

TITLE 28. INSURANCE

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

CHAPTER 126. GENERAL PROVISIONS APPLICABLE TO ALL BENEFITS

28 TAC §126.15 and §126.16

ADOPTION

1. INTRODUCTION.

The Commissioner of Workers' Compensation (Commissioner), Texas Department of Insurance, Division of Workers' Compensation (Division) adopts new §126.15 and §126.16 of this title (relating to Procedures for Resolution of Underpayments of Income Benefits, and Procedures for Recouping Overpayments of Income Benefits).

These rules are necessary to implement statutory provisions of House Bill 2089, enacted by the 82nd Legislature, Regular Session, effective September 1, 2011 (HB 2089).

The Division adopts §126.15 and §126.16 with changes to the proposed text published in the October 28, 2011 issue of the *Texas Register* (36 TexReg 7264). The changes, which are more fully discussed below, are in response to written comment provided on the rules as proposed. The changes, however, do not materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

In accordance with Government Code §2001.033, the Division's reasoned justification for the rules is set out in this order, which includes the preamble. The preamble contains a summary of the factual basis for the rules, a summary of the comments received from interested parties, the names of entities that commented and whether they were in support of or in opposition to the adoption of the

rules, and the reasons why the Division agrees or disagrees with the comments and recommendations.

The Division held two informal work group meetings on September 1, 2011 and September 12, 2011 for the purpose of formulating rule language for these rules required by HB 2089. These meetings were open to the public, and workers' compensation system participants at these meetings assisted the Division in developing the rule language in the proposal. Subsequently, the Division published an informal draft of the rules on the Division's website from September 21, 2011 until October 5, 2011. The Division received eight informal comments. The Division made several changes to the proposal as a result of the informal comments.

The Division also prepared and posted on the Division's website an informally proposed sample notice, *Notice of Underpayment of Income Benefits*, injured employees may use under §126.15(c) when providing written notice to an insurance carrier of an underpayment in income benefits. The Division accepted informal comments until November 28, 2011.

The sample notice is not mandatory and injured employees are free to use their own notices that meet the requirements of §126.15(c).

After the publication of the proposal in the Texas Register, the Commissioner conducted a public hearing on the proposed new rules on November 14, 2011. Two individuals provided public testimony at this hearing. The public comment period for the proposed new rules ended on November 28, 2011. The Division received seven written public comments. Several changes were made to the rule language as proposed as a result of the comments. One nonsubstantive clarifying change was made in §125.15(g) to change "denies" to "disagrees" for consistency in terminology.

The Division is adopting elsewhere in this issue of the *Texas Register* amendments to §128.1 of this title (relating to Average Weekly Wage: General Provisions). Those amendments are also

necessary to implement provisions of HB 2089. Section 128.1 of this title as a whole relates to the calculation of average weekly wage. Recoupment of overpayments of income benefits and correction of underpayments of income benefits for any reason, including a miscalculation of the average weekly wage, are best addressed in independent rules in order to avoid confusion by system participants.

2. REASONED JUSTIFICATION.

Adopted §126.15 and §126.16 are necessary to implement certain amendments in House Bill 2089, enacted by the 82nd Legislature, Regular Session, effective September 1, 2011, that affect underpayment and overpayment of income benefits.

HB 2089 enacted Labor Code §408.0815, which relates to the resolution of overpayment or underpayment of income benefits under the Texas workers' compensation program. Labor Code §408.0815(a) requires the Commissioner by rule to establish a procedure by which an insurance carrier (1) may recoup an overpayment of income benefits from future income benefit payments that are not reimbursable under Labor Code §410.209; and (2) shall pay an underpayment of income benefits, including interest on accrued but unpaid benefits.

Labor Code §408.0815(b) requires the procedures adopted pursuant to subsection (a) to include: (1) a process by which an injured employee may notify the insurance carrier of an underpayment; (2) the time frame and methodology by which an insurance carrier shall pay to an injured employee an underpayment; (3) a process by which an insurance carrier shall notify an injured employee of an overpayment of income benefits; (4) the time frame and methodology by which an insurance carrier may recoup an overpayment through the reduction of a future income benefit payment; and (5) a method for coordinating overpayments that may be recouped from future income benefits and reimbursements described by Labor Code §410.209.

Labor Code §408.0815(c) provides that the procedure for recouping overpayments under subsection (a)(1) must take into consideration the cause of the overpayment and minimize the financial hardship to the injured employee. However, this does not require continuation of an overpayment of income benefits due to a miscalculation of an injured employee's average weekly wage. Under §128.1 of this title, an insurance carrier shall make adjustments in the injured employee's average weekly wage and begin payment based on the adjusted average weekly wage not later than the first payment due at least seven days following the date the carrier received new average weekly wage information for the injured employee.

Previous Division rule §128.1 of this title established procedures for recouping overpayments of income benefits in certain cases. Previous §128.1(e) and (f) of this title permitted insurance carriers to recoup an overpayment of income benefits when the overpayment resulted from a miscalculation of the injured employee's average weekly wage. The procedures in §128.1(e) and (f) of this title did not provide for recoupment of an overpayment made for reasons other than average weekly wage miscalculations. These adopted rules are based on, expand on, and supersede the procedures previously established.

3. HOW THE SECTIONS WILL FUNCTION.

§126.15. Procedures for Resolution of Underpayments of Income Benefits.

Adopted §126.15 establishes the procedure by which an insurance carrier shall pay an underpayment of income benefits, including interest on accrued but unpaid benefits.

Adopted §126.15(a) clarifies that this procedure will apply only to insurance carrier underpayment of income benefits. It does not apply to insurance carrier underpayment of death, burial, or medical benefits. This subsection is consistent with the definition of "income benefit" as that

term is defined in Labor Code §401.011. This subsection also states that this section does not apply to redesignation of income benefits. This provision was added in response to comment on §126.16.

Adopted §126.15(b) provides that an insurance carrier shall pay an underpayment plus interest to the injured employee within seven days of its determination if the insurance carrier determines on its own that an underpayment of income benefits has occurred. This provision is necessary in order to establish the timeframe and methodology by which an insurance carrier will pay an underpayment in cases where an insurance carrier discovers that it has underpaid income benefits.

Adopted §126.15(c) provides that, if an injured employee determines that the injured employee has received less than the correct amount owed in income benefits, and the injured employee wishes to resolve the underpayment under this section, the injured employee must notify the insurance carrier in writing to request the additional amount. The notice must include an explanation and information that supports the injured employee's determination of the underpayment. This subsection is necessary in order to establish a procedure by which an injured employee may notify the insurance carrier of an underpayment in income benefits as required by Labor Code §408.0815(b)(1). In response to a comment, language was added to clarify that the written notice requirement only applies to this section.

As previously stated, the Division has prepared a sample notice that injured employees may use to notify insurance carriers of an underpayment.

Adopted §126.15(d) provides that, if the insurance carrier agrees with the injured employee that there has been an underpayment of income benefits, the insurance carrier shall pay the full amount of the underpayment with interest on accrued but unpaid benefits within seven days of receipt of the notice from the injured employee. This provision is necessary in order to establish the

time frame and methodology the insurance carrier must follow when an injured employee notifies the insurance carrier of the underpayment and the insurance carrier agrees there has been an underpayment.

Adopted §126.15(e) provides for dispute resolution by specifying that, if the insurance carrier disagrees that there has been an underpayment of income benefits, the insurance carrier must, within seven days of receipt of the notice from the injured employee, provide the injured employee with written notice of its determination. The insurance carrier notice must include the reasons for the insurance carrier's determination, and a statement that the injured employee may request dispute resolution through the dispute resolution processes outlined in Chapters 140 - 144 and 147 of this title (relating to Dispute Resolution), including expedited dispute resolution. This subsection is necessary in order to ensure that the injured employee is promptly notified by the insurance carrier when the insurance carrier disagrees that there has been an underpayment of income benefits. It is also necessary to ensure that the injured employee is informed of his or her right to seek dispute resolution.

Adopted §126.15(f) sets forth that the insurance carrier must provide notice to the injured employee and the Division of any change in the payment of an injured employee's income benefits in accordance with the requirements of §124.2 of this title (relating to Carrier Reporting and Notification Requirements). This subsection is necessary in order to ensure that both the injured employee and the Division have up-to-date and accurate information regarding the amount of income benefits received by the injured employee.

Adopted §126.15(g) provides for dispute resolution by specifying that, if an insurance carrier denies that there has been an underpayment of income benefits, the injured employee may request dispute resolution. This subsection is necessary in order to clarify that a dispute over whether there

has been an underpayment of income benefits may be resolved in the Division's dispute resolution process.

Adopted §126.15(h) provides that this rule does not affect the Division's authority to identify and take action on underpayments on its own motion. This provision is necessary in order to clarify that this rule will not prevent the Division from exercising any authority provided by the Act or Division rules when it identifies or otherwise becomes aware of any underpayment of income benefits.

§126.16. *Procedures for Recouping Overpayments of Income Benefits*

Adopted §126.16 establishes the procedure by which an insurance carrier may recoup an overpayment of income benefits from future income benefits payments. Recoupment under this section is separate and distinct from reimbursement from the Subsequent Injury Fund (SIF). Nothing in this section creates an entitlement to seek reimbursement from the SIF. Reimbursement from the SIF is governed by Labor Code §§403.006, 408.0041, 410.209 and applicable Division rules.

Adopted §126.16(a) clarifies that this section applies only to insurance carrier overpayment of income benefits. It does not apply to insurance carrier overpayment of death, burial, or medical benefits. This provision is consistent with the definition of "income benefit" in Labor Code §401.011(25). Subsection (a) also provides that this section will not apply to redesignation of income benefits. Provisions regarding redesignation of income benefits were originally proposed in a subsection (i). However, in response to comment, subsection (i) was removed and the provisions regarding redesignation proposed in that subsection were moved to subsection (a). Those provisions were also changed in response to comment. Finally, subsection (a) also provides that this section will not apply to recovery of fraudulently denied or obtained benefits under Labor Code §415.008. This provision was also added in response to comment.

Adopted §126.16(b) establishes the procedure by which an insurance carrier may recoup overpayments from future income benefit payments. Adopted subsection (b)(1) requires an insurance carrier to provide the injured employee with written notice when it will begin recouping overpayment of income benefits. Adopted subsection (b)(1) also specifies that the notice must be in plain language and in English or Spanish, as appropriate. Subsection (b)(1) also specifies what information must be included in this notice to the injured employee, and provides that the insurance carrier may not begin recoupment of the overpayment earlier than the second income benefit payment made after the written notice has been sent to the injured employee. Adopted subsection (b)(1) is necessary in order to establish a procedure by which the insurance carrier will notify the injured employee of an overpayment in income benefits and the time frame and methodology by which an insurance carrier may recoup an overpayment of income benefits.

Adopted §126.16(b)(2) and (3) sets out what percentage of future income benefits payable to the injured employee the insurance carrier may withhold in order to recoup an overpayment of income benefits. If the injured employee's income benefits are not concurrently being reduced to pay approved attorney's fees or to recoup a Division approved advance, the insurance carrier may recoup the overpayment in an amount not to exceed 25% of the income benefit payment due to the injured employee. If the injured employee's income benefits are concurrently being reduced to pay approved attorney's fees or to recoup a Division approved advance, the insurance carrier may recoup the overpayment in an amount not to exceed 10% of the income benefit payment due to the injured employee. These provisions are necessary in order to establish the methodology by which an insurance carrier may recoup an overpayment of income benefits from future income benefits.

Adopted §126.16(c) provides that if the insurance carrier wishes to recoup an overpayment in an amount greater than the 10% or 25% of income benefits permitted by subsection (b)(2) and (3),

the insurance carrier must attempt to enter into a written agreement with the injured employee and, if unable to do so, may request dispute resolution. Adopted subsection (c) also provides that if the injured employee wishes to provide for recoupment of an overpayment in an amount less than the percentage chosen by the insurance carrier, the injured employee must attempt to enter into a written agreement with the insurance carrier and, if unable to do so, request dispute resolution. These provisions are necessary because they establish a methodology that allows insurance carriers and injured employees to agree upon the recoupment rate the insurance carrier may use for recoupment.

Adopted §126.16(d) provides for dispute resolution when the insurance carrier and injured employee cannot agree on a recoupment rate. This adopted subsection provides that in determining whether to approve an increase or decrease in the recoupment rate, the Division must consider the cause of the overpayment and minimize the financial hardship that may reasonably be created for the injured employee. This provision is necessary to provide an opportunity to consider the cause of the overpayment and the financial hardship to the injured employee when determining the recoupment rate the insurance carrier may use to recoup overpayments.

Adopted §126.16(e) provides that the insurance carrier must provide notice to the injured employee and the Division of any change in the payment of an injured employee's income benefits. The insurance carrier's notice to the injured employee also must identify the amount that was overpaid. This subsection is necessary in order to ensure that both the injured employee and the Division has up-to-date and accurate information regarding the amount of income benefits received by the injured employee.

Adopted §126.16(f) provides that this section does not create an entitlement for an insurance carrier to seek reimbursement from the SIF except as provided by Labor Code §§403.006, 408.0041, 410.209, and applicable Division rules. This subsection is necessary in order to clarify that this rule

does not govern reimbursements from the SIF. Reimbursement by the SIF is governed by Labor Code §§403.006, 408.0041, 410.209, and applicable Division rules.

Adopted §126.16(g) states that, if an injured employee does not agree that the injured employee has received an overpayment of income benefits, the injured employee may request dispute resolution. This subsection is necessary in order to clarify that a dispute over whether there has been an overpayment of income benefits may be resolved in the Division's dispute resolution process.

Adopted §126.16(h) provides that this section does not affect the Division's authority to identify and take action on overpayments on its own motion. This provision is necessary in order to clarify that this rule will not prevent the Division from exercising any authority provided by the Act or Division rules when it identifies or otherwise becomes aware of any overpayment of income benefits.

4. SUMMARY OF COMMENTS AND AGENCY RESPONSES.

COMMENT: Several commenters state their support for these rules. A commenter states that the proposed rules track the legislative intent of HB 2089 and reflect the work of Division staff and system participants who met twice to negotiate the rules. The commenter voiced appreciation for the work of system participants and Division staff in the modified rulemaking negotiations. A commenter states the formal proposal is within the Division's rulemaking authority and appears to provide for reasonable implementation of HB 2089. A commenter states it supports the Division's proposed approach to both the underpayment and overpayment process as generally consistent with the intent of HB 2089. A commenter states it generally supports the proposed rules. A commenter states that the proposed rules will implement the intent of HB 2089 and opines that they are fair and a testament and a tribute to how the system works.

AGENCY RESPONSE: The Division appreciates the supportive comments.

COMMENT: A commenter states that the issue of the procedure outlining how to take into consideration the cause and financial hardship was discussed “quite a bit” by the work group and was “thoroughly hashed out in both work group meetings.” The commenter explains that the procedure has been in place for about a decade and the 10 and the 25 percent already take into account the financial hardship and “no one has had any complaints.” Furthermore, the commenter clarifies that if a carrier seeks to recoup anything above either one of those levels depending on what’s involved in the claim, then there is Division involvement through dispute resolution level.

AGENCY RESPONSE: The Division agrees with commenter. The percentages have been in place under §128.1 of this title (relating to Average Weekly Wage: General Provisions) since 2002. Section 126.16(b) outlines the process and amounts for standard recoupment if the carrier determines there has been an overpayment and seeks recoupment. Section 126.16(c) provides that if the insurance carrier wishes to recoup an overpayment in an amount greater than the 10 or 25 percent of income benefits permitted by §126.16(b), the insurance carrier must attempt to enter into a written agreement with the injured employee and, if unable to do so, may request dispute resolution outlined in Chapters 140-144 and 147 of this title (relating to Dispute Resolution).

§126.15

COMMENT: A commenter provides a hypothetical situation in which the insurance carrier denies disability. The injured employee pursues dispute resolution. The Division issues a Contested Case Hearing Decision and Order in favor of the injured employee. The Decision and Order is not appealed and becomes final. The insurance carrier refuses to pay income benefits as required. The injured employee seeks judicial action under Labor Code §410.208 to enforce the order of the

Division. The insurance carrier then moves to abate the proceeding citing §126.15 because the injured employee has not exhausted his administrative remedies. The commenter questions whether the employee must go back through the administrative process under §126.15 before proceeding forward with the §410.208 claim. The commenter suggests adding the following to §126.15(h): "This section does not affect the claimant's ability to pursue judicial remedies for an underpayment pursuant to Texas Labor Code §410.208."

AGENCY RESPONSE: The Division agrees to provide additional clarification. It was not the intent of the Division in proposed new §126.15 to require an injured employee to utilize the procedures in that rule prior to pursuing a remedy authorized by Labor Code §410.208 as described by commenter, or any other remedy available under the Texas Workers' Compensation Act or other Division rules. The Division therefore has modified the language in this rule to clarify the Division's intent.

Specifically, the Division modified the first sentence in §126.15(c) to state "if an injured employee determines that the injured employee has received less than the correct amount owed in income benefits *and the injured employee wishes to resolve the underpayment under this section*, the injured employee must notify the insurance carrier in writing to request the additional amount." (italics added). However, if a party does not comply with a Division order, the opposing party should notify the Division immediately so that it may investigate possible enforcement action for noncompliance.

COMMENT: A commenter agrees with the insurance carrier having seven days from receipt of information or determination of an underpayment to make the additional benefits payment. The commenter stated that they appreciate the Division clarifying a previously undefined payment deadline in these situations.

AGENCY RESPONSE: The Division appreciates the supportive comment.

§126.15(a) and §126.16(a)

COMMENT: A commenter states that these rules should apply to death benefits as well as income benefits and that a procedure for correcting errors in payments of death benefits should be added to these rules.

AGENCY RESPONSE: The Division disagrees and declines to make the change. First, House Bill 2089 and the supporting bill analysis speaks only about income benefits. Death benefits are excluded in the definition of income benefits in Labor Code §401.011(25). Second, the Division held two informal work group meetings with system participants representing injured employees and insurance carriers to address House Bill 2089 and develop rule language and procedures. During the work group meeting of September 1, 2011, the moderator raised the issue of applicability and whether the procedures for resolution of underpayment and procedures for recouping overpayments would only apply to income benefits and not apply to death, burial, or medical benefits. There was consensus that the procedures would only apply to income benefits.

§126.16(b)

COMMENT: A commenter states that this section should not apply to Labor Code §415.008(c), relating to Fraudulently Obtaining or Denying Benefits; Administrative Violation. The commenter suggested the following language be added to the rule: "This section does not apply to repayments pursuant to §415.008(c) of the Texas Labor Code."

AGENCY RESPONSE: The Division agrees and has added language to §126.16(a) providing that this section "does not apply to repayments pursuant to Labor Code §415.008."

§126.16(b)

COMMENT: A commenter states that this section should begin with the clause: "Except as provided in subsection (i)...".

AGENCY RESPONSE: The Division agrees it is necessary to clarify that the text in proposed subsection (i) applies to this section. The Division has moved the text proposed in subsection (i) to subsection (a) which governs the applicability of this rule. Placement of this provision in subsection (a) will provide better clarity as to the applicability of this rule.

§126.16(b)(1)

COMMENT: A commenter states that some benefits are paid monthly. Waiting until the 2nd benefit check to begin recoupment requires the carrier to wait two months to start recoupment. The commenter suggests that §126.16(b)(1) be changed to allow recoupment to begin 10 days after the written notice of recoupment has been sent to the injured employee, rather than the second income benefit payment made after the notice has been sent.

AGENCY RESPONSE: The Division disagrees and declines to make the change. The work group that participated in the development of these rules agreed to begin recoupment on the second income benefit payment made after the notice was sent. The suggested recommendation might benefit an insurance carrier when they are making payments monthly, by possibly allowing the insurance carrier to begin recoupment on the first benefit payment after the notice was sent to the injured employee. But it may negatively impact an insurance carrier's ability to begin recoupment of weekly income benefits. In these situations, the suggested recommendation could possibly postpone the beginning of the recoupment process until the third weekly income benefit payment. Additionally, the Division also declines to make the change for income benefits paid monthly because doing so

would create different timeframes for different benefit types which would be administratively burdensome.

§126.16(b)(2) and (3)

COMMENT: A commenter suggests that the 10% recoupment rate in §126.16(b)(3) and the 25% recoupment rate in §126.16(b)(2) should only apply if the injured employee caused the overpayment. If the overpayment was caused by the insurance carrier, the commenter suggests a recoupment rate of 5% if benefits are concurrently being reduced to pay attorney fees or an advance and a recoupment rate of 10% if benefits are not being concurrently reduced.

AGENCY RESPONSE: The Division disagrees and declines to make the change. The 10% and 25% recoupment rates already take into account minimization of financial hardship. The rates have been in place by rule since 2002 and have not been problematic. Cause must be addressed in a case specific review and has been taken into consideration in two ways. First, the rule allows flexibility for agreements between the parties and second, the rule allows for variation in the percentage of recoupment through the dispute resolution process.

§126.16(d)

COMMENT: A commenter states that language should be added to §126.16(d) as follows:

"Regardless of the cause for the overpayment, the division may not eliminate the carrier's right to recoup the overpayments against future indemnity benefits. The Division may provide that recoupment against income replacement benefits are at a different rate than against impairment income benefits (IIBs). The injured employees' knowledge of the overpayment and any actions to minimize the overpayment shall be considered."

AGENCY RESPONSE: The Division disagrees and declines to make the change. The suggested language would serve to restrict the hearing officer's ability to fully consider the cause of the overpayment. Cause is best addressed in case specific reviews. There may be instances where the hearing officer may determine there should be no recoupment from future income benefits allowed, just as there may be instances where the hearing officer may allow a 100% reduction of income benefits.

§126.16(d)

COMMENT: A commenter suggests specifying appropriate factors that can be considered when considering a request to increase or decrease the recoupment rate, such as income benefit type, duration of expected future benefits, etc.

AGENCY RESPONSE: The Division disagrees. While the suggested factors may be appropriate in certain cases, it is not possible to enumerate all the possible factors that could be appropriate in a given case. The determination of which factors are appropriate is best made by a hearing officer on a case-by-case basis.

§126.16(i)

COMMENT: Commenter states that this rule properly recognizes that temporary income benefits (TIBs) previously paid after the date of maximum medical improvement (MMI) can be re-characterized as impairment income benefits (IIBs) consistent with APD 110692 and should preclude frivolous objections to that as has been seen in the past. However, the commenter states that by limiting this to the attainment of MMI, the rule does not contemplate the situation where the date of MMI is rescinded. The commenter states that under such circumstances instead of re-designating

the IIBs as TIBs, the carrier may simply pay TIBs back to the original date of MMI with the intention of taking credit for the IIBs paid once another IR is issued. This frequently occurs when a claimant is not disabled and therefore not entitled to TIBs during the period where he was paid IIBs. As such, and given that IIBs are not income replacement benefits, the carrier should be allowed to take a week for week credit of IIBs against IIBs. The commenter requests that the following text be added to §126.16: "Nothing in this section applies to the redesignation of accrued and paid income benefits upon receipt of certification that the injured employee has reached maximum medical improvement. Upon notification that an injured employee is not at maximum medical improvement after a previous certification, an insurance carrier may either elect to redesignate any payment of impairment income benefits (IIBs) as accrued temporary income benefits (TIBs) or it may elect to issue payment for accrued TIBs and credit any previously paid IIBs against future IIBs due to the injured employee."

AGENCY RESPONSE: The Division agrees with commenter in part and disagrees in part. First, the Division agrees that the language as proposed in §126.16(i) is too limited. There may be other situations such as a rescinded date of MMI as cited by the commenter where there could be a redesignation of income benefits from one income benefit type to another. Thus, the Division has modified the language as proposed in §126.16(i) to state that this section "does not apply to redesignation of income benefits." The Division has clarified this provision in §126.16(a)(2) and has also added this provision to §126.15(a).

Second, the Division disagrees with the commenter's suggested text that states, "upon notification that an injured employee is not at maximum medical improvement after a previous certification, an insurance carrier may either elect to redesignate any payment of impairment income benefits (IIBs) as accrued temporary income benefits (TIBs) or it may elect to issue payment for accrued TIBs and credit any previously paid IIBs against future IIBs due to the injured employee."

Adopted §126.16 is intended to create procedures to recoup overpayments of income benefits from future income benefits. If, in the scenario presented by the commenter, there is an overpayment of income benefits, then this adopted rule would govern the recoupment of the overpayment. However, if there is a redesignation of income benefits, then that redesignation is not affected by these adopted rules and is outside the scope of these adopted rules.

COMMENT: A commenter states that situations arise where there is both an overpayment and an underpayment on the same claim. For example, a carrier may have been paying the wrong TIBs rate until discontinuance due to an assertion of a lack of disability or attainment of maximum medical improvement. Subsequently, however, it is determined that the claimant remained disabled or was not at maximum medical improvement. Thus, a lump sum is due. Under such circumstances any lump sum of past benefits should be offset by any overpayment of past benefits. The commenter suggests additional text to §126.15 to provide that upon a determination that there has been an underpayment of income benefits in accordance with §126.15 of this title, the insurance carrier may offset any accrued but unpaid benefits by any overpayment of benefits. The commenter suggests additional text to §126.16 to provide that upon a determination that there has been an overpayment of income benefits in accordance with §126.16 of this title, the insurance carrier may offset any accrued but unpaid benefits by any overpayment of benefits.

RESPONSE: The Division disagrees that the suggested language is necessary and declines to make the change. When applying the plain text as adopted, the existence of an overpayment or underpayment will be determined based on the amount owed and the amount paid, in the aggregate. If there is an underpayment of income benefits, §126.15 will provide direction. If there is ultimately an overpayment of income benefits, §126.16 will provide direction.

5. NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For: American Insurance Association, Burns Anderson Jury & Brenner, LLP, Insurance Council of Texas and Property Casualty Insurers Association of America.

For, with changes: One individual, Office of Injured Employee Counsel, State Office of Risk Management, Texas Mutual Insurance Company and Flahive, Ogden & Latson.

Against: None.

Neither for or Against: None.

6. STATUTORY AUTHORITY.

The new rules are adopted under the Labor Code §§408.081, 408.0815, 402.00116, 402.00111, 402.061, and 402.00128. Section 408.081 states that an employee is entitled to timely and accurate income benefits as provided by Labor Code Chapter 408. Section 408.0815 directs the Commissioner to establish procedures by rule by which an insurance carrier may recoup an overpayment of income benefits from future income benefit payments and shall pay an underpayment of income benefits, including interest on accrued but unpaid benefits. Section 402.00116 grants the powers and duties of chief executive and administrative officer to the Commissioner and the authority to enforce the Labor Code, Title 5, and other laws applicable to the Division or Commissioner. Section 402.00111 provides that the Commissioner shall exercise all executive authority, including rulemaking authority, under the Labor Code, Title 5. Section 402.061 provides the Commissioner the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act. Section 402.00128 vests general operational powers to the Commissioner including the authority to delegate, and assess and enforce penalties as authorized by the Labor Code, Title 5.

7. TEXT

§126.15. *Procedures for Resolution of Underpayments of Income Benefits.*

(a) This section applies to insurance carrier underpayment of income benefits. It does not apply to:

- (1) insurance carrier underpayment of death, burial, or medical benefits; or
- (2) redesignation of income benefits.

(b) If the insurance carrier determines on its own that an underpayment of income benefits has occurred, the insurance carrier shall pay the full amount of the underpayment with interest on accrued but unpaid benefits in accordance with Chapter 408, Labor Code, applicable division rules related to payment of benefits, §102.10 of this title (relating to Interest, General), and §126.12 of this title (relating to Payment of Interest on Accrued but Unpaid Income Benefits) within seven days of the determination.

(c) If an injured employee determines that the injured employee has received less than the correct amount owed in income benefits and the injured employee wishes to resolve the underpayment under this section, the injured employee must notify the insurance carrier in writing to request the additional amount. The notice must include an explanation and information that supports the injured employee's determination of the underpayment.

(d) If the insurance carrier agrees with the injured employee that there has been an underpayment of income benefits, the insurance carrier shall pay the full amount of the underpayment with interest on accrued but unpaid benefits in accordance with Chapter 408, Labor Code, applicable division rules related to payment of benefits, §102.10 of this title, and §126.12 of this title within seven days of receipt of the notice from the injured employee.

(e) If the insurance carrier disagrees that there has been an underpayment of income benefits, the insurance carrier must, within seven days of receipt of the notice from the injured employee, provide the injured employee with written notice of its determination. The insurance carrier notice must be in plain language, in English or Spanish, as appropriate, and include the reasons for the insurance carrier's determination, and a statement that the injured employee may request dispute resolution through the dispute resolution processes outlined in Chapters 140 - 144 and 147 of this title (relating to Dispute Resolution), including expedited dispute resolution.

(f) The insurance carrier must provide notice to the injured employee and the division of any change in the payment of an injured employee's income benefits in accordance with the requirements of §124.2 of this title (relating to Carrier Reporting and Notification Requirements).

(g) If an insurance carrier disagrees that there has been an underpayment of income benefits, the injured employee may request dispute resolution through the dispute resolution processes outlined in Chapters 140 - 144 and 147 of this title, including expedited dispute resolution.

(h) This section does not affect the division's authority to identify and take action on underpayments on its own motion.

§126.16. *Procedures for Recouping Overpayments of Income Benefits.*

(a) This section applies to insurance carrier overpayment of income benefits. It does not apply to:

- (1) insurance carrier overpayment of death, burial, or medical benefits;
- (2) redesignation of income benefits; or
- (3) repayments pursuant to Labor Code §415.008.

(b) If an insurance carrier determines that it has overpaid income benefits to an injured employee, the insurance carrier may recoup the overpayment from future income benefit payments as follows:

(1) The insurance carrier must notify the injured employee in writing that it will begin withholding benefits to recoup an overpayment. The notice must be in plain language and in English or Spanish, as appropriate. The notice must also include the reason for the overpayment; the amount of the overpayment to be recouped from future income benefit payments; the date recoupment will begin; and relevant documentation that supports the insurance carrier's determination of an overpayment, such as a wage statement or a supplemental report of injury. The notice must also advise the injured employee that if the injured employee disagrees that there has been an overpayment, the injured employee may request dispute resolution through the dispute resolution processes outlined in Chapters 140 - 144 and 147 of this title (relating to Dispute Resolution), including expedited dispute resolution. The insurance carrier may not begin recoupment of the overpayment earlier than the second income benefit payment made after the written notice has been sent to the injured employee.

(2) If the injured employee's income benefits are not concurrently being reduced to pay approved attorney's fees or to recoup a division approved advance, the insurance carrier may recoup the overpayment under this subsection in an amount not to exceed 25% of the income benefit payment to which the injured employee is entitled, except as provided by subsection (c) of this section.

(3) If the injured employee's income benefits are concurrently being reduced to pay approved attorney's fees or to recoup a division approved advance, the insurance carrier may recoup the overpayment under this subsection in an amount not to exceed 10% of the income benefit

payment to which the injured employee is entitled, except as provided by subsection (c) of this section.

(c) If the insurance carrier wishes to recoup the overpayment in an amount greater than that permitted by subsection (b) of this section, the insurance carrier must attempt to enter into a written agreement with the injured employee and, if unable to do so, request dispute resolution through the dispute resolution processes outlined in Chapters 140 - 144 and 147 of this title. If the injured employee wishes to provide for recoupment of the overpayment in an amount less than the percentage chosen by the insurance carrier, the injured employee must attempt to enter into a written agreement with the insurance carrier and, if unable to do so, request dispute resolution through the dispute resolution processes outlined in Chapters 140 - 144 and 147 of this title.

(d) In determining whether to approve an increase or decrease in the recoupment rate, the division must consider the cause of the overpayment and minimize the financial hardship that may reasonably be created for the injured employee.

(e) The insurance carrier must provide notice to the injured employee and the division of any change in the payment of an injured employee's income benefits in accordance with the requirements of §124.2 of this title (relating to Carrier Reporting and Notification Requirements). The insurance carrier's notice to the injured employee must identify the amount that was overpaid.

(f) This section does not create an entitlement for an insurance carrier to seek reimbursement from the Subsequent Injury Fund except as provided by Labor Code §§403.006, 408.0041, 410.209, and applicable division rules.

(g) If an injured employee does not agree that the injured employee has received an overpayment of income benefits, the injured employee may request dispute resolution through the

dispute resolution processes outlined in Chapters 140 - 144 and 147 of this title, including expedited dispute resolution.

(h) This section does not affect the division's authority to identify and take action on overpayments on its own motion.

8. CERTIFICATION.

This agency hereby certifies that the adopted rules have been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued at Austin, Texas, on December 12, 2011.

X

Dirk Johnson
General Counsel
Texas Department of Insurance,
Division of Workers' Compensation

IT IS THEREFORE THE ORDER of the Commissioner of Workers' Compensation that §126.15 specified herein, concerning Procedures for Resolution of Underpayments of Income Benefits, and §126.16 specified herein, concerning Procedures for Recouping Overpayments of Income Benefits, are adopted.

AND IT IS SO ORDERED.

X

ROD BORDELON
COMMISSIONER OF WORKERS' COMPENSATION

ATTEST:

X

Dirk Johnson
General Counsel

COMMISSIONER ORDER NO.