CHAPTER 116. GENERAL PROVISIONS--SUBSEQUENT INJURY FUND
28 TAC §116.11

INTRODUCTION. The Texas Department of Insurance, Division of Workers' Compensation (DWC) adopts amendments to 28 Texas Administrative Code §116.11, relating to Request for Reimbursement from the Subsequent Injury Fund (SIF). The amendments are adopted with changes to the proposed text as published in the December 4, 2020, issue of the *Texas Register* (45 TexReg 8736). Two references to Texas Administrative Code sections were added. The rule will be republished.

REASONED JUSTIFICATION. Section 116.11 applies to an insurance carrier's request to the SIF for reimbursement under Texas Labor Code §403.006. The amended section is necessary to update DWC's method for receiving SIF requests to increase the security of protected health information and increase SIF processing efficiency.

The previous version of §116.11 required that an insurance carrier file its reimbursement requests with the SIF administrator in writing, but the rule did not require the use of DWC forms when requesting reimbursement and specify the manner of delivery of the SIF request. DWC amends §116.11 to require electronic submission of SIF requests in the form and manner DWC prescribes to improve the security of protected private claim data contained in the SIF requests.

SIF staff developed DWC forms for each type of SIF request. To increase DWC's efficiency in processing requests, DWC adopts amendments to §116.11 to require insurance carriers to electronically submit all §116.11(a)(1)-(5) requests using DWC Form-095 through DWC Form-098. Subsections (c) and (f) require electronic submission and use of DWC Form-095, *Overturned Order or Designated Doctor Opinion*. Subsection (d) requires electronic submission and use of DWC Form-096, *Refund of Death Benefits*.

Subsection (e) requires electronic submission and use of DWC Form-097, *Multiple Employment*. Subsection (g) requires electronic submission and use of DWC Form-098, *Pharmaceutical*. Each form instructs how the SIF reimbursement request may be electronically submitted to DWC.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Commenters: DWC received one written comment, and no oral comments. The commenter in support of the proposal is the Office of Injured Employee Counsel (OIEC). DWC received no comments to change the proposal or against the proposal.

Comment on §116.11. One commenter supports the amendments to increase protection of confidential injured employee health information and increase efficiency in the SIF reimbursement process.

Agency Response to Comment on §116.11. DWC appreciates the comment in support of the amendments to §116.11.

CHAPTER 116: GENERAL PROVISIONS--SUBSEQUENT INJURY FUND

28 TAC §116.11

STATUTORY AUTHORITY. The commissioner of workers' compensation adopts the amendments to 28 TAC §116.11 under Labor Code §§402.00111, 402.00116, 402.061, 401.024, 403.006, 408.0041, and 408.042.

Labor Code §402.00111(a) states that, except as otherwise provided, the commissioner of workers' compensation will exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code.

Labor Code §402.00116 provides that the commissioner of workers' compensation will administer and enforce this title, other Texas workers' compensation laws, and other laws granting jurisdiction to or applicable to DWC or the commissioner.

Labor Code §402.061 provides that the commissioner of workers' compensation will adopt rules as necessary to implement and enforce Title 5 of the Labor Code.

Labor Code §401.024 defines electronic submission and provides that the commissioner of workers' compensation by rule may permit or require use of electronic transmission for transmitting any authorized or required data.

Labor Code §403.006 describes the SIF account and outlines reimbursement liability.

Labor Code §408.0041 provides that an insurance carrier is entitled to apply for and receive reimbursement from the SIF for any overpayment of benefits that were paid based on the opinion of the designated doctor if that opinion is reversed or modified by a final order of the division or a court.

Labor Code §408.042 provides that an insurance carrier is entitled to apply for and receive reimbursement from the SIF for the amount of income and death benefits paid to an injured worker that are based on wages paid from a noninjury employer.

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) under 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 the decision of an administrative law judge, 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 under 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 based on multiple employment and paid under 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 based on multiple employment and paid under Labor Code §408.042;

(5) reimbursement from the SIF, under 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 under 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 noncompensability is one year from the date the insurance carrier filed the dispute with the division.

(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 must reimburse the SIF for any initial pharmaceutical payment that the SIF previously reimbursed to the insurance carrier. The insurance carrier's reimbursement of the SIF must be paid within the timeframe the insurance carrier has to comply with the agreement, decision and order, or other judgment that found the claim to be compensable.

(b) The amount of reimbursement 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's opinion, or a 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) To request reimbursement under subsection (a)(1) of this section for 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, an insurance carrier must:

(1) submit the request electronically in the form and manner prescribed by

the division;

(2) provide a claim-specific summary of the reason the insurance carrier is seeking reimbursement and the total amount of reimbursement requested, including how it was calculated;

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

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

(5) provide copies of all relevant orders and decisions (benefit review conference reports, interlocutory orders, contested case hearing decisions and orders, Appeals Panel decisions, and court orders) relating to the requested reimbursement and show which document is the final decision on the matter;

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

(7) provide copies of all medical bills, preauthorization request documents, relevant independent review organization (IRO) decisions, medical fee dispute decisions, contested case hearing decisions and orders, Appeals Panel decisions, and court orders on medical disputes associated with the overpayment, if the request is based on an overpayment of medical benefits.

(d) To request reimbursement under subsection (a)(2) of this section for reimbursement of death benefits paid to the SIF before a legal beneficiary is determined

to be entitled to receive death benefits, an insurance carrier must:

(1) submit the request electronically in the form and manner prescribed by the division;

(2) provide a claim-specific summary of the reason the insurance carrier is seeking reimbursement and the total amount of reimbursement requested, including how it was calculated;

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

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

(5) provide the documentation the legal beneficiary submitted with the claim for death benefits under §122.100 of this title (relating to Claim for Death Benefits); and

(6) provide 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) To request reimbursement under subsections (a)(3) or (4) of this section regarding multiple employment, the requester must submit the request on an annual basis for the payments made during the same or previous fiscal year. The fiscal year begins each September 1 and ends on August 31 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. To request reimbursement under subsections (a)(3) or (4) of this section, an insurance carrier must:

(1) submit the request electronically in the form and manner prescribed by the division;

(2) provide a claim-specific summary of the reason the insurance carrier is seeking reimbursement and the total amount of reimbursement requested, including how it was calculated;

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

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

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

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

(f) To request reimbursement under subsection (a)(5) of this section, for insurance carrier claims of benefit overpayments made pursuant to a designated doctor's opinion that is later reversed or modified by a final arbitration award or a final order or decision of the commissioner or a court, an insurance carrier must:

(1) submit the request electronically in the form and manner prescribed by the division;

(2) provide a claim-specific summary of the reason the insurance carrier is seeking reimbursement and the total amount of reimbursement requested, including how

it was calculated;

(3) provide a detailed payment record showing the dates and amounts of payments, payees, type of benefits and periods of benefits paid, PLNs about the payment of benefits, and all certifications of maximum medical improvement and assignments of impairment rating;

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

(5) provide copies of all relevant designated doctors' 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) relating to the designated doctor's opinion and the payment made pursuant to the designated doctor's opinion for which reimbursement is being requested, and indicate which document is the final decision on the matter;

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

(7) provide copies of all medical bills and preauthorization request documents associated with an overpayment of medical benefits.

(g) To request reimbursement under subsection (a)(6) of this section regarding initial pharmaceutical coverage, a requester must submit the request in the same or following fiscal year after a determination that the injury is not compensable. The fiscal year begins each September 1 and ends on August 31 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 under 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. An insurance carrier must:

(1) submit the request electronically in the form and manner prescribed by the division;

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

(3) provide a detailed payment record showing the dates of payments, including documentation on dates of payment of initial pharmaceutical coverage (i.e., during the first seven days following the date of injury), payment amounts, and payees;

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

(5) provide 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, and identify the prescribed pharmaceutical services; and

(6) provide documentation of:

(A) the final resolution of any dispute either from the commissioner or court of last resort that determines the injury is not compensable; or

(B) a claimant's failure to respond in accordance with subsection (a)(6)(B) of this section.

(h) The prescribed forms under this section are on the division's website at www.tdi.texas.gov/wc/index.html. An insurance carrier seeking reimbursement from the SIF must timely provide to the SIF administrator by electronic transmission, as that term is used in §102.5(h) of this title (relating to General Rules for Written Communications to and from the Commission), all forms and 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.

CERTIFICATION. This agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas, on January 22, 2021.

Kara Mace
Deputy Commissioner for Legal Services
TDI, Division of Workers' Compensation

The commissioner adopts amended 28 TAC §116.11.

Cassie Brown
Commissioner
TDI, Division of Workers' Compensation

Commissioner's Order No. 2021-6664.