

TITLE 28. INSURANCE
PART 2. TEXAS DEPARTMENT OF INSURANCE,
DIVISION OF WORKERS' COMPENSATION
CHAPTER 130: IMPAIRMENT AND SUPPLEMENTAL INCOME BENEFITS
Title 28 TAC §§130.10, 130.101, 130.102

1. INTRODUCTION. The Texas Department of Insurance, Division of Workers' Compensation (division) adopts the repeal of 28 Texas Administrative Code (TAC) §130.10, *Commission Review of Employment Status during the Impairment Income Benefits Period*, and amendments to §130.101, *Definitions*, and §130.102, *Eligibility for Supplemental Income Benefits; Amount*. The repeal and amended sections are adopted without changes to the proposed text published in the January 26, 2018, issue of the *Texas Register* (43 TexReg 443). The public comment period closed on February 26, 2018, and the division did not receive any comments. No request for a public hearing was submitted to the division.

In accordance with Government Code §2001.033, the division's reasoned justification for these rules is set out in this order, which includes the preamble. The following paragraphs include a detailed section-by-section description and reasoned justification for the repeal of §130.10 and of all amendments to §130.101 and §130.102.

2. REASONED JUSTIFICATION. In House Bill (HB) 2112, the 85th legislature amended or repealed certain reporting and notification requirements throughout the Labor Code. The bill included the repeal of Labor Code §408.086, *Division Determination of Extended Unemployment or Underemployment*, which required the commissioner to determine, at least annually, whether any unemployment or

underemployment was the direct result of the employee's impairment. Additionally, HB 2112 repealed Labor Code §409.012(d), which permitted a private provider of vocational rehabilitation services to register with the division. As a result of the repeal of Labor Code §409.012(d), the division is no longer maintaining a Registry of Private Providers of Vocational Rehabilitation Services, and removed the registry from the division website. The adopted amendments to §130.101 and §130.102, as well as the repeal of §130.10, are necessary to implement these legislative changes, which became effective June 9th, 2017.

Section 130.10 addresses **Commission Review of Employment Status during the Impairment Income Benefits Period**. Section 130.10 requires the division to review the employment status of injured employees with an impairment rating of 15% or greater to determine whether the employee is unemployed or underemployed, and, if so, whether that unemployment or underemployment is a direct result of the impairment. The division adopts the repeal of §130.10 to implement the legislative repeal of Labor Code §408.086 in HB 2112.

Section 130.101 addresses **Definitions**. Section 130.101(8) defines a "vocational rehabilitation program" as any program, provided by the Texas Department of Assistive and Rehabilitative Services (DARS), a comparable federally-funded rehabilitation program in another state, or a private provider of vocational rehabilitation services that is included in the Registry of Private Providers of Vocational Rehabilitation Services, for the provision of vocational rehabilitation services designed to assist the injured employee to return to work that includes a vocational rehabilitation plan. The

division amended §130.101(8) to replace “Texas Department of Assistive and Rehabilitative Services (DARS)” with “Texas Workforce Commission (TWC)” and “DARS” with “TWC” to reflect a change in the state agency tasked with providing vocational rehabilitation services to injured employees. The division also amended §130.101(8) to delete “that is included in the Registry of Private Providers of Vocational Rehabilitation Services” because the division no longer maintains a registry.

Section 130.102 addresses **Eligibility for Supplemental Income Benefits; Amount.** Section 130.102(i) permits an insurance carrier to provide vocational rehabilitation services as long as the provider is registered on the division’s Registry of Private Providers of Vocational Rehabilitation Services. In addition, subsection (i) states that an insurance carrier is responsible for reasonable travel expenses if the employee is required to travel in excess of 20 miles one way to obtain the vocational rehabilitation services. The division amended §130.102(i) to delete “[T]he insurance carrier may provide vocational rehabilitation services through a provider of such services provided that the individual is registered as a private provider in accordance with §136.2 of this title (relating to Registry of Private Providers of Vocational Rehabilitation Services) and that the.” This amendment is necessary to reflect that, as a result of HB 2112 and the repeal of Labor Code §409.012(d), the division no longer maintains a registry of private providers. However, Labor Code §408.150 continues to authorize an insurance carrier to provide services through a private provider of vocational rehabilitation services. Thus, amended subsection (i) remains to inform system participants of the insurance carrier’s responsibility for reasonable travel when the injured employee is required to travel in

excess of 20 miles one way to obtain vocational rehabilitation services from a private provider. The division also replaced “will be” with “is” and added “[T]he” and “from a private provider” to the remaining sentence to help ensure this responsibility is stated in a clear and concise manner. The division emphasizes that amendments to Chapter 130, including §130.102, do not change the eligibility criteria or work search requirements for supplemental income benefits.

3. SUMMARY OF COMMENTS AND AGENCY RESPONSE.

The division did not receive comments on the proposed repeal or amendments.

4. STATUTORY AUTHORITY.

§130.10

Existing §130.10 is repealed under the authority of Labor Code §402.00111, *Relationship Between Commissioner of Insurance and Commissioner of Workers' Compensation, Separation of Authority, Rulemaking*; and Labor Code §402.061, *Adoption of Rules*.

Labor Code §402.00111(a) states that, except as otherwise provided, the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code. Labor Code §402.061 authorizes the commissioner to adopt rules as necessary for the implementation and enforcement of the Act.

5. TEXT.

§130.10. Commission Review of Employment Status during the Impairment Income Benefits Period.

§130.101. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Application for Supplemental Income Benefits--The Division form required pursuant to Labor Code §408.143(b) containing the following information:

(A) a statement, with supporting payroll documentation, that the employee has earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury;

(B) the amount of the employee's wages during the qualifying period;

(C) a statement, with supporting documentation, that the employee has complied with Labor Code §408.1415 and this subchapter; and

(D) for self-employed individuals, copies of all supporting documentation to establish the amount of self-employment income earned during the qualifying period and any other pertinent documentation of efforts to establish or maintain a self-employed enterprise during the qualifying period.

(2) First Quarter--The 13 weeks beginning on the day after the last day of the impairment income benefits period.

(3) Impairment income benefits period--The number of weeks computed under Labor Code §408.121 for which the injured employee is entitled to receive impairment income benefits, starting with the day after the date the employee reached maximum medical improvement.

(4) Qualifying period--A period of time for which the employee's activities and wages are reviewed to determine eligibility for supplemental income benefits. The qualifying period ends on the 14th day before the beginning date of the quarter and consists of the 13 previous consecutive weeks. In accordance with §130.100(a) of this title (relating to Applicability), a qualifying period that begins on or after July 1, 2009, is subject to the provisions of this subchapter, and a qualifying period that begins prior to July 1, 2009, remains subject to the rules in effect on the date the qualifying period begins.

(5) Reviewing authority--The person who reviews the Application for Supplemental Income Benefits and other information to make the determination of entitlement or non-entitlement to supplemental income benefits including Division staff for the first quarter determination and the insurance adjuster for subsequent quarter determinations.

(6) Subsequent Quarter--A 13-week period beginning on the day after the last day of a previous quarter. The term subsequent quarter applies to all quarters after the first quarter.

(7) Vocational Rehabilitation Services--Services which can reasonably be expected to benefit the employee in terms of employability including, but not limited to, identification of the employee's physical and vocational abilities, training, physical or mental restoration, vocational assessment, transferable skills assessment, development of and modifications to an individualized vocational rehabilitation plan, or other services necessary to enable an injured employee to become employed in an occupation that is

reasonably consistent with his or her strengths, physical abilities including ability to travel, educational abilities, interest, and pre-injury income level.

(8) Vocational rehabilitation program--Any program, provided by the Texas Workforce Commission (TWC), a comparable federally-funded rehabilitation program in another state under the Rehabilitation Act of 1973, as amended, or a private provider of vocational rehabilitation services, for the provision of vocational rehabilitation services designed to assist the injured employee to return to work that includes a vocational rehabilitation plan. A vocational rehabilitation plan, also known as an Individual Plan for Employment at TWC, includes, at a minimum, an employment goal, any intermediate goals, a description of the services to be provided or arranged, the start and end dates of the described services, and the injured employee's responsibilities for the successful completion of the plan.

(9) Wages--All forms of remuneration payable for personal services rendered during the qualifying period as defined in Labor Code §401.011(43), including the wages of a bona fide offer of employment which was not accepted.

§130.102. Eligibility for Supplemental Income Benefits; Amount.

(a) General. An injured employee is not entitled to supplemental income benefits until the expiration of the impairment income benefit period.

(b) Eligibility Criteria. An injured employee who has an impairment rating of 15% or greater, who has not commuted any impairment income benefits, who has not permanently lost entitlement to supplemental income benefits and who has completed

and filed an Application for Supplemental Income Benefits in accordance with this subchapter is eligible to receive supplemental income benefits if, during the qualifying period, the injured employee:

(1) has earned less than 80% of the injured employee's average weekly wage as a direct result of the impairment from the compensable injury; and

(2) has demonstrated an active effort to obtain employment in accordance with Labor Code §408.1415 and this section.

(c) Direct Result. An injured employee has earned less than 80% of the injured employee's average weekly wage as a direct result of the impairment from the compensable injury if the impairment from the compensable injury is a cause of the reduced earnings.

(d) Work Search Requirements.

(1) An injured employee demonstrates an active effort to obtain employment by meeting at least one or any combination of the following work search requirements each week during the entire qualifying period:

(A) has returned to work in a position which is commensurate with the injured employee's ability to work;

(B) has actively participated in a vocational rehabilitation program as defined in §130.101 of this title (relating to Definitions);

(C) has actively participated in work search efforts conducted through the Texas Workforce Commission (TWC);

(D) has performed active work search efforts documented by job applications; or

(E) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.

(2) An injured employee who has not met at least one of the work search requirements in any week during the qualifying period is not entitled to SIBs unless the injured employee can demonstrate that he or she had reasonable grounds for failing to comply with the work search requirements under this section.

(e) Vocational Rehabilitation. As provided in subsection (d)(1)(B) of this section, regarding active participation in a vocational rehabilitation program, an injured employee shall provide documentation sufficient to establish that he or she has actively participated in a vocational rehabilitation program during the qualifying period.

(f) Work Search Efforts. As provided in subsection (d)(1)(C) and (D) of this section regarding active participation in work search efforts and active work search efforts, an injured employee shall provide documentation sufficient to establish that he or she has, each week during the qualifying period, made the minimum number of job applications and or work search contacts consistent with the work search contacts established by TWC which are required for unemployment compensation in the injured employee's county of residence pursuant to the TWC Local Workforce Development Board requirements. If the required number of work search contacts changes during a

qualifying period, the lesser number of work search contacts shall be the required minimum number of contacts for that period. If residing out of state, the minimum number of work search contacts required will be the number required by the public employment service in accordance with applicable unemployment compensation laws for the injured employee's place of residence.

(g) Calculation of amount. Subject to any approved reduction for the effects of contribution, the monthly supplemental income benefit payment is calculated quarterly as follows:

- (1) multiply the injured employee's average weekly wage by 80% (.80);
- (2) add the injured employee's wages for all 13 weeks of the qualifying period;
- (3) divide the total wages by 13;
- (4) subtract this figure from the result of paragraph (1) of this subsection;
- (5) multiply the difference by 80% (.80);
- (6) if the resulting amount is greater than the maximum rate under the Act, Labor Code, §408.061, use the maximum rate; and
- (7) multiply the result by 4.34821.

(h) Maximum Medical Improvement and Impairment Rating Disputes. If there is no pending dispute regarding the date of maximum medical improvement or the impairment rating prior to the expiration of the first quarter, the date of maximum medical improvement and the impairment rating shall be final and binding.

(i) Services Provided by a Carrier Through a Private Provider of Vocational Rehabilitation Services. The insurance carrier is responsible for reasonable travel expenses incurred by the injured employee if the employee is required to travel in excess of 20 miles one way from the injured employee's residence to obtain vocational rehabilitation services from a private provider.

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 _____, 2018.

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

The commissioner adopts the repeal of §130.10 and amendments to §§130.101 and 130.102.

W. Ryan Brannan
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. _____