

**TITLE 28. INSURANCE**

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

**CHAPTER 129: INCOME BENEFITS--TEMPORARY INCOME BENEFITS  
AMEND: §§129.3 and 129.11**

**1. INTRODUCTION.** The Texas Department of Insurance, Division of Workers' Compensation (division) proposes amendments to 28 TAC §129.3 and §129.11, concerning temporary income benefits (TIBs). Amended §129.3 and §129.11 implement Senate Bill (SB) 901, 84th Legislature, Regular Session (2015), which amends Labor Code §408.103. Labor Code §408.103 provides the method for calculating the amount of TIBs an injured employee is entitled to receive. SB 901 increased the hourly wage that qualifies an injured employee to be paid TIBs at 75% of the employee's pre-injury average weekly wage for the first 26 weeks of the injured employee's disability. SB 901 increased the qualifying wage from less than \$8.50 an hour to less than \$10 an hour for workers' compensation claims with a date of injury on or after September 1, 2015 under Labor Code §408.103(a)(2). Before SB 901, in order to be eligible for the higher TIBs rate of 75% of the average weekly wage for the first 26 weeks of disability, an injured employee had to earn less than \$8.50 an hour. Under SB 901, an injured employee has to earn less than \$10.00 an hour in order to qualify for the higher TIBs rate of 75% of the average weekly wage for the first 26 weeks of the injured employee's disability. Amended §129.3 and §129.11 only reflect the amount of statutory TIBs provided by the SB 901 amendments to Labor Code §408.103(a) and do not add any new requirements. An informal working draft of the rule text was published on the division's website on June 8, 2015, and the division received no comments.

Necessary amendments proposed throughout the rule text also make non-substantive changes to delete the term "Commission" and add the word "division," add the word "insurance" before the word "carrier(s)," and reletter and renumber rule text.

### **Amended §129.3 and §129.11**

Amended §§129.3(b), 129.3(f), and 129.11(b) increase the hourly wage that qualifies an injured employee to be paid at the higher TIBs rate of 75% of the employee's pre-injury average weekly wage for the first 26 weeks of disability. The qualifying wage increased from less than \$8.50 an hour to less than \$10 an hour for workers' compensation claims with a date of injury on or after September 1, 2015. The amendments align the division's rules regarding the calculation and payment of TIBs with statutory changes provided by Labor Code §408.103(a).

Amended §§129.3(b), 129.3(f)(1), and 129.11(b)(1) clarify that the \$8.50 an hour wage rate still applies to workers' compensation claims with a date of injury before September 1, 2015. The amendments reflect the effective date of changes made to Labor Code §408.103(a) by SB 901 and are necessary for ease of stakeholder compliance for claims that have not been brought or are already receiving TIBs before the effective date.

**2. FISCAL NOTE.** Mr. Kerry Sullivan, Deputy Commissioner for Hearings, has determined that for each year of the first five years the amended rules will be in effect, there will be no fiscal impact to state and local governments as a result of enforcement or administration of the proposal. There will be no measurable effect on local employment or the local economy because of the proposal. The amendments to §129.3 and §129.11 only reflect the amounts of statutory TIBs provided by Labor Code §408.103(a) and do not impose any additional requirements that would cause a fiscal impact as a result of the rule.

**3. PUBLIC BENEFIT/COST NOTE.** Mr. Sullivan has determined that for each year of the first five years the sections are in effect, there are public benefits anticipated as a result of the enforcement and administration of the proposal.

**Anticipated Public Benefits.** Mr. Sullivan has determined that, for each year of the first five years amended §129.3 and §129.11 are in effect, the public benefits anticipated because of the proposed amendments include: (1) aligning the division's rules regarding the calculation and payment of TIBs with the statutory changes made by SB 901; and (2) providing injured employees appropriate income benefits under the goals of Labor Code §402.021.

**Anticipated Costs to Comply with the Proposal.** Mr. Sullivan has determined that there will be no costs to persons required to comply with amended §129.3 and §129.11 because the proposal only aligns the division's rules with the amendments to Labor Code §408.103 found in SB 901, 84th Legislature, Regular Session (2015). SB 901 increased the hourly wage that qualifies an injured employee to be paid TIBs at 75% of the employee's pre-injury average weekly wage for the first 26 weeks of disability. SB 901 increased the qualifying wage from less than \$8.50 an hour to less than \$10 an hour for workers' compensation claims with a date of injury on or after September 1, 2015 under Labor Code §408.103(a). Thus, injured employees will be eligible for increased temporary income benefits if they earn less than \$10.00 an hour, instead of \$8.50 an hour, for new work-related injuries occurring on or after September 1, 2015. While the group of injured employees eligible for increased TIBs may have increased, the increase is a direct result of SB 901. Amended §129.3 and §129.11 only reflect the amounts of statutory TIBs provided by Labor Code §408.103(a) and do not add any new requirements as a result of the rule. Therefore, any costs associated with compliance result from Labor Code §408.103(a), as amended by SB 901, and not from amended §129.3 and §129.11.

#### **4. ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL**

**AND MICRO BUSINESSES.** Government Code §2006.002(c) requires that, if a proposed rule may have an adverse economic impact on small businesses, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule on small businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. An agency is not required to consider alternatives that, while possibly minimizing adverse impacts on small and micro businesses, would not be protective of the health, safety, and environmental and economic welfare of the state.

In accordance with Government Code §2006.002(c), the division has determined that the proposed amendments will not have an adverse effect on small or micro businesses because the proposed rules are necessary to implement statutory requirements. While the group of injured employees eligible for increased TIBs has increased, the increase is a direct result of SB 901. Therefore, in accordance with Government Code §2006.002(c), a regulatory flexibility analysis is not required.

**5. TAKINGS IMPACT ASSESSMENT.** The division has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

**6. REQUEST FOR PUBLIC COMMENT.** If you want to comment on the proposal, submit your written comments by 5:00 p.m. central time on Monday, November 9, 2015. A request for a public hearing must be sent separately from your written comments. Send written comments or hearing requests by email to [Rulecomments@tdi.texas.gov](mailto:Rulecomments@tdi.texas.gov) or by mail to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, Office of Workers' Compensation Counsel, MS-

4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645. If a hearing is held, the division will consider written comments and oral testimony presented at the hearing.

**7. STATUTORY AUTHORITY.** The amendments are proposed under the Labor Code §§402.00128, 402.021, 402.061, and 408.103. Section 402.00128 lists the general powers of the commissioner, including the power to hold hearings. Section 402.021 establishes the basic goals and legislative intent of the workers' compensation system, including the goal that the system must provide appropriate income benefits and medical benefits in a manner that is timely and cost-effective. Section 402.061 requires the division to adopt rules necessary for the implementation and enforcement of the Texas Workers' Compensation Act. Section 408.103 provides that the amount of a temporary income benefit is equal to: (1) 70% of the amount computed by subtracting the employee's weekly earnings after the injury from the employee's average weekly wage; or (2) for the first 26 weeks, 75% of the amount computed by subtracting the employee's weekly earnings after the injury from the employee's average weekly wage if the employee earns less than \$10 an hour.

**8. TEXT.**

**§129.3. Amount of Temporary Income Benefits**

(a) The insurance carrier (carrier) shall pay an injured employee (employee) the temporary income benefits (TIBs) the employee is entitled to in accordance with this chapter.

(b) The carrier shall determine whether the employee earns less than \$8.50 per hour for a workers' compensation claim with a date of injury before September 1, 2015, or less than \$10 per hour for a workers' compensation claim with a date of injury on or after September 1, 2015, as follows:

(1) Once the carrier has received the Wage Statement required by this title, the carrier shall divide the average weekly wage (AWW) calculated from the Wage Statement by the

average number of hours worked. The average hours worked is the total gross hours reported worked on the Wage Statement divided by the period in which the hours were worked;

(2) If the carrier has not received the Wage Statement, but has received the Employer's First Report of Injury, the carrier shall use the wage information provided by the employer through the first report; or

(3) If the carrier has not received the information necessary to perform the calculations required by subsection (b)(1) or (2) of this section, the carrier shall use wage information provided by the employee until the necessary information is obtained from the employer.

(c) The carrier shall calculate the AWW in accordance with Chapter 128 of this title (relating to Calculation of Average Weekly Wage) and shall calculate the Post-Injury Earnings (PIE) in accordance with §129.2 of this title (relating to Entitlement to Temporary Income Benefits). In determining the PIE, the carrier shall base its calculations on specific wage information reported by the employer and/or the employee. A generic statement by the employer indicating the employer is "continuing full salary" or "the employee is earning full salary" is not adequate documentation to be considered PIE.

(d) The carrier shall calculate the employee's lost wages by subtracting the PIE from the AWW (or  $AWW - PIE$ ).

(e) The amount of TIBs an employee is entitled to is based on the lost wages. If the employee's PIE equals or exceeds the employee's AWW, the employee has no lost wages and the carrier shall not pay TIBs.

(f) Subject to the minimum and maximum TIBs rates as provided in subsection (g) of this section, an employee is entitled to TIBs as follows:

(1) for a workers' compensation claim with a date of injury before September 1, 2015,

(A) an employee who earns \$8.50 or more per hour is entitled to TIBs in the amount of 70% of the lost wages; or

(B)~~(2)~~ an employee who earns less than \$8.50 per hour is entitled to TIBs as follows:

(i)~~(A)~~ 75% of the lost wages for the first 26 weeks of TIBs due; and

(ii)~~(B)~~ 70% of the lost wages for all TIBs payments thereafter; ~~and~~[-]

(2) for a workers' compensation claim with a date of injury on or after September 1, 2015,

(A) an employee who earns \$10 or more per hour is entitled to TIBs in the amount of 70% of the lost wages; or

(B) an employee who earns less than \$10 per hour is entitled to TIBs as follows:

(i) 75% of the lost wages for the first 26 weeks of TIBs due; and

(ii) 70% of the lost wages for all TIBs payments thereafter.

(g) The carrier shall pay the TIBs in the amount calculated in subsection (f) of this section, unless:

(1) this amount is greater than the maximum weekly TIBs rate computed in accordance with Texas Labor Code, §408.061, in which case the carrier shall pay the maximum weekly TIBs rate; or

(2) this amount, when added to the employee's PIE, is less than the minimum weekly TIBs rate computed in accordance with Texas Labor Code, §408.062, in which case the carrier shall pay the minimum weekly TIBs rate.

**§129.11. Agreement for Monthly Payment of Temporary Income Benefits**

(a) Upon the request of an injured employee, the insurance carrier and an injured employee entitled to temporary income benefits (TIBs) may agree to change the frequency of TIBs payments from the standard weekly period to a monthly period. The agreement to change the payment frequency must be in writing and is only required to be filed with the division~~[Commission]~~ if the division~~[Commission]~~ requests a copy. To relieve the insurance carrier of the responsibility to pay TIBs weekly, a valid written agreement must include the following terms and conditions:

- (1) the agreement for the monthly payment of TIBs shall be effective the first calendar day of the month following the month in which the written agreement was entered into by the insurance carrier and the injured employee;
- (2) monthly TIBs payment shall be issued on or before the seventh day of the month following the month for which benefits are due;
- (3) weekly TIBs payments shall continue through the end of the month in which the agreement was signed;
- (4) payment of the last week of TIBs to transition from weekly payment of TIBs to monthly payments shall be prorated to the end of the month to ensure the injured employee receives TIBs through the last day of the month; and
- (5) if less than the maximum weekly compensation rate in effect on the date of the compensable injury is being paid, a completed Employer's Wage Statement must be included with the injured employee's copy of the written agreement.

(b) To calculate the amount of monthly TIBs to pay, the carrier shall determine the average monthly wage by multiplying the average weekly wage by 4.34821 and subtracting any Post-Injury Earnings the employee earned during the month for which the employee was entitled

to TIBs to determine the lost wages. The carrier shall then pay the employee in monthly TIBs as follows:

(1) for a workers' compensation claim with a date of injury before September 1, 2015,

(A) if the employee earns \$8.50 per hour or more, the carrier shall pay 70% of the lost wages; or

(B)~~(2)~~ if the employee earns less than \$8.50 per hour, the carrier shall pay:

(i)~~(A)~~ 75% of the lost wages for the first 26 weeks of TIBs due; and

(ii)~~(B)~~ 70% of the lost wages for all TIBs payments thereafter; ~~and~~

(2) for a workers' compensation claim with a date of injury on or after September 1, 2015,

(A) if the employee earns \$10 per hour or more, the carrier shall pay 70% of the lost wages; or

(B) if the employee earns less than \$10 per hour, the carrier shall pay:

(i) 75% of the lost wages for the first 26 weeks of TIBs due; and

(ii) 70% of the lost wages for all TIBs payments thereafter.

(c) Entering into an agreement under this section does not prohibit any party to the claim from raising disputes over periods, amounts of, or entitlement to TIBs. Disputes must be raised as and when they arise.

(d) The agreement for the monthly payment of TIBs shall expire upon the suspension or termination of TIBs in accordance with the Act and division~~Commission~~ rules. The last monthly payment shall be prorated to ensure the insurance carrier pays the appropriate amount of TIBs.

(e) At any time after signing the agreement for the monthly payment of TIBs, the injured employee or the insurance carrier may notify the other party in writing that it no longer agrees to

the monthly payment of TIBs. In this case, the insurance carrier shall pay all accrued but unpaid TIBs at the end of the current monthly cycle and shall continue to pay TIBs weekly as and when they accrue and are due.

~~[(f) This section applies only to agreements entered into on or after January 1, 2000, for payment of TIBs under the provisions of the Act.]~~

**9. 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 \_\_\_\_\_ 2015.

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Division of Workers' Compensation