his fingers as he tries to teach himself to play guitar on the same guitar I taught myself to play back in high school. And Saturday night I danced with my wife to the song we danced to at our wedding 21 years ago. Those are the moments I work for.

I never complain about being busy. But I also try to remember what I should be busy at.

Respectfully,

Ken Wrobel
Workers' Compensation Section's
Newsletter Editor

Liberty Mutual –v- Adcock (02-11-00059-CV) No Subsequent Review After LIBs Awarded.

By: Joan Durkin
Attorney for Claimant

(As a background, Appellants Liberty Mutual Insurance Co. and the Texas Department of Insurance, Division of Workers' Compensation, asserted that the trial court erred by granting summary judgment for the appellee Ricky Adcock, arguing that the Division had jurisdiction in 2009 to review a 1997 award of lifetime income benefits (LIBs) to Adcock. The Court determined the statutory language stating that LIBs are paid until the death of the employee, and the Legislature's clear intent when enacting the TWCA to provide for review under several other circumstances but not once entitlement to LIBs has been established, indicated that the Legislature gave the Division no express or implicit authority for further review of LIBs after eligibility is determined. The Division has no implied right to review LIBs under Texas Labor Code §408.161 after the initial administrative and appellate remedies have been exhausted. The trial court's judgment is affirmed. Fort Worth Court of Appeals, No. 02-11-00059-CV, 10-20-2011.)

The Carriers Petition for Review is ending before the Texas Supreme Court on the issue of whether the DWC has jurisdiction to review LIBs after there has been one final decision awarding LIBs.

The case stems from a Fort Worth CCH where the injured worker was awarded LIBs following an unappealed ruling by the Appeals Panel in 1997. The 1997 Appeals Panel found that the 1991 injury which developed into severe RSD caused permanent and total loss of use of the right upper and lower extremities. A decade later, during a brief period of multiple medication therapies, the Claimant was caught on tape walking short distances, using his hands to drive, holding an ice cream cone, cigarette and even a self serve car wash wand.

The Carrier argued that the DWC can review LIBs eligibility as often as it is requested to by either side (without the need for a change in condition). The DWC agreed, but cited as authority, AP 020432-s that required a "change in condition" to trigger such review. Claimant argued that while a Claimant may be found not to be LIBs eligible more than once (since the condition may not yet be permanent), once LIBs are awarded, LIBs can never be reviewed and as such the DWC has no jurisdiction to hold another CCH on LIBs.

The Division intervened and Judge Donald Cosby of the 67th District Court in Fort Worth agreed with Claimant, ruling against the DWC and Carrier, as did the Second Court of Appeals. The DWC (represented by the Attorney General's Office) accepted the ruling of the Second Court of Appeals and did not seek review. Liberty Mutual has filed a petition for review which is pending before the Texas Supreme Court.

The key terms that the Courts have focused on are Permanent, and "until death".

Permanent: The initial LIBs award must find that the loss of use of the two members is total and permanent under Texas Labor Code 408.161. *Permanent*, as set forth in Texas Labor Code 408.011 (23) can only happen once (albeit based upon a reasonable presumption at that time), and it can not be reviewed by the Appeals Panel more than once. Thus even if medical science were able to reanimate the legs of a paraplegic, that change in medical technology does not serve as a basis to later reopen a case that

has already been through the whole dispute resolution process. Similar to an impairment rating that is based upon "permanent" condition, the determination is made as of a fixed date, the MMI date. 29 Texas Register 2328-2343. Changes after that fixed date may not be considered when assigning the final rating. TEXAS LABOR CODE § 401.011 See also *Texas Workers' Compensation Com'n v. Garcia* 893 S.W.2d 504 (1995) which found that the administrative finality that the Act created, was a key factor in the Acts validity.

Paid Until Death: The statute defines LIBs as "paid until death" in Texas Labor Code 408.161. Once entitled, LIBs continue for life. The Division itself confirmed this in their 2007 comments to the LIBs rule changes which resulted from *MidCentury v. TX. Workers' Compensation Com'n* 187 S.W.3d 754 (Tex. App.–Austin 2006) where the DWC commented "that the law already provides that LIBS are paid until death" Division Order 07-0148.

Finally, the Court reinforced the fact that DWC may only exercise those specific powers that the law confers in clear and express language. See *Kawasaki Motors Corp. v. Texas Motor Vehicle Comm'n*, 855 S.W.2d 792, 797 (Tex.App.–Austin 1993, no writ). The agency may not by implication enlarge the meaning of any word in the statute beyond its ordinary meaning which would be the result if "until death" is disregarded or "permanent" is made to be subject to periodic reviews. *Monsanto* 865 S.W.2d at 939.

RECOUPMENT

"Back in the Saddle Again[1]"

By: Joe R. Anderson and Kirsten Grosenheider

I. AN OVERVIEW OF THE LAW REGARDING RECOUPMENT

The law regarding recoupment in the Texas Workers' Compensation System has evolved over the years, sometimes rather drastically. All recoupment cases should be handled carefully and all actions should be well documented. Of particular importance is the adoption of Rules 126.15 and 126.16 on December 12, 2011, in which the Division outlined the procedures carriers and employees must follow when resolving an overpayment or underpayment of income benefits. The purpose of the adopted new rules and amendments is to implement House Bill (HB) 2089, enacted by the 82nd Legislature, Regular Session, effective September 1, 2011. HB 2089 enacted Texas Labor Code §408.0815 which requires the Commissioner of Workers' Compensation to adopt rules to establish procedures that address how an insurance carrier (1) may recoup an overpayment of income benefits from future income benefit payments; and (2) shall pay an underpayment of income benefits, including interest on accrued by unpaid benefits. The newly adopted Rules 126.15 and 126.16 expand on and supersede any previously established procedures by providing for the timely and accurate payment of workers' compensation income benefits and the resolution of overpayments and underpayments of such benefits.

II. PROCEDURES FOR THE RESOLUTION OF UNDERPAYMENTS AND OVERPAYMENTS OF INCOME BENEFITS

A. §126.15: Procedures for Resolution of Underpayments of Income Benefits

Newly adopted Rule 126.15 establishes the procedure by which a carrier shall pay an underpayment of income benefits, including interest on accrued but unpaid benefits. Adopted section 126.15(a) clarifies that this procedure will apply only to carrier underpayment of income benefits; it does not apply to a carrier underpayment of death, burial or medical benefits, or the redesignation of income benefits.

Section 126.15(b) provides that, if the carrier determines on its own that an underpayment of income benefits has occurred, the carrier shall pay the underpayment plus interest to the employee within seven days of its determination. Additionally, section 126.15(c) provides that, if an employee determines that he has received less than the correct amount owed in income benefits, and the employee wishes to resolve the underpayment under this section, he must notify the carrier in writing to request the additional amount. The notice must include an explanation and information that supports the employee's determination of the underpayment. The Division has prepared a sample notice employees may use to notify carriers of an underpayment. Available on the Division website, this sample notice is not mandatory, and the employee is free to use his or her own notice that meets the requirements of section 126.15(c).

Section 126.15(d) provides that, if the carrier agrees with the employee that there has been an underpayment of income benefits, the carrier shall pay the full amount of the underpayment with interest on accrued but unpaid benefits within seven days of receipt of the notice from the employee. Adopted section 126.15(e) provides that, if the carrier disagrees that there has been an underpayment of income benefits, it must, within seven days of receipt of the notice from the employee, provide the employee with written notice of its determination. The carrier notice must include the reasons for the its determination, and a

1 "Back In The Saddle Again" was the signature song of cowboy entertainer Gene Autry. It was co-written by Autry with Ray Whitley and first released in 1939. The song was associated with Autry throughout his career and used as the title of his autobiography in 1976. This was also the year that "Back in the Saddle" was released by Aerosmith as the first song on their pinnacle album "Rocks," It was written by Steven Tyler and Joe Perry, and released by Columbia Records. No doubt Mr. Tyler and Mr. Perry read Mr. Autry's autobiography that year and were inspired by it, thus resulting in the contribution of not one, but two memorable songs to popular culture.

statement that the employee may request dispute resolution through the Division's dispute resolution processes (as outlined in Chapters 140 – 144 and 147), including expedited dispute resolution. Additionally, under section 126.15(f), the carrier must provide notice to the employee and the Division of any change in the payment of an employee's income benefits. Section 126.15(g) provides for dispute resolution by specifying that, if a carrier denies that there has been an underpayment of income benefits, the employee may request dispute resolution. Lastly, section 126.15(h) provides that the rule does not affect the Division's authority to identify and take action on underpayments on its own motion.

B. §126.16: Procedures for Recouping Overpayments of Income Benefits

Newly adopted Rule 126.16 establishes the procedure by which a carrier may recoup an overpayment of income benefits from future income benefit payments. Section 126.16(a) clarifies that this section applies only to carrier overpayment of income benefits. It does not apply to carrier overpayment of death, burial, or medical benefits; redesignation of income benefits; or repayments pursuant to Texas Labor Code §415.008.

Section 126.16(b) provides that, if a carrier determines that it has overpaid income benefits to an employee, it may recoup the overpayment from future income benefit payments as follows: adopted subsection (b)(1) requires a carrier to provide the employee with written notice when it will begin recouping overpayment of income benefits. The notice must be in plain language and in English or Spanish, as appropriate. Additionally, the notice must include:

(1) the reason for the overpayment;
(2) the amount of the overpayment to be recouped from future income benefit payments;
(3) the date recoupment will begin; and
(4) relevant documentation that supports the carrier's determination of an overpayment (i.e. wage statement or supplemental report of injury).

The notice must advise the employee that if he disagrees, he may request dispute resolution through the Division's dispute resolution process.

Subsection (b)(1) also specifies that the carrier may not begin recoupment of the overpayment earlier than the second income benefit payment made after the written notice has been sent to the employee.

Subsections (b)(2) and (3) set out what percentage of future income benefits payable to the employee the carrier may withhold in order to recoup an overpayment. If the employee's income benefits are not concurrently being reduced to pay approved attorney's fees or to recoup a Division-approved advance, the carrier may recoup the overpayment in an amount not to exceed 25 percent of the income benefit payment due to the employee. If the employee's income benefits are concurrently being reduced to pay approved attorney's fees or to recoup a Division-approved advance, the carrier may recoup the overpayment in an amount not to exceed 10 percent of the income benefit payment due to the employee.

Subsection (c) provides that if the carrier wishes to recoup an overpayment in an amount greater than the 10 percent or 25 percent of income benefits permitted by subsections (b)(2) and (3), the carrier must attempt to enter into a written agreement with the employee and, if unable to do so, may request dispute resolution. Subsection (c) also provides that if the employee wishes to provide for recoupment of an overpayment in an amount less than the percentage chosen by the carrier, the employee must attempt to enter into a written agreement with the carrier and, if unable to do so, may request dispute resolution. Section 126.16(d) further provides for dispute resolution when the carrier and employee cannot agree on a recoupment rate.

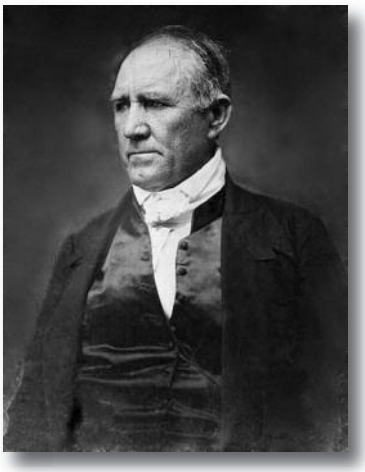
In determining whether to approve an increase or decrease in the recoupment rate, the Division must consider the cause of the overpayment and minimize the financial hardship that may reasonably be created for the employee. Section 126.16(e) provides that the carrier must provide notice to the employee and the Division of any change in the payment of the employeess income benefits. The notice must specify the amount that was overpaid.

Additionally, section 126.16(f) provides that the rule does not create an entitlement for a carrier to seek reimbursement from the Subsequent Injury Fund (SIF), except as provided by Labor Code §§403.006, 408.0041 and 410.209, and applicable Division rules. Adopted section 126.16(g) states that, if the employee does not agree that he has received an overpayment, the employee may request dispute resolution. Lastly, adopted section 126.16(h) provides that this section does not affect the Division's authority to identify and take action on overpayments on its own motion.

The passage of HB2089 and Rule 126.16 marks a significant victory for the workers' compensation system, since it returns system participants to the "no more, no less" principle under which the parties operated for years. Recoupment is indeed, "Back in the Saddle Again."

"IT IS A MATTER OF GREAT SATISFACTION TO ME TO HOPE THAT MY CHILDREN WILL BE IN CIRCUMSTANCES TO RECEIVE A GOOD EDUCATION. MINE WAS DEFECTIVE AND I FEEL THE INCONVENIENCE, IF NOT THE MISFORTUNE OF NOT RECEIVING A CLASSICAL EDUCATION. KNOWLEDGE IS THE FOOD OF GENIUS, AND MY SON, LET NO OPPORTUNITY ESCAPE YOU TO TREASURE UP KNOWLEDGE." –

Sam Houston



"TEXAS DOES NOT, LIKE ANY OTHER REGION, SIMPLY HAVE INDIGENOUS DISHES. IT PROCLAIMS THEM. IT CONGRATULATES YOU, ON YOUR ARRIVAL, AT HAVING ESCAPED FROM THE SLOP PAILS OF THE OTHER 49 STATES." —

Alistair Cooke

TO BRC OR NOT TO BRC? "A PRACTITIONER'S LOOK AT PART I OF THE NEW TDI-DWC BENEFIT REVIEW CONFERENCE RULES."

By John Aubry Davis

"Prior to discussing the merits, I would like to acknowledge the considerable efforts made by Commissioner Bordelon and Chief counsel Dirk Johnson in providing an open and transparent dialogue most particularly for your attention and consideration at the public hearing held September 20, 2011, on the proposed changes referenced above. On behalf of the injured workers, healthcare professionals, and legal professionals that attended I can say that we appreciated the opportunity to provide input into these changes at the hearing. We look forward to assisting in your continuing work in response to meeting the goals of the Texas Workers' compensation system which per statute are concerned with ensuring a fair and accessible dispute resolution system for injured workers."

INTRODUCTION:

Beginning December 1, 2011, the Texas Department of Insurance, Division of Workers' Compensation put into effect, after going through the formal rule making process, new rules for stakeholders regarding the cancellation or rescheduling of a Benefit Review Conference, hereinafter referred to as a "BRC." Prior to discussing the merits, I would like to acknowledge the considerable efforts made by Commissioner Bordelon and Chief counsel Dirk Johnson in providing an open and transparent dialogue most particularly for your attention and consideration at the public hearing held September 20, 2011, on the proposed changes referenced above. On behalf of the injured workers, healthcare professionals, and legal professionals that attended I can say that we appreciated the opportunity to provide input into these changes at the hearing. We look forward to assisting in your continuing work in response to meeting the goals of the Texas Workers' compensation system which per statute are concerned with ensuring a fair and accessible dispute resolution system for injured workers.

We believe in large part that the proposed changes are consistent with the Legislative directives set forth in HB 2605 and your staff should be commended on their diligence in addressing these issues. This paper will attempt to address these changes and examine some of the possible and/or probable effects said changes will have upon practitioner's seeking to cancel or reschedule a BRC. This paper is not meant nor should be considered as an exhaustive one, as the interpretation of said rules will change and/or modify as the interpretation of the rules are applied, challenged, and resolved through the normal administrative dispute resolution/litigation process. The opinion's herein are the author's own and should not be used for claims handling or administration purposes. That being said, we believe this paper aptly demonstrates that in adopting these rules, the Division has subordinated the Legislature's mandate that they ensure accessibility to a fair dispute resolution system for injured employees in exchange for prompt resolution of claims for all parties.

As noted in the Division's preamble to the proposed rule, "Section 410.021 sets forth that a BRC is a non-adversarial and informal proceeding within the dispute resolution process which purpose is designed to explain, discuss, mediate and resolve

disputed issues by agreement of the parties."[1] As such, it is contemplated that the use of a BRC is to explain, discuss, mediate and resolve issues that have already been "disputed" as opposed to any interpretation that requiring the request for or attendance at a BRC as necessary to maintain the dispute itself.[2] Thus, it is important to note, that in accord with the language of the rule and consistent with the Division's interpretation of the rule and its effects as stated in the rule's Preamble, it appears that a party does not lose their right to seek exhaustion of administrative remedies on a substantive issue due to non-attendance or non-cancellation of a BRC; however, a party may lose their right to a subsequent BRC on the substantive issue.

Let's begin with the language of Rule 28 TAC §141.2(b)[3]; we have taken the liberty of underlining some of the more salient provisions for practitioners:

(b) Applicability. This subsection applies to a benefit review conference that is requested on or after December 1, 2011.

(1) In this subsection, "good cause" will be determined at the discretion of the benefit review officer on a case-by-case basis, including consideration of prejudice to parties, and means:
  (A) objective facts beyond the control of a party, which reasonably:
    (i) prevent a party from attending the benefit review conference; or
    (ii) would prevent the benefit review conference from accomplishing its purpose, such as the need for a reasonable amount of additional time to secure necessary evidence for the dispute; or
  (B) objective facts which make the benefit review conference unnecessary.

(2) The division may cancel or reschedule a benefit review conference at any time before the benefit review conference:
  (A) on its own motion;
  (B) at the request of the party who requested the conference; or
  (C) at the mutual request of the parties.

(3) A request for cancellation or rescheduling under paragraph (2)(B) or (C) of this subsection **shall be made by notifying the division within 10 days** of the date the notice of setting is received. **The date the notice of setting is received is deemed to be the fifth day after the date of the notice**. Cancellation or rescheduling requests made during this 10-day period **are unrestricted unless a pattern of abuse is detected**.

(4) Cancellation or rescheduling requests under paragraph (2)(B) or (C) of this subsection made after the unrestricted cancellation period defined in paragraph (3) of this subsection must:
  (A) be in writing and in the form prescribed by the division;
  (B) demonstrate good cause for canceling or rescheduling, as defined by paragraph (1) of this subsection; and
  (C) be sent to the division and opposing party or parties.

(5) A cancellation of a benefit review conference without simultaneous rescheduling constitutes a withdrawal of the dispute on the issue. A request to cancel a benefit review conference subject to §130.12 of this title (relating to Finality of the First Certification of Maximum Medical Improvement and/or First Assignment of Impairment Rating) must comply with the provisions of §130.12(b)(3) of this title.

(6) The division will notify the parties of a cancellation or rescheduling of a benefit review conference in a timely manner.

(7) If the benefit review officer denies a request to cancel or reschedule a benefit review conference under this section, the **benefit review officer will notify the parties in writing and state the reasons for the denial**.

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1 We believe that the deliberate use of the word "disputed" (past tense) by the Texas Legislature in its Preamble to §410. 021 is important in that it, if not expressly, implies that the filing of a dispute is not and should not be the same mechanism used for filing for a BRC. A "disputed" issue predates a need or request for a BRC. Clearly, per the language of the Preamble cited above, the Legislature contemplated that issues, including MMI and IR, would have already been "disputed" before a BRC was sought.

2 This is consistent with the language of the Division's Preamble stating that the, "proposed subsection (b)(6) provides that a party who forfeits the party's entitlement to a BRC on the issue in dispute does not forfeit the party's right, as provided by the Texas Workers' Compensation Act (Act) and Division rules, to a contested case hearing on the issue in dispute.

3 For the purpose of this paper, due to the date, we will not address T.A.C. rule 141.2(a) pertaining to requests for a BRC prior to December 1, 2011

I. UNRESTRICTED CANCELLATIONS

T.A.C Rule 141.2 makes clear that there is a ten (10) day unrestricted window to unilaterally cancel a BRC setting which current practice of the Division is to automatically result in another resetting.[4] Thus, it would appear that even the most cursory glance at the language of the rule reveals that it is incumbent upon a practitioner who is not ready to proceed to immediately move to cancel the BRC within 15 days of the notice. The language of the rule does not require that cancellation be done in writing or that "good cause" be demonstrated for the cancellation. Thus we turn to what is meant by the language "cancellation or rescheduling requests made during this 10-day period are unrestricted **unless a pattern of abuse is detected**.

There is no definition for what constitutes "a pattern of abuse." Reviewing the Preamble and comments to the rule is of little value in determining what the Division's interpretation of "pattern of abuse." The current Preamble and Comments states, "the term "pattern of abuse" came from language in previous §141.2(b). This is not a new term to the system and historically has been commonly understood." A look at the past version of the rule suggests that unrestricted means unrestricted and that the only prohibition is that opposing parties, who did originally request the BRC or are seeking resolution of the issue are not permitted to engage in this practice.[5] The common meaning of the term "pattern" seems to suggest multiple, certainly more than two, unilateral cancellation requests during the 10 day period after notice has been sent. "Abuse" is defined as to use wrongly or improperly. Since the language of the rule itself does not require justification or that a basis be asserted for seeking the unrestricted cancellation, it is difficult to see how a party can be considered to be abusing a provision that permits for unilateral and unrestricted cancellations, if the party is merely exercising its right to seek said cancellations within the allotted time period.[6] As a practical matter, simply requiring cancellation after cancellation to preserve basic rights to fair adjudication does not lend itself to the most efficient administrative practices, but this may be the end result of this rule.

Thus, we turn our focus to matters concerning requests filed after the 10 day time frame has expired; a representative of an injured worker that has not cancelled the BRC within 15 days[7] after the date of the notice, but who is not prepared to go forward, should tender something in writing attesting to a need for an additional amount of time to secure "additional necessary evidence" for the dispute or that frames the BRC as unnecessary. According to the rule, this request must be in writing, on the proper Form with a copy sent to all parties. As will be discussed, the amended version of Rule 141.2 regarding cancellations of BRC's after the 10 day timeframe, although very similar to the previous version, has distinct changes that the practitioner must be aware of that have the potential to cause significant problems depending on the Division's interpretation.

II. WHAT IS "GOOD CAUSE"?

When first proposed Rule 141.2(b)(1) defined "good cause" as "objective facts beyond the control of a party" that would prevent a party from attending or "would prevent the BRC from accomplishing its purpose". The former version then continues with examples of "good cause" without specifically defining how the Division will or should arrive at its determination. While a fair reading might mandate the granting of a "good cause" cancellation, under this definition, there was sufficient ambiguity that in practice there was a substantial likelihood of inconsistent or unfair application.

4 Only the requesting party, the Division, or upon mutual agreement of the parties can a scheduled BRC be cancelled.

5 The opposing party does not have a unilateral, unrestricted right to cancel. The Division has modified §141.2(b) of this title to clarify that only the parties identified in §141.2(a) of this title can request a cancellation or rescheduling. Section 141.2(a) of this title states that a cancellation or rescheduling of a BRC can only be made by the Division, the party who requested the BRC, and the parties by mutual agreement. See Preamble to Rule 141.2.

6 Per the Preamble; "Adopted §141.2(b)(3) continues the provisions in the previous §141.2 that give the parties the unrestricted right to cancel or reschedule a BRC within 10 days of the date the notice of setting is received."

7 To be safe, ensure the request is filed not later than 15 days from the date of the notice, ten days from the date of the notice plus five days under T.A.C. Rule 102.3.

The first change in the amended version of the Rule is found in the definition of "good cause". The amended version defines "good cause" as:

> "objective facts beyond the control of a party, which reasonably prevent a party from attending the BRC, or would prevent the BRC from accomplishing its purpose, such as the need for a reasonable amount of time to secure necessary evidence for the dispute; or objective facts which make the BRC unnecessary".

This definition attempts to guide the Benefit Review Officer ("BRO") as well as offer some examples of situations which would meet the definition. It appears that the Division was concerned that a BRO making a determination on "good cause" would be unable to make a full, complete and rational determination if the facts on which the underlying request was made were subjective. Thus the request, according to the new rule, must be based on "objective facts" which are out of the party's control, such as the need for a reasonable amount of time to procure necessary evidence or conduct discovery. Given that the Division has authorized for some time, the use of pre-BRC discovery, a general assertion of the need for additional discovery should be considered as an "objective fact" that should amount to "good cause" under the language of the rule. Seeking additional medical evidence, including the need to procure reports after further treatment and diagnostic testing, could be another. As long as the basis for the request asserts objective facts that are beyond the requester's ability to control or create (i.e. created and/or manufactured by another party or in a 3rd party's control) the request should be approved. Since it is relatively easy to demonstrate a conflict once a need for additional information/evidence is asserted the question becomes what constitutes "a reasonable amount of additional time" for the purpose of securing "necessary" additional information/evidence?

It is our position that, because the language of the rule does not require the practitioner to provide concrete specific details regarding the nature of the additional evidence being sought, a generalized statement can be provided expressing the need for cancellation.[8] This would be consistent with rules governing the civil justice system where a party seeking discovery is not required to indentify with particularity the nature of the evidence he/she intends to introduce at a proceeding. Thus, we turn to what constitutes "**a reasonable amount**" of additional time" without going into the specificity that would be compulsory if the rule contained language requiring the production of "specific" or "subjective" facts in the request.

As previously discussed, per the Legislature, the purpose of a BRC is to explain, discuss, mediate and resolve disputed issues by agreement of the parties. The rule defines "good cause" for cancelling a BRC as objective facts which reasonably prevent a party from attending the BRC, or would prevent the BRC from accomplishing its purpose, such as the need for a reasonable amount of time to secure necessary evidence for the dispute; or objective facts which make the BRC unnecessary". As such, we would assert that in most cases a generalized statement asking for an additional ninety (90) days to obtain additional evidence should be considered sufficient in most matters, including, but not limited to, disputes concerning MMI/IR. Additional requests after the initial requested period are governed by the same language as the initial request and would simply require the assertion of objective facts, which on their face, express the need that more evidence is needed before any meaningful discussion could occur regarding a possible resolution.

III. WHO DETERMINES GOOD CAUSE ?

The determination of "good cause", as applied by both versions of Rule 141.2, will be carried out by a BRO. Issues have been raised regarding the ability of BROs, whom often have little or no formal legal training, to determine the history and meaning of precise legal words or phrases such as "reasonable" and "good cause". The Division's response[9] evades the issue of due process insisting that the Texas Legislature has bestowed upon the BRO the authority to make such a determination with no route for appeal. Whether or not this provision is repugnant to notions of procedural due process will be determined in the future. However, given that the Division's position that the forfeiture of a party's entitlement to a BRC on the issue in dispute does not forfeit the party's right to seek a Contested Case Hearing on the merits, an argument can be made that due process is not compromised by this provision.

8 Practice Tip: Said Request must be in writing, on the correct form, and sent to all parties.

IV. WHAT IS "PREJUDICE TO THE PARTIES?"

The second change to Rule 141.2 is the requirement that the BRO in determining whether "good cause" exists to cancel or reschedule a BRC must also consider whether proceeding with a BRC would result in "prejudice to the parties". Necessarily, in determining what represents prejudice to the parties, one must take into account the Legislature's mandate found in Section 402.021 of the Texas Labor Code entitled: GOALS; LEGISLATIVE INTENT; GENERAL WORKERS' COMPENSATION MISSION OF DEPARTMENT:

> (a) The basic goals of the workers' compensation system of this state are as follows:
>
> (2) each injured employee shall have access to a fair and accessible dispute resolution process;

Section 402.021 goes on to provide that for the purpose of implementing the goal, that the Division:

> (b) It is the intent of the legislature that, in implementing the goals described by Subsection (a), the workers' compensation system of this state must:
>
> (5) minimize the likelihood of disputes and resolve them promptly and fairly when identified;

The Texas Workers' Compensation Act is a legislative compromise between employers and employees. Insurance carriers, with the exception of self-insured entities, are ancillary parties to the Act. Necessarily when undertaking an examination of what constitutes "prejudice to parties" a consideration of the mandated goals of Section 402.021 that each injured **employee** shall have access to a fair and accessible dispute resolution process must take precedent. The provision is expressly directed to "each injured employee" and not parties in general. Thus, any analysis of "prejudice to parties" must necessarily include an analysis of whether the request is consistent with and promotes a fair and accessible dispute resolution for an injured employee. A refusal to grant an injured worker's cancellation request for additional time to continue to gather evidence thereby forcing an injured worker to go through dispute resolution unprepared, particularly given the lack of any statutorily imposed limitation deadline, we believe is in conflict with and runs counter to the legislatively mandated goal of Section 402.021.

V. WHAT DOES WITHDRAWAL OF THE DISPUTE ON THE ISSUE REALLY MEAN?

This brings us to the final change, that cancellation without simultaneous rescheduling constitutes a withdrawal of the dispute on the issue. What this means exactly is anyone's guess. We would suggest that the language merely means a party may, in matters where there has been a prior BRC', forfeit their ability to another BRC. This provision is tempered with the provision that disputes subject to §130.12 (finality of the first certification of maximum medical improvement and/or impairment rating) must comply with section 130.12(b)(3).

Section 130.12(b)(3) states that "[a] dispute may not be revoked or withdrawn to allow the first certification of MMI and/or the first valid assignment of IR to become final except by agreement of the parties." A plain reading of this language would lead one to believe that a BRC involving the first assignment of MMI or IR may be canceled or rescheduled in accordance with 141.2 but that the withdrawal subsection of (b)(5) would not allow the dispute to be revoked or withdrawn, thus canceling the BRC while preserving the right to future dispute. This reading is based on the difference in the wording of the two sections. Section 130.12(b)(3) allows a party to withdraw a dispute only by agreement of the parties. Section 141.2(b)(5)

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9 "With regard to "good cause" determinations, Labor Code §410.028(a) specifically provides that the benefit review officer has the authority to determine whether "good cause" exists to reschedule a BRC. This statute does not provide a mechanism by which this determination may be appealed. While the Division authorizes a request for an expedited Contested Case Hearing on a denial of an incomplete BRC request in §141.1(g) of this title, that rule does not authorize an appeal of a denial to cancel or reschedule the BRC." Comment/Preamble Rule T.A.C Rule 141.2

only states that first assignment cases must comport with 130.12. It is possible to comply with 130.12 and 141.2 without agreeing, thereby not effecting withdrawal of the dispute but securing cancellation of the BRC. However, the Division comments regarding "how the sections will function" imply that the section is meant to prevent parties from canceling without simultaneously rescheduling first assignment BRCs if they do not first reach an agreement between the parties. The comments state that "[t]his clarification prevents a conflict between §141.2(b)(5) and §130.12(b)(3) and is necessary in order to clarify the status of a disputed issue when the requestor of the BRC cancels the BRC without requesting a new setting." In the event that the parties reach an agreement to cancel a BRC set on MMI/IR, could the dispute be considered revoked or withdrawn by operation of section 130.12(b)(3)? We would assert that in the absence of a proper "agreement" in the form and manner required under §40.011 and T.A. C. Rule 147.2 the answer is and should be no.

CONCLUSION

In the Preamble the Division justifies the need for the adopted amendments to Rule 141.2 as follows:

> "The Division, by statute, is responsible for administering the dispute resolution process and ensuring that disputes raised by the parties are resolved promptly and fairly."

This statement suggests that the Division has it backwards. The articulated goals of the workers' Compenation system, per the applicable statute are:

(1) each employee shall be treated with dignity and respect when injured on the job;
(2) each injured employee shall have access to a fair and accessible dispute resolution process;
(3) each injured employee shall have access to prompt, high-quality medical care within the framework established by this subtitle; and
(4) each injured employee shall receive services to facilitate the employee's return to employment as soon as it is considered safe and appropriate by the employee's health care provider.

The minimization of disputes and prompt dispute resolution are intended by the Legislature to be a means to an end. Respectively, "prompt and fair resolution of claim disputes through the use of an administrative dispute resolution process administered by the Division (i.e., BRCs, Contested Case Hearings, Appeals Panel" are NOT articulated by the Texas Legislature as goals they are merely the "means" to effectuate the goals of the workers compensation system in the state of Texas.[10] We would respectfully submit that in application, these rules appear to subordinate the end to the means and the Division, in its rush to put in place prompt dispute resolution, has in fact put in place a dispute resolution system that, in some substantive matters,[11] sacrifices the fairness and accessibility it is has been required to provide to injured employees in exchange for expediency and prompt dispute resolution for all.

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10 None of the stated goals of the Legislature regarding the workers' compensation system reference the need to ensure that insurance carriers are afforded the same protections as injured employees.

11 Texas Labor Code Section 408.123(e) mandates that a first MMI/IR is final if not disputed. However, Section 408.123 does not require a party to dispute a certification of MMI and IR by filing a DWC-45 requesting the setting of a BRC. The Division has done so by rule. It is our position that as a substantive matter, Section 408.123 does require a party to file a dispute within 90 days after receiving a certification of MMI and IR, but does not require a party to file a DWC-45. This would be consistent with the numerous provisions in the Texas Labor Code that permits an insurance carrier to dispute a claim or part of a claim without activating the dispute resolution process. See Section 409.021 of the Texas Labor Code. The Division has attempted to reconcile an irreconcilable conflict by incorporating language into Rule 141.2(b)(5) that attempts to prevent finality of impairment ratings from occurring due to cancellation or withdrawal of and from BRC's. The Division's choice to continue to use the DWC-45 Form for the dual purpose of seeking a BRC and disputing the first certification of MMI/IR, we believe, is inappropriate, confusing and in conflict with §402.021(A)(2) and §408.123. Moreover, by imposing further substantive requirements to effectuate a proper filing of the DWC-45 itself through Rule 141.1, the Division has imposed upon parties an additional burden beyond that required under Section 408.123 of the Texas Labor Code for disputing a certification of MMI/IR. Texas law makes clear that additional burdens, conditions, or restrictions in excess of, or inconsistent with, the relevant statutory provisions are improper. *See Kelly v. Ind. Accident Bd.*, 358 S.W. 2d 874, 876-77 (Tex. Civ. App.—Austin 1962, writ ref'd).

THE DRIVE TO WORK[1]

By John Molinar

You've seen the movie. The one where the guy seems to have it all, yet with the demands of work, he finds that setting aside time to spend with his loving wife and picture-perfect children has grown increasingly difficult. Only when he begins to realize he has lost control of his life does he finally appreciate what he's been missing because of work. That's a lesson this guy has learned and doesn't want to forget.

"Don't drive too fast!" That's not a scene from the movie. That's the guy's wife reminding him that he can't afford another speeding ticket. If life wasn't already a high-speed adventure, the guy just can't seem to slow down. So much to do, so little time to do it.

"Love you Daddy. Wish you didn't have to go to work so soon." That's the guy's daughter trying to coax him into staying home a little longer and watching TV with her, which he would love to do because he loves spending every moment with his little girl who bravely faced a life-threatening medical condition when she was six years old. "No can do, sweetie. How about this afternoon?" A quick kiss goodbye and the guy's out the back door of his suburban home, climbing into his black sports sedan and thinking about the day ahead. It's nearly 7 a.m. The drive to work begins.

He pulls out of the driveway and accelerates. Have you ever noticed that once people encounter a life-changing event in their lives, an illness, death or tragedy, how quickly their priorities change?[2] It's amazing how instantaneously things that were so important yesterday fail to carry the same significance today.

He downshifts into a lower gear. Life is more balanced now and his priorities are there but putting them in the right place is hard. Learning how to maintain balance in life is a constant challenge because the drive to work is always there.

Yellow light. He doesn't need to change direction completely, only to slow down a bit. After all, work gives him identity. Work provides friends, a social group to belong to, and support when in need. Not everyone finds this in work, but the profession he has chosen is not like any other.

He guns his engine. When people ask him what he does, he usually talks about his job before he ever mentions being a father. It's not that he's not passionate about his children, it's just that he's been a workers' comp attorney longer than he's been a dad.

A scholarly voice resonates from the radio: "Lawyers, as a group, are the highest paid profession, but disproportionately unhappy and unhealthy—with unusually high instances of depression, substance abuse, and divorce."[3] "In the win-lose game, lawyers are trained to be aggressive, judgmental, intellectual, analytical and emotionally detached. This produces predictable emotional consequences: he or she will be depressed, anxious, and angry a lot of the time."[4] Perhaps lawyers should be consoled by Justice Cardozo's musing: "As to being happy, I fear that happiness is not my line."

U-turn ahead. But, what if we're motivated to broaden our purpose and achieve balance in our life? A new voice offers an uplifting perspective: "The science confirms what we already know in our hearts…We know if we spend time with young children, or remember ourselves at our best, that we're not destined to be passive and compliant…And we know that the richest experiences in our lives aren't when we're clamoring for validation from others but when we're listening to our own voice. Doing something that matters, doing it well, and doing it in the service of a cause larger than ourselves." [5]

Ring! Ring! The voice is interrupted. He pulls into his parking space, reaches for his phone and listens to the message. "Hi Daddy, I really miss you. I love you." He smiles to himself realizing a truth that escaped him just a few years earlier—even though the drive to work is compelling, it can't compare to the drive home.

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1 Inspired by "We're In Baseball Heaven" by Gary Smith, Sports Illustrated October 3, 2011.
2 Anthony Mullins, Priorities: Are You Living Yours?, People of Faith.com
3 Martin E.P. Seligman, Ph. D., Authentic Happiness: Using the New Positive Psychology to Realize Your Potential for Lasting Fulfillment, Free Press, 2002.
4 Id.
5 Daniel H. Pink, Drive: The Surprising Truth About What Motivates Us, 2009.

ACTIVE SHOOTER INFORMATION – WHAT TO DO

By Ken Wrobel, Editor

In response to random public shootings, especially at government agencies and offices, FEMA put together an informational video and online test to help educate the public about what to do when these awful events occur. We have all seen angry clients or claimants. We honestly never know when one of them might snap. That's reality. And our field offices have little to no security unless we get notice of a potentially volatile situation. Take 20 minutes and watch the video and take the test. I strongly suggest you watch this and require your staff to watch this as well. You will even get a certificate if you complete and pass the test at the end of the video. It's only about 20 minutes. And like learning CPR, you will probably never use any of this information but it will be nice to know in case you do experience this terrifying situation.

http://emilms.fema.gov/IS907/index.htm

"Texas has yet to learn submission to any oppression, come from what source it may." —

Sam Houston

THE NEW RULEBOOK SUPPLEMENT IS HERE!

THE NEW RULEBOOK SUPPLEMENT IS HERE!

The Texas Workers' Compensation Rulebook Supplement 2012-02 containing rules adopted by the Commissioner of Workers' Compensation is available online from the Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC). The supplement can be printed from the TDI website at **http://www.tdi.texas.gov/wc/rules/supplements.html.**

Rulebook Supplement 2012-02 contains adopted amendments to 28 Texas Administrative Code(TAC) §§180.1, 180.3, 180.5, 180.8, 180.27 and new 28 TAC §§180.4, 180.9 and 180.10. These rules were adopted on January 24 2012; filed with the SOS on January 25, 2012; andwere published in the February 10, 2011 issue of the *Texas Register* (37 TexReg 691). These rules became effective February 14, 2012.

APPEALS PANEL DECISIONS UPDATE (111237-111738)
(October 28, 2011 – February 01, 2012)
http://www.tdi.texas.gov/appeals/2011cases

111237 – Doctor did not consider the entire compensable injury when certifying the impairment rating.

111246 – An injury can be a compensable injury, no matter how small. Disability issue remanded because injury determination reversed.

111262 – No doctor opined the compensable injury caused or aggravated the diagnoses at issue.

111327 – Hearing officer failed to make a conclusion of law or decision on the issue added for good cause and by agreement of the parties regarding whether the doctor was properly appointed as designated doctor.

111353 – No doctor properly rated Claimant.

111364 – Treating doctors did not properly complete the DWC-69s and their reports. The narrative report from one doctor certifying a different date of MMI cannot be substituted as a narrative for another doctor.

111384 – Designated Doctor improperly rated Claimant.

111386 – Designated Doctor did not rate the entire injury.

111393 – Although there was no other DWC-69 in evidence, the hearing officer was allowed to find Claimant was not at MMI pursuant to claimant's treating doctors' reports and was not required to adopt the certification of MMI/IR from Dr. M, because it was contrary to the preponderance of the other medical evidence as evidenced by the medical records of the treating doctor and Dr. H.

111432 – How to get an agreement reversed and remanded: "The claimant further argued that her attorney failed to meet with her and explain what was to be agreed upon, stating "[h]e took me out of the hearing and told me not to say anything." " The court interpreter then stated that the claimant is "making hand gestures at me and she was saying that she really doesn't understand." "The claimant again interrupted the proceedings. The court interpreter stated to the hearing officer that the claimant "wanted to show you x-rays," that "the pain is from her shoulder to her elbow," and that "she did not have chronic pain at the time of the injury." At that point, the claimant's attorney stated "I probably need to talk to her about this." "A review of the record reflects the court interpreter incorrectly translated from English into Spanish for the claimant medical terms with regard to the extent-of-injury condition(s)."

111447 – Material recovery or lasting improvement could reasonably be anticipated. It is not whether a claimant gets better, only if it could be anticipated.

111496 – Hearing officer sua sponte determined the first treating doctor. First certification if MMI could not be determined and was remanded to determine which rating was the first valid rating.

111515-s – Both of Claimant's feet were amputated. Claimant was able to return to work. AP says Claimant is still entitled to LIBS.

111516 – The decedent had begun his job duties directed by his employer regardless of whether or not he was "on the clock" and being paid travel time. Followed Leordeanu.

111519 – Lots of DWC-69s, none of them were valid.

111563 – AP chose a different impairment rating.

111573 – No valid impairment ratings.

111586 – Once the IR became final pursuant to Rule 130.102(h), what was included in the underlying compensable injury was established.

111607 – Claimant beneficiary had been equitably adopted by the decedent through a district court. Courts did not intend to hold, and did not hold, that "equitable adoption" or "adoption by estoppel" is the same as legal adoption. The courts have held that adoption by estoppel is inapplicable to many situations. The 1989 Act does not provide of the payment of death benefits to a child who has been equitably adopted.

111610 – Extent-of-injury issue is a threshold issue that must be resolved before MMI and IR can be resolved.

111639 – Claimant had not reached MMI.

111708 – Claimant did not provide report to prove up inability to work to qualify for SIBs.

111710 – Designated Doctor made up FCE findings. Claimant didn't do FCE but Designated Doctor had figures for one. "The AMA Guides do not require a total loss of reflexes to qualify for an IR of radiculopathy. See Appeals Panel Decision 091039 and 040924 " AP corrected Designated Doctor's mathematical errors.

111738 – attenuation problem for Claimant with extent of injury.

"You may all go to Hell, and I will go to Texas." – Davy Crocket

JIM BOWIE

JUAN SEGUIN

WILLIAM BARRET TRAVIS

IMPORTANT WORKERS' COMPENSATION WEBSITES AND LINKS

Texas Department of Insurance (note the change in the domain to .gov. All state agencies will be making this change.)
http://www.tdi.texas.gov/

TDI-Division of Workers' Compensation
http://www.tdi.texas.gov/wc/index.html

Administrative decisions including AP decisions and medical contested case decisions
http://www.tdi.texas.gov/wc/admindecisions.html

Advisories and bulletins
http://www.tdi.texas.gov/wc/news/advisories/index.html

Appeals Panel Decision Manuel
http://www.tdi.texas.gov/wc/idr/apdmtoc.html

Medical Contested Case Hearing Manuel
http://www.tdi.texas.gov/wc/idr/mddmtoc.html

Medical Fee Dispute Resolution
http://www.tdi.texas.gov/wc/mfdr/

Workers' compensation forms
http://www.tdi.texas.gov/forms/form20.html

Requests for a Letter of Clarification (LOC) of a Designated Doctor's Report
http://www.tdi.texas.gov/wc/loc/index.html

SIBs Work Requirements per County
http://www.tdi.texas.gov/wc/employee/sibs.html

Carrier's Interrogatories to Claimant
http://www.tdi.texas.gov/wc/rules/documents/car_interr_cla.pdf

Claimant's Interrogatories to Carrier
http://www.tdi.texas.gov/wc/rules/documents/cla_interr_car.pdf

Proposed Rules
http://www.tdi.texas.gov/wc/rules/proposedrules/index.html

Informal Working Drafts
http://www.tdi.texas.gov/wc/rules/drafts.html

TxComp
https://txcomp.tdi.state.tx.us/twccprovidersolution/homehtml

TDI Search for Company's Attorney for Service
https://wwwapps.tdi.state.tx.us/inter/perlroot/consumer/attorney/attorney.html

Information on Networks
http://www.tdi.texas.gov/wc/wcnet/indexinjured.html

Texas Board of Legal Specialization
http://www.tbls.org/Default.aspx

Rule book supplements
http://www.tdi.texas.gov/wc/rules/supplements.html

Designated Doctor Outreach and Oversight
Texas Department of Insurance Division of Workers Compensation
7551 Metro Center Drive, Suite 100
Austin, TX 78744-1645

(512) 804-4766
Fax (512) 804-4207

Designated Doctor homepage
DesDoc.Education@tdi.state.tx.us

SAN JACINTO FLAG

ALAMO FLAG

"Texas will again lift it's head and stand among the nations. It ought to do so, for no country upon the globe can compare with it in natural advantages" –

Sam Houston

"ONLY IN THE WC" February 2012

By Michael Sprain

I was doing a CCH in front of Judy Ney a couple of months ago. My client had food poisoning the day of the hearing but all parties agreed to let her appear by phone and go forward. My client had told me she only slept about an hour the night before the hearing but insisted on going forward. The hearing involved an extent of injury and a doctor was going to testify on behalf of the carrier. During the testimony of the doctor, my client was completely silent on the line until we started to hear the faint sound of snoring that gradually got louder and louder. Judy Ney stopped the doctor's testimony and was trying to yell into the phone to wake up my client. We were unable to arouse her and she continued to snore. Ms. Ney made both myself and the defense attorney state on the record that if we continued to go forward that neither of us could use the fact that the Claimant was sleeping as a basis for an appeal. After we both agreed, the hearing went forward with a snoring client.

WE DESPERATELY NEED YOUR HELP!!!

By Ken Wrobel, Editor

Thanks so much to Maggie Knott who is going to step up and be our webmaster. Next time you see her make sure you address her as "Webmaster Knott." Thanks Maggie!

The newsletter needs someone to keep up with the court cases that go on out there. Some of you do this anyway, so just send me the list when it is newsletter publishing time. We don't need fancy "Lexis/Nexus" summations. Our newsletter does not have the room and is not the place for it. You see how I summarize the AP decisions. You get the Appeals Panel Decision number and one to three sentences about the case, occasionally more on the important cases. The court cases – we would want the cites and two or three sentences on the issue and decision. Nothing fancy. If you think it is an important case with high impact to our arena, you could let Joe and/or me know. Then we find someone to write an article. That's it. Please help with this task.

Finally, we need more members. Pass the newsletter on to your work comp buddies who aren't members and show them the kind of information and networking they can get for $25 a year. But don't keep passing these on. Let them buy their own.

Community News

G.W. Quick

On February 29, 2012, G.W. Quick took the opportunity to use Leap Day to leap into retirement. He Graduated from East Texas State University (now Texas A&M at Commerce) with a degree in journalism. Later he graduated from St Mary's Law School. He worked for Liberty Mutual Ins Co. doing "Old Law" Pre-Hearing Conferences across the state for 10-years. One of the many examples of the awareness around the state of G.W.'s credibility was being placed on the Governor's Insurance Advisory Board for several years while with Liberty Mutual. After leaving LMIC, G.W. practiced Plaintiff law in Wichita Falls for 10 years doing only workers' comp. When the "New Law" came in, he was hired in 1991 as a Hearings Officer. G.W. worked 21 years with the state. "I am retiring from state employment and plan to do a lot of fishing."

Mason Wrobel

Mason Wrobel, the son of Ken Wrobel, a hearing officer in the Fort Worth Field Office, signed his National Letter of Intent on February 01, 2012, indicating his commitment to run cross country and long distance track for Tarleton State University in Stephenville. In return, Mason will receive a partial scholarship from TSU beginning in the Fall of 2012. (Just FYI, in case you are wondering what you need to do to get a running scholarship – as a junior, Mason ran a 4:35 mile and 10:04 two-mile.) Mason's twin sister, Courtney, will also be attending TSU in the fall. "We are still waiting to hear if she gets a scholarship, but we hope her 3.9 GPA and top 10% of her class ranking get her something."

Carolyn Moore

Carolyn Moore, a hearing officer in the Lubbock Field Office, lost her beloved brother, Lewis Daniel Moore, on Christmas Day (2011) at 8:20 P.M. in Lubbock, Texas. Both her husband and her brother's two sons were with him at the time of death. He was 59 years old and had been a doctor of optometry since 1976. In addition to his sons, he had one step-daughter.