

ADOPTED RULE WITH PREAMBLE TO BE SUBMITTED TO THE *TEXAS REGISTER*. THIS DOCUMENT WILL NOT HAVE ANY SUBSTANTIVE CHANGES BUT IS SUBJECT TO FORMATTING CHANGES AS REQUIRED BY THE *TEXAS REGISTER*.

Section 815.16 Appeals to Appeal Tribunals from Determinations.

The Texas Workforce Commission (Commission) adopts the amendment of §815.16, Appeals to Appeal Tribunals from Determinations, to Chapter 815, Unemployment Insurance, Subchapter B, Benefits, Claims and Appeals, as proposed in the August 22, 2003, issue of the *Texas Register* (28 TexReg 6799) with changes.

The adoption document is organized into three parts:

Part I. Purpose and Background.

Part II. Comment Summaries and Responses.

Part III. Amended Rule.

Part I. Purpose and Background.

A. Purpose. Texas Labor Code §212.101, V.T.C.A. authorizes the Commission to establish one or more impartial Appeal Tribunals to hear and decide disputed claims, if the establishment of these Appeal Tribunals is necessary to ensure prompt disposal of cases on appeal; accordingly, Appeal Tribunals were established. The purpose for amending the Rule 816.16 is to implement the provisions of Section 212.106 of the Texas Labor Code. Section 212.106 directs the Commission to develop procedures by which an Appeal Tribunal will conduct unemployment insurance telephone conference hearings.

B. Background: On June 20, 2003, Senate Bill 280 (SB 280), 78th Texas Legislature, Regular Session, was signed into law. SB 280 included Section 7A.02 that amended Chapter 212, Texas Labor Code entitled *Dispute Resolution* by adding §212.106. Section 212.106 entitled *Rules Regarding Hearings Conducted by Telephone Conference*, provides that "the Commission, by rule, shall develop procedures to ensure that an Appeal Tribunal make every effort in a hearing conducted by telephone conference under...[the Texas Unemployment Compensation Act] to obtain all relevant facts and evidence from the parties to the appeal." Amendments to Rule 815.16 are being adopted by the Commission. The amendment ensures that the current unemployment insurance rules reflect the requirements set out in §212.106.

In accordance with the requirements of federal law 42 USC §503 and 20 C.F.R. Part 650, the Commission instituted an impartial Appeal Tribunal to adjudicate appeals from initial determinations pertaining to the payment of unemployment insurance benefits to claimants and whether these benefits are charged to base period employer(s). The Commission promulgated rules governing the administration of the unemployment insurance benefits process including procedures for appealing Commission decisions and conducting the hearings. Commission Rule 815.15 defines who is a "Party of Interest" to an appeal. Commission Rule 815.16, addresses relevant aspects of the hearing procedure

applicable to telephone hearings and the responsibilities of an Appeal Tribunal. Commission Rule 815.18 provides for general rules for both the Appeal Tribunal and Commission level appeals. Rule 815.19 provides guidance for the conduct of unemployment fraud hearings. Commission Rule 815.32 defines when an appeal will be considered timely.

Coordination Activities. The Commission circulated the proposed rule to the Board chairs, members and executive directors, and the Texas Association of Workforce Boards Policy Committee (formerly known as the Workforce Leadership of Texas (WLT) Policy Committee). The U.S. Department of Labor (DOL) was sent a copy of the proposed rule for comment.

Part II. Comment Summaries and Responses.

The Commission received comments on the rule from the following: State Representative Scott Hochberg and Richard Levy on behalf of the Texas AFL-CIO. The commenters indicated their belief that more instructive language should be included in the proposed rule to ensure that all of the relevant evidence is received in the hearing. A summary of the comments and responses to the comments are as follows.

Comment: State Representative Scott Hochberg, the author of the language in SB 280, commented that he avoided the use of very prescriptive language in the statute to give the Commission some latitude in developing this program. However, he was concerned that the proposed revision did not give the Appeal Tribunals enough guidance. For instance, he suggested that the rule should ensure adequate record development. The rule should provide that the Appeal Tribunal has the responsibility to develop the record adequately to make sure the entire circumstances of the relevant issues involved in the case are discussed. The goal of the proceeding is complete fact-finding, not adherence to specific legal rules of procedure.

Response: The Commission appreciates the avoidance of use of very prescriptive language in the statute. The Commission has adopted hearing rules and maintains manuals including the Appeals Manual, Hearing Officer's Handbook and the Commission's Appeal's and Precedent Manual that describe hearing procedures to be used by the Appeal Tribunal. These documents reflect DOL requirements for fair hearing; they also enumerate the elements necessary for conducting quality hearings that are used in performance reviews of the Appeal Tribunals. DOL's Quality Appraisal requirements place a high level of responsibility on the Appeal Tribunal. Based on these directions, the Commission has the duty to ensure that the Appeal Tribunal adequately develops the hearing record concerning the relevant issues at the hearing. The Commission recognizes that one of the primary purposes of the administrative hearing is to complete fact-finding on the relevant issues in the case, while not maintaining unnecessarily strict levels of formality that precludes the parties from participating in the hearing. The directives from DOL are that these hearings are to be conducted as informal proceedings. These concepts must be balanced with the need to maintain order in the proceeding to ensure all parties have an opportunity to be heard. To reinforce these existing prescriptions, and to provide additional instructive language to ensure that the

hearing record is adequately developed by the hearing officer, the Commission is amending Rule 815.16(3)(A) to clearly state that it is the responsibility of the Appeal Tribunal to ensure that all relevant issues are thoroughly explored during the hearing. The amendment also provides that the Appeal Tribunal actively develop the record by asking questions necessary to obtain pertinent facts concerning events related to the issues in the hearing. In addition, the Commission will include language in its Notice of Hearing packet of information to the parties that advises them, in boldface, that the parties should treat the hearing as if it will be the only chance they will receive to explain their side of the situation.

Comment: Richard Levy, on behalf of the Texas AFL-CIO, commented that the proposed rule did not give enough guidance to the Appeal Tribunals, and more instructive language was needed to require the Appeal Tribunal to communicate to the parties the importance of bringing forth any relevant testimony. The rule should have provided that the Appeal Tribunal have the obligation to develop the record to ensure all relevant testimony was in the record. This obligation included attempting to contact potentially available witnesses during the hearing. The Appeal Tribunal should have been given the authority to continue the hearing to another date to obtain the testimony of additional witnesses. The rule should also have provided for the Appeal Tribunal to explain to the parties the relative weight of evidence between firsthand testimony, affidavits, and hearsay.

Response: The Commission refers Mr. Levy to the response to Representative Hochberg. In addition, the current version of the rule at 40 T.A.C. §815.16(4)(A) provides the Appeal Tribunal the authority to continue the hearing to another date to obtain the testimony of relevant witnesses. The Commission believes that the determinations regarding the quality of evidence is not a procedural matter appropriate for rule. Rather, it goes to the issue of the persuasiveness of the evidence, which is judged by the Appeal Tribunal and, subsequently, by the Commissioners. Under certain circumstances, the relative weight given to these types of evidence may vary, therefore, this is a matter best left to the discretion of the Appeal Tribunal who serves as the trier of fact in the proceeding. For these reasons the Commission disagrees with the portion of the comments not addressed by the amendment to the Rule.

Part III. Amended Rule.

The amended rule is adopted under the following sections:

Section 301.0015, Texas Labor Code, which provides that the Commission has the authority to adopt rules necessary to administer the Commission's policies, including rules necessary for the administration of Title 4, Texas Labor Code, relating to employment services and unemployment;

Section 212.101, Texas Labor Code, which provides that the Commission shall establish one or more impartial Appeal Tribunals to hear and decide disputed claims if the

establishment of those Appeal Tribunals is necessary to ensure prompt disposal of cases on appeal; and

Section 212.106, Texas Labor Code, which provides that the Commission by rule shall develop procedures to ensure that an Appeal Tribunal makes every effort in a hearing conducted by telephone conference to obtain all relevant facts and evidence from the parties to the appeal.

The adopted new rule affects Texas Labor Code, Title 4.

§815.16. Appeals to Appeal Tribunals from Determinations

A party of interest may appeal a determination to the appeal tribunal. Appeals shall be in accordance with the terms of this section, §815.15 of this chapter (relating to Parties with Appeal Rights), §815.17 of this chapter (relating to Appeals to the Commission from Decisions), and §815.18 of this chapter (relating to General Rules for Both Appeal Stages). As used in this section and in §815.17 and §815.18, the term "party" includes a person's or individual's representative. In this section, a reference to the term "supervisor of appeals" includes the supervisor's designee.

- (1) Presentation of appealed claims.
 - (A) A party appealing from a determination made by an examiner under the provisions of the Act, shall file an appeal by hand delivery, mail, common carrier, facsimile (fax) transmission, or other method approved by the Agency in writing. A written appeal that is sent to the Agency should be addressed to the Texas Workforce Commission, 101 East 15th Street, Austin, Texas, 78778-0001, or faxed to the number provided in the determination. A written appeal may be hand delivered to the Texas Workforce Commission, 101 East 15th Street, Austin, Texas 78778-0001, a local office of the Agency, or an agent state, or a workforce center or an office of a Board. The appeal should identify the determination being appealed, the basis for the appeal, the name of the party appealing, and the date of the appeal. The provisions of §815.32 of this chapter (relating to Timeliness) shall determine on what date the appeal was filed.
 - (B) Upon the scheduling of a hearing on an appeal or a petition to reopen, notice of the hearing shall be mailed to the parties at least five days before the date of the hearing. The notice shall identify the decision or determination appealed from and shall specify the time and date of the hearing, the party appealing, and the issue to be heard. If the hearing is an in-person hearing, the notice shall also specify the location of the hearing.
- (2) Disqualification of appeal tribunal. The essence of a fair hearing lies in the impartiality of the appeal tribunal. An appeal tribunal should be free not only of any personal interest or bias in the appeal before it, but also of any

reasonable suspicion of personal interest. No appeal tribunal shall participate in the hearing of an appeal in which that tribunal has a personal interest in the outcome of the appeal decision. The appeal tribunal may withdraw from a hearing to avoid the appearance of impropriety or partiality. Challenges to the impartiality of any appeal tribunal may be heard and decided by the supervisor of appeals.

(3) Hearing of appeal.

(A) Consistent with § 212.106 of the Act, All hearings shall be conducted informally and in a manner to ensure the substantial rights of the parties. All issues relevant to the appeal shall be considered and ruled upon. The parties to an appeal before an appeal tribunal may present evidence that may be material and relevant as determined by an appeal tribunal. The appeal tribunal shall examine parties and witnesses, if any, and may allow cross-examination to the extent the appeal tribunal deems necessary to afford the parties due process. The appeal tribunal, with or without notice to any of the parties, may take additional evidence that it deems necessary, provided that a party shall be given an opportunity to rebut the evidence if it is to be used against the party's interest.

- (i) In conducting a hearing, the appeal tribunal shall actively develop the record on the relevant circumstances leading to the separation for hearings involving the issue of work separation and, for hearings involving other issues, the relevant facts to resolve those issues. It is the responsibility of the appeal tribunal to ensure that all relevant issues are thoroughly explored at the hearing.
- (ii) The appeal tribunal shall ask any questions necessary to obtain pertinent facts concerning all events (such as job separation) that are at issue in the hearing.

(B) The parties to an appeal, with the consent of the appeal tribunal, may stipulate in writing the facts involved. The appeal tribunal may decide the appeal on the basis of a stipulation or, in its discretion, may set the appeal for hearing and take any additional evidence it deems necessary to enable it to determine the appeal.

(C) Hearings shall be conducted by telephone conference call unless the supervisor of appeals determines that an in-person hearing is necessary because a party with a physical impairment cannot effectively participate by telephone, because the nature of the evidence to be presented makes a hearing by telephone impractical, or because the supervisor of appeals otherwise determines that an in-person hearing is necessary. The rules and procedures in this chapter govern both in-person and telephone hearings. A party may request an in-person hearing by informally contacting, orally or in writing or by any other reasonable method of communication, the appeal tribunal or the

supervisor of appeals before the scheduled time of the hearing and presenting information to support the request. The supervisor of appeals has the discretion to determine whether the party's request for an in-person hearing will be granted.

- (4) Adjournment, continuance, and postponement of hearing.
 - (A) The appeal tribunal shall use its best judgment to determine when to grant a continuance or postponement of a hearing in order to secure all the evidence that is necessary and to be fair to the parties.
 - (B) Either prior to or during a hearing, an appeal tribunal, on its own motion or on the motion of a party of interest, may continue, adjourn, or postpone a hearing. The continuance, adjournment, or postponement shall not be for the purpose of delaying the proceeding and may be granted due to illness of the appellant, death in the immediate family of the appellant, or a pending criminal prosecution of the appellant. A continuance, adjournment or postponement may also be granted at the request of the appellant or appellee when there is a need for an interpreter, religious observance, jury duty, court appearance, active military duty, or other reasons approved by the supervisor of appeals. Prior to the hearing, requests for a continuance or a postponement of a hearing may be made informally, either orally or in writing, to the appeal tribunal designated to hear the appeal or to the supervisor of appeals.
- (5) Reopening of hearing before appeal tribunal.
 - (A) If a party fails to appear for a hearing, the appeal tribunal may hear and record the evidence of the party present and the witnesses, if any, and shall proceed to decide the appeal on the basis of the record unless there appears to be good reason for continuing the hearing. A copy of the decision shall be promptly mailed to the parties of interest with an explanation of the manner in which, and time within which a request for reopening may be submitted.
 - (B) A party of interest to the appeal who fails to appear at a hearing may, within 14 days from the date the decision is mailed, petition for a new hearing before the appeal tribunal in the manner set out in subsection (1)(A) of this section. The petition should identify the party requesting the reopening, the applicable decision of the appeal tribunal, the date of the petition, and explain the reason for the failure to appear. The provisions of §815.32 of this chapter (relating to Timeliness) shall determine on what date the petition was filed. The petition shall be granted if it appears to the appeal tribunal that the petitioner has shown good cause for the petitioner's failure to appear at the hearing. In the event that an appeal to the Commission is filed before the filing of the petition for reopening by the appeal tribunal, the appeal shall be referred to the Commission for review.

- (C) For purposes of this section, the term "appear" shall mean participation by a party or a party's representative in the proceeding. Actions that may be considered as participation include offering testimony, examining witnesses, or presenting oral argument. If the hearing is a telephone hearing, a party or a party's representative shall appear at a hearing by calling on the date and at the time of the hearing and participating in the hearing proceedings. If the hearing is an in-person hearing, a party or a party's representative shall appear by being at the location of the hearing on the date and at the time scheduled for the hearing and participating in the hearing proceedings. Mere submission of written documents, whether sworn or unsworn, or observation of the proceedings shall not constitute an appearance.
- (6) The determination of appeals.
- (A) As soon as possible following the conclusion of a hearing of an appeal, the appeal tribunal shall issue its findings of fact and decision with respect to the appeal. The decision shall be in writing and shall reflect the name of the appeal tribunal who conducted the hearing and who rendered the decision. In the decision, the appeal tribunal shall set forth findings of fact and conclusions of law, with respect to the matters on appeal, and the reasons for the decision. Copies of the decision shall be mailed by the appeal tribunal to the parties of interest to the appeal. Upon request, courtesy copies may be mailed to other parties to the appeal.
- (B) At any time during the 14-day period from the date a decision on an appeal is mailed, unless a party of interest has already appealed to the Commission, the appeal tribunal or the supervisor of appeals may assume continuing jurisdiction over the appeal for the purpose of reconsidering the issues on appeal and issuing a corrected decision. During the period in which continuing jurisdiction is assumed, the appeal tribunal, after notice to the parties, may take any additional evidence or secure any additional information it deems necessary to issue a decision.

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