

TITLE 28. INSURANCE

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

CHAPTER 116: GENERAL PROVISIONS – SUBSEQUENT INJURY FUND

Title 28 Texas Administrative Code (TAC) §116.11

1. INTRODUCTION. The commissioner of workers' compensation (commissioner), Texas Department of Insurance, Division of Workers' Compensation (DWC) adopts amendments to 28 TAC §116.11. The change replaces "hearing officer" with "administrative law judge." The amendments are adopted without changes to the proposed text published in the November 2, 2018, issue of the *Texas Register* (43 TexReg 7312). The public comment period ended on December 3, 2018. No public hearing was requested.

2. BACKGROUND AND PURPOSE. House Bill (HB) 2111, enacted by the 85th Texas Legislature, Regular Session, replaced all references to "hearing officer" in the Texas Workers' Compensation Act with "administrative law judge." These amendments make conforming changes to DWC's rules.

3. SUMMARY OF COMMENTS AND AGENCY RESPONSE

General: Commenter expressed support for the proposal.

DWC Response: DWC appreciates the supportive comment.

4. NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL

For: Office of Injured Employee Counsel

For, with changes: None

Against: None

Neither for nor against: None

5. STATUTORY AUTHORITY. The amendment is adopted under the authority of Labor Code §§402.00111, 402.00116, 402.00128, and 402.061.

Labor Code §402.00111 states that the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority, under the Texas Workers' Compensation Act.

Labor Code §402.00116 states that the commissioner of workers' compensation is the division's chief executive and administrative officer and shall administer and enforce the Texas Workers' Compensation Act, other workers' compensation laws of this state, and other laws granting jurisdiction to or applicable to the division or the commissioner of workers' compensation.

Labor Code §402.00128 states that the commissioner of workers' compensation shall conduct the daily operations of the division and otherwise implement division policy and, among other functions, may delegate; assess and enforce penalties; and enter appropriate orders.

Labor Code §402.061 states that the commissioner shall adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act.

The adopted amendments affect the Texas Workers' Compensation Act, Texas Labor Code, Title 5, Subtitle A.

6. TEXT.

§116.11. Request for Reimbursement from the Subsequent Injury Fund

(a) An insurance carrier may request:

(1) reimbursement from the Subsequent Injury Fund (SIF), pursuant to Labor Code §403.006(b)(2), for an overpayment of income, death, or medical benefits when the insurance carrier has made an unrecoupable overpayment pursuant to decision of an administrative law judge or the appeals panel or an interlocutory order, and that decision or order is reversed or modified by final arbitration, order, or decision of the commissioner, State Office of Administrative Hearings, or a court of last resort;

(2) reimbursement from the SIF pursuant to Labor Code §403.007(d) for death benefits paid to the SIF before a legal beneficiary was determined to be entitled to receive death benefits;

(3) for a compensable injury that occurs on or after July 1, 2002, reimbursement from the SIF for the amount of income benefits paid to an injured employee attributable to multiple employment and paid pursuant to Labor Code §408.042;

(4) for a compensable injury that occurs on or after September 1, 2007, reimbursement from the SIF for the amount of income, death benefits, or a combination paid to an injured employee or a legal beneficiary attributable to multiple employment and paid pursuant to Labor Code §408.042;

(5) reimbursement from the SIF, pursuant to Labor Code §408.0041(f) and (f-1), for an overpayment of benefits made by the insurance carrier based on the opinion

of the designated doctor if that opinion is reversed or modified by a final arbitration award or a final order or decision of the commissioner or a court; or

(6) reimbursement from the SIF made in accordance with rules adopted by the commissioner pursuant to Labor Code §413.0141. For purposes of this subsection only, an injury is determined not to be compensable following:

(A) The final decision of the commissioner or the judgment of the court of last resort; or

(B) A claimant's failure to respond within one year of a timely dispute of compensability filed by an insurance carrier. In this instance only, the effective date of the determination of non compensability is one year from the date the dispute is filed with the division by the insurance carrier.

(i) A determination under this paragraph does not constitute final adjudication. It does not preclude a party from pursuing their claim through the division's dispute resolution process and it does not permit a health care provider to pursue a private claim against the claimant.

(ii) If the claim is later determined to be compensable, the insurance carrier shall reimburse the SIF for any initial pharmaceutical payment which the SIF previously reimbursed to the insurance carrier. The insurance carrier's reimbursement of the SIF shall be paid within the timeframe the insurance carrier has to comply with the agreement, decision and order, or other judgment which found the claim to be compensable.

(b) The amount of reimbursement that the insurance carrier may be entitled to is equal to the amount of unrecoupable overpayments paid and does not include any amounts the insurance carrier overpaid voluntarily or as a result of its own errors. An unrecoupable overpayment of income or death benefits for the purpose of reimbursement from the SIF only includes those benefits that were overpaid by the insurance carrier pursuant to an interlocutory order, a designated doctor opinion or decision which were finally determined to be not owed and which, in the case of an overpayment of income or death benefits to the injured employee or legal beneficiary, were not recoverable or convertible from other income or death benefits.

(c) Requests for reimbursement attributable to subsection (a)(1) of this section, insurance carrier claims of benefit overpayments made under an interlocutory order or decision of the commissioner that is later reversed or modified by final arbitration, order, decision of the commissioner, the State Office of Administrative Hearings, or court of last resort shall be filed with the SIF administrator in writing and include:

(1) a claim-specific summary of the reason the insurance carrier is seeking reimbursement and the total amount of reimbursement requested;

(2) a detailed payment record showing the dates of payments, the amounts of the payments, purpose of payments, the payees, the periods of benefits paid, all plain language notices (PLNs) regarding the payment of benefits, all certifications of maximum medical improvement, all assignments of impairment rating and documentation that demonstrates that the overpayment was unrecoupable as described in subsection (b) of this section, if applicable;

(3) the name, address, and federal employer identification number of the payee for any reimbursement that may be due;

(4) copies of all relevant orders and decisions (Benefit Review Conferences, Interlocutory Orders, Contested Case Hearing Decisions & Orders, Appeals Panel Decisions, and Court orders) regarding the payment for which reimbursement is being requested along with an indication of which document is the final decision on the matter;

(5) copies of all relevant reports and DWC forms filed by the employer with the insurance carrier; and

(6) if the request is based on an overpayment of medical benefits, copies of all medical bills and preauthorization request documents associated with the overpayment as well as all relevant Independent Review Organization (IRO) decisions, fee dispute decisions and Contested Case Hearing Decisions and Orders, Appeals Panel Decisions, and court orders regarding medical disputes.

(d) Requests for reimbursement pursuant to subsection (a)(2) of this section, related to a reimbursement of death benefits paid to the SIF prior to a legal beneficiary being determined to be entitled to receive death benefits, shall be filed with the SIF administrator in writing and include:

(1) a claim-specific summary of the reason the insurance carrier is seeking reimbursement and the total amount of reimbursement requested;

(2) a detailed payment record showing the dates of payments, the amounts of the payments, purpose of payments, the payees, and the periods of benefits paid;

(3) the name, address, and federal employer identification number of the payee for any reimbursement that may be due;

(4) the documentation the legal beneficiary provided with the claim for death benefits in accordance with §122.100 of this title (relating to Claim for Death Benefits); and

(5) if applicable, the final award of the commissioner, or the final judgment of a court of competent jurisdiction determining that the legal beneficiary is entitled to the death benefits.

(e) Requests for reimbursement pursuant to subsection (a)(3) or (4) of this section, regarding multiple employment, shall be submitted on an annual basis for the payments made during the same or previous fiscal year. The fiscal year begins each September 1st and ends on August 31st of the next calendar year. For example, insurance carrier payments made during the fiscal year from September 1, 2009 through August 31, 2010, must be submitted by August 31, 2011. Any claims for insurance carrier payments related to multiple employment that are not submitted within the required timeframe will not be reviewed for reimbursement. These requests shall be filed with the SIF administrator in writing and include:

(1) a claim-specific summary of the reason the insurance carrier is seeking reimbursement and the total amount of reimbursement requested;

(2) a detailed payment record showing the dates of payments, the amounts of the payments, purpose of payments, the payees, and the periods of benefits paid, all PLNs regarding the payment of benefits, as well as documentation that shows that the overpayment was unrecoupable as described in subsection (b) of this section, if applicable;

(3) the name, address, and federal employer identification number of the payee for any reimbursement that may be due;

(4) information documenting the injured employee's average weekly wage amounts paid from all non claim employment held at the time of the work related injury pursuant to §122.5 of this title (relating to Employee's Multiple Employment Wage Statement); and

(5) information documenting the injured employee's average weekly wage amounts paid based on employment with the claim employer.

(f) Requests for reimbursement attributable to subsection (a)(5) of this section, insurance carrier claims of benefit overpayments made pursuant to a designated doctor opinion that is later reversed or modified by a final arbitration award or a final order or decision of the commissioner or a court, shall be filed with the SIF administrator in writing and include:

(1) a claim-specific summary of the reason the insurance carrier is seeking reimbursement and the total amount of reimbursement requested;

(2) a detailed payment record showing the dates of payments, the amounts of the payments, purpose of payments, the payees, and the periods of benefits

paid; PLNs regarding the payment of benefits and all certifications of maximum medical improvement and all assignments of impairment rating;

(3) the name, address, and federal employer identification number of the payee for any reimbursement that may be due;

(4) copies of all relevant designated doctor opinions (including responses to letters of clarification) and orders and decisions (IRO decisions, Interlocutory Orders, Contested Case Hearing Decisions and Orders, arbitration awards, Appeals Panel Decisions, and Court orders) regarding the designated doctor opinion and the payment, made pursuant to the designated doctor opinion for which reimbursement is being requested along with an indication of which document is the final decision on the matter;

(5) copies of all relevant reports and DWC forms filed by the employer with the insurance carrier; and

(6) for an overpayment of medical benefits, copies of all medical bills and preauthorization request documents associated with the overpayment.

(g) Requests for reimbursement attributable to initial pharmaceutical coverage shall be submitted in the same or in the following fiscal year after a determination that the injury is not compensable in accordance with subsection (a)(6) of this section. The fiscal year begins each September 1st and ends on August 31st of the next calendar year. For example, if an injury is determined to be not compensable during the fiscal year from September 1, 2009 through August 31, 2010, the request for reimbursement pursuant to Labor Code §413.0141 must be submitted by August 31, 2011. Any claims for insurance carrier payments related to initial pharmaceutical coverage that are not

submitted within the required timeframe will not be reviewed for reimbursement. The requests shall be filed with the SIF administrator in writing and include:

(1) a claim-specific summary of the reason the insurance carrier is seeking reimbursement and the total amount of reimbursement requested;

(2) a detailed payment record showing the dates of payments, specifically including documentation of payment of initial pharmaceutical coverage (i.e., first seven days following the date of injury); the amounts of the payments, the purpose of payments, the payees, and the periods of benefits paid;

(3) the name, address, and federal employer identification number of the payee for any reimbursement that may be due;

(4) documentation that the pharmaceutical services were provided during the first seven days following the date of injury, not counting the actual date the injury occurred, which is to include a description of the prescribed pharmaceutical service(s); and

(5) documentation of the final resolution of any dispute which determines the injury is not compensable either from the commissioner or court of last resort, or documentation of a claimant's failure to respond in accordance with subsection (a)(6)(B) of this section.

(h) An insurance carrier seeking reimbursement from the SIF shall timely provide all documentation reasonably required by the SIF administrator to determine entitlement to reimbursement or payment from the SIF and the amount of reimbursement to which the insurance carrier is entitled. The insurance carrier must also provide notice to the SIF

of any relevant pending dispute, litigation or other information that may affect the request for reimbursement.

7. CERTIFICATION. The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Issued at Austin, Texas, on December 17, 2018.

X

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

The commissioner adopts amendments to §116.11.

Cassie Brown
Commissioner of Workers' Compensation

COMMISSIONER'S ORDER NO. _____

ATTEST:

X _____

Nicholas Canaday III

General Counsel

Texas Department of Insurance, Division of Workers' Compensation

COMMISSIONER'S ORDER NO. _____