

No. 2020-6425

**Official Order
of the
Texas Commissioner of Workers' Compensation**

Date: 08-06-2020

Subject Considered:

City of Irving
P.O. Box 152288
Irving, Texas 75015-2288

Consent Order
DWC Enforcement File No. 17143

General remarks and official action taken:

This is a consent order with City of Irving. The commissioner of the Texas Department of Insurance, Division of Workers' Compensation (DWC) considers whether DWC should take disciplinary action against City of Irving.

Waiver

City of Irving acknowledges that the Texas Labor Code and other applicable laws provide certain rights. City of Irving waives all of these rights, and any other procedural rights that apply, in consideration of the entry of this consent order.

Findings of Fact

1. City of Irving is a self-insured, governmental entity that provides workers' compensation benefits to its employees in accordance with Tex. Lab. Code Ch. 504.
2. City of Irving was classified as "average" tier in the 2009 Performance Based Oversight (PBO) assessment. City of Irving was not selected to be tiered in the 2007, 2010, 2012, 2014, 2016, or 2018 PBO assessments.

3. DWC reviewed two claims where City of Irving (hereinafter, to include its agents or representatives), in each claim, issued a *Notice of Denial of Compensability/Liability and Refusal to Pay Benefits* or Plain Language Notice-1 (PLN-1) after receiving a DWC Form-1, *Employer's First Report of Injury or Illness* (DWC-1) filed in accordance with the statutory presumption established under Tex. Gov't. Code § 607.055 (cancer presumption).

Claim # 1

4. City of Irving received the DWC-1 on [REDACTED], and issued the PLN-1 on [REDACTED].

Misrepresentations of the Reasons for Not Paying Benefits

5. City of Irving included in the PLN-1 the following assertions as reasons for refusing to pay benefits:
 - no medical evidence has been received that indicates damage or harm to the physical structure of the body resulted from work activities;
 - no medical evidence has been received that indicates a causal relationship between work activities and the diagnosis of prostate cancer; and
 - City of Irving is further relieved of liability because the injured employee made a knowing election of remedies to pursue treatment through his group health insurance.
6. City of Irving had minimal or no investigative support for these assertions and had not meaningfully considered these assertions at the time it issued the PLN-1.

Refusal to Pay Benefits Without Reasonable Grounds

7. City of Irving, at the time it issued the PLN-1, failed to establish any reasonable grounds for its refusal to pay benefits, as determined by the commissioner, because it did not have sufficient investigative support for any of its assertions in the PLN-1.

Failure to Process a Claim Promptly in a Reasonable and Prudent Manner

8. City of Irving was required or had a duty but failed to adequately investigate the applicability of the cancer presumption. Specifically, City of Irving:
- issued a PLN-1 within 13 days of receiving the DWC-1;
 - took little or no meaningful action in the claim with respect to the applicability of the cancer presumption during the 13 days that the claim was supposed to be under investigation;
 - issued a PLN-1 without having adequately investigated the injured employee's employment or medical history, acquiring a recorded statement or employment or medical records, or seeking expert medical opinions when necessary;
 - failed to adequately notate in the documentation of the adjuster's actions in the file (adjuster's notes) the investigative steps it took, if any, to investigate the applicability of the cancer presumption;
 - failed to adequately investigate or inquire as to whether or not the injured employee was claiming the cancer presumption to be applicable;
 - failed to provide the injured employee reasonable notice as to which elements of the applicability of the cancer presumption it was disputing, or failed to provide the injured employee reasonable notice and opportunity to produce evidence relevant to the disputed elements of the applicability of the cancer presumption; and
 - denied the applicability of the cancer presumption, without a supporting basis, when it otherwise should have applied.
9. City of Irving was required or had a duty but failed to adequately investigate compensability. Specifically, City of Irving:
- issued a PLN-1 within 13 days of receiving the DWC-1;
 - took little or no meaningful action in the claim with respect to compensability during the 13 days that the claim was supposed to be under investigation;
 - issued a PLN-1 without having adequately investigated the injured employee's employment or medical history, acquiring a recorded statement or employment or medical records, or seeking expert medical opinions when necessary;

- failed to adequately notate in the adjuster's notes the investigative steps it took, if any, to investigate compensability;
 - failed to provide the injured employee reasonable notice as to which elements or aspects of compensability it was disputing, or failed to provide the injured employee reasonable notice and opportunity to produce evidence relevant to the disputed elements or aspects of compensability; and
 - determined the claim not to be compensable without providing a supporting basis to rebut the applicability of the cancer presumption which, otherwise, should have applied.
10. City of Irving was required or had a duty but failed to adequately investigate its own reasons for denial. Specifically, City of Irving failed to adequately investigate each assertion it made in the PLN-1 that failed to establish reasonable grounds for its refusal to pay benefits.
11. City of Irving processed the claim imprudently or unreasonably each time it failed to adequately investigate an aspect of the claim that it was required or had a duty to investigate.

Claim # 2

12. City of Irving received the DWC-1 on [REDACTED], and issued the PLN-1 on [REDACTED].

Insufficient Notice of Refusal to Pay Benefits

13. City of Irving failed to explain in the PLN-1 why it determined that the cancer presumption did not apply.
14. City of Irving failed to describe in the PLN-1 the evidence it reviewed in making the determination that the cancer presumption did not apply.

Misrepresentations of the Reasons for Not Paying Benefits

15. City of Irving included in the PLN-1 the following assertions as reasons for refusing to pay benefits:

- City of Irving hasn't received medical evidence indicating a causal relationship between work activities and the diagnosis of prostate cancer or medical evidence indicating that damage or harm to the physical structure of the body resulted from work activities;
- City of Irving hasn't received evidence to substantiate the applicability of the cancer presumption per TEX. GOV'T CODE § 607.055; and
- City of Irving is further relieved of liability because the injured employee made a knowing election of remedies to pursue treatment through his group health insurance.

16. City of Irving had minimal or no investigative support for these assertions and had not meaningfully considered these assertions at the time it issued the PLN-1.

Refusal to Pay Benefits Without Reasonable Grounds

17. City of Irving, at the time it issued the PLN-1, failed to establish any reasonable grounds for its refusal to pay benefits, as determined by the commissioner, because it did not have sufficient investigative support for any of its assertions in the PLN-1.

Failure to Process a Claim Promptly in a Reasonable and Prudent Manner

18. City of Irving was required or had a duty but failed to adequately investigate the applicability of the cancer presumption. Specifically, City of Irving:

- issued a PLN-1 within 23 days of receiving the DWC-1;
- took little or no meaningful action in the claim with respect to the applicability of the cancer presumption during the 23 days that the claim was supposed to be under investigation;
- issued a PLN-1 without having adequately investigated the injured employee's employment or medical history, acquiring a recorded statement or employment or medical records, or seeking expert medical opinions when necessary;
- failed to adequately notate in the adjuster's notes the investigative steps it took, if any, to investigate the applicability of the cancer presumption;
- failed to adequately investigate or inquire as to whether or not the injured employee was claiming the cancer presumption to be applicable;

- failed to provide the injured employee reasonable notice as to which elements of the applicability of the cancer presumption it was disputing, or failed to provide the injured employee reasonable notice and opportunity to produce evidence relevant to the disputed elements of the applicability of the cancer presumption; and
 - denied the applicability of the cancer presumption, without a supporting basis, when it otherwise should have applied.
19. City of Irving was required or had a duty but failed to adequately investigate compensability. Specifically, City of Irving:
- issued a PLN-1 within 23 days of receiving the DWC-1;
 - took little or no meaningful action in the claim with respect to compensability during the 23 days that the claim was supposed to be under investigation;
 - issued a PLN-1 without having adequately investigated the injured employee's employment or medical history, acquiring a recorded statement or employment or medical records, or seeking expert medical opinions when necessary;
 - failed to adequately notate in the adjuster's notes the investigative steps it took, if any, to investigate compensability;
 - failed to provide the injured employee reasonable notice as to which elements or aspects of compensability it was disputing, or failed to provide the injured employee reasonable notice and opportunity to produce evidence relevant to the disputed elements or aspects of compensability; and
 - determined the claim not to be compensable without providing a supporting basis to rebut the applicability of the cancer presumption which, otherwise, should have applied.
20. City of Irving was required or had a duty but failed to adequately investigate its own reasons for denial. Specifically, City of Irving failed to adequately investigate each assertion it made in the PLN-1 that failed to establish reasonable grounds for its refusal to pay benefits.

21. City of Irving processed the claim imprudently or unreasonably each time it failed to adequately investigate an aspect of the claim that it was required or had a duty to investigate.

Assessment of Sanction

1. Reasonable and transparent claims processing decreases disputes in the Texas workers' compensation system, promotes payment of appropriate income and medical benefits, and ensures that each injured employee is treated with dignity and respect.
2. In assessing the sanction for this case, DWC fully considered the following factors in TEX. LAB. CODE § 415.021(c) and 28 TEX. ADMIN. CODE § 180.26(e):
 - the seriousness of the violation, including the nature, circumstances, consequences, extent, and gravity of the prohibited act;
 - the history and extent of previous administrative violations;
 - the violator's demonstration of good faith, including actions it took to rectify the consequences of the prohibited act;
 - the penalty necessary to deter future violations;
 - whether the administrative violation had a negative impact on the delivery of benefits to an injured employee;
 - the history of compliance with electronic data interchange requirements;
 - to the extent reasonable, the economic benefit resulting from the prohibited act; and
 - other matters that justice may require, including, but not limited to:
 - PBO assessments;
 - prompt and earnest actions to prevent future violations;
 - self-report of the violation;
 - the size of the company or practice;
 - the effect of a sanction on the availability of health care; and
 - evidence of heightened awareness of the legal duty to comply with the Texas Workers' Compensation Act and DWC rules.
3. DWC found the following factors in TEX. LAB. CODE § 415.021(c) and 28 TEX. ADMIN. CODE § 180.26(e) to be aggravating: the seriousness of the violation, including the nature, circumstances, consequences, extent, and gravity of the prohibited act; the penalty necessary to deter future violations; whether the administrative violation has negative impact on the delivery of benefits to an injured employee; and other

matters that justice may require, including the fact that the injured employees' claims arose from their employment with City of Irving as first responders.

4. DWC found the following factors in TEX. LAB. CODE § 415.021(c) and 28 TEX. ADMIN. CODE § 180.26(e) to be mitigating: other matters that justice may require, including the fact that City of Irving is a self-insured, governmental entity.
5. City of Irving acknowledges it communicated with DWC about the relevant statutes and rules it violated; the facts establish that the administrative violation occurred; and the proposed sanction is appropriate, including the factors DWC considered under TEX. LAB. CODE § 415.021(c) and 28 TEX. ADMIN. CODE § 180.26(e).
6. City of Irving acknowledges that, in assessing the sanction, DWC considered the factors in TEX. LAB. CODE § 415.021(c) and 28 TEX. ADMIN. CODE § 180.26(e).

Conclusions of Law

1. The commissioner has jurisdiction over this matter pursuant to TEX. LAB. CODE §§ 402.001, 402.00114, 402.00116, 402.00128, 414.002, 414.003, and 414.004.
2. The commissioner has the authority to dispose of this case informally pursuant to TEX. GOV'T CODE § 2001.056, TEX. LAB. CODE §§ 401.021 and 402.00128(b)(7), and 28 TEX. ADMIN. CODE § 180.26(h).
3. City of Irving has knowingly and voluntarily waived all procedural rights to which it may have been entitled regarding the entry of this order, including, but not limited to, issuance and service of notice of intent to institute disciplinary action, notice of hearing, a public hearing, a proposal for decision, a rehearing by the commissioner, and judicial review.
4. Pursuant to TEX. LAB. CODE § 415.021, the commissioner may assess an administrative penalty against a person who commits an administrative violation.
5. Pursuant to TEX. LAB. CODE § 415.002(a)(22), an insurance carrier or its representative commits an administrative violation if that person fails to comply with a provision of the Texas Workers' Compensation Act.

6. Pursuant to TEX. LAB. CODE § 409.022(d)(1) and (2),¹ if an insurance carrier's notice of refusal to pay benefits under TEX. LAB. CODE § 409.021 is sent in response to a claim for compensation resulting from an emergency medical technician's or a firefighter's disability or death for which a presumption is claimed to be applicable under Subchapter B, Chapter 607, Government Code, the notice must include a statement by the carrier that explains why the carrier determined a presumption under that subchapter does not apply to the claim for compensation and describes the evidence that the carrier reviewed in making that determination.
7. City of Irving violated TEX. LAB. CODE § 415.002(a)(22) when it failed to explain in a PLN-1 why it determined that the cancer presumption did not apply.
8. City of Irving violated TEX. LAB. CODE § 415.002(a)(22) when it failed to describe in a PLN-1 the evidence it reviewed in making the determination the cancer presumption did not apply.
9. Pursuant to TEX. LAB. CODE § 415.002(a)(13), an insurance carrier or its representative commits an administrative violation if that person misrepresents the reason for not paying benefits.
10. City of Irving violated TEX. LAB. CODE § 415.002(a)(13) each time it included in the PLN-1 an assertion as a reason for refusing to pay benefits that it had minimal or no investigative support for and that it had not meaningfully considered.
11. Pursuant to TEX. LAB. CODE § 409.022(c), an insurance carrier commits an administrative violation if the insurance carrier does not have reasonable grounds for a refusal to pay benefits, as determined by the commissioner.
12. City of Irving violated TEX. LAB. CODE § 409.022(c) each time it issued a PLN-1 that failed to establish any reasonable grounds for its refusal to pay benefits, as determined by the commissioner.
13. Pursuant to TEX. LAB. CODE § 415.002(a)(11), an insurance carrier or its representative commits an administrative violation if that person fails to process claims promptly in a reasonable and prudent manner.

¹ Prior to amendments effective June 10, 2019, adding subsection (d-1) and amendments effective September 1, 2019, adding "peace officer" as first responder eligible for the cancer presumption.

14. City of Irving violated TEX. LAB. CODE § 415.002(a)(11) each time it failed to adequately investigate an aspect of the claim that it was required or had a duty to investigate.

Order

It is ordered that City of Irving must pay an administrative penalty of \$60,000 within 30 days from the date of this order. City of Irving must pay the administrative penalty by cashier's check or money order and make it payable to the "State of Texas." Mail the administrative penalty to the Texas Department of Insurance, Attn: DWC Enforcement Section, MC 9999, P.O. Box 149104, Austin, Texas 78714-9104.



Cassie Brown
Commissioner of Workers' Compensation

Approved Form and Content:



Glen Imes
Staff Attorney, Enforcement
Compliance and Investigations
Division of Workers' Compensation

COMMISSIONER'S ORDER
City of Irving
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AFFIDAVIT

STATE OF TEXAS
COUNTY OF DALLAS

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Before me, the undersigned authority, personally appeared the affiant, who being by me duly sworn, deposed as follows:

"My name is Richard H. Stopfer. I am of sound mind, capable of making this statement, and have personal knowledge of these facts which are true and correct.

I hold the office of Mayor of City of Irving, and am the authorized representative of City of Irving. I am duly authorized by said organization to execute this statement.

City of Irving waives rights provided by the Texas Labor Code and other applicable laws, and acknowledges the jurisdiction of the Texas commissioner of workers' compensation.

City of Irving is voluntarily entering into this consent order. City of Irving consents to the issuance and service of this consent order."



Affiant

SWORN TO AND SUBSCRIBED before me on July 15, 2020.
(NOTARY SEAL)

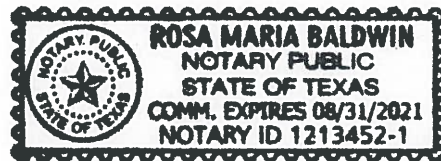


Signature of Notary Public

ROSA MARIA BALDWIN

Printed Name of Notary Public

My Commission Expires: 08/31/21



Confidential Information Redacted
Texas Labor Code §§402.083 & 402.092