

No. **2021-7042**

Confidential Information Redacted
Texas Labor Code §§402.083 and 402.092

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

Date: 11/4/2021

Subject Considered:

Zurich American Insurance Company
1299 Zurich Way
Schaumburg, Illinois 60196-5870

Consent Order
DWC Enforcement File No. 22967

General remarks and official action taken:

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

Waiver

Zurich American acknowledges that the Texas Labor Code and other applicable laws provide certain rights. Zurich American 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. Zurich American holds a certificate of authority issued by the Texas Department of Insurance to transact the business of insurance pursuant to TEX. INS. CODE §§ 801.051-801.053 and is licensed to write multiple lines of insurance in Texas, including workers' compensation/employers' liability insurance.
2. American Zurich was classified as "average" tier in the 2007, 2009, 2010, 2012, 2014, 2016, 2018, and 2020 Performance Based Oversight (PBO) assessments.

Failure to Properly Evaluate a Modified Offer of Employment or Bona Fide Offer of Employment in the Form and Manner Prescribed by DWC

3. On [REDACTED] the employer and injured employee signed an offer determining a return-to-work plan for the injured employee.
4. On [REDACTED] Gallagher Bassett Services (GBS), on behalf of Zurich American, issued a *Notice of Denial and Refusal to Pay Benefits* (PLN-1) denying benefits to the injured employee, stating that "the claimant was working a BFOE [Bona Fide Offer of Employment] at the time he was terminated for cause."
5. Zurich American improperly evaluated the offer determining a return-to-work plan because the offer did not:
 - include a copy of the relevant work status report;
 - describe the physical restrictions of the job in relation to the employee's injury; and
 - describe the days per week the injured employee was expected to work.

Therefore, the offer did not contain the minimum information necessary for the factfinder to make assessment about the physical restrictions and time requirements of the job.

Misrepresenting the Reasons for Not Paying Benefits

6. On [REDACTED] GBS, on behalf of Zurich American, issued a *Notice of Denial and Refusal to Pay Benefits* (PLN-1) denying benefits to the injured employee, stating that "the claimant was working a BFOE [Bona Fide Offer of Employment] at the time he was terminated for cause."
7. The [REDACTED] offer between the employer and the injured employee was neither an offer of modified duty nor BFOE, therefore it was an improper misrepresentation to deny on those grounds.

Assessment of Sanction

1. Compliance with DWC rules regarding offers of employment and required forms is imperative to minimize disputes and resolve them promptly and fairly. In addition, failure to follow such rules in the form and manner DWC prescribes is harmful to injured employees and the Texas workers' compensation system.
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 history and extent of previous administrative violations; the penalty necessary to deter future violations; and other matters that justice may require.

4. DWC found the following factors in TEX. LAB. CODE § 415.021(c) and 28 TEX. ADMIN. CODE § 180.26(e) to be **mitigating**: the penalty necessary to deter future violations and other matters that justice may require.
5. Zurich American 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. Zurich American 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, and 402.00128.
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)(6)-(7), and 28 TEX. ADMIN. CODE § 180.26(h) and (i).
3. Zurich American 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)(11), an insurance carrier or its representative commits an administrative violation each time it fails to process claims promptly in a reasonable and prudent manner.
6. Pursuant to TEX. LAB. CODE § 415.002(a)(13), an insurance carrier or its representative commits an administrative violation each time it misrepresents the reasons for not paying benefits or for terminating or reducing the payment of benefits.

7. Pursuant to TEX. LAB. CODE § 415.002(a)(20), an insurance carrier or its representative commits an administrative violation each time it violates a DWC rule.
8. Pursuant to TEX. LAB. CODE § 415.002(a)(22), an insurance carrier or its representative commits an administrative violation each time it fails to comply with a provision of the Texas Workers' Compensation Act.
9. 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.
10. Pursuant to TEX. ADMIN. CODE § 124.2(a) and (d), an insurance carrier must notify DWC and the claimant of actions taken on or events occurring in a claim as required by this title. The insurance carrier shall notify DWC and the claimant of a denial of a claim based on non-compensability or lack of coverage in accordance with this section and as otherwise provided by this title.
11. Pursuant to TEX. ADMIN. CODE § 124.2(f), notification to the claimant as required by subsections (d) and (e) of this section requires the insurance carrier to use plain language notices with language and content prescribed by DWC. These notices must provide a full and complete statement describing the insurance carrier's action and its reason(s) for such action. The statement must contain sufficient claim-specific substantive information to enable the employee/legal beneficiary to understand the insurance carrier's position or action taken on the claim.
12. Pursuant to TEX. ADMIN. CODE § 124.3(a), upon receipt of written notice of injury, the insurance carrier must conduct an investigation relating to the compensability of the injury, the insurance carrier's liability for the injury, and the accrual of benefits.
13. Pursuant to 28 TEX. ADMIN. CODE § 129.6(c), an employer's offer of modified duty must be made to the employee in writing and in the form and manner prescribed by DWC. A copy of the Work Status Report on which the offer is being based must be included with the offer as well as the following information:
 - the location the employee will be working;
 - the schedule the employee will be working;
 - the wages the employee will be paid;

- a description of the physical and time requirements that the position will entail; and
 - a statement that the employer will only assign tasks consistent with the employee's physical abilities, knowledge, and skills and will provide training if necessary.
14. Pursuant to 28 TEX. ADMIN. CODE § 129.6(d)(2)(B) and (C), an insurance carrier may deem an offer of modified duty to be a bona fide offer of employment if it is consistent with the doctor's certification of the employee's work abilities according to 28 TEX. ADMIN. CODE § 129.6(f) and the offer is communicated to the employee in writing, in the form and manner DWC prescribes and includes all the information required by 28 TEX. ADMIN. CODE § 129.6(c).
15. Zurich American violated TEX. LAB. CODE §§ 409.022(c), 415.002(11), (13), (20), and (22), when it improperly evaluated an incomplete return-to-work agreement as a BFOE and misrepresented the reasons for its denial on a PLN-1.

Order

It is ordered that Zurich American Insurance Company must pay an administrative penalty of \$2,000 within 30 days from the date of this order. Zurich American Insurance Company must pay the administrative penalty by company check, 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 AO-9999, P.O. Box 12030, Austin, Texas 78711-2030.



Dan Paschal, J.D.
Deputy Commissioner, Policy & Customer Services
TDI, Division of Workers' Compensation

Approved Form and Content:



Mackenzie Arthur
Staff Attorney, Enforcement
Compliance and Investigations
TDI, Division of Workers' Compensation

Unsworn Declaration

STATE OF IL

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COUNTY OF Cook

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Pursuant to the TEX. CIV. PRAC. & REM. CODE § 132.001(a), (b), and (d), my name is Doug Meyers. I hold the position of Claims Chief Operating Officer and am the authorized representative of Zurich American Insurance Company. My business address is:

1299 Zurich Way, Schaumburg, Cook, IL, 60196.

(Street)

(City)

(County)

(State)

(ZIP Code)

I am executing this declaration as part of my assigned duties and responsibilities. I declare under penalty of perjury that the facts stated in this document are true and correct.

Douglas P. Meyers

Declarant

Executed on September 2, 2021

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