TITLE 28. INSURANCE

PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 152: ATTORNEY FEES

Title 28 TAC §152.3, §152.4, and §152.6

INTRODUCTION. The Texas Department of Insurance, Division of Workers' Compensation (division) repeals 28 Texas Administrative Code (TAC) §152.3, *Approval or Denial of Fee by the Commission*, and §152.4, *Guidelines for Legal Services Provided to Claimants and Carriers*. Along with the repeal, the division adopts new 28 TAC §152.3, *Approval or Denial of Fee by the Division*, new §152.4, *Guidelines for Legal Services Provided to Claimants and Carriers*, and new §152.6, *Attorney Withdrawal*. An informal working draft of the rule text was published on the division's website on April 1, 2016. The proposal was published in the August 19, 2016, issue of the *Texas Register* (41 TexReg 6146) and a public hearing was held on September 13, 2016. New §152.3, §152.4, and §152.6 are adopted without changes to the proposed text.

In accordance with Government Code §2001.033, the division's reasoned justification for the sections is set out in this order, which includes the preamble. The following paragraphs include a detailed section-by section-description and reasoned justification for the repeal and re-enactment of §152.3 and §152.4, as well as new §152.6.

REASONED JUSTIFICATION. Labor Code §408.221, *Attorney's Fees Paid to Claimant's Counsel*, and §408.222, *Attorney's Fees Paid to Defense Counsel*, require the commissioner of workers' compensation to approve attorney fees for representing a claimant or defending an insurance carrier in a workers' compensation action. Chapter 152 implements the requirements set out in these sections. The repeal and re-enactment of §152.3 and §152.4 is necessary to update the attorney fee

rules for the first time since 1991. The scope of the amendments required to reflect changes in the industry over the past 25 years necessitates the repeal. The repeal is also necessary to permit the simultaneous adoption of new §152.3 and §152.4.

Under new §152.6, attorneys are required to comply with the Texas Disciplinary Rules of Professional Conduct when withdrawing representation. The requirements of new §152.6 are necessary to help prevent an attorney's withdrawal from having a materially adverse effect on a client. Additionally, the notification requirement will help the division track representation within the system, ensure communication with the correct parties, and inform the division when an injured employee may need assistance from the Office of Injured Employee Counsel (OIEC).

The repeal of existing §152.3 and §152.4 becomes effective January 30, 2017, when the new §152.3, §152.4, and §152.6 rules become effective.

Section 152.3 addresses **Approval or Denial of Fee by the Division.** New §152.3(a) requires an attorney to submit a complete and accurate application for attorney fees in order to claim a fee. This application must be in the form and manner prescribed by the division. New §152.3(a) helps ensure the division receives the necessary information to fulfill its duties under Labor Code §408.221 and §408.222 to approve attorney fees, and that the information provided is not misleading or incorrect. Receiving the information necessary in the form of an application helps the division to process requests for attorney fees in an efficient and timely manner. The division has provided the DWC Form-152, *Application for Attorney Fees*, as a standardized form for attorneys to request attorney fees. The application may be submitted in paper form by hand delivery, mail, or facsimile, or it may be submitted through the Web-Enabled Attorney Fee Processing System (WAFPS). Attorneys can access WAFPS after submitting the DWC Form-151, *Attorney Application for Web Access*, and receiving an access code.

New §152.3(b) specifies the information that an attorney must provide to the division on an application for attorney fees, and is substantially similar to previous requirements. New §152.3(b)(1) and (2) require each attorney's name and bar card number, as well as the law firm's name, phone number, and mailing address. This information is necessary for efficient processing of attorney fee requests and to help the division identify not only the requestor, but where to direct payment of approved fees. New §152.3(b)(3) and (4) require the injured employee's name, date of injury, and DWC claim number, and when applicable, the beneficiary's name, type, contact information, and social security number. This information is necessary to ensure the requested attorney fees are properly attributed to the correct claimant. New §152.3(b)(5) requires the dates of legal service for the application. This information is necessary to help the division collect data relating to attorney fees and track representation within the workers' compensation system. This information also helps the division protect against mistaken or fraudulent billing, including duplicate bills, by specifying the dates of service to which the application applies. New §152.3(b)(6) requires the hourly rate and number of hours for each attorney and legal assistant providing services, and new §152.3(b)(7) requires an itemized list of the services performed and expenses incurred, the attorney or legal assistant who provided the service, the date it was provided, and the hours or amount requested. This information is necessary to determine the time and labor required to represent the claimant or insurance carrier, a factor Labor Code §408.221(d) and §408.222(b) require the division to consider in approving an attorney's fee. For purposes of billing under the guidelines for legal services, the itemized list of the services performed and expenses incurred should identify the type of action performed. The division emphasizes that, under this subsection, an attorney is not required to provide any information considered privileged or confidential. New §152.3(b)(6) and (7) are also necessary to determine compliance of an application for attorney fees with the hourly rate and the guidelines for legal services established in new §152.4. New §152.3(b)(8) requires a certification that every statement,

numerical figure, and calculation in the application is within the attorney's personal knowledge, is true and correct, and represents services, charges, and expenses provided by the attorney or a legal assistant under the attorney's supervision. The certification is necessary to ensure the application for attorney fees contains true and correct information. Under Labor Code §408.221(b) an attorney's fee is based on the attorney's time and expenses according to written evidence provided to the division. The division relies on this written evidence of an attorney's fee when approving, partially approving, or denying an application. Therefore it is essential the information contained in an application is accurate. The attorney is in the best position to know whether the application is reflective of the accurate time and expenses, and so it is the attorney's responsibility to ensure the application is correct. New §152.3(b)(9) requires additional case-specific justification for any fee request that would exceed the guidelines for legal services contained in §152.4(c). This paragraph is necessary to ensure the division receives the justification required under new §152.4(b) when an attorney is requesting hours that exceed the guidelines for legal services. The justification is necessary for the division to determine whether the circumstances of the case warrant an exception to the number of hours provided for in §152.4(c). The division emphasizes that whether the attorney requests to exceed the guidelines for legal services in a single application, or over the course of multiple applications, additional case-specific justification for the fee request is required. If justification is not included, the portion of the fee request exceeding the guidelines for legal services may be denied automatically.

New §152.3(c) provides that the division may approve, partially approve, or deny an application based on the division's determination whether the requested time and expenses are reasonable according to new §152.4, Labor Code §408.221 and §408.222, and the written evidence presented to the division. New §152.3(c) further explains that the division will then issue an order approving, partially approving, or denying the application. This subsection is necessary to inform

system participants of the possible outcomes of the division's review of an application for attorney fees and the factors the division will take into consideration when evaluating fee requests. Informed system participants will help the application process and workers' compensation system, generally, run more efficiently and effectively by limiting submission of applications that are incomplete or lacking sufficient justification. Additionally new §152.3(c) reminds attorneys that, as system participants, they are subject to review for compliance under Labor Code Chapter 414, and that issuance of a division order approving, partially approving, or denying an application for attorney fees does not limit the commissioner's enforcement authority. Labor Code §414.002(a), *Monitoring Duties*, requires the division to monitor for compliance with commissioner rules, the Texas Workers' Compensation Act (Act), and all laws relating to workers' compensation, the conduct of persons subject to the Act. Under §414.002(a), persons to be monitored include attorneys and other representatives of parties. Additionally, §414.002(b) requires the division to monitor the conduct described in Labor Code §415.001, *Administrative Violation by Representative of Employee or Legal Beneficiary*, and Labor Code §415.002, *Administrative Violation by Insurance Carrier*. Labor Code §415.001 and §415.002 make it an administrative violation to violate a commissioner rule. New §152.3(c) is necessary to remind attorneys of the division's enforcement authority, including the statutorily imposed duty to monitor attorneys for compliance, and emphasize that the issuance of an order in response to an application for attorney fees is not a defense against any administrative violations attached to that application or the actions of the attorney in submitting it. Last, new §152.3(c) states that at any time the division may refer an attorney whose application is found to contain false or inaccurate information to enforcement or other authorities, including licensing agencies, district and county attorneys, or the attorney general for investigation and appropriate proceedings. This subsection is necessary to remind attorneys of the division's statutory authority to refer persons to other authorities under Labor Code §414.006, *Referral to Other Authorities*.

New §152.3(d) requires an attorney, claimant, or insurance carrier to request a contested case hearing (CCH) in order to contest a division order approving, partially approving, or denying an application for attorney fees. Submission of an application requesting fees for the same services or expenses addressed in any previous application is prohibited. This subsection is necessary to emphasize that resubmitting an application, or submitting a second application that includes requested fees for the same services or expenses addressed in a previous division order, is prohibited. A request for a CCH must comply with the dispute resolution process outlined in 28 TAC Chapters 140 – 144 and must be made no later than the 20th day after receipt of the order. It is necessary for the request to be made according to the established dispute resolution process to ensure timely and efficient resolution of disputes, and to further the division's duty under Labor Code §402.021(b)(8) to effectively educate and clearly inform participants of their rights, their responsibilities, and how to appropriately interact within the system. Labor Code §402.021, *Goals; Legislative Intent; General Workers' Compensation Mission of Department*, obligates the division to resolve disputes promptly and fairly when implementing the goals of the workers' compensation system. Requiring that a request for a CCH follow the established dispute resolution process helps the division meet the requirements of the Labor Code and encourages efficiency within the workers' compensation system. It is necessary for the division to receive the request for a CCH within 20 days after receipt of the order to ensure prompt resolution of any disputes and prevent issues from becoming stale. It is also necessary to conform to similar division dispute processes while allowing sufficient time for parties to receive notice, consider the options available, and, when applicable, make the necessary request. Additionally, the division recognizes that previous regulations required attorneys to send a copy of the application for attorney fees to their client at the same time as submitting it to the division, and allowed for 15 days to contest a fee after receipt of the order. Under new §152.3(a), attorneys are no longer required to send a copy of the application for attorney fees to

the client because the Attorney Fees Processing System (AFPS) allows for issuance of an order in response to an application on the same day it is submitted. Thus, a client could receive the copy of the application at the same time as the corresponding division order, which fails to provide any additional notice to the attorney's client. By allowing for 20 days following receipt to contest an order, the division is aligning the process with similar dispute timeframes found in the rules and providing for a more efficient application process overall. A request for a CCH by the attorney or insurance carrier must be submitted by personal delivery, first class mail, or facsimile to the division, and a copy must be sent to the other parties by personal delivery, first class mail, or electronic transmission on the same day it is submitted to the division. It is necessary for a request for a CCH to be made by personal delivery, first class mail, or facsimile to ensure the division receives it in a timely manner and is able to begin the dispute resolution process immediately. It is necessary for a copy of the request for a CCH to be sent to the other parties by personal delivery, first class mail, or electronic transmission to put all parties to a dispute on notice of the issue and avoid any ex parte communications, which are prohibited under Labor Code §410.167, *Ex Parte Contacts Prohibited*. Electronic transmission is defined in 28 TAC §102.4(m), *General Rules for Non-Commission Communication*, as transmission of information by facsimile, electronic mail, electronic data interchange, or any other similar method and does not include telephonic communication. Therefore, unlike the requirements for submitting the request to the division, an attorney may e-mail a copy of the request to the other parties. A claimant may request a CCH by contacting the division in any manner. Allowing a claimant to request a CCH by contacting the division in any manner is necessary to help further the basic goals of the system found in Labor Code §402.021, including ensuring each injured employee has access to a fair and accessible dispute resolution process. A simplified process for requests helps provide access to claimants disputing their attorney's fees, who are often unrepresented on this issue.

New §152.3(e) requires an attorney, claimant, or insurance carrier who wishes to contest a division order after a CCH under subsection (d) to request review by the appeals panel. This is necessary to inform system participants of the dispute resolution process following a CCH on an issue. It is also necessary to further the division's duty under Labor Code §402.021(b)(8) to effectively educate and clearly inform participants of their rights, their responsibilities, and how to appropriately interact within the system. New §152.3(e) further states a request for review by the appeals panel must be made pursuant to the provisions of 28 TAC §143.3, *Requesting the Appeals Panel to Review the Decision of the Hearing Officer*. It is necessary that the request for review be made in accordance with §143.3 to help promptly and efficiently resolve the dispute. Labor Code §402.021 requires that the division resolve disputes promptly and fairly when implementing the goals of the workers' compensation system. Requiring that a request for review by the appeals panel follow the established dispute resolution process helps the division meet the requirements of the Labor Code and encourages efficiency within the workers' compensation system.

New §152.3(f) provides that a division order approving, partially approving, or denying an application for attorney fees is binding during a contest or an appeal. Additionally, the insurance carrier is not relieved of the obligation to pay attorney fees according to the division order in the event of a contest or appeal. Labor Code §415.021(a), *Assessment of Administrative Penalties*, states that a person commits an administrative violation if the person violates, fails to comply with, or refuses to comply with the Act or a rule, order, or decision of the commissioner. This subsection is necessary to ensure parties comply with the division order approving, partially approving, or denying an application for attorney fees until a subsequent decision or order requires otherwise.

New §152.3(g) provides that a final order or decision will be issued by the division following a contest or appeal under subsection (d) or subsection (e). This subsection is necessary to inform system participants of the outcome of a contest or appeal under the attorney fee rules and their rights

in accordance with Labor Code §402.021. New §152.3(g) further states that when a final order or decision requires an attorney to reimburse funds, reimbursement must be made no later than 15 days after receipt of the final order or decision. It is necessary for an attorney to reimburse funds within 15 days of receipt of the final order or decision to accomplish timely recovery of the client's overpaid funds. In cases where a claimant's attorney is involved, timely recovery of the overpaid funds is important as the funds are part of the injured employee or beneficiary's benefits.

New §152.3(h) establishes a delayed effective date for §152.3 of January 30, 2017. A delayed effective date is necessary to ensure system participants and the division are afforded sufficient time to prepare and update the necessary systems to reflect the repeal and re-enactment of §152.3. The division emphasizes that attorney and legal assistant services rendered prior to January 30, 2017, must be billed in accordance with existing §152.3. An application for attorney fees may not contain dates of legal services spanning across the effective date. Therefore, one application must be submitted for services rendered as of January 30, 2017, and a separate application must be submitted for services provided prior to and including January 29, 2017. This subsection is necessary to inform system participants of the effective date of new §152.3.

Section 152.4 addresses **Guidelines for Legal Services Provided to Claimants and Carriers.** New §152.4(a) outlines the different factors the division will consider when determining the reasonableness of a request for attorney fees. Based on the guidelines for legal services, the maximum hourly rate for legal services, the criteria outlined in Labor Code §408.221 and §408.222, and the written evidence presented, the division will approve, partially approve, or deny the request for attorney fees. This subsection is necessary to inform system participants of the factors the division will take into consideration when evaluating the fee request. Informed system participants help the processing of applications for attorney fees and the workers' compensation system run more

efficiently and effectively by limiting the submission of applications that are incomplete or lacking sufficient justification.

New §152.4(b) allows an attorney to request additional hours that exceed the guidelines for legal services if the attorney demonstrates that the higher fee was justified based on the circumstances of the claim and the factors laid out in Labor Code §408.221 and §408.222. The division emphasizes that whether the attorney requests to exceed the guidelines for legal services in a single application or over the course of multiple applications additional case-specific justification for the fee request is required. If a justification is not included, the portion of the fee request exceeding the guidelines for legal services may be denied automatically. This subsection is necessary to account for circumstances under which the case-specific considerations, such as the novelty and difficulty of the questions involved in the dispute, warrant additional hours.

New §152.4(c) establishes the guidelines for legal services provided to claimants and insurance carriers. Figure: 28 TAC §152.4(c) includes the allotted maximum hours for each service the division has identified as part of the attorney's representation. The figure reads as follows: one hour for initial interview and research; half of an hour for setting up the file and completing and filing forms; three hours each month for communications with the client, health care providers, and other persons involved in the case; three and a half hours each month for direct dispute resolution negotiation with the other party; two hours for preparation and submission of an agreement or settlement; the actual time in a benefit review conference (BRC) plus two additional hours for participation in a BRC; the actual time in the CCH plus four additional hours for participation in a CCH; five hours for participation in the administrative appeal process; and the actual costs that are reasonable and necessary for travel each month. This subsection is necessary to help fulfill the division's statutory duty to provide guidelines for maximum attorney fees for specific services, and is substantially similar to the previous requirements. In setting the maximum hours for each legal

service, the division began by considering the applicable factors laid out in Labor Code §408.221, including the skill, time, and labor required to perform each specific legal service properly. The division then considered system goals, such as minimizing the likelihood of disputes by emphasizing informal mediation rather than litigation, providing injured employees with access to a fair and accessible dispute resolution process, and resolving disputes promptly and fairly when they do arise. Additionally, the division looked to the guidelines for legal services that have been in place since 1991. While the guidelines for legal services are substantially similar to previous requirements, additional hours have been allotted for direct dispute resolution negotiation, communications, and preparation and submission of an agreement or settlement form. These additional hours are necessary to encourage both early communication between the parties and resolution of disputes before the parties enter the formal administrative resolution process. The guidelines for legal services are intended to encourage early resolution of claim disputes by allowing time each month for activities such as communications with the client and other persons and negotiating with the other party. When negotiations are successful, a separate two hours are provided for the preparation and submission of an agreement or settlement. When they are not, hours have been allotted for the BRC and CCH stages of the dispute resolution process. At the BRC and CCH stage, actual time in each proceeding as well as two and four hours for preparation, respectively, have been allotted based on previous requirements, the goals of the workers' compensation system, and the factors in Labor Code §408.221 and §408.222. Last, five hours have been provided for participation in the administrative appeal process to account for disputes that are not resolved at the end of a CCH. Each of the service categories contained in the guidelines for legal services is necessary to allow time for attorney preparation and participation at each stage of representation, including initial interview, research and setting up the client's file, and the workers' compensation dispute resolution process. The service categories were determined based on a balancing of the system goals described above, the

requirements of Labor Code §408.221 and §408.222, and the guidelines provided in previous regulations.

New §152.4(d) establishes a maximum reasonable hourly rate for workers' compensation disputes in Texas of $200 for attorneys and $65 for legal assistants (not to include hours for general office staff). This subsection is necessary because it reflects the division's statutory duty to provide guidelines for maximum attorney fees for specific services. In setting the maximum hourly rate for legal services, the division considered the factors established in Labor Code §408.221(d), which include: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill required to perform the legal services properly; (4) the fee customarily charged in the locality for similar legal services; (5) the amount involved in the controversy; (6) the benefits to the claimant that the attorney is responsible for securing; and (7) the experience and ability of the attorney performing the services. Labor Code §408.221(d) and §408.222(b) require the division to consider these factors when approving an attorney's request for attorney fees. According to the Texas Workforce Commission, in 2014 the median hourly wage for all attorneys was $57.00 and for legal assistants it was $24.93 (http://www.texaswages.com/index3.aspx). Per the State Bar of Texas Department of Research & Analysis, in 2013 the median hourly rate for attorneys in private practice was $242 (https://www.texasbar.com/AM/Template.cfm?Section=Demographic_and_Economic_TrTren&Template=/CM/ContentDisplay.cfm&ContentID=27264) and, in 2014, the median hourly rate for paralegals was $121 (https://txpd.org/files/file/SalarySurvey/2014%20Salary%20Survey%20Results%20Final.pdf). While these numbers are helpful to quantify some of the factors required by Labor Code §408.221 and §408.222, namely the fee customarily charged in the locality for similar legal services, they are just one factor considered by the division in fulfilling its statutory duty. Therefore, the division balanced the above numbers against other factors, including system goals, such as encouraging early resolution of

disputes, providing access to effective attorney representation, limiting the adverse effect of attorney fee liens on a claimant's ability to obtain quality legal representation later in a dispute, the administrative nature of the workers' compensation dispute resolution process, and the statutory provision limiting attorney's fees to 25 percent of the injured employee's recovery. The division also considered Texas's position relative to other states that prescribe a maximum attorney fee rate for workers' compensation claims. After balancing the above considerations, the division determined that $200 an hour for attorneys and $65 an hour for legal assistants is the maximum hourly rate that is reasonable for workers' compensation disputes in Texas.

New §152.4(e) requires attorneys to bill using their own state bar card number. This subsection is necessary to help the division monitor against fraud and improper billing practices by requiring attorneys to use their own bar card number when requesting attorney fees. Providing a uniform, single identifier ensures that requested hours are attributed accurately to each attorney.

New §152.4(f) establishes a delayed effective date of January 30, 2017 for §152.4. A delayed effective date is necessary to ensure system participants and the division are afforded sufficient time to prepare and update the necessary systems to reflect the repeal and re-enactment of §152.4. The division emphasizes that attorney and legal assistant services rendered prior to January 30, 2017, must be billed in accordance with existing §152.4. An application for attorney fees may not contain dates of legal services spanning across the effective date. Therefore, one application must be submitted for services rendered as of January 30, 2017, and a separate application must be submitted for services provided prior to and including January 29, 2017. This subsection is necessary to inform system participants of the effective date of new §152.4.

Section 152.6 addresses **Attorney Withdrawal.** New §152.6(a) requires an attorney to submit a notice of withdrawal under subsection (b) or a motion to withdraw under subsection (d) when withdrawing representation. This is necessary to inform system participants of the differing

requirements of withdrawal. The specific explanation and justification for both subsection (b) and subsection (d) are included below. New §152.6(a) also requires an attorney to comply with the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas when withdrawing representation. Labor Code §415.021(a) states it is an administrative violation for a person to violate, fail to comply with, or refuse to comply with, the Act or a rule, order, or decision of the commissioner. Additionally, Labor Code §415.001 and §415.002 state that it is an administrative violation for a representative of an employee, legal beneficiary, or insurance carrier to violate a commissioner rule. 28 TAC §150.1, *Minimum Standards of Practice for an Attorney*, requires an attorney practicing before the division to observe the division's rules, the Texas Disciplinary Rules of Professional Conduct, and the Texas Lawyer's Creed. Furthermore, §415.001(8) provides that it is an administrative violation for a representative of an employee or legal beneficiary to violate the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas. Rule 1.15 of the Texas Disciplinary Rules of Professional Conduct governs declining or terminating representation. As such, new §152.6(a) emphasizes that attorneys in the workers' compensation system must comply with Rule 1.15 when withdrawing representation of a claimant or an insurance carrier. This section is necessary to emphasize that failure to comply with the Texas Disciplinary Rules of Professional Conduct when withdrawing is an administrative violation that may be referred to enforcement or other authorities. Additionally, §152.6 reiterates the Texas Disciplinary Rules of Professional Conduct requirement to surrender papers and property to the client upon withdrawal. This subsection is necessary to emphasize the requirement in Rule 1.15(d) and help ensure that claimants and insurance carriers obtain the portion of the case file to which they are entitled. The proper transfer of appropriate papers and property to the client helps the transition between attorneys or to an OIEC ombudsman move more quickly and smoothly and contributes to an overall efficient dispute resolution process.

New §152.6(b) addresses withdrawal before notice of a BRC or CCH is received and requires an attorney withdrawing representation to notify the division in the form and manner prescribed. New §152.6(b) requires notice of withdrawal in two circumstances. The first circumstance is any time the attorney may withdraw representation without a motion to withdraw described by subsection (d). The second circumstance is any time the attorney's client terminates the attorney's representation. This subsection is necessary to ensure there is no delay in a claimant or insurance carrier's ability to obtain subsequent representation or assistance when they choose to discharge their attorney. Under these two circumstances, notification is necessary to ensure the division has the required data to track the operation of attorneys in the system; ensure the correct parties are receiving communications from the division; and to put the division on notice that an injured employee may need assistance from OIEC. The division emphasizes that when new §152.6(b)(1) is applicable both the attorney and the attorney's client may terminate the attorney-client relationship with immediate effect. The required notice of withdrawal informs the division of a change in the representative relationship, but does not affect the date of termination.

New §152.6(c) states the notice of withdrawal must be provided to the division by personal delivery, first class mail, or facsimile no later than the 10th day following withdrawal, and the attorney must provide a copy of the notice to the client and opposing party by personal delivery, first class mail, or electronic transmission on the same day the notice is submitted to the division. It is necessary for the notice of withdrawal to be submitted to the division by personal delivery, first class mail, or facsimile to ensure the division receives the notification in a timely manner and is able to update the claimant or insurance carrier's representative information. It is necessary for the copies to be provided by the enumerated means to avoid any miscommunication or delay in the notice to the attorney's client or the opposing party. Section 102.4(m) defines electronic transmission as facsimile, e-mail, electronic data interchange, or any other similar method, but it does not include telephone

communication. It is necessary for the division to receive timely notification of an attorney's withdrawal to allow for better tracking and data on how attorneys are operating within the system; ensure the correct parties are receiving communications from the division; and to put the division on notice when an injured employee may need assistance from OIEC. It is necessary for the attorney's client and opposing party to receive a copy of the notice of withdrawal to ensure all parties are up to date on the representation involved in the dispute. The division has provided the DWC Form-150a, *Notice of Withdrawal of Representation*, as a standardized form for attorneys to notify the division of withdrawal of representation. The notice may be submitted to the division by personal delivery, mail, or facsimile. New §152.6(c) further specifies the information that an attorney must provide to the division on the notice of withdrawal. New §152.6(c)(1) and (2) require the attorney's name, bar card number, and contact information, as well as the law firm's name, when applicable. This information is necessary for the division to efficiently process attorney withdrawal notifications, ensure the system accurately reflects the claimant or carrier's current representation, if any, and properly process any future applications for attorney fees. New §152.6(c)(3) and (4) require the injured employee's information, including name, date of injury, and DWC claim number, and the beneficiary's information, when applicable. This information is necessary to ensure the correct claimant's information is properly updated to note the withdrawal of representation, and helps the division collect data and track representation of claimants in the workers' compensation system. New §152.6(c)(5) requires the insurance carrier name. This information is necessary to help the division collect data and track representation of carriers in the workers' compensation system. New §152.6(c)(6) requires the effective date of the attorney's withdrawal of representation. The effective date is necessary to ensure proper tracking of attorney representation within the system; facilitate processing of any future applications for attorney fees; and to verify the attorney met the requirement to submit the notification to the division within the 10 day period established by rule. The division emphasizes that the effective

date of the attorney's withdrawal is the actual date the representative relationship ended under paragraph (1) or (2) of subsection (b), and it is not tied to the submission date of the notice of withdrawal. New §152.6(c)(7) requires the attorney's signature. The attorney's signature is necessary to ensure the division can verify the party submitting the notice of withdrawal because the DWC Form-150a, *Notice of Withdrawal of Representation*, may also be used by the attorney's client to notify the division that the attorney-client relationship has been terminated. Thus, the attorney's signature helps signal to the division that it is the attorney submitting the DWC Form-150a.

New §152.6(d) addresses withdrawal after notice of a scheduled BRC or CCH is received and before resolution of the disputed issues through the division's dispute resolution process provided in Labor Code Chapter 410, Subchapters A – E. When new §152.6(d) applies, an attorney seeking withdrawal from representation may do so only after submitting a motion to withdraw and receiving a division order granting the motion. Labor Code Chapter 410 provides the division with the statutory authority to adjudicate disputes, as well as to adopt rules related to the adjudication of disputes. In particular, §410.027 requires the commissioner to adopt rules for conducting BRCs and §410.157 requires the commissioner to adopt rules governing procedures under which CCHs are conducted. Furthermore, Labor Code §415.021(a) states that a person commits an administrative violation if the person violates, fails to comply with, or refuses to comply with this subtitle or a rule, order, or decision of the commissioner. Additionally, Labor Code §415.001 and §415.002 state that it is an administrative violation for a representative of an employee, legal beneficiary, or insurance carrier to violate a commissioner rule. Section 150.1, requires an attorney in practice before the division to observe the rules, the Texas Disciplinary Rules of Professional Conduct, and the Texas Lawyer's Creed. Furthermore, §415.001(8) provides that it is an administrative violation for a representative of an employee or legal beneficiary to violate the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas. Under the Texas Disciplinary Rules of Professional Conduct, Rule 1.15(b), an

attorney may withdraw from representing a client under limited circumstances, including if withdrawal will not have a material adverse effect on the interests of the client. Oftentimes, the withdrawal of an attorney prior to a scheduled BRC or CCH can lead to continuances, which delay the resolution of the dispute, provide the claimant with inadequate subsequent representation or assistance due to timing constraints, and affect the efficiency of the overall dispute resolution process. Unnecessary delays can also prevent injured employees from receiving needed medical attention, income benefits, or returning to work. Once a BRC or CCH has been scheduled by the division, the time for a new attorney or ombudsman to prepare for the proceeding after the current attorney has withdrawn is cut short and can affect the resolution of the dispute. Once the CCH is completed, the deadline to file a written request for appeals panel review is statutorily set and cannot be extended. Thus, an attorney's withdrawal during this time period may affect the client's ability to timely appeal the decision of the hearing officer. If neither party files a request for appeals panel review, the division's dispute resolution process has resolved the disputed issues. If a request for appeals panel review is filed and the appeals panel reverses the decision of the hearing officer and renders a new decision, or affirms the decision of the hearing officer, the division's dispute resolution process has resolved the disputed issues. Additionally, if at any time the parties resolve all of the disputed issues by agreement or settlement under Labor Code §410.029, the division's dispute resolution process has resolved the disputed issues. However, if the appeals panel reverses the decision of the hearing officer and remands the case for further consideration in accordance with Labor Code §410.203(b), a motion to withdraw is still required for an attorney to withdraw representation. Under Labor Code §410.203(d), a hearing on remand must be accelerated and the commissioner must adopt rules to give priority to hearings in these circumstances. Thus, an attorney's withdrawal after a decision has been remanded may provide little time for a new attorney or ombudsman to prepare for the proceeding and can affect the resolution of the disputed issues. If appeals panel review is requested by a party after the

expedited, or accelerated, CCH, the appeals panel may either reverse and render a new decision or affirm the decision of the hearing officer. At this point, the division's dispute resolution process has resolved the disputed issues. This subsection is necessary to help prevent a materially adverse effect on the interests of claimants and insurance carriers by an attorney's withdrawal during the division's dispute resolution process. Additionally, continuances and delays during the dispute resolution process can negatively impact the effectiveness and fairness of the workers' compensation system. Labor Code §402.061, *Adoption of Rules*, provides the commissioner with authority to adopt rules as necessary for the implementation and enforcement of the Act. Labor Code §402.021(a)(2) states a basic goal of the workers' compensation system is that each injured employee must have access to a fair and accessible dispute resolution process, and (b)(5) establishes the prompt and fair resolution of disputes as another system goal. Labor Code §402.00128(b), *General Powers and Duties of Commissioner*, provides the commissioner with the power to hold hearings and to exercise other powers as necessary to implement and enforce the Act. Thus, new §152.6(d) is also necessary to help the division meet the statutorily imposed duty under Labor Code §402.021(a)(2) to provide a fair and accessible dispute resolution process and Labor Code §402.021(b)(5) to resolve disputes promptly and fairly.

New §152.6(e) requires that a motion to withdraw provide good cause for withdrawing from the case. Good cause is necessary to help prevent a materially adverse effect on the attorney's client as a result of the withdrawal. As described above, the withdrawal of an attorney during the dispute resolution process may have a material adverse effect on the client. Therefore, the division requires good cause to show that the attorney's withdrawal from the case is appropriate. This requirement is consistent with the Texas Disciplinary Rules of Professional Conduct, which state that, except in limited circumstances, an attorney may not withdraw representation unless withdrawal can be accomplished without a material adverse effect on the interests of the client. Texas Disciplinary Rule

1.15(c) states a lawyer shall continue representation notwithstanding good cause for terminating the representation when ordered to do so by a tribunal. New §152.6(e) simply requires a showing of good cause to withdraw during the dispute resolution process. New §152.6(e) further requires the motion to withdraw include a certification that the attorney's client has knowledge of and has approved, or refused to approve, the withdrawal or that the attorney made a good faith effort to notify the client and the client could not be located. The certification is necessary to ensure the participants, namely the attorney and the attorney's client, are communicating with one another and to provide information necessary under new §152.6(g)(5) when the hearing officer considers the motion to withdraw. The division emphasizes that the client's approval of an attorney's withdrawal is not the same as the client's termination of the attorney-client relationship under new §152.6(b)(2).

New §152.6(f) requires the attorney submit the motion to withdraw to the division by personal delivery, first class mail, or facsimile, and to provide a copy of the motion to the attorney's client and the opposing party. It is necessary for the motion to withdraw to be submitted to the division by personal delivery, first class mail, or facsimile to help ensure the division receives and considers the motion in a timely manner. It is necessary for the attorney's client and opposing party to receive a copy of the motion to withdraw to ensure all parties are up to date on the representation involved in the dispute and to avoid any ex parte communications, which are prohibited under Labor Code §410.167. The copy must be provided by personal delivery, first class mail, or electronic transmission on the same day the motion is submitted to the division. It is necessary for the copy to be provided by these means to avoid any miscommunication or delay in the notice to the attorney's client or the opposing party. Electronic transmission is defined in §102.4(m) as transmission of information by facsimile, electronic mail, electronic data interchange, or any other similar method and does not include telephonic communication. Therefore, unlike the requirements for submitting the motion to the division, an attorney may e-mail a copy of the motion to the other parties.

New §152.6(g) outlines the factors the hearing officer will rely on in determining whether good cause exists for the attorney's withdrawal, beginning with Rule 1.15 of the Texas Disciplinary Rules of Professional Conduct. This subsection is necessary to inform system participants how a hearing officer determines whether to approve or deny a motion to withdraw. The considerations are necessary to help protect the attorney's client from experiencing a material adverse effect due to the attorney's withdrawal. Labor Code §415.021(a) states that a person commits an administrative violation if they violate, fail to comply with, or refuse to comply with this subtitle or a rule, order, or decision of the commissioner. Additionally, Labor Code §415.001 and §415.002 state that it is an administrative violation for a representative of an employee, legal beneficiary, or insurance carrier to violate a commissioner rule. Section 150.1 requires an attorney, in practice before the division to observe the rules, the Texas Disciplinary Rules of Professional Conduct, and the Texas Lawyer's Creed. Furthermore, §415.001(8) provides that it is an administrative violation for a representative of an employee or legal beneficiary to violate the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas. Rule 1.15 of the Texas Disciplinary Rules of Professional Conduct governs declining or terminating representation. It is necessary for the hearing officer to begin with Rule 1.15 to help ensure the consideration of the attorney's reason for withdrawal within the context of the Texas Disciplinary Rules of Professional Conduct, which provide limited circumstances that require an attorney to withdraw representation, as well as a non-exhaustive list of circumstances that permit an attorney to withdraw representation without committing a disciplinary violation. In the absence of a situation requiring mandatory withdrawal, Rule 1.15 does not limit a tribunal's authority to weigh other case-specific factors when determining whether an attorney's withdrawal is permitted. New §152.6(g)(1) states the hearing officer will consider how close in time the withdrawal is to the scheduled BRC or CCH. Oftentimes, the withdrawal of an attorney prior to a scheduled BRC or CCH can lead to a continuance, which delays the resolution of the dispute, provides the claimant with

inadequate subsequent representation or assistance due to timing constraints, and affects the efficiency of the overall dispute resolution process. Unnecessary delays can also prevent injured employees from receiving needed medical attention, income benefits, or returning to work. Once a BRC or CCH has been scheduled by the division, the time for a new attorney or ombudsman to prepare for the proceeding once the current attorney has withdrawn is cut short and can affect the resolution of the dispute. This paragraph is necessary to help ensure the attorney's withdrawal is not so close in time as to lead to a rescheduled dispute proceeding or continuance. New §152.6(g)(2) and (3) state the hearing officer will consider the amount of attorney fees that have been requested and approved, as well as the attorney's willingness to waive payment of any portion of the approved fees outstanding at the time of withdrawal. Under Labor Code §408.221, a claimant attorney's fee is paid out of the claimant's recovery and may not exceed 25 percent of the recovery. Under Labor Code §408.203, *Allowable Liens*, any unpaid income or death benefits are subject to liens for attorney fees. Because attorney fees are capped at 25 percent of each income or death benefit check, there are often approved attorney fees operating as a lien on the claimant's benefits, sometimes through exhaustion of the available benefits. Therefore, unless an attorney is willing to waive outstanding fees when withdrawing from a case, any subsequent attorney will only receive a fee for representing the claimant after the original lien has been paid out. This can operate as a hindrance to injured employees and beneficiaries seeking access to an attorney in their dispute, making it an appropriate factor for consideration. The workers' compensation dispute resolution process does not require attorney representation in order for injured employees or beneficiaries to present their claim or obtain effective assistance. Similarly, the workers' compensation dispute resolution process does not require any party to obtain private counsel. The OIEC ombudsman program is available to assist injured employees, and parties are able to obtain other forms of qualifying non-attorney representation. The considerations in new §152.6(g)(2) and (3) are necessary to help enable claimants in the system who

want attorney representation to obtain a subsequent attorney if their current attorney withdraws. New §152.6(g)(4) considers the attorney's reason for withdrawing representation. This consideration is necessary as a corollary to Rule 1.15 of the Texas Disciplinary Rules of Professional Conduct. Under Rule 1.15, there are specific circumstances where an attorney is required to withdraw or is permitted to withdraw barring an order stating otherwise from a tribunal. This paragraph is necessary to encompass those reasons and put the hearing officer on notice of the attorney's reason for withdrawing representation during the dispute resolution process. However, the division emphasizes that an attorney is not required to provide any information that is considered privileged or confidential in stating the reason for withdrawal. Finally, new §152.6(g)(5) considers whether the attorney's client refused to approve the withdrawal. New §152.6(e) requires the motion to withdraw to include a statement reflecting whether the attorney's client has approved or refused to approve the withdrawal, unless the attorney certifies a good faith effort to notify the client regarding the withdrawal was made and the client could not be located. It is necessary for the hearing officer to consider whether the attorney's client has refused to approve the withdrawal, where applicable, to provide the claimant or insurance carrier an opportunity for their position to be heard. A consideration of good cause that includes the claimant or insurance carrier's voice helps encourage communication within the representation relationship and the workers' compensation system as a whole, as well as notify the hearing officer that there is a possible material adverse effect to the client if withdrawal occurs at that time.

New §152.6(h) requires an attorney to continue to represent the client until resolution of the disputed issues through the division's dispute resolution process provided in Labor Code Chapter 410, Subchapters A – E. Rule 1.15(c) of the Texas Disciplinary Rules of Professional Conduct states that a lawyer shall continue representation notwithstanding good cause for terminating the representation when ordered to do so by a tribunal. Under the Texas Disciplinary Rules of

Professional Conduct, a "tribunal" is defined as any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy and includes administrative agencies when engaging in adjudicatory activities, arbitrators, mediators, hearing officers, and comparable persons. New §152.6(e) requires a motion to withdraw show good cause for withdrawing from the case during the dispute resolution process, and is necessary to help prevent a materially adverse effect on the attorney's client. It is necessary for an attorney to continue representation if their motion to withdraw is denied because, after considering the circumstances, the hearing officer has determined that withdrawal at that point is not appropriate. This subsection tracks the requirements of the Texas Disciplinary Rules of Professional Conduct.

New §152.6(i) clarifies that nothing in §152.6 prevents a client from terminating the attorney-client relationship with immediate effect, or notifying the division of the termination of the attorney-client relationship. This subsection is necessary to emphasize that when the attorney's client terminates the representative relationship, these rules do not hinder the claimant or insurance carrier from obtaining immediate subsequent assistance from OIEC or representation from another attorney. Additionally, under §152.6(b) the attorney has 10 days to meet the requirement of submitting a notice of withdrawal. However, the client may seek immediate assistance from OIEC or subsequent representation following the attorney's withdrawal. In these instances, the attorney's client should not be prevented from notifying the division and obtaining assistance from OIEC or subsequent representation just because the attorney has not yet submitted the notice of withdrawal. Lastly, the division emphasizes that new §152.6(i) still requires the attorney to submit a notice of withdrawal under §152.6(b), regardless of whether the attorney's client has provided notification. This requirement helps to ensure the division is receiving the necessary information for tracking and data on how attorneys are operating within the system; to ensure the correct parties are receiving communications; and to provide consistent and clear application of the requirements. Consistent and

clear application of the withdrawal requirements is necessary to ensure the division is receiving all of the requested information on the DWC Form-150a. While an injured employee, beneficiary, or insurance carrier may submit the form to the division, participants other than the attorney are not required to. Therefore, new §152.6(i) requires attorneys to always submit the notice of withdrawal when applicable and helps ensure the division is receiving all of the necessary required information established in new §152.6(b).

New §152.6(j) establishes a delayed effective date for §152.6 of January 30, 2017. A delayed effective date is necessary to ensure system participants and the division are afforded sufficient time to prepare and update the necessary systems to reflect the new requirements contained in §152.6.This subsection is necessary to inform attorneys when the requirements of §152.6, including a notice of withdrawal under subsection (b) or a motion to withdraw under subsection (e), become effective.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

General

Comment: A commenter thanks the division for taking on a long overdue action.

Division Response: The division appreciates the supportive comment.

Comment: A commenter expresses concern about the tenor of the rule proposal and some over-regulations in the rule. The commenter states that there is a lot in the rule proposal about violations and compliance, and further wishes the tenor wasn't so focused on fraud and compliance. The commenter believes sometimes there are a few bad apples causing the need for too many rules and too many regulations but that there is a separate time and place for those rules instead of with the fees.

Division Response: The division disagrees with the commenter's assertion that the rule contains over-regulations and that the regulations should be separate from the fees. In Labor Code §408.221 and §408.222 the Legislature charges the division with regulating attorney fees in the workers' compensation system. The new rules help to ensure attorneys are providing the necessary information for the division to make its determination regarding whether to approve, partially approve, or deny an attorney's request for attorney fees, that the information is not misleading or incorrect, and that a uniform and fair dispute resolution process regarding attorney fees is outlined. Under §408.221, the division relies on the written evidence presented to determine the attorney's time and expenses. Thus, it is essential that the information provided by attorneys to the division is accurate and true. Additionally, it is important that both the attorneys and their clients have an opportunity to dispute the division's determination regarding attorney fees. The new rules also include a reminder of the division's statutorily imposed duty to monitor attorneys for compliance and the division's enforcement authority.

The purpose of the withdrawal rules is to encourage an efficient system and to help ensure the attorney's withdrawal does not have a material adverse effect on the client. The notice to withdraw requirement established in new §152.6(b) allows for better tracking and data on how attorneys are operating within the system; ensures the correct parties are receiving communications from the division; and puts the division on notice that an injured employee may need assistance from OIEC. The motion to withdraw requirement established in new §152.6(d) helps to ensure the attorney's withdrawal will not have a material adverse effect on the client's interests by requiring good cause for the attorney's withdrawal. New §152.6 also helps inform the division who the attorney of record is when it is considering a request for attorney fees.

Section 152.3(b)(6)

Comment: A commenter recommends the division require attorneys to submit hours for approval using one-tenth hour increments to help reduce incremental overbilling and thus, help control the effect of the proposed rate and maximum hour increases. The commenter expresses concern regarding attorneys engaging in quarter-hour unit billing for all tasks, including common tasks such as leaving a voicemail or "receive and review." The commenter recommends adding the following language to new §152.3(b)(6): "the hourly rate and number of hours in one-tenth hour increments for each attorney and legal assistant providing legal services."

Division Response: The division declines to make the suggested change to require attorneys submit hours for approval using one-tenth hour increments. The division requires attorneys to adhere to the Texas Disciplinary Rules of Professional Conduct, and the rules require an attorney to maintain the highest standards of ethical conduct, as well as prohibit an attorney from charging or collecting an unconscionable fee. A violation of the Texas Disciplinary Rules of Professional Conduct is a violation of Labor Code §415.001 and the Texas Administrative Code §150.1 and new §152.6. Additionally, under new §152.3(d) and (e), a claimant or insurance carrier may contest an order approving attorney fees for any reason, including if they do not agree with the attorney's billing practices. However, in response to comment, the division has changed the example on the DWC Form-152 to reflect a one-tenth hour billing increment in order to help inform attorneys they can always bill in smaller increments.

Section 152.4(c)

Comment: A commenter agrees with the division's decision to raise the maximum hourly rate that both attorneys and legal assistants may charge for services. The commenter believes an increase in the hourly rates will play an important role in increasing, or at least maintaining, the number of attorneys who represent injured employees in workers' compensation cases and thus, will

make it more likely that a sufficient number of qualified lawyers are available to represent injured employees on judicial review.

Division Response: The division appreciates the supportive comment.

Comment: Commenters believe there is no justification for increasing the service hour maximums, there is no evidence of an increased need or justification for increased communications or negotiations or that the complexity of preparing a settlement has increased by 100 percent, and that the increases are unnecessary. With advances in technology, the commenters continue, the service hour maximums should be decreasing rather than increasing, and a compelling argument should be made that attorneys are now more time efficient and the maximum hours should be reduced. Commenters believe the current guidelines provide the appropriate allowances for automatic approval of hours requested by attorneys in representing an injured employee or insurance carrier, and that the division has not demonstrated objective support for the proposition that any of the tasks have become more time-consuming.

Division Response: The division disagrees that there is no justification for increasing the service hour maximums. The division also disagrees that service hour maximums should be decreasing rather than increasing. The attorney fee rules have not been updated since originally enacted in 1991, and weighing the factors laid out in Labor Code §408.221 and §408.222 with the changes in the industry over time show that an increase in some of the individual service maximums is consistent with the division's statutory goals. The new maximum hours in the guidelines for legal services will help the rules be more reflective of the modern workers' compensation system and attorney practice field. In setting the individual service hour maximums, the division considered the complexities of workers' compensation cases as well as the realities of private practice, and balanced these considerations against the costs to the system, injured employees, and the division's statutory duties. The new guidelines for legal services are consistent with other division efforts encouraging

early dispute resolution and system goals emphasizing informal mediation rather than litigation. The division anticipates that new §152.4(c) will allow attorneys to exchange evidence, information, and communicate earlier to create more meaningful negotiations prior to entering the formal dispute resolution process.

Comment: A commenter recommends the division withdraw all the proposed increases in maximum service hours because there is no rationale for increasing the maximum hours when gains in technology demonstrate attorneys and legal assistants should be performing their work more efficiently and cost-effectively. The commenter states if the division withdraws the proposed increases in maximum service hours the system costs are $20 million annually instead of $50 million annually.

Division Response: The division declines to make the suggested change to withdraw the proposed increases in the maximum service guidelines. The division disagrees that there is no rationale for increasing the service hour maximums. The attorney fee rules have not been updated since originally enacted in 1991, and weighing the factors laid out in Labor Code §408.221 and §408.222 with the changes in the industry over time show that an increase in some of the individual service maximums is consistent with the division's statutory goals. The new maximum hours in the guidelines for legal services will help the rules be more reflective of the modern workers' compensation system and attorney practice field. In setting the individual service hour maximums in new §152.3(c), the division considered the complexities of workers' compensation cases as well as the realities of private practice, and balanced these considerations against the potential costs to the system, injured employees, and the division's statutory duties. The new guidelines for legal services help to further system goals by emphasizing informal mediation rather than litigation and encourage early dispute resolution by providing more time for pre-benefit review conference tasks.

The division emphasizes that the estimated system costs provided in the proposal are based on the total amount of attorney fees approved by the division and are not necessarily reflective of the

amount of attorney fees actually paid in the workers' compensation system. The statutory cap found in Labor Code §408.221 limits the amount of attorney fees paid to claimant attorneys to 25 percent of the benefits and does not provide for further recovery of any outstanding approved balance once the benefits are exhausted. Additionally, insurance carrier attorneys often contract with the insurance carrier for a fee below the amount approved by the division. Thus, the actual fees paid to the parties is often less than what the division approved. Because the division does not have information on the actual fees paid by the parties, the division's cost estimate is likely higher than what the actual costs to the system will be. The division further emphasizes that the higher cost estimate, reflecting an increase of $50 million in costs to the system, is based on the total amount of attorney fees that can possibly be billed in the system. The higher cost estimate does not account for actual billing practices, such as the total number of hours actually approved by the division, or the current data showing that attorneys do not bill the maximum amount of hours allowed in every dispute. Instead, the higher cost estimate of $50 million is dependent on a change in billing behavior that leads attorneys to begin billing at or near the maximum hours allowed in the guidelines for legal services, as well as the maximum hourly rate, in every claim.

Comment: Commenters believe that the maximum hours permitted invariably become the minimum hours requested by attorneys for reimbursement. The commenters emphasize that in rare instances when an attorney reasonably requires more than the current maximum hours to complete a task, the attorney only has to submit a request and justification for the additional time. The commenters state that because the division automatically approves hours within the maximums, attorneys already submit hours at or near the maximum hours.

Division Response: The division disagrees that the maximum hours permitted invariably becomes the minimum hours requested for reimbursement. Labor Code §408.221 requires the commissioner to provide guidelines for maximum attorney fees for specific services by rule. In

accordance with its statutory duty, the division originally established maximum guidelines in 1991, along with the rest of the attorney fee rules. Current attorney billing practices show that, on average, attorneys do not request hours at or above the guidelines for legal services. Instead the average hours requested are often below the maximum hours permitted for each service. For example, the current guidelines provide for a maximum of 1.5 hours for initial services, but the average amount of hours requested for that service in calendar year 2015 was 1.27 hours. Additionally, the average hours approved by the division are often below the maximum hours permitted for each service as well. This includes hours approved automatically and those approved manually. The division does not anticipate that increasing certain service hour maximums in the guidelines for legal services, which have not been updated since 1991, will lead to a change in billing behavior where attorneys begin billing at or above the new guidelines for legal services.

Comment: A commenter states that the increase in time to evaluate and handle a claim through the administrative process is completely inadequate and fails to recognize the difficulty in litigating administrative workers' compensation claims in Texas. The commenter believes a new, higher evidentiary standard, put in place by the division and applying to hearing officers and contested case hearings, has drastically increased the preparation time and level of involvement now required to effectively bring cases to trial (in the administrative process). The commenter emphasizes that the division is requiring the same standards of proof to establish causation as are required before a civil court, despite the lack of a single opinion by an Appellate Court in Texas that requires expert testimony establishing an injury was caused at work to be presented at an administrative contested case hearing. The commenter states that all of the cases cited by the Appeals Panel, including *Guevara*, *City of Laredo*, *Crump*, etc., pertain to the level of proof required to establish the existence of a work related injury in a civil court setting. The commenter questions why the artificially created standard, created through Appeals Panel decisions and requiring expert evidence of causation for

virtually every conceivable injury beyond a mere sprain/strain or contusion, began and why it applies to a contested case hearing that takes place a mere 60 days from a mediation with limited discovery and no depositions. The commenter states that the new, higher evidentiary standard has made it necessary for injured employees and their attorneys to obtain detailed expert medical evidence in every case where causation is an issue. The commenter states this is extremely troublesome and difficult because injured employees are often forced into networks controlled by insurance carriers that are permitted, by law, to remove any doctor from the network with a mere 90 days' notice letter. Therefore, the commenter states, it is at his/her own peril for a doctor in a network to advocate on the injured employee's behalf. The commenter further states that in fact, most network doctors do not advocate and refuse to provide such letters, further increasing the time and cost involved in attempting to meet the heightened level of proof.

Division Response: The division disagrees that the guidelines for legal services are inadequate and fail to recognize the difficulty of litigating administrative workers' compensation claims in Texas. In setting the guidelines, the division considered the complexities of workers' compensation practice, as well as the realities of private practice, and balanced these considerations against the costs to the system and injured employees, and the division's statutory duties. The division recognizes the changes in the workers' compensation system and established the guidelines with an emphasis on the parties spending more time in the pre-formal dispute resolution process to prepare and participate in informal mediation. Thus, the goal of new §152.4(c) is to encourage early resolution of disputes, specifically, resolution of disputes before the parties enter the formal administrative dispute resolution process. By allowing time each month for activities such as communications with the client and other persons and negotiating with the other party, the guidelines for legal services encourage early resolution rather than litigation of the disputes. When negotiations are successful, the division provides increased time to prepare and submit the agreement or settlement reached by

the parties. The additional hours encourage both early communication between the parties and the resolution of disputes promptly and fairly. Additionally, the division emphasizes that in circumstances where additional hours are necessary, the attorney may request above the guidelines for legal services by submitting written justification pursuant to new §152.4.

Comment: A commenter questions why the amount of time provided for preparing for a contested case hearing remains the same despite the significant changes of proof required and procedures at the division, and recommends the time be increased to 8-10 hours as necessary to properly prepare. The commenter further suggests the preparation time for a benefit review conference be increased to 4-6 hours, given the gravity of such proceedings under the current system and the necessity of seeking and obtaining information in accord with scheduling orders. The commenter believes the modest increase completely fails to recognize the most significant change in the practice of workers' compensation law, which is that the time associated with proving a workers' compensation claim has increased exponentially. The commenter believes the preparation time for benefit review conferences and contested case hearings has doubled, if not tripled, because the number of disputes has risen, the likelihood of prevailing on the merits has decreased for claimant's attorneys, the level of evidentiary proof has increased (requiring increased preparation, increased staff to handle the workload, increased costs involved with seeking and securing evidence), and the amount of time to apply proper scrutiny to a claim before deciding to invoke the dispute resolution process has drastically heightened.

Division Response: The division declines to make the suggested change increasing the time allotted for a contested case hearing to 8-10 hours and for a benefit review conference to 4-6 hours. The new guidelines for legal services are intended to encourage early resolution of claim disputes, specifically, resolution prior to the parties entering the formal dispute resolution process. The division recognizes the changes in the workers' compensation system over time and established the

guidelines with an emphasis on the parties spending more time in the pre-formal dispute resolution process to prepare and participate in informal mediation. The division determined that 2 and 4 hours respectively is a reasonable amount of time to prepare and attend a benefit review conference and contested case hearing. The determination is based on system goals emphasizing informal mediation over litigation, along with a consideration of the required factors in the Labor Code, the current complexities of the workers' compensation system, and the effects of increases on injured employees' benefits.

Additionally, the division notes that in calendar year 2015, less than 20 percent of the attorney fees approved by the division for preparing for a benefit review conference or a contested case hearing were above the maximum hours provided in the guidelines for those services. The division recognizes that circumstances do exist where case-specific considerations, such as the novelty and the difficulty of the questions involved in the dispute, warrant additional hours. Thus, under new §152.4(b), attorneys may continue to request, and the division may continue to approve, hours above the guidelines when necessary by providing written justification.

Comment: A commenter recommends communication time be increased to 5 hours and direct dispute resolution negotiation time increased to 6 hours due to the increase in disputes, the decrease in prevailing on the merits, and the significant increase in costs associated with the time of preparation, investigation, and presentation of proof due to heightened standards. The commenter believes the increases are necessary due to the increased mandated time involved with disputing impairment ratings and filing for benefit review conferences, and states division rules now require good faith attempts be made to resolve the dispute prior to filing for division informal dispute resolution.

Division Response: The division declines to make the suggested change increasing the time allotted for communications to 5 hours and for direct dispute resolution negotiations to 6 hours. The

new guidelines for legal services are intended to encourage early resolution of claim disputes, specifically, resolution prior to the parties entering the formal dispute resolution process. However, the division must also consider the effect increases have on the injured employee's benefits and the workers' compensation system as a whole, especially the costs of such increases. Thus, based on system goals emphasizing informal mediation over litigation, a consideration of the required factors in the Labor Code, the current complexities of the workers' compensation system, and the effects of increases on injured employees' benefits, the division determined that 3 and 3.5 hours respectively is the reasonable amount of time necessary each month for communications and direct dispute resolution negotiation. The division emphasizes that the allotted hours for these services are for each month.

Additionally, the division notes that in calendar year 2015, less than 10% of the attorney fees approved by the division for communications and direct dispute negotiations were above the maximum hours provided for those services. The division recognizes that circumstances do exist where the case-specific considerations, such as the novelty and the difficulty of the questions involved in the dispute, warrant additional hours. Thus, under new §152.4(b), attorneys may continue to request, and the division may continue to approve, hours above the guidelines when necessary by providing written justification.

Finally, the division emphasizes that Labor Code §410.023(b) requires the party requesting the BRC to provide documentation of efforts made to resolve the disputed issues before the request was submitted, and further requires the commissioner to adopt guidelines regarding the necessary information to satisfy this requirement. To the extent the commenter is requesting the division to amend the rules requiring a good faith effort be made to resolve a dispute before requesting a BRC, the division notes that this is both a statutorily based requirement and outside the scope of the current rule project.

Section 152.4(c) & (d)

Comment: A commenter supports retention of the current rules, maximum hourly rates, and service hour maximums for attorneys and legal assistants. The commenter believes that the current guidelines for maximum rates and service hour maximums are working effectively and there is no availability or access problem for either claimants or insurance carriers in the retention of counsel for workers' compensation cases.

Division Response: The division declines to retain the current rules, maximum hourly rates, and service hour maximums for attorneys and legal assistants. The attorney fee rules have not been updated since 1991, and weighing the factors laid out in §408.221 and §408.222 with the changes in the industry over time show that an increase in the hourly rate, as well as some of the service hour maximums, is consistent with the division's statutory goals. The new maximum hourly rate will help the rules be more reflective of the modern workers' compensation system and attorney practice field, and encourage high quality attorneys to participate in the system. The new guidelines for legal services help further system goals by emphasizing informal mediation rather than litigation and encouraging early dispute resolution.

Section 152.4(d)

Comment: Commenters believe there is no justification for increasing attorney fee rates in the absence of an attorney access or availability problem and that the increases are unnecessary. Additionally, commenters state that there is more than an ample supply of attorneys willing to handle Texas workers' compensation cases and that raising the maximum hourly rate to $200 for every attorney, regardless of skill level, may produce the unintended consequence of decreasing the quality of representation in the workers' compensation system by paying non-specialist attorneys for complex work requiring the command of a specialized body of law. One commenter states that, based on this

availability, a compelling case could be made that maximum rates could be lowered. However, the commenter is not recommending a lowering of the maximum rates.

Division Response: The division disagrees that an increase is unjustified or unnecessary in the absence of an availability or access problem. The division has a statutory duty to provide guidelines for maximum attorney fees for specific services. Under Labor Code §408.221 and §408.222, the division is required to consider specific factors in approving an attorney's request for fees, including the time and labor required, the novelty and difficulty of the questions involved, the skill required to perform the legal services properly, and the fee customarily charged in the locality for similar legal services. Changes to the workers' compensation system, the practice of law in general, the median hourly rate for attorneys, and even simple inflation calculations show that an increase in the maximum attorney fees for specific services is warranted in light of the required factors under the Labor Code. The division also wants to encourage quality representation within the workers' compensation system. As such, the division has balanced the required factors against other considerations, including the workers' compensation system goals, providing access to effective attorney representation, the administrative nature of the dispute resolution process, and Texas's position relative to other states that prescribe a maximum attorney fee rate for workers' compensation. Ultimately, the division determined that $200 an hour for attorneys and $65 an hour for legal assistants is the maximum hourly rate reasonable for workers' compensation disputes in Texas.

Comment: A commenter recommends the division remain consistent with the 2014 proposal and increase maximum rates to $175 an hour, rather than the proposed $200 an hour. The commenter believes no new evidence in the interim suggests that $175 is inadequate and a reimbursement rate of $175 represents a healthy 17% increase from current levels, which seems more than adequate and reasonable. Additionally, the commenter states that an increase to $175 would presumably lower the cost of the proposal from $20 million annually to approximately $10

million annually. The commenter believes adding $10 million in costs may not be prudent, but is much more reasonable than increasing by $20 million or $50 million a year.

Division Response: The division declines to limit the increase to the maximum hourly rate for attorneys to $175 an hour. Under Labor Code §408.221 and §408.222, the division is required to balance a number of specific factors in approving an attorney's request for fees, including the time and labor required, the novelty and difficulty of the questions involved, the skill required to perform the legal services properly, and the fee customarily charged in the locality for similar legal services, which is a readily quantifiable number. According to the Texas Workforce Commission, the median hourly wage for all attorneys in 2014 was $57 an hour, and according to a State Bar of Texas survey the median hourly rate for attorneys in private practice for 2013 was $242. The division then balanced the fee customarily charged against other factors, including system goals, such as encouraging early resolution of disputes, providing access to effective attorney representation, and the statutory provision limiting attorney's fees to 25 percent of the injured employee's benefits. Ultimately, the division determined that $200 an hour for attorneys and $65 an hour for legal assistants is the maximum hourly rate reasonable for workers' compensation disputes in Texas.

The division also emphasizes that the estimated system costs provided in the proposal are based on the total amount of attorney fees approved by the division and are not necessarily reflective of the amount of attorney fees actually paid out in the workers' compensation system. The statutory cap found in Labor Code §408.221 limits the amount of attorney fees paid out to claimant attorneys to 25 percent of the benefits and does not provide for further recovery of any outstanding approved balance once the benefits are exhausted. Additionally, insurance carrier attorneys often contract with the insurance carrier for a fee below the amount approved by the division. Thus, the actual fees paid to the parties is often less than what was approved by the division. Because the division does not

have information on the actual fees paid by the parties, the division's cost estimate is likely higher than what the actual costs to the system will be.

Comment: Commenters recommend that any proposed increase only apply to experienced attorneys who have been board certified in workers' compensation by the Texas Board of Legal Specialization in order to preserve expertise in representation of injured employees. The commenters believe an increase in maximum reimbursement rates and maximum reimbursable service hours will likely increase the number of attorneys practicing workers' compensation law. Therefore, to ensure the quality of attorney work remains high, the commenters recommend limiting proposed increases to experienced attorneys with expertise and board certification in workers' compensation; attorneys who work almost solely in workers' compensation and operate at a level of skill that warrants an increase in recognition of their expertise.

Division Response: The division declines to limit the increase in the maximum hourly rate to board certified attorneys. The experience and ability of the attorney performing the services is only one of the seven required factors for the division to consider under Labor Code §408.221 and §408.222. Providing a higher maximum hourly rate for board certified attorneys would quantify the value of a single factor and over-prioritize it. The division considered all of the required factors, including the experience and ability of the attorney, in setting the maximum hourly rate for attorneys and legal assistants. The division then balanced the factors against a number of additional considerations, including the nature and complexity of the modern workers' compensation system, the system goals set forth in the Labor Code mandating each injured employee have access to a fair and accessible dispute resolution process, and Texas's position relative to other states that prescribe a maximum attorney fee rate for workers' compensation claims. The division determined that $200 and $65, respectively, is the maximum hourly rate reasonable for attorneys and legal assistants in the workers' compensation system in Texas, including those who are board certified.

Additionally, the division notes that one of the goals in increasing the maximum hourly rate and the legal services guidelines is to encourage quality representation within the workers' compensation system. Increased access to attorneys in the system may provide injured employees and insurance carriers with a wider variety of choices when choosing representation. An attorney's experience may be one of the considerations taken into account by the parties if and when they choose to obtain attorney representation.

Comment: A commenter recommends the division reconsider $225 an hour for board certified attorneys and a higher rate than currently proposed for board certified paralegals. The commenter believes the recommendation will further the goal of quality representation of claimants and carriers.

Division Response: The division declines to provide a $225 maximum hourly rate for board certified attorneys and a higher rate than currently proposed for board certified paralegals. The experience and ability of the attorney performing the services is only one of the seven required factors for the division to consider under Labor Code §408.221 and §408.222. Providing a higher maximum hourly rate for board certified attorneys would quantify the value of a single factor and over-prioritize it. The division considered all of the required factors, including the experience and ability of the attorney, in setting the maximum hourly rate for attorneys and legal assistants. The division then balanced the factors against a number of additional considerations., including the nature and complexity of the modern workers' compensation system, the system goals set forth in the Labor Code mandating each injured employee have access to a fair and accessible dispute resolution process, and Texas's position relative to other states that prescribe a maximum attorney fee rate for workers' compensation claims. The division determined that $200 and $65, respectively, is the maximum hourly rate reasonable for attorneys and legal assistants in the workers' compensation system in Texas, including those who are board certified.

Comment: A commenter states that the rate in the current rule became effective in February 1991 and there have been significant changes in the costs of operating a legal practice, the market rate for legal fees, and the cost of living since that time. Additionally, the commenter states, there have been significant changes in the costs involved in representing injured employees now that the division has applied civil court evidentiary standards to administrative hearings, which has increased the burden, and hence the costs, for injured employees to prove (causation) that their injury(ies) occurred due to some work related activity(ies).

Division Response: The division recognizes that there have been changes in the costs of operating a legal practice, the market rate for legal fees, and the cost of living since the attorney fee rules were originally enacted in 1991. These changes to the workers' compensation system, the practice of law in general, and the median hourly rate for attorneys show that an increase in the maximum hourly rate for attorneys and legal assistants is warranted in light of the required factors under the Labor Code. In updating the attorney fee rules, the division balanced these changes with other considerations, such as the required factors under the Labor Code, the workers' compensation system goals, providing access to effective attorney representation, limiting the adverse effect of attorney fee liens on a claimant's ability to obtain quality legal representation later in the dispute, the administrative nature of the dispute resolution process, and Texas's position relative to other states that prescribe a maximum attorney fee rate for workers' compensation. Ultimately, the division determined that $200 an hour for attorneys and $65 an hour for legal assistants is the maximum hourly rate reasonable for workers' compensation disputes in Texas.

Comment: A commenter points out that the rules have not been amended in 25 years. The commenter states that in 1991, which is when the rules establishing a $150 maximum hourly rate for attorneys and $50 an hour for legal assistants were adopted, the state average weekly wage for injured employees was $428. The commenter further states that the state average weekly wage in

2016 is $829 for an injured employee, an approximately 109 percent increase from 1991. The commenter believes a comparable increase in attorneys' fees would lead to a maximum hourly rate of $313.50, and a comparable increase for legal assistants would be a maximum hourly rate of $104.50. The commenter believes these changes somewhat track inflation in the state bar surveys, which do excellent data and research over hourly billing rates. Additionally, the commenter points out that in 1991 the maximum hourly rate was over a third of the state average weekly wage, but also notes that at least for the claimant attorneys, the 25 percent cap still applied and in effect made it a cap below the 150 for weekly temporary income benefits (TIBs) checks.

Division Response: The division disagrees that the maximum hourly rate should track the increase in the state average weekly wage and be $313.50 for attorneys and $104.50 for legal assistants. The division recognizes that the rules have not been amended since originally adopted in 1991 and agrees that an increase in the hourly rates is warranted. However, the division disagrees that the increase should be solely based on a comparison between the rate as a percentage of the state average weekly wage in 1991 and now. The division is statutorily required to consider a number of factors, including the novelty and difficulty of the questions involved, the skill required to perform the legal services properly, and the experience and ability of the attorney performing the services. The division considered these factors and balanced them against the system goals, such as encouraging early resolution of disputes, providing access to effective attorney representation, limiting the adverse effect of attorney fee liens on a claimant's ability to obtain quality legal representation later in a dispute, the administrative nature of the workers' compensation dispute resolution process, and the statutory provision limiting attorney fees to 25 percent of the injured employee's recovery. The division also considered Texas's position relative to other states that prescribe a maximum attorney fee rate for workers' compensation claims. Ultimately, the division

determined that $200 an hour for attorneys and $65 an hour for legal assistants is the maximum hourly rate reasonable for workers' compensation disputes in Texas**.**

Comment: A commenter challenges the use of the Texas Workforce Commission data because it is wage data and includes wages for public sector attorneys. The commenter states that the wage data does not include a number of additional items, such as benefits, and that because it is not billable hours, it is not comparable billing data to the private sector. Instead, the commenter suggests focusing on the state bar average, which has an average median above $260 an hour as of 2015. The commenter notes that even this data is almost two years old because it is likely based on 2014 numbers, and states that for 2014 the legal assistant data is $121. The commenter emphasizes that in the private sector, as opposed to the public sector, a billable hour pays taxes, overhead expenses, and liability insurance. Thus, less than a third of the billable hour probably ever makes it to the actual person billing it. The commenter states that this assessment does not include pay or providing leave for employees or staff.

Division Response: The division disagrees that the Texas Workforce Commission data is not useful in providing insight into some of the factors provided by the Legislature in Labor Code §408.221. In particular, the division is statutorily required to consider a number of factors, including the fee customarily charged in the locality for similar legal services. The Texas Workforce Commission wage data is often the starting place for determining wages in Texas, and is even used to determine the state average weekly wage pursuant to Labor Code §408.047. The Administrative Procedure Act requires the division to determine and include costs to system participants in the proposal of a rule, and the Texas Workforce Commission wage data is often used by the division for this purpose. Thus, the Texas Workforce Commission data is a useful tool in determining the fee customarily charged.

Additionally, the division notes that the Texas Workforce Commission data was not the only data considered in the division's analysis. Instead, it represents only one source. The division also considered the State Bar of Texas Department of Research & Analysis information on median hourly rates for attorneys in private practice. Finally, the division emphasizes that the fee customarily charged is only one factor of the larger consideration by the division in fulfilling its statutory duty. Therefore, the division balanced the Texas Workforce Commission and State Bar of Texas data against the other statutory factors and various considerations.

Comment: A commenter states that defense attorneys are subject to what the free market will pay and believes the market is the check on defense attorneys. The commenter states that defense attorneys have been paid at least $450 an hour, if not more, on average in district court cases going back to 2007 and the other attorneys in the same cases were paid $250, or $150 an hour. The commenter states he has been approved at $500 an hour in judicial review cases where the insurance carrier agreed and the commenter was able to recover fees from the insurance carrier. The commenter notes that the district judges have recognized the continuing increase of legal services and approve much higher fees than what is allowed under the division rules. Additionally, the commenter notes that the State of Texas recommends paying private attorneys $500 an hour and provides an article citing an hourly rate of $750 paid by a state agency for outside counsel. The commenter emphasizes that the state is even recommending a much higher attorney fee rate than what is proposed by the division. Thus, the commenter believes that if the division wants to encourage great attorneys to practice workers' compensation it should allow for a higher hourly rate. The commenter states that attorneys will then not bill as many hours, and if they do, it will be subject to the courts to review.

Division Response: The division declines to establish a higher hourly rate than proposed. Unlike the court system, the division is statutorily required to provide guidelines for maximum

attorney's fees. In fulfilling this statutory requirement, the division considered the factors provided in Labor Code §408.221. The division then balanced these factors against various system goals and related considerations, including limiting the adverse effect of attorney fee liens on a claimant's ability to obtain quality legal representation later in a dispute, the administrative nature of the workers' compensation dispute resolution process, and Texas's position relative to other states that prescribe a maximum attorney fee rate for workers' compensation claims. The division also notes that pursuant to the Labor Code claimant attorney fees are paid directly out of the claimant's recovery, with limited exceptions. It is claimants and the workers' compensation system as a whole who ultimately experience the costs associated with higher attorney fees. In light of these considerations, the division determined that $200 an hour for attorneys is the maximum hourly rate reasonable for workers' compensation disputes in Texas.

Comment: The commenter believes that when looking at the lodestar factors, the factors every court, every administrative and judicial system considers in assessing attorneys' fees—experience, complexity, benefits to the employee—there is one that's often missing. The commenter points out that the division did not appear to take into account the contingency factors, which is a modifier that is taken into account in other systems such as the federal courts and federal systems. The commenter emphasizes that the 25% cap on claimant attorneys is important but it does not come into play unless the attorney is successful in helping the injured employee recover benefits, or actually win.

Division Response: The division disagrees with the commenter's assertion that it did not consider the appropriate factors in setting the maximum hourly rate. The division is statutorily required to consider the factors provided in Labor Code §408.221, including the amount involved in the controversy and the benefits to the claimant that the attorney is responsible for securing. In setting the maximum hourly rate for attorneys at $200, the division considered these factors and

balanced them against various system goals and related considerations, such as the statutory provision limiting attorney fees to 25 percent of the claimant's recovery. Ultimately, the division determined that $200 is the maximum hourly rate reasonable for workers' compensation disputes in Texas. The division further notes that the Texas workers' compensation system, unlike the court or federal systems, is governed by the Labor Code and thus, the division is statutorily required to consider certain factors when determining an attorney's fee that may not always be considered in other systems.

Comment: A commenter states that the division has approved a $175 fee, even a $182.50 fee, for some defense attorneys for the past six years. The commenter believes the reason for this practice was the original rule allowed attorneys to exceed the guidelines and the clients agreed to the rate. The commenter further emphasizes that in the Texas Register discussion of the original rule the division stated that both the hours and the hourly cap could be exceeded with justification because they were just guidelines. The commenter points out that an attorney billing $300 or $400 an hour doing ten hours of work on a case would be up to $4,000 in legal fees, compared to an attorney at $200 an hour doing 25 hours of work totaling $5,000 in fees. The commenter believes that the higher hourly bill has less overall impact on the injured employee's benefits and focuses on the overall benefit of the higher hourly rate.

Division Response: The division declines to increase the maximum hourly rate above the proposed amount of $200, or to approve a higher hourly rate than provided in new §152.4(d). The division emphasizes that the Labor Code requires the division to provide guidelines for maximum attorney fees for specific services. New §152.4(d) establishes a maximum hourly rate of $200 an hour for attorneys and $65 an hour for legal assistants. The division has determined that the hourly rates in new §152.4(d) are the maximum reasonable for workers' compensation disputes in Texas. The division emphasizes that it considered all of the required factors under §408.221(d), including the

experience and ability of the attorney performing the services, in making this determination. Additionally, in circumstances where additional hours are necessary, the attorney may continue to request above the guidelines for legal services by submitting written justification pursuant to new §152.4.

Comment: A commenter provides an example of representation and states that there is no way he will ever get back the time put in to win the hearing out of the injured employee's recovery. The commenter believes that the 25 percent cap is a harsh cap on income benefits and states that it is a rare case where the injured employee will recover enough for the attorney to get the full amount paid. The commenter believes this is something conceded by staff and has never been tracked. The commenter states that under old law, if an attorney settled a claim it would include a settlement of future medical. Therefore, if an attorney settled future medical of $40,000 plus the medical past things the attorney would get 25% of the future medical. Now, attorneys do not see a penny of the medical recovery; it's going to the hospital. Additionally, if it a medical only claim, there are often no income benefits owed to pay an attorney. The commenter believes this scenario was never factored in when the law changed in 1991 and states this should be considered.

Division Response: Labor Code §408.221 states that a claimant attorney's fee may not exceed 25 percent of the claimant's recovery. The division recognizes the statutory cap on claimant attorney fees and took it into consideration when establishing the maximum hourly rate.

Comment: A commenter believes that injured employees are penalized for having an attorney when they prevail. The commenter states that except in SIBs cases and some judicial review cases, this is due to the legislature and not the division. The commenter states that the penalty to the injured worker results from the attorney's fees coming out of the injured employee's benefits.

Division Response: Labor Code §408.221 states that, except as provided in subsection (c) or §408.147(c), the attorney's fee shall be paid from the claimant's recovery. Labor Code §408.221(c)

relates to judicial review and Labor Code §408.147(c) relates to SIBs disputes. Thus, under the Labor Code, a claimant attorney's fee is either paid out of the claimant's recovery or by the insurance carrier, depending on the circumstances.

Comment: A commenter is pleased that the rule takes into consideration the adverse impact to injured employees if there is a huge lien of attorney fees. The commenter states that for an injured employee to pay off the increase in attorney fees allowed under the new system compared to the repealed rules, they would need to recover an additional $16,800 in income benefits. At a $400 a week rate that would take 42 weeks off duty, for a $600 rate it would take 28 weeks off duty, and at an $800 rate it would take 21 weeks off duty. The commenter believes this is the unfortunate side of the increase, but injured employees are happy to find attorneys that will take a workers' compensation case and even happier when it is explained that the attorney only gets paid if they win the case/help the injured employee with a recovery and even then the fee is capped at 25 percent.

Division Response: The division appreciates the supportive comment. The division anticipates that the new rules will help to ensure there is quality representation available within the workers' compensation system, that injured employees have access to a fair and accessible dispute resolution process, and that system participants who want attorney representation are able to obtain it.

Comment: A commenter states that any increase is great but the maximum should be a true maximum. The commenter believes a true maximum would be at least $350 to $400 an hour. Additionally, the commenter believes that it should include a contingency fee load backer of a 25% to 50% increase for contingency fee attorneys--if it is a contingency fee where you have to prevail to win.

Division Response: The division declines to establish a maximum attorney hourly rate of $350 to $400 an hour. The division is statutorily required to consider a number of factors when

approving an attorney's request for fees, including the benefits to the claimant that the attorney is responsible for securing, the skill required to perform the legal services properly, and the experience and ability of the attorney performing the services. The division considered these factors and balanced them against the system goals, such as encouraging early resolution of disputes, providing access to effective attorney representation, limiting the adverse effect of attorney fee liens on a claimant's ability to obtain quality legal representation later in a dispute, the administrative nature of the workers' compensations dispute resolution process, and the statutory provision limiting attorney fees to 25 percent of the injured employee's recovery. The division also considered Texas's position relative to other states that prescribe a maximum attorney fee rate for workers' compensation claims.

Additionally, the division declines to include a 25% to 50% increase for contingency fee attorneys. The division notes that it is statutorily required to establish guidelines for maximum attorney's fees for specific services. Providing a higher maximum hourly rate for contingency attorneys would over-prioritize one factor or consideration. Instead, the division accounted for all of the required factors and related considerations outlined above when setting the maximum hourly rate, and determined that $200 is the maximum reasonable for workers' compensation disputes in Texas.

Comment: A commenter believes that legal assistants do not get enough credit, have been hurt worse than anything, and should be compensated because they can handle things more efficiently, and ultimately more cheaply, for the injured employee. The commenter states that if the division wants to encourage attorneys and legal assistants to participate in the system, there must be provisions to pay them. The commenter provides data on the legal assistants' hourly rates as an average $100 an hour in 2000, $109 an hour in 2010, and $121 an hour in 2014 (which, commenter states, is almost three years old). The commenter recommends that if the maximum accounts for the average, it ought to be at least $150 or even $200 an hour for legal assistants, not assuming that's what will ultimately be billed.

Division Response: The division declines to set the maximum hourly rate for legal assistants at $150 or $200 an hour. The division emphasizes that the maximum hourly rate of $65 for legal assistants accounts for the State Bar of Texas Department of Research and Analysis data providing a median hourly rate for paralegals in 2014 of $121. This data, as well as the information from the Texas Workforce Commission, was helpful in quantifying some of the required factors under Labor Code §408.221 and §408.222, namely the fee customarily charged in the locality for similar legal services. However, the division disagrees that the increase should be solely based on the median hourly rate reflected in the State Bar of Texas data because the fee customarily charged is just one factor of the larger consideration by the division in fulfilling its statutory duty.

The division is statutorily required to consider a number of factors, including the novelty and difficulty of the questions involved, the skill required to perform the legal services properly, and the experience and ability of the attorney performing the services. In setting the maximum hourly rates, the division considered these factors and balanced them against the system goals, such as encouraging early resolution of disputes, providing access to effective attorney representation, limiting the adverse effect of attorney fee liens on a claimant's ability to obtain quality legal representation later in a dispute, the administrative nature of the workers' compensation dispute resolution process, and the statutory provision limiting attorney fees to 25 percent of the injured employee's recovery. The division also considered Texas's position relative to other states that prescribe a maximum attorney fee rate for workers' compensation claims. Ultimately, the division determined that $65 an hour is the maximum hourly rate reasonable for legal assistants dealing with workers' compensation disputes in Texas.

Comment: A commenter encourages the division to establish a median target or an average target, which would be more in line with the current proposal's maximum, for both legal assistants and

attorneys. The commenter states that attorney hourly rates have gone from an average of $234 for private practice in 2009 to $288, with the median at $260.

Division Response: The division declines to establish a median or average target for attorney fees. The division is statutorily required under Labor Code §408.221 to provide guidelines for maximum attorney fees for specific services.

Section 152.4 (e)

Comment: A commenter supports the language of §152.4(e) requiring attorneys to bill for hours using the attorney's State Bar number so that the division can better audit billing practices. The commenter would support division efforts to obtain a billing review system or other automated technology to increase efficiencies and help address fraud and abuse.

Division Response: The division appreciates the supportive comment.

Section 152.6

Comment: A commenter strongly supports new §152.6 regarding attorney withdrawals and agrees that withdrawals during the dispute resolution process cause unnecessary delay and backlog in the hearing schedule process. The commenter fully supports the division's efforts to minimize the issues caused by attorneys withdrawing from a case at the last minute.

Division Response: The division appreciates the supportive comment.

Comment: A commenter agrees with the requirement for attorneys to obtain division approval prior to withdrawing from a case once a benefit review conference or benefit contested case hearing has been scheduled. The commenter emphasizes that last minute withdrawals severely limit the ability of an ombudsmen to provide meaningful assistance to injured employees.

Division Response: The division appreciates the supportive comment.

Comment: A commenter expresses concern about the adverse impact of attorney withdrawals following the conclusion of the benefit contested case hearing because, under 28 TAC §143.3, an

appeal of the decision of a hearing officer must be filed no later than the 15th day after receipt of the division. Thus, the commenter believes an attorney's withdrawal following a benefit contested case hearing should be subjected to higher scrutiny due to the limited amount of time for a new attorney or an ombudsman to review the evidence, conduct legal research, and draft an effective appeal.

Division Response: The division agrees with the commenter's concern about the adverse impact of withdrawals following the contested case hearing. New §152.6(d) addresses withdrawal after notice of a scheduled benefit review conference or contested case hearing is received and before resolution of the disputed issues through the division's dispute resolution process provided in Labor Chapter 410, Subchapters A - E, which includes the time period following the conclusion of the contested case hearing. When new §152.6(d) applies, an attorney seeking withdrawal must submit a motion to withdraw, and receive a division order granting the motion, before they may withdraw representation. Once a contested case hearing is completed, the deadline to file a written request for appeals panel review is statutorily set and cannot be extended. Thus, an attorney's withdrawal after the contested case hearing may affect the client's ability to timely appeal the decision of the hearing officer. The division's goal is to limit the adverse impact of withdrawals during this time period by requiring a motion to withdraw providing good cause for why the attorney should be permitted to withdraw despite the adverse impact it may have on their client.

Comment: A commenter states that unlike in the court setting and given the existence of the Office of Injured Employee Counsel, it seems impossible for anyone to establish that withdrawal under any circumstances would have a "material adverse effect on the interests of the client." The commenter further states this point will be raised to the Legislature regarding the existence and funding of the Office of Injured Employee Counsel.

Division Response: The division disagrees that there are no circumstances under which withdrawal would have a material adverse effect on the interests of the client. For example, under

Labor Code §410.202, a party must file a written request for appeal with the appeals panel not later than the 15th day after the day on which the decision is received. This section provides a limited timeframe, which cannot be extended, for a new attorney or an ombudsman to review the evidence, conduct legal research, and draft an effective appeal. Therefore, as pointed out by another commenter and emphasized in the proposal, an attorney's withdrawal following a contested case hearing may affect an injured employee or insurance carrier's ability to timely appeal the decision of the hearing officer. Additionally, withdrawal of an attorney prior to a scheduled benefit review conference or contested case hearing can lead to continuances, which delay the resolution of the dispute, provide the claimant with inadequate subsequent representation or assistance due to timing constraints, and affect the efficiency of the overall dispute resolution process. Unnecessary delays can also prevent injured employees from receiving needed medical attention, income benefits, or returning to work. Under all of the above circumstances the attorney's withdrawal may have a materially adverse effect on the interests of their client, and a motion to withdraw showing good cause is required.

Comment: A commenter states that an attorney's preparation time has drastically increased while the likelihood of success on the merits is on the decline, and believes that despite this, the division is attempting to force attorneys to represent claimants on a claim regardless of whether the claim lacks merit or if further representation is no longer economically feasible. In support, the commenter states that the division heard nearly 16,000 disputes in 2012, which was more than double the 7,575 disputes heard in 2011. Additionally, the commenter states the 2011 success rate of attorneys in contested case hearings dropped from 41 percent to 29 percent. The commenter believes the statistics show that disputes are on the rise and that new levels of proof require much more work in almost every dispute, but without as much success.

Division Response: The division disagrees that new §152.6 attempts to force attorneys to represent claimants on a claim. New §152.6(b) requires only notice of an attorney's withdrawal if: (1) the motion to withdraw requirement is not triggered, or (2) at any time the attorney's client terminates the attorney's representation. Under this subsection, an attorney may withdraw effective immediately and need only notify the division of the withdrawal. New §152.6(d) requires an attorney to submit a motion to withdraw, and receive a division order granting the motion, after notice of a scheduled benefit review conference or contested case hearing. Once triggered, the motion to withdraw is required until the resolution of the disputed issues through the division's dispute resolution process provided in Labor Code Chapter 410, Subchapters A - E. Under this section, an attorney's withdrawal is not effective until a division order granting the motion is received.

In new §152.6, good cause is a fact-based consideration by the hearing officer that weighs the factors under the Texas Disciplinary Rules of Professional Conduct, Rule 1.15(b) and the attorney's reason for withdrawal against a number of other considerations. The other considerations include how close in time the withdrawal is to a scheduled proceeding, the amount of attorney fees requested and approved, the attorney's willingness to waive payment of any portion of the outstanding approved fees, and whether the client has refused to approve the withdrawal. Additionally, the division notes that the guidelines for legal services in new §152.4(c) are intended to encourage early resolution of claim disputes and provide additional hours for direct dispute resolution negotiation, communications, and preparation and submission of an agreement or settlement form. The division anticipates that the new rules will help reduce the number of disputes and further system goals, such as emphasizing informal mediation rather than litigation and resolving disputes promptly and fairly when they do arise.

Comment: A commenter believes the withdrawal provision will result in significant costs to represent claimants because an attorney will essentially be stuck with representing claimants on cases the attorney will never get paid for, and so, the attorney will have to apply much greater

scrutiny (time) to cases/claims before accepting them. The commenter further believes this will ultimately decrease the number of claimant attorneys willing to represent claimants, directly depriving claimants of their ability to exercise their constitutional right to obtain an attorney.

Division Response: The division disagrees that new §152.6 will result in significant costs to claimant attorneys. The division emphasizes that new §152.6 does not automatically require an attorney to continue representation, or mandate continued representation in all instances. Instead, it is only when a motion to withdraw is denied because a hearing officer found no good cause for withdrawal that an attorney will be required to continue representation. Additionally, when a motion to withdraw is denied by a hearing officer, the attorney may continue to request attorney fees for the time spent representing the client and another motion to withdraw may be submitted when appropriate. The division also notes that new §152.4 provides additional time for preparation and communication prior to the claim entering the dispute resolution process, and that the attorney may always withdraw during this time period without approval from the division. Generally, the additional hours in the guidelines for legal services will allow an attorney the opportunity to obtain pertinent information and investigate the merits of the case after undertaking representation and before the motion to withdraw requirement is triggered. It is only after the claim has entered the dispute resolution process and notice of a scheduled proceeding is received that an attorney must obtain an order granting the withdrawal. An attorney is also not required to obtain an order granting withdrawal when the client has terminated the attorney-client relationship, regardless of the stage of the claim. Thus, it is in limited circumstances that an attorney will be required to continue representation by the division.

However, the division does recognize that attorneys may incur some costs under the new rules, including §152.6(b) and (d). The costs will generally result from the time it takes an attorney to complete the requirements of the notice to withdraw or motion to withdraw. Costs may also vary

depending on the complexity of the circumstances. The division further notes that an attorney's withdrawal during the dispute resolution process can delay the resolution of the dispute, provide the claimant with inadequate subsequent representation or assistance due to timing constraints, and affect the efficiency of the overall dispute resolution process. In many instances, the time for a new attorney or ombudsman to prepare for a proceeding or an appeal is cut short. While the workers' compensation dispute resolution process does not require attorney representation in order for injured employees or beneficiaries to present their claim or obtain effective assistance, the division did consider an injured employee's ability to obtain subsequent representation in establishing new §152.6. Thus, the division disagrees that new §152.6 will negatively impact injured employees in the system.

Comment: A commenter believes §152.6 is arguably illegal and is subject to an open challenge by an attorney in the courts of Texas due to the burdens and restrictions it will impose upon injured workers' in obtaining legal representation. Specifically, the commenter states the withdrawal provision is impermissible under the recent United States Supreme Court decision in Whole Woman's Health v. Hellerstedt, 136 S.Ct. 2292 (2016). The commenter provides his analysis of the case and summarizes the court's holding to state that regulations regarding providers of constitutionally protected services may not have the effect of presenting a substantial obstacle to a party seeking such services, and when the regulations have the effect of decreasing the availability of such services, they are unconstitutional. The commenter states that by forcing an attorney to represent a claimant through the administrative process the withdrawal regulation will reduce the number of claimants an attorney is willing or able to represent and, thus, pose a significant hurdle to claimants seeking their constitutionally protected to right to secure legal representation. The commenter emphasizes that, if necessary, it is possible to secure evidence and affidavits establishing that the

regulation will pose a significant obstacle to claimants seeking representation and to attorneys accepting representation.

Division Response: The division disagrees that new §152.6 is illegal and imposes a significant hurdle to injured employees seeking legal representation. First, the division notes that the workers' compensation dispute resolution process does not require attorney representation in order for injured employees or beneficiaries to present their claim or obtain effective assistance. The OIEC ombudsman program is available to assist injured employees, and parties are able to obtain other forms of qualifying non-attorney representation. However, the division did consider the availability of effective attorney representation or assistance when establishing the new rules, particularly in §152.4 and §152.6. In setting the new maximum hourly rate for attorneys, the division considered a variety of factors, including providing access to effective attorney representation within the system. In establishing the motion to withdraw requirements, the division considered the effect an attorney's withdrawal can have on the client and the system; an attorney's withdrawal during the dispute resolution process can delay the resolution of the dispute, provide the claimant with inadequate subsequent representation or assistance due to timing constraints, and affect the efficiency of the overall dispute resolution process. In many instances, the time for a new attorney or ombudsman to prepare for a proceeding or an appeal is cut short. The division has determined that in these instances, there may be a material adverse effect on the interests of the client and the attorney must provide good cause pursuant to §152.6(g) to withdraw.

The division also disagrees that new §152.6 forces attorneys to continue representation in all instances. An attorney is only required to obtain an order granting the withdrawal under specific circumstances and the division emphasizes that the requirement does not automatically result in an attorney continuing representation. Instead, it is only when a motion to withdraw is denied because a hearing officer found no good cause for withdrawal that an attorney will be required to continue

representation. Additionally, when a motion to withdraw is denied by a hearing officer, the attorney may continue to request attorney fees for the time spent representing the client and another motion to withdraw may be submitted when appropriate. Finally, the division notes that new §152.4 provides additional time for preparation and communication prior to the claim entering the dispute resolution process, and that the attorney may always withdraw during this time period without approval from the division.

Comment: A commenter generally believes new §152.6 is unnecessary and states that for the division to spend time trying to do what the State Bar does effectively, and very well, is unnecessary. The commenter understands there may be an attorney or a couple of attorneys that may have played games on withdrawal, and notes that the commenter has found out the day before that a hearing will be rescheduled, but believes that things happen. The commenter encourages the division not to wade into State Bar territory and to back off the violation and fraud concerns in the overall purpose of the rule. The commenter notes that every attorney has a law license, just like a medical provider, and the Texas Medical Board, Chiropractic Board, and State Bar of Texas do a good job of protecting those licenses if someone is committing any kind of problems. The commenter emphasizes that the division can refer someone over and if there is an ongoing problem that is for the State Bar to take care of.

Division Response: The division disagrees that new §152.6 is unnecessary. The legislature directly expressed its intent for attorneys in the workers' compensation system to comply with the Texas Disciplinary Rules of Professional Conduct when it adopted the rules by reference in Labor Code Chapter 415. Additionally, the division notes that the purpose of new §152.6 extends beyond the Texas Disciplinary Rules of Professional Conduct. New §152.6(b) establishes a notification requirement that helps the division track representation within the system, ensures communication with the correct parties, and informs the division when an injured employee may need assistance

from OIEC. New §152.6(d) references the disciplinary rules to establish a good cause standard during the workers' compensation dispute resolution process. This standard helps prevent continuances, which can delay the resolution of the dispute, provide the claimant with inadequate subsequent representation or assistance due to timing constraints, and affect the efficiency and fairness of the overall dispute resolution process. The legislature has provided authority in Labor Code Chapter 410 for the division to adopt rules under which benefit review conferences and contested case hearings are conducted. The legislature has also provided statutory authority in Labor Code Chapter 414 and 415 for the division to monitor attorneys and pursue administrative violations, as necessary, to enforce compliance with the Labor Code and division rules. Thus, while the section does emphasize pre-existing requirements regarding compliance with the Texas Disciplinary Rules of Professional Conduct, it also helps the division fulfill its statutorily imposed duty to provide a fair and accessible dispute resolution process, to resolve disputes promptly and fairly, and to adopt rules concerning the division's dispute resolution process.

Comment: Instead of adopting §152.6, a commenter recommends that the division call any supposed offenders in the system and ask why they withdrew and if they can't explain it then the division can warn them not to let it happen again. If it continues, the commenter believes that is for the State Bar to handle. The commenter encourages the division to provide a smaller, streamlined government and states that is achievable by providing a higher hourly rate, allowing more experienced attorneys to stay in the system, and not getting into the little problems. The commenter emphasizes that not everything needs a rule or regulation.

Division Response: The division declines to adopt the commenter's recommendation that the division call supposed offenders rather than provide a rule or regulation regarding withdrawal. New §152.6 provides a uniform and detailed guideline for the requirements surrounding an attorney's withdrawal in the workers' compensation system. It enhances the transparency of the division's

actions, including enforcement, and helps place attorneys on notice of the expectations and steps that must be taken when withdrawing representation. Additionally, new §152.6 helps prevent continuances during the dispute resolution process, which can delay the resolution of the dispute, provide the claimant with inadequate subsequent representation or assistance due to timing constraints, and affect the efficiency and fairness of the overall dispute resolution process. Calling an attorney after the attorney has withdrawn would not help to further these goals.

Comment: A commenter is in favor of requiring an attorney to notify everybody when withdrawing and if everyone is in agreement with it then allowing it to continue. The commenter points out that often carrier attorneys will switch out, sometimes the day before a hearing, because a contract gets switched. The commenter believes that most times people are going to work out an agreement.

Division Response: The division declines to make the suggested change to automatically permit withdrawal when everyone is in agreement. The division has determined that good cause for an attorney's withdrawal is necessary during the workers' compensation dispute resolution process. The division emphasizes that when the motion to withdraw requirement is not triggered, an attorney may withdraw effective immediately and need only notify the division. If the motion to withdraw requirement is triggered, good cause for the attorney's withdrawal is required. There is no single factor that establishes automatic good cause because it is a fact-based consideration informed by the context and circumstances of the attorney's motion to withdraw. New §152.6(g) outlines the appropriate factors to be considered by the hearing officer. These include the situations listed in the Texas Disciplinary Rules of Professional Conduct, Rule 1.15 (Declining or Terminating Representation), as well as other case-specific considerations relating to the dispute resolution process. The division emphasizes that whether the attorney's client agrees to the withdrawal is incorporated into the hearing officer's consideration of the attorney's motion to withdraw. The division

also emphasizes that if the attorney's client ends the attorney-client relationship, for instance by terminating a contract, the withdrawal is effective immediately and only a notice of withdrawal is required.

Comment: A commenter believes it is acceptable for an attorney to withdraw the day before a hearing if there are no income benefits left to be paid, and thus, there's no way the attorney will get paid on the claim. The commenter believes if the law does not allow an attorney to get paid then the attorney cannot be faulted for not showing up and participating in the hearing. The commenter states it is across the board allowed by judges for an attorney to withdraw in private practice when a client refuses to pay them. The commenter states that injured employees will have trouble finding an attorney who will represent them knowing that the benefits have been paid out. The commenter believes it's a problem if the division doesn't encourage attorneys by providing solid compensation for both attorneys and paralegals up front.

Division Response: The division declines to define the absence of income benefits for an attorney's fee to be paid as automatic good cause for an attorney's withdrawal. The division has determined that good cause for an attorney's withdrawal is necessary during the workers' compensation dispute resolution process. There is no single factor that establishes automatic good cause because it is a fact-based consideration informed by the context and circumstances of the attorney's motion to withdraw. New §152.6(g) outlines the appropriate factors to be considered by the hearing officer. These include the situations listed in the Texas Disciplinary Rules of Professional Conduct, Rule 1.15 (Declining or Terminating Representation), as well as other case-specific considerations relating to the dispute resolution process. The division emphasizes that the attorney's reason for the withdrawal is incorporated into the hearing officer's consideration of good cause. However, the division declines to equate the lack of benefits for the attorney's fee to be paid from as automatic good cause because this would not help further the division's goals, which includes

preventing continuances and resolving disputes promptly and fairly. Additionally, the division notes that Labor Code §408.221 requires attorney fees to be paid from the claimant's recovery and caps the amount paid out at 25 percent. The division took these requirements into consideration when establishing the maximum hourly rate for attorneys and legal assistant, and notes that the hourly rates have been increased under new §152.4.

Comment: A commenter believes that requiring an attorney to explain and give good cause/reasons violates confidentiality rules. The commenter states that California looked into something similar and found that at most, in the courthouse, you have an in-camera talk with the judge, which is privately held and the other side is not present. The commenter believes the issue at the division is that the hearing officer is the fact finder, instead of the jury at the courthouse. The commenter is concerned that if the attorney has to tell the judge they want to withdraw because they are worried, for instance, that their client is going to commit fraud, then this puts the client in a bad spot and shouldn't be necessary. The commenter believes §152.6 crosses the line by putting the commenter in a possible conflict with their client or asking the attorney to violate ethical obligations.

Division Response: The division disagrees that requiring the attorney provide good cause for withdrawal, a consideration that includes the attorney's reason for withdrawal, violates confidentiality rules. The attorney's reason for withdrawal is a necessary corollary to Rule 1.15 of the Texas Disciplinary Rules of Professional Conduct. Under Rule 1.15, there are specific circumstances where an attorney is required to withdraw or is permitted to withdraw barring an order stating otherwise from a tribunal. Including the attorney's reason for withdrawal helps the division incorporate those circumstances into the hearing officer's consideration of whether good cause for the attorney's withdrawal exists. The division emphasizes that under new §152.6 an attorney is not required to provide any information that is considered privileged or confidential when stating the reason for withdrawal. As with the Texas Disciplinary Rules of Professional Conduct, a lawyer's statement that

professional considerations require termination of the representation ordinarily should be sufficient to put the hearing officer on notice that one of the circumstances permitting withdrawal under Rule 1.15 may be present, including the possibility of fraud.

Comment: A commenter believes the withdrawal provision violates the Texas Disciplinary Rules of Professional Conduct Rule 1.15 because it includes a requirement regarding withdrawal after the setting of the first benefit review conference. The commenter states that the first benefit review conference is often where documentation and information that directly reveals the merits, or the lack thereof, is available for the first time. Thus, the commenter states, the withdrawal requirement will require attorneys to continue to represent claimants in direct violation of the Texas Disciplinary Rules of Professional Conduct.

Division Response: The division disagrees that the withdrawal provision violates the Texas Disciplinary Rules of Professional Conduct, Rule 1.15. New §152.6 does not require an attorney to continue representation in all instances and the division emphasizes that the motion to withdraw requirement does not equal mandated continued representation. Instead, it is only when a motion is denied that an attorney will be required to continue representation.

The Texas Disciplinary Rules, Rule 1.15, provides limited circumstances that require an attorney to withdraw representation. It also provides a non-exhaustive list of circumstances that permit an attorney to withdraw representation without committing a disciplinary violation. In the absence of a situation requiring mandatory withdrawal, Rule 1.15 does not limit a tribunal's authority to weigh other case-specific factors when determining whether an attorney's withdrawal is permitted. In new §152.6, good cause is a fact-based consideration by the hearing officer that weighs the factors under Rule 1.15(b) and the attorney's reason for withdrawal against a number of other considerations. The other considerations include how close in time the withdrawal is to a scheduled benefit review conference or contested case hearing, the amount of attorney fees that have been requested and approved, as

well as the attorney's willingness to waive payment of any portion of the approved fees outstanding at the time of withdrawal, the attorney's reason for withdrawal (which may be a circumstance listed under Rule 1.15(b)), and whether the client has refused to approve the withdrawal. The division also emphasizes that, generally, the additional hours in the guidelines for legal services will allow an attorney the opportunity to obtain pertinent information and investigate the merits of the case after undertaking representation and before the motion to withdraw requirement is triggered.

Comment: A commenter recommends the motion to withdraw provision apply after all parties have agreed to a contested case hearing, similar to the setting of a trial.

Division Response: The division declines to limit the motion to withdraw provision to after all parties have agreed to a contested case hearing. Withdrawal prior to a scheduled benefit review conference can lead to delays in the resolution of the dispute and prevent injured employees from receiving needed medical attention, income benefits, or returning to work. Once a benefit review conference has been scheduled, the time for a new attorney or ombudsman to prepare for the proceeding after the current attorney has withdrawn is cut short and can affect the resolution of the dispute in the future. Labor Code §410.151 limits the contested case hearing to issues that were raised at the benefit review conference, unless the parties consent or a determination is made that good cause existed for not raising the issue at the benefit review conference. Additionally, before requesting a benefit review conference, 28 TAC §141.4 requires that all pertinent information in the possession of the party making the request must be provided to the opposing party. All pertinent information in the possession of the opposing party must then be exchanged within 10 working days after receipt of a copy of the request for the benefit review conference. Thus, an attorney's withdrawal prior to the scheduled benefit review conference can have lasting effects on their client's ability to meet deadlines, bring the claim, and resolve the dispute.

Comment: A commenter believes the withdrawal provision is vague and ambiguous and fails to define what constitutes "good cause." The commenter emphasizes that under the Texas Disciplinary Rules of Professional Conduct, Rule 1.15, a lawyer may withdraw if the client persists in pursuing what the lawyer reasonably believes to be fraudulent; if the client insists upon pursuing an objective the lawyer considers imprudent or repugnant or has a fundamental disagreement with; if the client fails to fulfill an obligation to the lawyer; or if further representation will result in an unreasonable financial burden upon the lawyer or the client has become unreasonably difficult.

Division Response: The division disagrees that new §152.6 is vague, ambiguous, and fails to define what constitutes good cause. Good cause is a fact-based consideration that is informed by the context and circumstances of the attorney's motion to withdraw. New §152.6(g) outlines the appropriate factors to be considered by the hearing officer. These factors include the situations listed in the Texas Disciplinary Rules of Professional Conduct, Rule 1.15 (Declining or Terminating Representation), as well as other case-specific considerations relating to the dispute resolution process.

The division also disagrees that new §152.6 is inappropriately more restrictive in authorizing permissive withdrawal than the Texas Disciplinary Rules of Professional Conduct. Rule 1.15 provides limited circumstances that require an attorney to withdraw representation. It also provides a non-exhaustive list of circumstances that permit an attorney to withdraw representation without committing a disciplinary violation. In the absence of a situation requiring mandatory withdrawal, Rule 1.15 does not limit a tribunal's authority to weigh other case-specific factors when determining whether an attorney's withdrawal is permitted. In new §152.6(g), the division has outlined the appropriate factors to be considered by the hearing officer when determining good cause, which include the Texas Disciplinary Rules of Professional Conduct, Rule 1.15, as well as other case-specific considerations.

Comment: A commenter notes that the Texas Disciplinary Rules of Professional Conduct, Rule 1.15, require attorneys to withdraw under certain circumstances unless otherwise ordered to continue representation. The commenter states the exceptions and requirements of "good cause" are in the disjunctive and only one need to be met, and believes the agency is attempting, without legislative authority, to eliminate exceptions 1 through 6.

Division Response: The division disagrees that new §152.6 eliminates exceptions 1 through 6 of the Texas Disciplinary Rules of Professional Conduct, Rule 1.15. Rule 1.15 provides limited circumstances that require an attorney to withdraw representation. It also provides a non-exhaustive list of circumstances that permit an attorney to withdraw representation without committing a disciplinary violation. New §152.6(g) outlines the appropriate factors to be considered by the hearing officer when reviewing a motion to withdraw. These include the situations listed in the Texas Disciplinary Rules of Professional Conduct, Rule 1.15 (Declining or Terminating Representation), as well as other case-specific considerations relating to the dispute resolution process. The division emphasizes that new §152.6(g) includes a consideration of the non-exhaustive list of circumstances permitting an attorney to withdraw representation under Rule 1.15. In the absence of a situation requiring mandatory withdrawal, Rule 1.15 does not limit a tribunal's authority to weigh other case-specific factors when determining whether an attorney's withdrawal is permitted. Often the withdrawal of an attorney during the dispute resolution process can affect the client's interests by leading to continuances, preventing access to needed medical attention or income benefits, or delaying the resolution of the dispute and affecting the efficiency of the overall dispute resolution process. As a result, new §152.6 provides oversight during the dispute resolution process.

Comment: A commenter states that nothing in the Texas Disciplinary Rules of Professional Conduct requires an attorney to continue representation or, notably, considers whether a client has refused to approve the withdrawal. The commenter requests the division reconsider adopting the

withdrawal provisions of the proposed rule for all the reasons previously listed and the clear conflict it represents with the provisions of the Texas Disciplinary Rules of Professional Conduct.

Division Response: The division disagrees that nothing in the Texas Disciplinary Rules of Professional Conduct requires an attorney to continue representation. There are several instances where the Texas Disciplinary Rules of Professional Conduct do require an attorney to continue representation. Rule 1.15(b) prohibits a lawyer from withdrawing from representation of a client unless one of the several circumstances is present. Additionally, under Rule 1.15(c) a lawyer is required to continue representation despite the presence of good cause when ordered to do so by a tribunal. The division meets the definition of tribunal as defined by the Texas Disciplinary Rules of Professional Conduct, but only requires good cause as outlined in new §152.6(g) when an attorney requests to withdraw during the dispute resolution process. The division emphasizes that, in the absence of a situation requiring mandatory withdrawal, Rule 1.15 does not limit a tribunal's authority to weigh other case-specific factors when determining whether an attorney's withdrawal is permitted.

The division has determined that the factors laid out in new §152.6(g), including whether the client has approved the withdrawal, are necessary to assist the hearing officer in determining whether good cause exists for the attorney's withdrawal. The division emphasizes that a consideration of good cause that includes the claimant or insurance carrier's voice encourages communication within the representation relationship and the workers' compensation system as a whole, as well as notifies the hearing officer that there may be a possible material adverse effect if withdrawal occurs at that time.

Comment: A commenter recommends the division include "whether the client is seeking something beyond the scope, objectives and methods agreed to upon the attorney undertaking representation" as a factor in the withdrawal provision. The commenter notes that under the Texas Disciplinary Rules of Professional Conduct, Rule 1.02, an attorney is permitted to limit the scope and the objectives of the representation, but the division's proposed rule does not take note of this.

Division Response: The division declines to make the suggested change to include "whether the client is seeking something beyond the scope, objectives and methods agreed to upon the attorney undertaking representation" as a factor in the withdrawal provision. In new §152.6, good cause is a fact-based consideration by the hearing officer that weighs the factors under Rule 1.15(b) and the attorney's reason for withdrawal against a number of other case-specific considerations. The attorney's reason for withdrawal may be a circumstance listed under Rule 1.15(b) or another valid reason, including that the client is seeking something beyond the scope, objectives, and methods agreed to upon. Under new §152.6(g), the hearing officer will consider the attorney's reason for withdrawal along with the other factors to determine whether good cause exists. The division declines to include the scope of the attorney's representation as a specific factor as this scenario is reflected in the proposed rule's case-specific considerations.

Cost Note

Comment: A commenter believes that nothing in the current version of the guidelines for legal services prevents or discourages "quicker resolution of cases," and the division's anticipated offset to costs due to "quicker resolution of cases" is speculative with no objective support. The commenter states that although the division's statement implies an attorney may not exceed the current hours, existing §152.4 allows an attorney to request, and the division to approve, hours greater than those allowed by the current guidelines if the attorney demonstrates that a greater number of hours was justified.

Division Response: The division disagrees that the anticipated offset to costs due to quicker resolution of cases is speculative with no objective support. New §152.4(c) provides a greater number of hours at the pre-benefit review conference stage than the guidelines in place since 1991. Specifically, the new guidelines for legal services provide three hours each month for communications with the client, health care providers, and other persons involved in the case; three and a half hours

each month for direct dispute resolution negotiation with the other party; and two hours for preparation and submission of an agreement or settlement. The additional hours are included to encourage both early communication and meaningful negotiation between the parties, as well as resolution of disputes before the parties enter the formal administrative dispute resolution process. The anticipated offset in costs due to quicker resolution of disputes is a reflection of the division's goals of emphasizing informal mediation rather than litigation and resolving disputes promptly and fairly.

Comment: Commenters believe it is unrealistic that hours billed will not increase because the proposal also includes extreme increases in the maximum service hours that may be billed for various tasks. Therefore, the commenters believe the $20 million annual estimate is only a best case scenario that is extremely improbable, and instead believe the relatively large increases in maximum service hours for routine tasks makes the $50 million estimate more realistic. The commenters state that the increases in hourly rates and maximum allowable service hours on routine matters will add $50 million in annual costs based on current attorney billing practices already known to the division.

Division Response: The division disagrees that the $50 million annual cost estimate is more realistic. The division emphasizes that the estimated system costs provided in the proposal are based on the total amount of attorney fees approved by the division and are not necessarily reflective of the amount of attorney fees actually paid in the workers' compensation system. The statutory cap found in Labor Code §408.221 limits the amount of attorney fees paid to claimant attorneys to 25 percent of the claimant's benefits and does not provide for further recovery of any outstanding approved balance once the benefits are exhausted. Additionally, insurance carrier attorneys often contract with the insurance carrier for a fee below the amount approved by the division. Thus, the actual fees paid to the parties is often less than what was approved by the division. Because the division does not have information on the actual fees paid by the parties, the division's cost estimate is likely higher than

what the actual costs to the system will be. The division further emphasizes that the higher cost estimate reflecting an increase of $50 million in costs to the system is reflective of the total amount of attorney fees that can be billed in the system if attorneys were to bill both the maximum hourly rate and the maximum number of hours for each service category. This cost estimate does not account for actual billing practices, such as the total number of hours actually approved by the division, or the current data showing that attorneys do not bill the maximum amount of hours allowed in every dispute. Instead, the lower cost estimate of $20 million is likely closer to what the impact to the system may be because it is based on current billing practices and the total number of hours actually approved by the division in recent years. The division reiterates, however, that the cost estimate of $20 million is also based on the amount of attorney fees approved and not what is actually paid by the parties. Thus, actual costs to the system will likely be even lower than the division's estimate.

Additionally, the division stresses that current attorney billing practices known to the division show that, on average, attorneys do not request hours at or above the guidelines for legal services. For example, the guidelines for legal services provide a maximum of 1.5 hours to complete initial services, which include an initial interview, research, setting up the file, and completing and filing forms. However, the average amount of hours requested in the calendar year 2015 for these initial services was 1.27 hours.

Comment: A commenter states that the proposed cost increase is an extremely sizable amount of additional annual costs to a workers' compensation system that has only recently become more efficient and cost-effective. The commenter believes the proposed increase of $20 million annually is unnecessary, not based upon any attorney access problem, and highlights the problematic nature of the proposal. Additionally, the commenter emphasizes that none of the $20 million in additional annual system costs will go to indemnity or medical benefits for the injured employee.

Division Response: The division disagrees with the commenter's assertion that the costs are an extremely sizable amount of additional annual costs to the workers' compensation system. The division emphasizes that the estimated system costs provided in the proposal are based on the total amount of attorney fees approved by the division and are not necessarily reflective of the amount of attorney fees actually paid in the workers' compensation system. The statutory cap found in Labor Code §408.221 limits the amount of attorney fees paid to claimant attorneys to 25 percent of the claimant's benefits and does not provide for further recovery of any outstanding approved balance once the benefits are exhausted. Additionally, insurance carrier attorneys often contract with the insurance carrier for a fee below the amount approved by the division. Thus, the actual fees paid to the parties is often less than what was approved by the division. Because the division does not have information on the actual fees paid by the parties, the division's cost estimate is likely higher than what the actual costs to the system will be.

The division disagrees that in the absence of an access problem the proposal is unnecessary and recognizes that the increased costs will not go directly towards indemnity or medical benefits for the injured employee. The attorney fee rules have not been updated since 1991, and weighing the factors laid out in Labor Code §408.221 and §408.222 with the changes in the industry over time show that an increase in the hourly rate, as well as some of the service hour maximums, is consistent with the division's statutory goals. The new maximum hourly rate will help the rules be more reflective of the modern workers' compensation system and attorney practice field, and encourage the highest quality attorneys to participate in the system. The new guidelines for legal services further the system goals of emphasizing informal mediation rather than litigation and encourage early dispute resolution. The division has a statutory duty to provide guidelines for maximum attorney fees for specific services. The division also wants to encourage quality representation within the workers' compensation system. As such, the division has balanced the required factors against other

considerations, including the workers' compensation system goals, providing access to effective attorney representation, the administrative nature of the dispute resolution process, and Texas's position relative to other states that prescribe a maximum attorney fee rate for workers' compensation. The division has also taken the 25 percent statutory cap on attorney fees into consideration when evaluating the effect of increases on the injured employee's benefits.

Comment: A commenter believes the combined effect of the increase in maximum hourly rates and the maximum number of hours that may be billed will be detrimental to the overall health of the workers' compensation system, as provided by the division in the "Anticipated Costs to Comply with the Proposal" statement.

Division Response: The division disagrees that the combined effect of the increase in maximum hourly rates and the maximum number of hours that may be billed will be detrimental to the overall health of the workers' compensation system. The division emphasizes that the estimated system costs provided in the proposal are based on the total amount of attorney fees approved by the division and are not necessarily reflective of the amount of attorney fees actually paid in the workers' compensation system. The statutory cap found in Labor Code §408.221 limits the amount of attorney fees paid to claimant attorneys to 25 percent of the claimant's benefits and does not provide for further recovery of any outstanding approved balance once the benefits are exhausted. Additionally, insurance carrier attorneys often contract with the insurance carrier for a fee below the amount approved by the division. Thus, the actual fees paid to the parties is often less than what was approved by the division. Because the division does not have information on the actual fees paid by each party, the division's cost estimate is likely higher than what the actual costs to the system will be. The division further emphasizes that the cost estimate reflecting an increase of $50 million in costs to the system is reflective of the total amount of attorney fees that can be billed in the system. This cost estimate does not account for actual billing practices, such as the total number of hours

actually approved by the division, or the current data showing that attorneys do not bill the maximum amount of hours allowed in every dispute. Instead, the cost estimate of $50 million is dependent on a change in billing behavior that leads attorneys to begin billing at or near the maximum hours allowed in the guidelines for legal services, as well as the maximum hourly rate, in every claim.

Additionally, the division notes there are a number of public benefits anticipated as a result of the repeal and re-enactment of §152.3 and §152.4, as well as new §152.6. The division anticipates that the new rules will help reduce the number of disputes and further system goals, such as emphasizing informal mediation rather than litigation and resolving disputes promptly and fairly when they do arise. The division also anticipates the new rules will help to ensure there is quality representation available within the workers' compensation system, allow for additional time at the beginning of a dispute for preparation and case management in order to encourage early resolution of claim disputes, help to prevent an attorney's withdrawal from having a material adverse effect on their client, establish clear and consistent guidelines for submission of required information and requests, help to resolve disputes fairly and promptly by minimizing delays and continuances in the dispute resolution process, ensure injured employees have access to a fair and accessible dispute resolution process by protecting against disparate impact between parties, and educate and clearly inform system participants of their rights under the system by providing for consistent notice of all disputes and issues. Therefore, despite anticipated costs, the division expects the benefits of new §152.3, §152.4, and §152.6 will positively contribute to the health of the workers' compensation system as a whole.

Comment: A commenter states that injured employees will pay the majority of the increased costs to the system and points out that the division does not distinguish the difference in effect of the anticipated costs on the injured employee versus the insurance carrier. The commenter believes insurance carriers have more bargaining power to negotiate rates or hours below the maximums set

forth by the rules, whereas injured employees do not. The commenter emphasizes that the increase in fees will increase the liens against the injured employees' income benefits for the life of the claim, and strongly encourages the division to study the effect of the proposed changes to the hourly rates and maximum hours on injured employees' income benefits before proceeding further.

Division Response: The division disagrees that injured employees will pay the majority of the increased costs to the system and that the division has not considered the effect of the changes on the injured employees' income benefits. Under Labor Code §408.221 and §408.222, the division is required to balance a number of specific factors in approving an attorney's request for fees, including the amount involved in the controversy, the novelty and difficulty of the questions involved, and the fee customarily charged in the locality for similar legal services. The maximum hourly rate and guidelines for legal services have not been updated since 1991. Since that time the average weekly wage has increased, as has the median hourly rate of attorneys. For fiscal year 2016, the state average weekly wage was $895.08, compared to $428.25 in 1991. According to the Texas Workforce Commission, the median hourly wage for all attorneys in 2014 was $57 an hour, and according to a State Bar of Texas survey the median hourly rate for attorneys in private practice for 2013 was $242. The division considered these increases when determining whether amendments were necessary, and further in determining the appropriate maximum hourly rate to reflect the modern workers' compensation system. The division balanced these considerations against other factors, including system goals, such as encouraging early resolution of disputes, providing access to effective attorney representation, and the statutory provision limiting claimant attorney fees to 25 percent of the injured employee's benefits. Ultimately, the division determined that $200 an hour for attorneys and $65 an hour for legal assistants is the maximum hourly rate reasonable for workers' compensation disputes in Texas.

The division also emphasizes that the estimated system costs provided in the proposal are based on the total amount of attorney fees approved by the division and are not necessarily reflective of the amount of attorney fees actually paid in the workers' compensation system. The statutory cap found in Labor Code §408.221 limits the amount of attorney fees paid to claimant attorneys to 25 percent of the claimant's benefits and does not provide for further recovery of any outstanding approved balance once the benefits are exhausted. Additionally, insurance carrier attorneys often contract with the insurance carrier for a fee below the amount approved by the division. Thus, the actual fees paid to the parties is often less than what was approved by the division. Because the division does not have information on the actual fees paid by the parties, the division's cost estimate is likely higher than what the actual costs to the system, including injured employees, will be.

Comment: A commenter states that there will be no additional fiscal impact on the system for most of the workers' attorney fees, only for defense attorney fees. The commenter believes it is not an additional impact on the system to have an attorney when the attorney's payment comes out of the injured employee's limited recovery.

Division Response: The division disagrees with the implication that the fiscal impact to injured employees is not a required consideration in the division's decision to adopt new §152.3 and §152.4. Injured employees are part of the workers' compensation system. Additionally, under Government Code §2001.024, relating to Content of Notice, the division is required to include in the notice of the proposed rule a note about public costs that provides the probable economic costs to persons required to comply with the rule. Injured employees and other claimants are a party required to comply with division rules, including Chapter 152. Claimant's attorney's fees, which are paid directly out of the claimant's benefits, are requested and approved according to the requirements of §152.3 and §152.4. Thus, a note about the costs to claimants as a result of the repeal and re-enactment of these rules is required by the Administrative Procedure Act, or Chapter 2001 of the Government

Code. The estimated costs to the system found in the cost note are a reflection of an increase in the hourly rate and guidelines for legal services found in new §152.4 for both claimant attorneys and insurance carrier attorneys.

Forms

Comment: A commenter recommends the sequence number be on the first page.

Division Response: The division declines to include the sequence number on the first page because it is not necessary information on the forms. Sequence numbers are unique identifiers used by the division for internal purposes. They are not provided by system participants and thus, it is not necessary to include them on forms completed and submitted by system participants.

Comment: A commenter states the total approved to date section is necessary if the total approved is feeding directly from the division because the claimant attorney will put the total billed instead of the total approved.

Division Response: The division declines to make the recommended change because none of the forms posted for comment include a total approved to date section or a total billed section.

Comment: A commenter recommends the attorney's address and telephone number be included on the first page.

Division Response: The division appreciates the comment and notes that the attorney's address and telephone number are already included on the first page of the forms posted for comment (DWC Form-150, DWC Form-150a, DWC Form-151, and DWC Form-152).

NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For:

Office of Injured Employee Counsel.

For, with changes:

One individual on behalf of himself, his firm, the Claimant's Bar of the Workers' Compensation Section of the State Bar of Texas, and Texas Workers' Advocates; Caldwell Fletcher; American Insurance Association; Texas Mutual Insurance; and two individuals.

Against:

None.

Neither for nor against:

None.

STATUTORY AUTHORITY. Existing §152.3 and §152.4 are repealed under the authority of Labor Code §402.00111, *Relationship Between Commissioner of Insurance and Commissioner of Workers' Compensation, Separation of Authority, Rulemaking*; and Labor Code §402.061, *Adoption of Rules*.

Labor Code §402.00111(a) states that, except as otherwise provided, the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code. Labor Code §402.061 authorizes the commissioner to adopt rules as necessary for the implementation and enforcement of the Act.

TEXT.

~~§152.3. Approval or Denial of Fee by the Commission.~~

~~§152.4. Guidelines for Legal Services Provided to Claimants and Carriers.~~

STATUTORY AUTHORITY. New §152.3, §152.4, and §152.6 are adopted under the authority of Labor Code §402.00111, *Relationship Between Commissioner of Insurance and Commissioner of Workers' Compensation, Separation of Authority, Rulemaking*; Labor Code §402.061, *Adoption of Rules*; Labor Code §402.021, *Goals, Legislative Intent, General Workers' Compensation Mission of*

Department; Labor Code §408.221, *Attorney's Fees Paid to Claimant's Counsel*; Labor Code §408.222, *Attorney's Fees Paid to Defense Counsel*; Labor Code §415.021, *Assessment of Administrative Penalties*; Labor Code §402.00128, *General Powers and Duties of Commissioner*; Labor Code §415.001, *Administrative Violation by Representative of Employee or Legal Beneficiary*; Labor Code §415.002, *Administrative Violation by Insurance Carrier*; Labor Code §414.002, *Monitoring Duties*; Labor Code §414.006, *Referral to Other Authorities*; Labor Code §408.203, *Allowable Liens*; Labor Code §410.167, *Ex Parte Contacts Prohibited*; and Labor Code Chapter 410, *Adjudication of Disputes*.

Labor Code §402.00111(a) states that, except as otherwise provided, the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code. Labor Code §402.061 authorizes the commissioner to adopt rules as necessary for the implementation and enforcement of the Act.

Labor Code §402.021 requires that, in implementing the goals described in the section, the workers' compensation system must minimize the likelihood of disputes and resolve them promptly and fairly when identified, as well as promptly detect and appropriately address acts or practices of noncompliance with the Act and rules. Labor Code §402.021 states a basic goal of the workers' compensation system is that each injured employee must have access to a fair and accessible dispute resolution process. The section further requires the workers' compensation system effectively educate and clearly inform each person who participates in the system as a claimant, employer, insurance carrier, health care provider, or other participant of the person's rights and responsibilities under the system and how to appropriately interact within the system.

Labor Code §408.221 requires an attorney's fee, including a contingency fee, for representing a claimant before the division or court under the Act to be approved by the commissioner or court, to be paid from the claimant's recovery, and to be based on the attorney's time and expenses according

to written evidence presented to the division or court. Labor Code §408.221 further requires the commissioner or court to consider a number of factors when approving an attorney's fee and to provide guidelines for maximum attorney's fees for specific services by rule.

Labor Code §408.222 requires an attorney's fee for defending an insurance carrier in a workers' compensation action brought under the Act to be approved by the division or court and determined by the division or court to be reasonable and necessary. Labor Code §408.222 further requires the division or court consider issues analogous to those listed under §408.221(b) when determining whether a fee is reasonable.

Labor Code §415.021 states that a person commits an administrative violation if they violate, fail to comply with, or refuse to comply with the Act or a rule, order, or decision of the commissioner.

Labor Code §402.00128(b) provides the commissioner with the power to hold hearings and to exercise other powers and perform other duties as necessary to implement and enforce the Act

Labor Code §415.001 states it is an administrative violation for a representative of an employee or legal beneficiary to violate the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas or a commissioner rule.

Labor Code §415.002 states it is an administrative violation for an insurance carrier or its representative to violate a commissioner rule or fail to comply with a provision of the Act.

Labor Code §414.002 requires the division to monitor for compliance with commissioner rules, the Act, and other laws relating to workers' compensation the conduct of persons subject to this title, including attorneys and other representatives of parties. Labor Code §414.002 further requires the division to monitor the conduct described in Labor Code §415.001 and §415.002 and refer persons engaging in that conduct to the division of hearings.

Labor Code §414.006 authorizes the division to refer persons involved in a case subject to an investigation to other appropriate authorities for further investigation or the institution of appropriate proceedings, including licensing agencies, district and county attorneys, or the attorney general.

Labor Code §408.203 provides that an income or death benefit is subject to liens or claims for an attorney's fee for representing an employee or legal beneficiary in a matter arising under the Act.

Labor Code §410.167 states that a party and a hearing officer may not communicate outside a CCH unless the communication is in writing with copies provided to all parties or relates to a procedural matter.

Labor Code Chapter 410 provides the division with the statutory authority to adjudicate disputes. In particular, Subchapter A pertains to general provisions, Subchapter B to benefit review conferences, Subchapter C deals with arbitration, Subchapter D pertains to contested case hearings, and Subchapter E to the Appeals Panel. Labor Code Chapter 410 also provides the division with statutory authority to adopt rules related to the adjudication of disputes. Section 410.027 requires the commissioner to adopt rules for conducting benefit review conferences and §410.157 requires the commissioner to adopt rules governing procedures under which contested case hearings are conducted.

TEXT.

§152.3. Approval or Denial of Fee by the Division

(a) To claim a fee, an attorney representing any party must submit to the division a complete and accurate application for attorney fees in the form and manner prescribed by the division.

(b) An application for attorney fees must include:

(1) each attorney's name and bar card number;

(2) the law firm name, phone number, and mailing address;

(3) the injured employee's name, date of injury, and DWC claim number;

(4) the beneficiary's name, type, contact information, and social security number, if applicable;

(5) the dates of legal service;

(6) the hourly rate and number of hours for each attorney and legal assistant providing legal services;

(7) an itemized list of each legal service performed and expense incurred representing the claimant or insurance carrier that identifies the attorney or legal assistant who provided the service, the date the service was provided, and the hours or amount requested;

(8) a certification that every statement, numerical figure, and calculation in the application for attorney fees submitted to the division is within the attorney's personal knowledge, is true and correct, and represents services, charges, and expenses provided by the attorney or a legal assistant under the attorney's supervision; and

(9) additional case-specific justification for any fee that exceeds the guidelines for legal services.

(c) The division may approve, partially approve, or deny an application for attorney fees based on the division's determination of whether the requested time and expenses are reasonable according to the guidelines for legal services and maximum hourly rate established in §152.4 of this title, Labor Code §408.221 and §408.222, and written evidence presented to the division. The division will issue an order approving, partially approving, or denying an application for attorney fees. Submission of an application requesting fees for the same services or expenses addressed in any previous application is prohibited. Attorneys are subject to review for compliance with commissioner rules, the Act, and other laws under Labor Code Chapter 414. An order approving, partially approving, or denying an application for attorney fees does not limit the commissioner's authority to

enforce a sanction, administrative penalty, or other remedy authorized by the Act. At any time an attorney whose application is found to contain false or inaccurate information may be referred to enforcement or other authorities, including licensing agencies, district and county attorneys, or the attorney general for investigation and appropriate proceedings.

(d) To contest a division order approving, partially approving, or denying an application for attorney fees, an attorney, claimant, or insurance carrier must request a contested case hearing through the dispute resolution process outlined in Chapters 140 – 144 of this title. A request must be submitted by personal delivery, first class mail, or facsimile to the division no later than the 20th day after receipt of the division's order. A claimant may request a hearing by contacting the division in any manner no later than the 20th day after receipt of the division's order. A contesting party other than a claimant must send a copy of the request by personal delivery, first class mail, or electronic transmission to the insurance carrier and the other parties, including the claimant and attorney, on the same day the request is submitted to the division.

(e) After a contested case hearing under subsection (d), an attorney, claimant, or insurance carrier must request review by the appeals panel pursuant to the provisions of §143.3 of this title (Requesting the Appeals Panel To Review the Decision of the Hearing Officer) to contest the division order approving, partially approving, or denying an application for attorney fees.

(f) The division's order approving, partially approving, or denying an application for attorney fees is binding during the pendency of a contest or an appeal of the order. Notice of a contest or an appeal does not relieve the insurance carrier of the obligation to pay attorney fees according to the division order.

(g) Following a contested case hearing or appeals panel review of an order approving, partially approving, or denying an application for attorney fees under subsection (d) or subsection (e), the division will issue a final order or decision. If the final order or decision of the division requires an

attorney to reimburse funds, the reimbursement must be made no later than the 15th day after receipt of the final order or decision.

(h) This section is effective January 30, 2017.

§152.4. Guidelines for Legal Services Provided to Claimants and Insurance Carriers

(a) The division will consider the guidelines for legal services outlined in subsection (c), the maximum hourly rate for legal services in subsection (d), Labor Code, §408.221 and §408.222, and written evidence presented to the division, when approving, partially approving, or denying an application for attorney fees.

(b) An attorney may request, and the division may approve, a number of hours greater than those allowed by the guidelines for legal services if the attorney demonstrates to the satisfaction of the division that the higher fee was justified based on the circumstances of the specific claim and Labor Code, §408.221 and §408.222.

(c) The guidelines for legal services provided to claimants and insurance carriers are as follows:

Figure: 28 TAC §152.4(c)

	Service Maximum	Total Hours
1.	a. initial interview and research	1.0
	b. setting up file; completing and filing forms	0.5
2.	Communications per month (with client, health care providers, other	3

	persons involved in the case)	
3.	Direct dispute resolution negotiation with the other party (per month)	3.5
4.	Preparation and submission of an agreement or settlement	2
5.	Participation in benefit review conference	Actual time in BRC + 2.0
6.	Participation in contested case hearing	Actual time in CCH + 4.0
7.	Participation in administrative appeal process	5.0
8.	Travel (per month)	Actual costs that are reasonable and necessary

(d) The maximum hourly rate for legal services shall be as follows. Hourly rate:

(1) attorney--$200; and

(2) legal assistant (not to include hours for general office staff)--$65.

(e) Each attorney must bill for hours using that attorney's state bar card number.

(f) This section is effective January 30, 2017.

§152.6. Attorney Withdrawal

(a) An attorney withdrawing representation must submit a notice of withdrawal under subsection (b) or a motion to withdraw under subsection (d) and comply with the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas, including surrendering papers and property to the client as required.

(b) An attorney must submit a notice of withdrawal in the form and manner prescribed by the division when:

(1) the attorney withdraws representation and a motion to withdraw under subsection (d) is not required; or

(2) the attorney's representation is terminated by the attorney's client.

(c) An attorney must submit a notice of withdrawal under subsection (b) to the division by personal delivery, first class mail, or facsimile no later than the 10th day following withdrawal. An attorney must provide a copy of the notice to the attorney's client and the opposing party by personal delivery, first class mail, or electronic transmission on the same day the notice is submitted to the division. The notice of withdrawal must include:

(1) the attorney's name, bar card number, and contact information;

(2) the law firm name, if applicable;

(3) the injured employee's name, contact information, date of injury, and DWC claim number;

(4) the beneficiary's name, contact information, and social security number, if applicable;

(5) the insurance carrier name;

(6) the effective date of the attorney's withdrawal of representation under paragraph (1) or (2) of subsection (b); and

(7) the attorney's signature.

(d) Except when the attorney's representation is terminated by the attorney's client, an attorney withdrawing representation must submit a motion to withdraw to the division, and receive a division order granting the motion to withdraw, after notice of a scheduled benefit review conference or contested case hearing has been received and until resolution of the disputed issues through the division's dispute resolution process provided in Labor Code Chapter 410, Subchapters A – E.

(e) The motion to withdraw must provide good cause for withdrawing from the case and a certification that states:

(1) the attorney's client has knowledge of and has approved or refused to approve the withdrawal; or

(2) the attorney made a good faith effort to notify the attorney's client and the attorney's client cannot be located.

(f) An attorney must submit the motion to withdraw to the division by personal delivery, first class mail, or facsimile. An attorney must also provide a copy of the motion to the attorney's client and the opposing party by personal delivery, first class mail, or electronic transmission on the same day the motion is submitted to the division.

(g) The hearing officer will determine whether good cause exists for the attorney's withdrawal based on Rule 1.15 of the Texas Disciplinary Rules of Professional Conduct and other factors, including:

(1) how close in time the attorney withdrawal is to a scheduled benefit review conference or contested case hearing;

(2) the amount of attorney fees that have been requested and approved by the division;

(3) whether the attorney is willing to waive payment of any portion of the approved fees;

(4) the attorney's reason for the withdrawal; and

(5) whether the attorney's client refused to approve the withdrawal, if applicable.

(h) If the hearing officer determines good cause does not exist for the attorney's withdrawal, the attorney must continue to represent the party until resolution of the disputed issues through the division's dispute resolution process provided in Labor Code Chapter 410, Subchapters A – E.

(i) This section does not prevent the attorney's client from terminating the attorney-client relationship or notifying the division of the termination of the attorney-client relationship. If the attorney's client notifies the division of a termination, the attorney is not relieved of the duty to submit to the division a notice of withdrawal under subsection (b).

(j) This section is effective January 30, 2017.

10. CERTIFICATION. This agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas, on _____, 2016.

_____

Nicholas Canaday III
General Counsel
Texas Department of Insurance, Division of Workers' Compensation

The commissioner adopts the repeal of existing §152.3 and §152.4, along with new §152.3, §152.4, and §152.6.

_____

W. Ryan Brannan
Commissioner of Workers' Compensation

COMMISSIONER'S ORDER NO._____

ATTEST:

X _____

Nicholas Canaday III
General Counsel
Texas Department of Insurance, Division of Workers' Compensation

COMMISSIONER'S ORDER NO._____