

# RULES AND REGULATIONS

## Title 25—ENVIRONMENTAL PROTECTION

### ENVIRONMENTAL HEARING BOARD

[ 25 PA. CODE CH. 1021 ]

#### Practice and Procedure

The Environmental Hearing Board (Board) amends Chapter 1021 (relating to practice and procedures) as set forth in Annex A. The amendments modify the rules of practice and procedure before the Board by implementing improvements in practice and procedure.

The Board approved the final-form regulations at its March 30, 2009, meeting.

#### *Effective Date*

The amendments will go into effect upon publication in the *Pennsylvania Bulletin* as final-form rulemaking.

#### *Contact Person*

For further information, contact either Maryanne Weddock, Senior Assistant Counsel, 1507 State Office Building, 300 Liberty Avenue, Pittsburgh, PA 15222, (412) 565-3511, or William T. Phillipy, IV, Secretary to the Board, 2nd Floor, Rachel Carson State Office Building, P. O. Box 8457, Harrisburg, PA 17105-8457, (717) 787-3483. If information concerning this notice is required in an alternative form, William T. Phillipy, IV may be contacted at the previous number. TDD users may telephone the Board through the Pennsylvania AT&T Relay Center at (800) 654-5984.

#### *Statutory Authority*

The regulations are promulgated under the authority of section 5 of the Environmental Hearing Board Act (Act) (35 P.S. § 7515) which empowers the Board to adopt regulations pertaining to practice and procedure before the Board.

#### *Comments and Revisions to Proposed Rulemaking*

The Board received comments on the proposed revisions from the Independent Regulatory Review Commission (IRRC). The comments were discussed by the Board and by its Procedural Rules Committee (Rules Committee). Responses to the comments are addressed as follows.

#### *Automatic Party Status (§ 1021.51(h)(1))*

IRRC expressed a concern that by amending the language “recipient of a permit, license, certification or approval” to “person to whom the action of the Department is directed or issued” in subsection (h)(1), the Board may be extending its jurisdiction beyond its statutory authority. Entities covered by subsection (h)(1) are automatic parties to an action, and IRRC was concerned that individuals merely impacted by a Department action, but not necessarily recipients of the action, could be added as parties to an appeal, thereby requiring them to expend legal fees to participate in the proceeding. IRRC recommended that the Board narrow the language of this section to ensure that the regulation does not impermissibly expand the scope of the Board’s jurisdiction in violation of any statute. The Board agreed to delete the proposed revision. The Board has left the current language of the regulation intact and added “recipient of an order” to the list of entities covered by subsection (h)(1),

to clarify that subsection (h)(1) applies only to third party appeals of permits, licenses, certifications, approvals or orders directed at or held by a regulated entity.

IRRC also expressed a concern regarding the proposed revision to subsection (j), stating that as to any entities covered by subsection (h)(2)—(4) who chose not to enter a proceeding after being given notice of it, their “right to appeal from the Board’s adjudication in the matter may be adversely affected.” Because IRRC felt this language did not establish a binding norm, it should be omitted from the body of the regulation. IRRC agreed with the Board’s proposal to move the language to the comment to the rule.

#### *Prepayment of Penalties (§ 1021.54a)*

IRRC asked for clarification on what would constitute a “verified statement” and accepted the Board’s explanation that it would follow the definition of “verified statement” set forth in Title 231 (relating to Rules of Civil Procedure). IRRC also questioned why the language “[i]f a civil penalty is assessed under more than one statute, an appellant shall follow the procedures set forth in each statute” was set forth in a comment to the rule, rather than in the rule itself, since the statement established a binding norm. The Board agreed to move the language to the body of the rule in subsection (c).

#### *Default Judgment (§ 1021.76a)*

IRRC asked for more specificity regarding when a hearing may be conducted under subsection (d) of this rule. The Board revised the rule to clarify that the hearing would be an evidentiary hearing as directed by the Board. The Board also clarified that this subsection pertained to a situation when default judgment had been entered, not sought.

#### *Expedited Proceedings (§ 1021.96a)*

IRRC objected to the language in subsection (d) stating that “[t]he Board will grant a motion for expedited hearing only in rare circumstances.” Because this is unenforceable, nonregulatory language, IRRC felt it did not establish a binding norm and recommended omitting it from the final-form regulation. The Board agreed with IRRC’s recommendation and omitted the language from the final-form regulation.

#### *Withdrawal without Prejudice (§ 1021.141b)*

IRRC questioned whether the language of subsection (a) allowed withdrawal of an appeal without prejudice only if all parties agreed, and recommended that the final-form regulation should explain whether the Board may approve a withdrawal without prejudice over the objection of a nonmoving party. Because it was not the intention of the Board to allow withdrawals of appeals without prejudice only if all parties agree, the Board determined that the regulation was not appropriately drafted to express the intent of the Board. Therefore, this regulation has not been included in this package as a final-form regulation. Rather, it will be considered by the Board and Rules Committee over the next year to determine whether the rule is necessary.

#### *Sunset Date*

A sunset date has not been established for these regulations. The effectiveness of the regulations will be evaluated on an ongoing basis by the Board and the Rules Committee.

*Regulatory Review*

As required under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), the Board submitted copies of the proposed rulemaking, which was published at 38 Pa.B. 6154 (November 8, 2008), to IRRC and the Senate and House Environmental Resources and Energy Committees (Committees) for review and comment. The Board, in accordance with section 5.1(j.1) of the Regulatory Review Act (71 P.S. § 745.5a(j.1)), also provided IRRC and the Committees with the Regulatory Analysis Form prepared in compliance with Executive Order 1982-2 (relating to improving government regulations) and copies of comments received.

In preparing the final-form regulations, the Board has considered all comments received. No comments on the proposed regulations were received from either of the Committees.

These final-form regulations were submitted to the Committees on June 30, 2009. Because no action was taken by the Committees within 20 days after submission of the final-form regulations, they are deemed approved. IRRC met on August 6, 2009, and approved the regulations under section 5(c) of the Regulatory Review Act.

*Findings*

The Board finds that:

(1) Public notice of the proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and the regulations thereunder in 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

(2) These regulations are necessary and appropriate for administration of the Act.

*Order*

(1) The regulations of the Board, 25 Pa. Code Chapter 1021, are amended by amending §§ 1021.34, 1021.55, 1021.74, 1021.93, 1021.94a; and by adding §§ 1021.96b and 1021.96c to read as set forth at 38 Pa.B. 6154; and by amending §§ 1021.32 and 1021.51; and by adding §§ 1021.54a, 1021.76a, 1021.96a and 1021.96d to read as set forth in Annex A.

(2) The Chief Judge and Chairperson of the Board shall submit this order, 38 Pa.B. 6154 and Annex A to the Office of Attorney General and Office of General Counsel as to legality and form as required by law.

(3) The Chief Judge and Chairperson of the Board shall submit this order, 38 Pa.B. 6154 and Annex A to the Committees and IRRC, as required by law.

(4) The Chief Judge and Chairperson of the Board shall certify this order, 38 Pa.B. 6154 and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(5) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

THOMAS W. RENWAND,  
*Acting Chairperson*

*(Editor's Note:* The proposal to add § 1021.141b, included in the proposed rulemaking at 38 Pa.B. 6154, has been withdrawn by the Board.)

**Fiscal Note:** Fiscal Note 106-9(F) remains valid for the final adoption of the subject regulations.

**Annex A**

**TITLE 25. ENVIRONMENTAL PROTECTION**  
**PART IX. ENVIRONMENTAL HEARING BOARD**  
**CHAPTER 1021. PRACTICE AND PROCEDURES**  
**DOCUMENTARY FILINGS**

**FILING AND SERVICE OF DOCUMENTS****§ 1021.32. Filing.**

(a) Documents filed with the Board shall be filed at its headquarters—2nd Floor, Rachel Carson State Office Building, 400 Market Street, Post Office Box 8457, Harrisburg, Pennsylvania 17105-8457.

(b) The date of filing shall be the date the document is received by the Board.

(c) Documents may be filed by personal delivery, by mail or by facsimile. Legal documents, as defined in § 1021.2 (related to definitions), may be filed electronically in accordance with this chapter. When a document is filed by facsimile, the original shall be deposited in the mail on the same day. If a document exceeds ten pages, the facsimile shall consist of the first five pages and last five pages of the document and the certificate of service.

(d) Legal documents may be filed with the Board electronically through the Board's website by a filing attorney unless provided otherwise by Board order. A legal document filed electronically shall be deemed the equivalent of the original document subject to the following conditions:

(1) The electronic filing of a legal document constitutes a certification by the filing attorney that the original hard copy was properly signed and, where applicable, verified.

(2) An executed hard copy of the legal document, with any required verifications, shall be maintained by the filing attorney and produced at the request of the Board or any other party within 14 days of the request.

(e) In filing legal documents electronically, a filing attorney shall be responsible for the following:

(1) An objective description of the legal document consistent with the title placed on the legal document as required by the Board's website.

(2) Any delay, disruption, interruption of the electronic signals and readability of the legal document.

(3) Any risk that a legal document may not be properly or timely filed with the Board.

(f) Hard copy of any electronically filed legal document which exceeds 50 pages in length shall also be filed with the Board in accordance with subsections (a) and (c) and § 1021.37 (relating to the number of copies). Exhibits to legal documents may be filed and served either electronically or by hard copy in accordance with the sections in this chapter relating to filing and service. If these requirements are met by hard copy of exhibits, they must be sent to the Board by mail or express delivery and, in the case of requests for expedited disposition, service shall mean actual receipt by the opposing party as required by § 1021.34(c) (relating to service by a party).

(g) Documents filed by United States mail, hand or other delivery services after the close of the business day at 4:30 p.m. Eastern Time shall be deemed to be filed on the following business day. Documents filed electronically, including by facsimile, shall be deemed filed on the day received by the Board.

(h) Documents filed with the Board, other than exhibits, must be typewritten on letter size paper (approximately 8 to 8 1/2 inches by 10 1/2 to 11 inches) and pages after the first must be numbered. Legal documents, as defined in § 1021.2, must be double spaced, except that footnotes must be single spaced and quotations in excess of a few lines must be single spaced and indented. Photocopied documents will be accepted as typewritten, provided that all copies are legible. Failure to comply with this subsection will not result in dismissal of a filing, but the Board may request the party to resubmit the document in proper form.

**FORMAL PROCEEDINGS**

**APPEALS**

**§ 1021.51. Commencement, form and content.**

(a) An appeal from an action of the Department shall commence with the filing of a written notice of appeal with the Board.

(b) The caption of an appeal must be in the following form:

ENVIRONMENTAL HEARING BOARD  
2nd Floor, Rachel Carson State Office Building  
400 Market Street, Post Office Box 8457  
Harrisburg, Pennsylvania 17105-8457

JOHN DOE, Appellant  
234 Main Street, Smithtown,  
Jones County, Pennsylvania 15555  
(Telephone (123) 456-7890)

\_\_\_\_\_ v. Docket No. \_\_\_\_\_

Commonwealth of Pennsylvania  
Department of \_\_\_\_\_, Appellee

(c) The appeal must set forth the name, address and telephone number of the appellant.

(d) If the appellant has received written notification of an action of the Department, a copy of the action shall be attached to the appeal.

(e) The appeal must set forth in separate numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal.

(f) When the appeal is from an assessment of a civil penalty for which the statute requires an appellant to prepay the penalty or post a bond, the appellant shall follow the procedures in § 1021.54a (relating to prepayment of penalties).

(g) Concurrent with or prior to the filing of a notice of appeal, the appellant shall serve a copy thereof on each of the following:

(1) The office of the Department issuing the notice of Departmental action.

(2) The Office of Chief Counsel of the Department or agency taking the action appealed.

(3) In a third party appeal, the recipient of the action. The service shall be made at the address set forth in the document evidencing the action by the Department or at the chief place of business in this Commonwealth of the recipient.

(h) For purposes of this section, the term “recipient of the action” includes the following:

(1) The recipient of a permit, license, approval, certification or order.

(2) Any affected municipality, its municipal authority, and the proponent of the decision, where applicable, in

appeals involving a decision under sections 5 or 7 of the Sewage Facilities Act (35 P. S. §§ 750.5 and 750.7).

(3) A mining company, well operator or owner or operator of a storage tank in appeals involving a claim of subsidence damage, water loss or contamination.

(4) Other interested parties as ordered by the Board.

(i) The service upon the recipient of a permit, license, approval, certification or order, as required under subsection (h)(1), shall subject the recipient to the jurisdiction of the Board, and the recipient shall be added as a party to the third-party appeal without the necessity of filing a petition for leave to intervene under § 1021.81 (relating to intervention). The recipient of a permit, license, approval or certification who is added to an appeal under this section shall still comply with §§ 1021.21 and 1021.22 (relating to representation; and notice of appearance.)

(j) Other recipients of an action under subsection (h)(2), (3) or (4), may intervene as of course in the appeal by filing an entry of appearance within 30 days of service of the notice of appeal in accordance with §§ 1021.21 and 1021.22, without the necessity of filing a petition for leave to intervene under § 1021.81.

(k) The appellant shall provide satisfactory proof that service has been made as required by this section.

(l) Subsections (a)—(k) supersede 1 Pa. Code §§ 35.5—35.7 and 35.9—35.11 (relating to informal complaints; and formal complaints).

**Comment**

If a recipient of an action under subsection (h)(2), (3) or (4) elects not to intervene following service of notice of an appeal or notice by the Board that the recipient's rights may be affected by an appeal, the recipient's right to appeal from the Board's adjudication in the matter may be adversely affected. This comment is added in response to the Commonwealth Court's ruling in *Schneiderwind v. DEP*, 867 A.2d 724 (Pa. Cmwlth. 2005).

**§ 1021.54a. Prepayment of penalties.**

(a) When an appeal is from the assessment of a civil penalty for which the statute requires an appellant to prepay the penalty or post a bond with the Department, the appellant shall submit to the Office of Chief Counsel of the Department a check in the amount of the penalty or an appropriate bond securing payment of the penalty or a verified statement that the appellant is unable to pay.

(b) When an appeal is from the assessment of a civil penalty for which the statute requires an appellant to prepay the penalty or post a bond with the Board, the appellant shall submit to the Board a check in the amount of the penalty or an appropriate bond securing payment of the penalty or a verified statement that the appellant is unable to pay.

(c) If a civil penalty is assessed under more than one statute, an appellant shall follow the procedures set forth in each statute.

(d) When an appellant submits a verified statement of inability to prepay, under subsection (a) or (b), a copy of the verified statement shall be included with the notice of appeal.

**Comment**

Practitioners should note that the Air Pollution Control Act (35 P. S. §§ 4001—4015), requires that prepayment of a civil penalty be made to the Board and not to the Department.



**SPECIAL ACTIONS****§ 1021.76a. Entry of default judgment.**

(a) The Board, on motion of the plaintiff, may enter default judgment against the defendant for failure to file within the required time an answer to a complaint that contains a notice to defend.

(b) The motion for default judgment must contain a certification that the plaintiff served on the defendant a notice of intention to seek default judgment after the date on which the answer to the complaint was due and at least 10 days prior to filing the motion.

(c) The filing of an answer to the complaint by the defendant prior to the filing of a motion for default judgment by the plaintiff shall correct the default.

(d) When default judgment is entered in a matter involving a complaint for civil penalties, the Board may assess civil penalties in the amount of the plaintiff's claim or may assess the amount of the penalty following an evidentiary hearing, as directed by the Board, at which the issues shall be limited to the amount of the civil penalties.

**Comment**

This rule is modeled after Pa.R.C.P. 237.1 and 1037.

**MOTIONS****§ 1021.96a. Motions for expedited hearing.**

(a) A motion for an expedited hearing may be filed at any time in either an appeal or special action, or the Board may order an expedited hearing on its own motion.

(b) The Board may issue an order for an expedited hearing notwithstanding the time requirements contained in a previous order of the Board, the Board's Rules of Practice and Procedure in § 1021.101 (relating to prehearing procedure), or Title 231 (relating to rules of civil procedure) relating to discovery.

(c) In issuing such an order, the Board will be guided by relevant judicial and Board precedent. Among other factors to be considered:

(1) Whether pollution or injury to the public health, safety or welfare exists or is threatened during the period ordinarily required to complete the proceedings.

(2) Severity of prejudice to any party during the time period ordinarily required to complete the proceedings.

(3) The status of discovery and the realistic need of the parties for extended discovery and for time to prepare for a hearing.

(4) Whether the issuance of such an order would promote judicial economy or would otherwise be in the public interest.

(5) The effect of expedited proceedings on the nonrequesting party.

(d) The Board may direct that a prehearing conference be held to determine an appropriate schedule for the completion of prehearing proceedings as well as the time and place of the hearing.

**§ 1021.96d. Conduct of expedited hearing.**

(a) Nothing contained in this rule shall limit the rights of the parties to a full hearing before the Board under the applicable rules of evidence with full rights of cross-examination of witnesses. The Board may limit the number of witnesses or the subjects of examination in

order to avoid duplication of evidence as provided in § 1021.126 (relating to limiting number of witnesses and additional evidence).

(b) Testimony may be submitted by prepared written testimony as provided for under § 1021.124 (relating to written testimony).

(c) After the conclusion of the hearing, the Board will direct the prompt filing of posthearing briefs.

**Comment**

The Board will grant a motion for expedited hearing only in rare circumstances.

[Pa.B. Doc. No. 09-1924. Filed for public inspection October 16, 2009, 9:00 a.m.]

## Title 34—LABOR AND INDUSTRY

**DEPARTMENT OF LABOR AND INDUSTRY**

[ 34 PA. CODE CHS. 111 AND 131 ]

### Special Rules of Administrative Practice and Procedure Before the Workers' Compensation Appeal Board; Special Rules of Administrative Practice and Procedure Before Workers' Compensation Judges

The Department of Labor and Industry (Department), Workers' Compensation Appeal Board (Board) and Office of Adjudication (Office), amends Chapters 111 and 131 (relating to special rules of administrative practice and procedure before the Workers' Compensation Appeal Board; and special rules of administrative practice and procedure before workers' compensation judges) (Rules) to read as set forth in Annex A. The rulemaking clarifies and provides detailed guidance for practice and procedure before the Board, the Office and workers' compensation judges (judges).

*Statutory Authority*

This final-form regulation is published under the authority contained in sections 401.1 and 435(a) and (c) of the Workers' Compensation Act (act) (77 P. S. §§ 710 and 991(a) and (c)), and section 2205 of The Administrative Code of 1929 (71 P. S. § 565), as well as section 414 of the Occupational Disease Act (77 P. S. § 1514).

*Background*

In 1980, the Secretary of the Department established a Rules Committee (Committee) to develop rules and procedures for the workers' compensation system. The Committee consisted of a Board representative, judges, equal numbers of representatives of the claimant and defense bar and Department representatives. This Committee has met at various times since its inception to amend the Board and judges Rules. The most recent version of the Rules became effective December 7, 2002.

In the fall of 2006, the Committee reconvened to incorporate into the Board and judges rules the Department's ability to accept filings electronically, various legislative amendments and appellate decisions, as well as comments received from interested practitioners in the field since 2002. At 38 Pa.B. 4902 (September 6, 2008), the Department published the notice of proposed rule-making. As a result, the Department received written

comments from the following: Terry L. M. Bashline, Esquire; Lawrence R. Chaban, Esquire (on behalf of interested practitioners in the field including Workers' Compensation Judge Ada Guyton and R. Burke McLemore, Jr., Esquire); Christian A. Davis, Esquire (on behalf of the firm Weber, Gallagher, Simpson, Stapleton, Fires & Newby, L.L.P.); Paul J. Dellasega, Esquire; Thomas C. Lowry, Esquire; Samuel R. Marshall, Esquire (on behalf of The Insurance Federation of Pennsylvania, Inc. (IFP)); and Joseph A. Prim, Esquire. The Department also received written comments from the Independent Regulatory Review Commission (IRRC) dated November 5, 2008. In response to the comments received, the Committee met on December 5, 2008, and approved the changes that are incorporated into this final-form rulemaking.

#### *Purpose*

The rulemaking clarifies and expedites the procedures in the workers' compensation system and updates existing rules to ensure compliance with amendments to the act and various appellate court decisions. The present rules have not been comprehensively reviewed since 2002. Since that time, the act has been amended, and a change was made to the law governing child support payments that impacts certain workers' compensation awards. See the act of November 9, 2006 (P. L. 1362, No. 147) (Act 147); and the act of July 7, 2006 (P. L. 1055, No. 109) (Act 109). Additionally, advances in technology, including the ability of the Bureau of Workers' Compensation (Bureau) to accept certain filings electronically and the anticipation that the Board will also obtain this capability, prompted the need for these amendments. The amendments incorporate these necessary changes, and ensure that parties will continue to be advised of up-to-date rules for practice and procedures before the Board, the Office and judges.

#### *Summary of Final-Form Regulations and Responses to Comments*

IRRC made the general comment that the Department should only list the General Rules of Administrative Practice and Procedure (GRAPP) provisions that are actually superseded by the specific regulatory language found in the regulations. The Department notes that it has always been its intent for the regulations governing workers' compensation proceedings to supersede the GRAPP. Nonetheless, the Department reviewed the regulations and have amended them to ensure that only those specific provisions of GRAPP that are being superseded by that particular section of the regulations are listed as being superseded.

IRRC commented that references to electronic filing in §§ 111.3, 111.11 and 111.12 (relating to definitions; content and form; and filing, service and proof of service), should be omitted since the Board currently lacks the technological capability to accept electronic filings. The Department disagrees since it believes that electronic filing will likely result in significant time and cost savings for all parties and does not think that allowing for electronic filing in the regulations before the Board can accept electronic filings will result in widespread confusion in the regulated community. IRRC additionally stated that if the Department retains the phrase "electronic filing," the final-form regulations should further explain what is meant by the term and when the Department expects to implement electronic filing. The Department disagrees, believing that not specifically defining the term enables filing with the Department to evolve as technology evolves. Moreover, it would be difficult for the Department to determine with specificity

when the Board will begin implementing electronic filing as there are many variables at play in such a process.

IRRC also commented that if the Department chooses to retain the reference to electronic filing in § 111.3, and § 111.11 should be amended to provide specific instruction as to where the electronic format may be accessed. In response, the Department amends § 111.11 to provide that the Department will notify the public of the required electronic format in the *Pennsylvania Bulletin* or on the Department's web site.

The IFP also commented with respect to § 111.3 and § 131.11 (relating to filing, service and proof of service) that the Board and the Bureau respectively should make the "formats and forms" of the electronic filing a part of the regulation to subject them to public comment. The Department disagrees, noting that it would be unwieldy and inefficient to go through the legislative process each time a new form is created or modified. The Department will continue to proceed cautiously by soliciting stakeholder comment, as it has in the past, when implementing new forms for electronic filing.

IRRC questioned what constitutes an "original of each appeal and cross-appeal" for purposes of electronic filing as referenced in § 111.12(b). In response, the Department amends § 111.12(b) by deleting the requirement to file an original of an appeal or cross-appeal when filing electronically, since the requirement is redundant and therefore unnecessary.

Christian A. Davis provided a general comment in relation to electronic filing, requesting the promulgation of specific rules to permit that answers to claim petitions be filed electronically with either the judges or Bureau and to determine when something is timely filed in the event of a system crash. The Department responds with the intention that all forms will be capable of electronic filing in the future, and that it is unnecessary to have a specific regulation governing the filing of one type of electronic form. In regards to specific regulations governing the timeliness of the filing of an answer, the Department notes that the question of a petition's timeliness is a factual matter that can be decided by a judge on a case-by-case basis.

There were numerous comments made by IRRC and the IFP regarding additional definitions added to § 131.5 (relating to definitions) in response to Act 147's addition of mandatory mediation to the act, and the Department agrees that the definitions needed further clarification. Specifically, the Department amends § 131.5 by adding a definition for "mandatory mediation," renaming "voluntary settlement conferences" to "voluntary mediation," and clarifying the definition for voluntary mediation for reasons spelled out further in the discussion accompanying § 131.59a (relating to voluntary mediation). Also pursuant to an IRRC comment, the Department agrees to add a definition for "resolution hearing," using the definition provided in the act. The Department additionally amends the definition of "mediation" to clarify that mediation encompasses both "mandatory mediation" and "voluntary mediation."

Christian A. Davis expressed concern about removing the "substantial or compelling" language in § 131.13 (relating to continuances or postponements of hearings) for a judge to grant a continuance and replacing it with "good cause." He also states that it would be beneficial for the final-form regulations to include a definition of "good cause." The Department believes, however, that it is complying with Act 147 in making this change, and that

case law will eventually provide the parties with guidance regarding how this standard is to be applied in comparison with the “substantial or compelling” standard.

Joseph A. Prim commented that § 131.41 (relating to request for supersedeas or reconsideration of supersedeas) should not be amended to permit a judge to alter a prior supersedeas determination on the judge’s own motion. The Department responds that the regulation as revised promotes the expeditious administration of the act, and notes that other commentators have indicated their support for the amendment.

IRRC commented that the use of the term “challenge hearing” in § 131.50a(c) (relating to employee request for special supersedeas hearing under sections 413(c) and (d) of the act) was not consistent with existing regulatory terminology. The Department agrees and amends the section by replacing the phrase “challenge hearing” with “challenge proceeding.”

In response to the IFP comments, the Department amends § 131.50a(d) by clarifying that a judge may receive evidence on a supersedeas request only if the introduction of evidence does not prejudice the claimant at the time of the challenge proceeding. The Department agrees with the IFP that the previous wording did not make sense, as the concern addressed by the regulation is whether claimant is procedurally prejudiced by the admission of evidence at that time.

Lawrence R. Chaban commented that § 131.52(b)(3) (relating to first hearing procedures) should be amended to require a judge to consult with the parties about the “best date” for the mandatory mediation conference. In response, the Department notes that most judges routinely consult with counsel when scheduling mandatory mediation. Nonetheless, the Department chooses not to incorporate the suggestion, since it is not always practical for judges utilizing the one day hearing format to consult with the parties ahead of time and still be compliant with Act 147’s mandates.

The IFP recommended that § 131.52(b)(1) be revised to allow the judge to alter deadlines for good cause shown. The Department responds that a judge is already permitted this flexibility under § 131.3 (relating to waiver and modification of rules). The IFP further questioned why a judge is permitted to establish a trial schedule before an initial hearing. The Department responds that permitting a judge to establish a trial schedule before an initial hearing allows judges using a 1 day hearing format to comply with Act 147’s mandates.

The Department amends § 131.52(b)(4) by adding a reference to § 131.53(g) (relating to procedures subsequent to the first hearing) (formerly § 131.53(f)), which requires that medical examinations be scheduled within 45 days of the first hearing actually held, if they have not already been scheduled prior to the first hearing. Several commentators expressed concern about the elimination of this requirement in the proposed amendments. The Department agrees that this provision should not be eliminated, and reinstates former subsection (f) of § 131.53 as new subsection (g).

Lawrence R. Chaban and Joseph A. Prim commented that § 131.53b (relating to bifurcation) should be amended to make clear that a judge’s decision on a bifurcated issue does not result in a final, appealable order. The IFP noted its concern that the section grants the judge “unilateral power” to bifurcate issues. The Department disagrees, noting that a judge does not have

unlimited authority to bifurcate issues, and that case law provides parties with sufficient guidance regarding a judge’s power.

Terry L. M. Bashline commented that § 131.53(d) should be amended to include the phrase “or hearing” because he is concerned that the use of the word “conference” alone can be read to specifically exclude the judge from permitting attendance at a hearing by telephone. The Department disagrees, noting that telephone hearings are already authorized under § 131.54(a) (relating to manner and conduct of hearings).

With respect to § 131.59 (relating to mediation), IRRC commented that the final-form regulation should define the term “alternative dispute resolution” or provide a cross-reference to an appropriate statutory definition. In response, the Department has removed the reference to alternative dispute resolution and renamed the section “mediation.” The term “mediation” is now defined in § 131.5 (relating to definitions). Additionally, the Department has eliminated the phrase “conventional adjustment of the claim” from § 131.59(a), agreeing with the IFP that the phrase was ambiguous.

In response to the concerns raised by IRRC and the IFP, the Department amends § 131.59a by renaming the section “voluntary mediation” and clarifying that an adjudicating judge may conduct a voluntary mediation upon the agreement of the parties and the judge. The Department further amends § 131.59a to eliminate the reference to “adjudicating” judges, because voluntary mediation may be requested at any time during the proceedings, for example, after mandatory mediation has already occurred, and may not necessarily be conducted by the adjudicating judge.

IRRC commented that § 131.59b (relating to mandatory mediation) was ambiguous by not defining “mandatory mediation.” In response, the Department has added a definition for “mandatory mediation” in § 131.5. Additionally, the Department agrees with IRRC that it was confusing to reference 42 Pa.C.S. § 5949 (relating to confidential mediation communications and documents) in § 131.59b, and therefore amends the regulation to delete the statutory reference.

IRRC also requested that the Department specify its authority in § 131.59b to prohibit an adjudicating judge from conducting a mandatory mediation conference. The Department responds by noting that Act 147 mandates that the parties engage in a mandatory mediation conference, but that the judge conducting the conference is “not necessarily the judge assigned to the actual case involving the parties.” This phrase grants the Department the discretion to assign a judge to conduct the mandatory mediation conference who is different from the one assigned to adjudicate the underlying claim. The Department’s position is consistent with section 501 of the Internal Operating Procedures of the Pennsylvania Commonwealth Court (210 Pa. Code § 67.71 (relating to policy)) and protects the integrity of the workers’ compensation proceeding. Furthermore, the Department notes that the parties can consent to having the adjudicating judge mediate the case by requesting voluntary mediation under § 131.59a.

IRRC further questioned the Department’s statutory authority to limit confidentiality in § 131.59b(b) in circumstances when a party has not complied with the mandatory mediation provisions. Initially, the Department notes that the amended section no longer references 42 Pa.C.S. § 5949 (relating to confidential mediation



communications and documents). The Department maintains it has implicit authority to craft limited exceptions to the regulations' general requirement for confidentiality in mediation conferences in order to enforce compliance with Act 147's mandates.

Paul J. Dellasega commented that mandatory mediation should not be compelled where the cost of mediation exceeds the worth of the case. The Department responds that Act 147 does not provide for any such exception; rather, mandatory mediation is compelled unless, upon good cause shown, the judge determines that mediation would be futile.

IRRC commented that § 131.60(g) (relating to resolution hearings) should clarify what constitutes "proof" that a petition has been filed so as to enable a judge to proceed with a resolution hearing. In response, the Department amends the regulation by requiring that the parties show proof that a petition has been filed "pursuant to § 131.11 (relating to filing, service, and proof of service)." As previously noted, the Department has also added a definition for "resolution hearing" in § 131.5 in response to IRRC's comment that the term "resolution hearing" was undefined.

Finally, the IFP commented that § 131.111(c) (relating to decisions of judges) should be amended to provide that interest is suspended if there is a delay incurred due to the claimant's failure to comply with the Act 109 requirements of a written statement and documentation from the Pennsylvania Child Support Enforcement System web site. The Department responds that whether interest can be suspended pending receipt of the required documentation is a substantive, rather than a procedural, issue best resolved elsewhere.

*Affected Persons*

Those affected by these final-form regulations include the Board Commissioners and officials, employees of the Department, the Office and judges, as well as attorneys and litigants in the Pennsylvania workers' compensation system.

*Fiscal Impact*

There is no significant fiscal impact associated with this final-form regulation.

*Reporting, Recordkeeping and Paperwork Requirements*

The final-form regulations do not require the creation of new forms. However, the amendments do incorporate Act 109's mandate to report the existence or nonexistence of any child support order to a judge before the award of certain benefits under the act, and whether the support payments are current. There are no other additional reporting, recording or paperwork requirements on either the Commonwealth or the regulated community.

*Effective Date*

This final-form rulemaking is immediately effective upon its publication in the *Pennsylvania Bulletin*.

*Sunset Date*

No sunset date is necessary for these regulations. The Department will continue to monitor the impact and effectiveness of the regulations.

*Contact Persons*

Persons who require additional information about these final-form regulations may contact: (1) with respect to the judges' rules, Elizabeth A. Crum, Deputy Secretary for Compensation and Insurance, Department of Labor and Industry, 651 Boas Street, Harrisburg, PA 17121, (717)

787-5082; and (2) with respect to the Board rules, Susan McDermott, Workers' Compensation Appeal Board, 901 North Seventh Street, 3rd Floor South, Harrisburg, PA 17102-1412, (215) 560-4583.

*Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on August 26, 2008, the Department submitted a copy of the proposed rulemaking, published at 38 Pa.B. 4902, to IRRC and to the Senate Committee on Labor and Industry and the House Labor Relations Committee (Senate and House Committees). In addition, the Department also provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Department.

The Department also provided the Senate and House Committees and IRRC with copies of the comments received as well as other documents when requested. In preparing these final-form regulations, the Department considered all the comments from IRRC and public. The Senate and House Committees did not comment.

Under section 5.1(j.1)—(j.3) of the Regulatory Review Act (71 P. S. § 745.5a(j.1)—(j.3)), these final-form regulations were deemed approved by the Senate and House Committees on August 2, 2009. IRRC met on August 20, 2009, and approved the final-form regulations in accordance with section 5.1(e) of the Regulatory Review Act (71 P. S. § 745.a(e)).

*Findings*

The Department finds that:

(a) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the related regulations in 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

(b) A public comment period was provided as required by law and all comments were considered.

(c) The final-form regulations are necessary and appropriate for the administration and enforcement of the authorizing statute.

*Order*

The Department, acting under the authorizing statute, orders that:

(a) The regulations of the Department, 34 Pa. Code, are amended by adding §§ 131.53b, 131.56a, 131.59, 131.59a, 131.59b and 131.60; and by amending §§ 111.3, 111.11, 111.12, 131.3, 131.5, 131.11, 131.13, 131.22, 131.41, 131.50a, 131.52, 131.53, 131.53a, 131.54, 131.57, 131.66 and 131.111 to read as set forth in Annex A.

(b) The Secretary of the Department shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for approval as to legality and form as required by law.

(c) The Secretary of the Department shall submit this order and Annex A to IRRC and the Senate and House Committees as required by law.

(d) The Secretary of the Department shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(e) This order shall take effect immediately upon publication in the *Pennsylvania Bulletin* as a final-form regulation.

SANDI VITO,  
Secretary

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission relating to this document, see 39 Pa.B. 5279 (September 9, 2009).)

**Fiscal Note:** Fiscal Note 12-84 remains valid for the final adoption of the the subject regulations.

#### Annex A

### TITLE 34. LABOR AND INDUSTRY

#### PART VII. WORKERS' COMPENSATION APPEAL BOARD

#### CHAPTER 111. SPECIAL RULES OF ADMINISTRATIVE PRACTICE AND PROCEDURE BEFORE THE WORKERS' COMPENSATION APPEAL BOARD

##### Subchapter A. GENERAL PROVISIONS

#### § 111.3. Definitions.

(a) The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

*Act*—The Pennsylvania Workers' Compensation Act (77 P. S. §§ 1—1041.4 and 2501—2708).

*Appeal*—A proceeding to review a ruling or decision by a judge.

*Board*—The Workers' Compensation Appeal Board.

*Bureau*—The Bureau of Workers' Compensation of the Department.

*Disease Law*—The Pennsylvania Occupational Disease Act (77 P. S. §§ 1201—1603).

*Filing*—Delivery by mail, in person or electronically. If filing by mail, it is deemed complete upon deposit in the United States mail, as evidenced by a United States Postal Service postmark, properly addressed, with postage or charges prepaid. If filing by hand delivery or electronically, the filing date is the Board's date of receipt.

*Judge*—A workers' compensation judge assigned by the Office of Adjudication as provided in section 401 of the act (77 P. S. § 701) or assigned by the Office of Adjudication to determine a petition filed under the Disease Law.

*Office of Adjudication*—The Office of the Department created under section 1401(a) of the act (77 P. S. § 2501(a)).

*Party*—A petitioner or respondent. An act required or authorized by this chapter, to be done by or to a party, may be done by or to that party's counsel of record.

*Petitioner*—Anyone seeking to review a ruling or decision by a judge or the moving party in a petition filed under Subchapter D (relating to other petitions).

*Respondent*—Anyone in whose favor the matter was decided by the judge or other than the moving party in any petition filed under Subchapter D.

*Service*—Delivery in person, by mail or electronics. If service is by mail, it is deemed complete upon deposit in the United States mail, as evidenced by a United States Postal Service postmark, properly addressed, with postage or charges prepaid.

*Supersedeas*—A temporary stay affecting a workers' compensation case.

(b) Subsection (a) supersedes 1 Pa. Code §§ 31.3, 31.11 and 33.34 (relating to definitions; timely filing required; and date of service).

#### Subchapter B. APPEALS

#### § 111.11. Content and form.

(a) An appeal or cross appeal shall be filed with the Board on a form provided by the Board. All references to forms mean paper forms or an electronic format prescribed by the Board and published in the *Pennsylvania Bulletin* or the Department's web site located at [www.dli.state.pa.us](http://www.dli.state.pa.us). All forms must contain the following information:

(1) The name and address of the claimant, name and address of the defendant, date of the injury, type of petition, Bureau claim number, insurance carrier and circulation date of the decision at issue.

(2) A statement of the particular grounds upon which the appeal is based, including reference to the specific findings of fact which are challenged and the errors of the law which are alleged. General allegations which do not specifically bring to the attention of the Board the issues decided are insufficient.

(3) A statement of the relief which is requested.

(4) A statement whether the petitioner seeks an opportunity to file a brief or present oral argument or whether the case should be heard on the record without brief or oral argument.

(5) Identification of the judge whose decision is in question, including as an attachment, a copy of that judge's decision.

(6) A proof of service as specified in § 111.12(d) (relating to filing, service and proof of service).

(b) An appeal or a cross appeal shall be served on all parties and the judge.

(c) A request for supersedeas, if desired, shall be indicated on the appeal and conform to § 111.21 (relating to content and form).

(d) Subsections (a)—(c) supersede 1 Pa. Code §§ 31.5, 33.1—33.4, 33.11, 33.12, 35.17 and 35.20.

#### § 111.12. Filing, service and proof of service.

(a) When filing by mail or in person, an original and two copies of each appeal or cross-appeal shall be filed. Only the original appeal shall have attached a copy of the judge's decision which is in question as required by § 111.11(a)(5) (relating to content and form).

(b) When filing electronically, the Board will obtain a copy of the judge's decision from the Office of Adjudication.

(c) The petitioner shall serve a copy of any appeal upon all parties and the judge.

(d) The respondent shall serve a copy of any cross appeal upon all parties and the judge.

(e) The petitioner or respondent shall, concurrently with the filing of an appeal or cross appeal, on a form prescribed by the Board or in substantial compliance therewith, file a proof of service with the Board containing:

(1) A statement of the date of service.

(2) The names of parties and judge served.

(3) The mailing address, the applicable zip code and the manner of service on the parties and judge served.

(f) Subsections (a)—(e) supersede 1 Pa. Code §§ 31.26, 33.15, 33.32, 33.33 and 33.35—33.37.



**PART VIII. BUREAU OF WORKERS' COMPENSATION**

**CHAPTER 131. SPECIAL RULES OF ADMINISTRATIVE PRACTICE AND PROCEDURE BEFORE WORKERS' COMPENSATION JUDGES**

**Subchapter A. GENERAL PROVISIONS**

**§ 131.3. Waiver and modification of rules.**

(a) The judge may, for good cause, waive or modify a provision of this chapter, except as otherwise provided in § 131.59b(a) (relating to mandatory mediation), upon motion of a party, agreement of all parties or upon the judge's own motion.

(b) Subsection (a) supersedes 1 Pa. Code §§ 33.61, 35.18, 35.54 and 35.55 and also supersedes 1 Pa. Code Chapter 35, Subchapter D.

**§ 131.5. Definitions.**

(a) The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

*Act*—The Workers' Compensation Act (77 P. S. §§ 1—1041.4 and 2501—2708).

*Additional defendant*—An insurance carrier, the Commonwealth or an employer, other than the insurance carrier or employer against which the original petition was filed, joined under this chapter, not including the Uninsured Employers Guaranty Fund.

*Adjudicating judge*—A judge assigned to hold hearings and issue decisions relating to a petition or petitions.

*Bureau*—The Bureau of Workers' Compensation of the Department.

*Bureau record*—Official copies of documents received by the Bureau, on forms prescribed by the Bureau, if forms prescribed by the Bureau are available, or official copies of documents received by the Bureau on forms prepared by a party if no forms prescribed by the Bureau are available, which record transactions between the parties and which are determined by the judge to pertain to the case.

*Challenge proceeding*—A proceeding governed by § 131.50a (relating to employee request for special supersedeas hearing under section 413(c) and (d) of the act).

*Claimant*—An individual who files a petition for, or otherwise receives, benefits under the act or the Disease Law.

*Defendant*—An employer, insurance carrier and the Commonwealth, unless specifically designated individually, and the Uninsured Employers Guaranty Fund, except for purposes of joinder, penalties or assessment of counsel fees under section 440 of the act (77 P. S. § 996).

*Department*—The Department of Labor and Industry of the Commonwealth.

*Director of Adjudication*—The individual specified in section 1402 of the act (77 P. S. § 2502).

*Disease Law*—The Pennsylvania Occupational Disease Act (77 P. S. §§ 1201—1603).

*Insurer*—A workers' compensation insurance carrier or self-insured employer, as applicable.

*Judge*—A workers' compensation judge assigned by the Office of Adjudication as provided in sections 401 and 401.1 of the act (77 P. S. §§ 701 and 710) or assigned by

the Office of Adjudication to determine a petition filed under the act or the Disease Law.

*Judge manager*—A workers' compensation judge with management responsibilities appointed under the Civil Service Act (71 P. S. §§ 741.1—741.1005).

*Mandatory mediation*—A mediation conducted by a mediating judge under § 131.59b (relating to mandatory mediation).

*Mediating judge*—A judge assigned to mediate petitions in accordance with sections 401 and 401.1 of the act (77 P. S. §§ 701 and 710) and this chapter.

*Mediation*—A conference conducted by a judge, having as its purpose an attempt to reconcile any or all disputes under the act or this chapter existing between contending parties. Mediation can be either mandatory or voluntary.

*Office of Adjudication*—The Office of the Department created under section 1401(a) of the act (77 P. S. § 2501(a)).

*Party*—A claimant, defendant, employer, insurance carrier, additional defendant, health care provider and, if relevant, the Commonwealth and the Uninsured Employers Guaranty Fund. An act required or authorized by this chapter, to be done by or to a party, may be done by or to that party's counsel of record.

*Penalty proceeding*—A proceeding governed by section 435(d) of the act (77 P. S. § 991(d)).

*Records of work environment*—Records and documents relating to work place health, safety, hazards and exposure, including records or documents which may be obtained under the Worker and Community Right-to-Know Act (35 P. S. §§ 7301—7320) and 29 CFR 1901.1—1928.1027 (relating to Occupational Safety and Health Administration, Department of Labor).

*Resolution hearing*—A procedure established by the Office of Adjudication with the sole purpose of providing a venue to present a compromise and release to a judge in an expedited fashion.

*Statement previously made*—A written statement signed or otherwise adopted or approved by the persons making it, or a stenographic, mechanical, electrical, computer-generated or other recording, or transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded. The term does not include statements made by parties which are protected by the attorney-client privilege or which are protected as the work product of counsel.

*Supersedeas*—A temporary stay affecting a workers' compensation case.

*Uninsured Employers Guaranty Fund*—The special fund established under Article XVI of the act (77 P. S. §§ 2701—2708).

*Voluntary mediation*—A mediation conducted by a judge under § 131.59a (relating to voluntary mediation) upon the agreement of the contending parties and the judge.

(b) Subsection (a) supersedes 1 Pa. Code §§ 31.3 and 33.33 (relating to definitions; effect of service upon an attorney).

**Subchapter B. TIME**

**§ 131.11. Filing, service and proof of service.**

(a) Whenever filing is required by this chapter, it is deemed complete upon one of the following:

(1) Delivery in person.

(2) If by electronic submission, upon receipt at the electronic address and in a format as prescribed by the Department and published in the *Pennsylvania Bulletin* or the Department's web site located at [www.dli.state.pa.us](http://www.dli.state.pa.us).

(3) If by mail, upon deposit in the United States Mail, as evidenced by a United States Postal Service postmark, properly addressed, with postage or charges prepaid.

(b) Whenever service is required by this chapter, it is deemed complete upon one of the following:

(1) Delivery in person.

(2) If by electronic submission, upon receipt and in a format as prescribed by the Department and published in the *Pennsylvania Bulletin* or the Department's web site located at [www.dli.state.pa.us](http://www.dli.state.pa.us).

(3) If by mail, upon deposit in the United States Mail, as evidenced by a United States Postal Service postmark, properly addressed, with postage or charges prepaid, except as provided in § 131.81(b) (relating to subpoenas).

(c) Any notice or other written communication required to be served upon or furnished to a party shall also be served upon or furnished to the party's attorney in the same manner as it is served upon the party.

(d) Whenever a proof of service is required by this chapter, the proof of service must contain the following:

(1) A statement of the date of service.

(2) The names of the judge and others served.

(3) The mailing address, the applicable zip code and the manner of service on the judge and others served, and, if applicable, the electronic address to which service was made.

(e) Unless otherwise specifically provided in this chapter, whenever the filing or service is required to be made upon the Bureau, it shall be made to the principal office of the Bureau at: 1171 South Cameron Street, Harrisburg, Pennsylvania 17104-2501, (717) 783-5421, or another address and telephone number as may be published in the *Pennsylvania Bulletin* or the Department's web site located at [www.dli.state.pa.us](http://www.dli.state.pa.us). Electronic filing and service on the Bureau shall be at the electronic address and in a format as prescribed by the Bureau and published in the *Pennsylvania Bulletin* or the Department's web site located at [www.dli.state.pa.us](http://www.dli.state.pa.us).

(f) Subsections (a)—(e) supersede 1 Pa. Code §§ 31.5, 31.11, 31.13, 31.14, 31.26, 33.32 and 33.34—33.36.

**§ 131.13. Continuances or postponements of hearings.**

(a) It is the intent of this chapter to discourage repeated continuances or postponements of hearings.

(b) Parties shall make every effort to avoid continuances or postponements by the prompt scheduling and submission of expert and medical testimony and by the prompt presentation of lay testimony.

(c) A continuance or postponement may be granted as set forth in this chapter for good cause shown at the discretion of the judge, if the continuance or postponement is consistent with this chapter and its purpose of providing an orderly and expeditious determination of proceedings before judges.

(d) Requests for a continuance or postponement must be:

(1) Made in writing or at a hearing. If not made in writing or at a hearing, confirmed in writing as required by this subsection and served as required by subsection (h).

(2) Made not later than 10 calendar days prior to the hearing date, except as set forth in subsection (f).

(e) Prior to the request for a continuance or a postponement, the party requesting the continuance or postponement shall ascertain the position of all counsel of record and unrepresented parties in the case relating to the continuance or postponement and shall advise the judge of the foregoing at the time of the request.

(f) A request for a continuance or postponement made within 10 calendar days prior to the hearing date will not be considered unless the judge is satisfied that circumstances relating to the requested continuance or postponement occurred within 10 calendar days of the hearing date.

(g) Requests for a continuance or postponement or written confirmation of the continuance or postponement must contain at least the following information:

(1) The identity of the requesting party.

(2) A detailed statement of the position of all counsel of record and unrepresented parties on the request for a continuance or postponement or an explanation of why counsel of record or unrepresented parties could not be contacted.

(3) A detailed statement of the reasons why the continuance or postponement is requested and the date on which the need to request a continuance or postponement arose.

(4) A summary of prior continuances or postponements in the case, at whose request the continuances or postponements were granted and the position of other parties in each continuance or postponement.

(h) A party requesting or confirming in writing a request for a continuance or a postponement other than a request made at a hearing shall serve a copy of the request or the confirmation upon all counsel of record, unrepresented parties and the judge. Counsel requesting or confirming in writing a request for a continuance or a postponement shall serve a copy of the request or confirmation on counsel's client.

(i) Anyone requesting a continuance or postponement shall concurrently with the service of the request or the confirmation file a proof of service with the judge.

(j) In ruling on requests for a continuance or postponement, the judge may consider one or more of the following, giving consideration to subsection (a):

(1) The positions of the various parties relating to the request for a continuance or postponement.

(2) The number of prior continuances or postponements or denials of continuances or postponements and at whose request they were granted or denied.

(3) Whether the requested continuance or postponement will work an undue hardship on a party.

(4) The unavailability of the parties, witnesses or counsel.

(5) The illness or death of the parties or counsel or members of their immediate families.

(6) The desirability of unrepresented parties obtaining counsel.

(7) The necessity to replace the services of an expert witness who becomes unavailable.

(8) Another reason deemed by the judge to be for good cause shown and consistent with this chapter and the purposes of the act and the Disease Law.

(k) A scheduling conflict in another tribunal may be considered but may or may not be determinative.

(l) If a continuance or a postponement is granted, the judge may impose conditions and direct action by the parties which the judge deems reasonable under the circumstances.

(m) In addition to the conditions and actions referred to in subsection (l), the judge may:

(1) Determine why the proceeding should not be dismissed for lack of prosecution or grant the relief sought without the receipt of further evidence or testimony upon the making of appropriate findings of fact.

(2) Schedule a hearing to determine whether to impose penalties under section 435(d) of the act (77 P. S. § 991(d)) and issue an appropriate written order.

(3) Issue a written order modifying in whole or in part a supersedeas ordered or denial previously entered or modifying an order previously entered upon a showing of compliance with the directions of the judge.

(4) Issue a written order at the end of the case, in the case of a claim petition, with appropriate findings of fact, directing that interest be disallowed. The judge may limit the disallowance of interest to a specified period on good cause shown.

(5) Issue a written order with appropriate findings of fact closing the record and deciding a case if a party has unreasonably delayed the proceeding.

(n) Subsections (a)—(m) supersede 1 Pa. Code §§ 31.15, 33.33 and 35.102 (relating to extensions of time; effect of service upon an attorney; and hearing calendar).

**Subchapter C. FORMAL PROCEEDINGS**

**GENERAL**

**§ 131.22. Transfer of cases or petitions on agreement of all parties.**

(a) If the transfer of the case is agreed to by the Office of Adjudication, the parties and the judge, the Office of Adjudication will promptly reassign the case or petition. Notice of reassignment will be given to all parties.

(b) Transfer or reassignment under subsection (a) will take place prior to the date of the first hearing unless circumstances dictate otherwise.

**SUPERSEDEAS**

**§ 131.41. Request for supersedeas or reconsideration of supersedeas.**

(a) When a petition contains a request for supersedeas, or when a request for supersedeas is made, the judge may rule on the request only after a hearing.

(b) After a hearing, the judge may grant or deny the request for supersedeas in whole or in part. The grant or denial may be for specified or indefinite periods and may be subject to conditions that the judge orders to implement the intent of the act, the Disease Law or this chapter. If a supersedeas has been granted or denied in whole or in part, the judge may, upon request or on the judge's own motion, and after hearing, review and modify the grant or denial as warranted.

(c) The decision of a judge on a request for or reconsideration of a supersedeas is an interlocutory order.

(d) Subsections (a)—(c) supersede 1 Pa. Code §§ 35.190 and 35.225 (relating to appeals to agency head from rulings of presiding officers; and interlocutory orders).

**§ 131.50a. Employee request for special supersedeas hearing under sections 413(c) and (d) of the act.**

(a) This section governs the disposition of an employee's request for a special supersedeas hearing made in connection with a challenge to the suspension or modification of workers' compensation benefits under sections 413(c) and 413(d) of the act (77 P. S. § 774.2 and 774.3).

(b) A special supersedeas hearing will be held within 21 days of the employee's filing of the notice of challenge.

(c) During the course of a challenge proceeding, the issues are limited to determining whether the claimant has stopped working or is earning the wages stated in the Notice of Suspension or Modification under sections 413(c) or 413(d) of the act and the challenge shall be decided only on those issues.

(d) If the employer has filed a separate petition requesting supersedeas, the judge may receive evidence and issue a separate decision on the request for supersedeas if the judge determines the claimant will not be prejudiced by the introduction of evidence on the supersedeas request at the time of the challenge proceeding.

(e) The judge to whom the notice of challenge has been assigned will issue a written order on the challenge within 14 days of the hearing.

(f) If the judge fails to hold a hearing within 21 days or fails to issue a written order approving the suspension or modification of benefits within 14 days of the hearing, the insurer shall reinstate the employee's workers' compensation benefits at the weekly rate the employee received prior to the insurer's suspension or modification of benefits under sections 413(c) or 413(d) of the act.

(g) Subsections (a)—(f) supersede 1 Pa. Code §§ 35.161, 35.162 and 35.190 (relating to form and admissibility of evidence; reception and ruling on orders; and appeals to agency head from rulings of presiding officers).

**HEARING PROCEDURE**

**§ 131.52. First hearing procedures.**

(a) The purpose of this chapter is to provide a fair and prompt hearing process, to allow all parties to introduce appropriate evidence and to receive a timely decision from the judge. When practicable and appropriate, the entire record relating to any petition shall be completed at the initial hearing, recognizing that the hearing process may differ based upon several variables including geographic location, number of parties involved, case volume and availability of experts for testimony.

(b) The hearing process chosen in any specific case, including a determination of whether testimony will be accepted at the initial hearing, is within the discretion of the judge. At or before the initial hearing by written order or on the record, the judge shall establish:

(1) Specific deadlines for the presentation of evidence by the parties.

(2) Dates for future hearings.

(3) Specific date and time for the mediation conference unless, for good cause shown, the judge determines at the first hearing or subsequently that mediation would be futile.



(4) Dates for setting any medical examinations to be scheduled consistent with § 131.53(g) (relating to procedures subsequent to the first hearing).

(c) The moving party, at the first hearing, shall advise the judge and opposing parties of the following:

(1) Allegations and issues of fact and law involved in the moving party's petition.

(2) Proposed amendments to pleadings.

(3) Stipulations of fact.

(4) Names, addresses and method of presentation of witnesses.

(5) Whether the items and information specified in § 131.61(a) (relating to exchange of information), which are intended to be used as evidence or exhibits, have been provided to the responding party at or before the first hearing.

(6) Dates of depositions.

(7) Estimate of hearing time.

(8) Other subjects which may aid in the disposition of the proceeding.

(d) The moving party, at the first hearing, unless otherwise directed by the judge, shall offer and have marked for identification available exhibits of the moving party.

(e) The parties shall provide the judge with all documents required by law to be filed with the Bureau and which are relevant to issues in dispute with the same injury date and pertaining to the same claim. The judge will place those documents in evidence along with any other documents required to be filed by law with the Bureau or prior judges and which the judge deems relevant to the proceeding. The judge and the employee may not introduce the First Report of Injury into evidence.

(f) Evidence furnished under this section does not become part of the record, unless otherwise admissible.

(g) Unless otherwise ordered by the judge, the moving party shall present testimony.

(h) Subsections (a)—(g) supersede 1 Pa. Code §§ 35.123, 35.125—35.128, 35.155, 35.164 and 35.169.

**§ 131.53. Procedures subsequent to the first hearing.**

(a) Within 45 days after the date of the first hearing actually held, the responding party shall comply with § 131.52(c) (relating to first hearing procedures) and shall submit, in writing, to the judge, with copies to counsel of record and unrepresented parties, the items and information specified in § 131.52(c).

(b) The responding party, in accordance with the directions of the judge, shall offer and have marked for identification the responding party's exhibits.

(c) The judge may issue an order directing the parties to proceed with the litigation in a manner that promotes expeditious resolution and avoids delay.

(d) The parties or the judge may request a conference at any time which may be held in person, by telephone, video, or any other electronic manner as directed by the judge.

(e) A party wishing to present testimony in the form of rebuttal or surrebuttal shall notify the judge in writing

within 21 days after conduct of the hearing or deposition at which the testimony to be rebutted or surrebutted has been given.

(f) Following a request to present rebuttal or surrebuttal testimony, the testimony shall be presented at a hearing or deposition provided the testimony shall be taken no later than 45 days after the conclusion of the case of the party presenting the testimony or evidence to be rebutted or surrebutted.

(g) Dates of the medical examinations, if not scheduled prior to the first hearing actually held, shall be scheduled within 45 days after the first hearing actually held.

(h) Subsections (a)—(g) supersede 1 Pa. Code §§ 35.126—35.128, 35.137, 35.138 and 35.161—35.169.

**§ 131.53a. Consolidated hearing procedure.**

(a) One day trials or other consolidated hearing procedures may be scheduled and conducted pursuant to this chapter to the extent practical. The judge may waive or modify this chapter as may be appropriate and adopt and direct procedures which are fair and just for a determination of the issues consistent with the act.

(b) Subject to § 131.3(a) (relating to waiver and modification of rules) in cases proceeding under a consolidated hearing procedure:

(1) Upon request, or on the judge's own motion, testimony from a party or witness may be taken by a trial deposition prior to the obligation of a party to conduct medical depositions, or at another appropriate time to clarify the issues.

(2) Upon request, a party shall have the opportunity to testify before the judge at the pretrial or other hearing prior to the obligation of a party to conduct medical depositions, or at another appropriate time to clarify the issues.

(c) Subsections (a) and (b) supersede 1 Pa. Code §§ 35.101—35.106, 35.111—35.116, 35.121—35.128, 35.137, 35.138, 35.155 and 35.161—35.169.

**§ 131.53b. Bifurcation.**

(a) The judge may, upon request or upon the judge's own motion, consider bifurcation of issues to promote expeditious resolution of cases.

(b) Subsection (a) supersedes 1 Pa. Code §§ 35.180 and 35.225 (relating to action on motions; and interlocutory orders).

**§ 131.54. Manner and conduct of hearings.**

(a) The judge will conduct fair and impartial hearings and maintain order. At the discretion of the judge, the hearings may be conducted by telephone or other electronic means if the parties do not object. Disregard by participants or counsel of record of the rulings of the judge shall be noted on the record, and if the judge deems it appropriate, will be made the subject of a written report to the Director of Adjudication together with recommendations.

(b) If the participants or counsel are guilty of disrespectful, disorderly or contumacious language or conduct in connection with a hearing, the judge may suspend the hearing or take other action as the judge deems appropriate, including the submission of a written report to the Director of Adjudication together with recommendations.

(c) A witness whose identity has not been revealed as provided in this chapter may not be permitted to testify

on behalf of the defaulting party unless the testimony is allowed within the judge's discretion.

(d) In addition to subsections (a)—(c), the judge may proceed under § 131.13(m) (relating to continuances or postponements of hearings).

(e) Subsections (a)—(d) supersede 1 Pa. Code §§ 31.21—31.23, 31.27 and 31.28 and also supersede 1 Pa. Code Chapter 35, Subchapter E.

**§ 131.56a. Withdrawal of appearance.**

(a) An attorney may withdraw his appearance without leave if another attorney has previously entered or is simultaneously entering an appearance on behalf of the party.

(b) Leave to withdraw an appearance shall be sought by written request to the adjudicating judge. An attorney may not withdraw representation until the adjudicating judge grants the request.

(c) In requesting a withdrawal of appearance, the attorney shall:

(1) Verify whether any party has any objection to the withdrawal request.

(2) Serve notice of the request to withdraw on his own client, all unrepresented parties and counsel of record for all represented parties.

(3) File a proof of service as provided in § 131.11(d) (relating to filing, service and proof of service).

(d) Except for withdrawals of appearance under subsection (a), the adjudicating judge shall, after conducting a hearing on any objection, or on the adjudicating judge's own motion, issue an interlocutory order granting the request unless the adjudicating judge determines that there will be prejudice to the parties or to the proceedings.

(e) Upon withdrawal of appearance, in the event of a fee dispute, the adjudicating judge shall have the authority to determine entitlement to receipt of counsel fees and costs, whether under sections 440 or 442 of the act (77 P. S. §§ 996 and 998), if the fee agreement or petition has been filed before discharge or withdrawal of counsel.

(f) Subsections (a)—(e) supersede 1 Pa. Code §§ 33.32—33.37, 35.2, 35.123, 35.124, 35.225 and 35.226.

**§ 131.57. Compromise and release agreements.**

(a) Under section 449 of the act (77 P. S. § 1000.5), upon or after filing a petition, the parties may engage in a compromise and release of any and all liability which is claimed to exist under the act on account of injury or death, subject to approval by the judge after consideration at a hearing.

(b) Proposed compromise and release agreements, including the stipulations of the parties, shall be recorded on a form prescribed by the Bureau. The parties may attach additional information to the form if circumstances so require.

(c) If another petition is pending before a judge at the time of the agreement of the parties to compromise and release the claim, any party may, in writing, request the judge to schedule a hearing on the proposed compromise and release agreement. The written request will be treated as an amendment of the pending matter to a petition to seek approval of a compromise and release agreement.

(d) The judge will expedite the convening of a hearing on the compromise and release agreement. The judge will

circulate a written decision on the proposed compromise and release agreement within 30 days after the hearing. This subsection does not apply if a resolution hearing has been requested in accordance with § 131.60 (relating to resolution hearings).

(e) Subsections (a)—(d) supersede 1 Pa. Code §§ 33.42, 35.40, 35.41, 35.48—35.51, 35.101—35.106, 35.111—35.116, 35.121—35.128 and 35.155.

**§ 131.59. Mediation.**

(a) Mediation may be utilized by the parties under this chapter and will not be limited in purpose to achieving a compromise settlement (compromise and release agreement), but may have as a goal the narrowing of issues by means of stipulation for decision by the judge or other amicable resolution.

(b) Subsection (a) supersedes 1 Pa. Code §§ 31.21—31.23, 35.111—35.116, 35.186 and 35.188.

**§ 131.59a. Voluntary mediation.**

(a) If all parties and the adjudicating judge agree, the adjudicating judge may conduct the voluntary mediation and may subsequently participate in a decision on the merits of the petition or petitions if they are not resolved amicably.

(b) Voluntary mediation activities conducted by judges are confidential.

(c) Subsections (a) and (b) supersede 1 Pa. Code §§ 31.21—31.23, 35.111—35.116 and 35.188.

**§ 131.59b. Mandatory mediation.**

(a) A mandatory mediation will not be assigned to an adjudicating judge. Petitions not resolved by mediation will proceed before the adjudicating judge as if mediation had not occurred. The mediating judge will not participate in any decision on the merits of the petition or petitions. This subsection cannot be waived or modified, as otherwise provided in § 131.3 (relating to waiver and modification of rules).

(b) Mandatory mediation activities conducted by mediating judges are confidential except that communications, conduct or documents are not confidential if relevant to establish that a party or counsel failed to do one of the following:

(1) Appear for a mediation without prior approval of the mediating judge.

(2) Attend a mediation in person or by teleconference, as required by the mediating judge.

(3) Have requisite authority to accept, modify or reject settlement proposals offered at the mediation, whether at the mediation, or within a reasonable period of time after the mediation as established by the mediating judge.

(c) The adjudicating judge shall possess authority to impose sanctions for the failure of the parties to comply with the mediation provisions of sections 401 and 401.1 of the act (77 P. S. §§ 701 and 710) and may consider sections 435(b) and 435(d) of the act (77 P. S. §§ 991(b) and 991(d)), as well as circumstances and sanctions set forth in § 131.13(j) and (m) (relating to continuances or postponement of hearings).

(d) Nothing in this chapter precludes the parties from participating in a voluntary mediation.

(e) Subsections (a)—(d) supersede 1 Pa. Code §§ 31.21—31.23, 35.111—35.116 and 35.188.

**§ 131.60. Resolution hearings.**

(a) A resolution hearing must be requested in writing.

(b) Counsel for either party, or any unrepresented party, may request a resolution hearing at any time after all parties are prepared to proceed within the time limits prescribed by the act and this rule for resolution hearings.

(c) If a petition is pending before a judge, the request for a resolution hearing must be directed to the assigned judge.

(d) If a petition is not pending before a judge, the request for a resolution hearing must be directed to the Judge Manager for the judge's office serving the county of the claimant's residence. If the claimant resides outside of this Commonwealth, the request must be directed to the Judge Manager for the judge's office most proximate to the claimant's residence. The Judge Manager will assign a judge to conduct the resolution hearing.

(e) The assigned judge's office will schedule the resolution hearing within 14 business days of receiving the request for a resolution hearing.

(f) The Judge Manager may reassign any case from one judge to another to ensure compliance with the resolution hearing requirements of sections 401 and 401.1 of the act (77 P. S. §§ 701 and 710). The Judge Manager will notify both judges of the reassignment.

(g) The judge conducting the resolution hearing will require proof that a petition has been filed with the Bureau under § 131.11 (relating to filing, service and proof of service), and will make the proof a part of the record. Upon receiving the proof, the judge shall proceed with the hearing and circulate a final decision within 5 business days of the hearing.

(h) The assigned judge need not comply with the procedures in this rule if any party is unable to proceed within the time limits established by the act for resolution hearings.

(i) Subsections (a)—(h) supersede 1 Pa. Code §§ 31.21—31.23, 35.48—35.51, 35.111—35.116, 35.185, 35.201—35.207 and 35.226.

**EXCHANGE OF INFORMATION AND  
DEPOSITIONS AND DISCOVERY**

**§ 131.66. Admissibility of oral depositions.**

(a) Oral depositions taken in accordance with §§ 131.62—131.65 or upon waiver of the formal requirements of those sections by agreement of all parties, will be admissible at the time of hearing or by mail if allowed by the judge in the same manner as if the deponent appeared before the judge and testified.

(b) Objections shall be made and the basis for the objections stated at the time of the taking of the depositions. Only objections which are identified in a separate writing, introduced prior to the close of the evidentiary record, as close of the record is specified in § 131.101(c)—(e) (relating to briefs, findings of fact and close of record), and stating the specific nature of the objections and the pages where they appear in the deposition or the exhibits to which they refer will be preserved for ruling. Objections not so preserved are waived.

(c) Subsections (a) and (b) supersede 1 Pa. Code §§ 35.126, 35.151, 35.161 and 35.162.

**DECISIONS**

**§ 131.111. Decisions of judges.**

(a) Following the close of the evidentiary record and the hearing of oral argument, if any, as provided in § 131.102(a) (relating to oral argument), the judge will issue a written decision, which will contain findings of fact, conclusions of law and an appropriate order based upon the entire evidentiary record.

(b) The decision of the judge will be a final order, subject to correction or amendment under § 131.112 (relating to correction or amendment of decision), or appeal.

(c) In any petition which may result in the payment of a monetary award subject to 23 Pa.C.S. § 4308.1 (relating to collection of overdue support from monetary awards), a decision will not be issued until the claimant provides to the judge a written statement signed by the claimant and made subject to 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities), including:

(1) The claimant's full name, mailing address, date of birth and Social Security number.

(2) Whether there is an outstanding child support order against the claimant, and if so, whether payments are current or in arrears.

(3) Written documentation of arrears from the Pennsylvania Child Support Enforcement System web site, or, if no arrears exist, written documentation from the web site indicating no arrears.

(d) Subsections (a)—(c) supersede 1 Pa. Code §§ 35.190, 35.201—35.207, 35.225, 35.226 and 35.241.

[Pa.B. Doc. No. 09-1925. Filed for public inspection October 16, 2009, 9:00 a.m.]