

No. **2023-8176**

**Official Order
of the
Texas Commissioner of Workers' Compensation**

Date: 8/31/2023

Subject Considered:

Indemnity Insurance Company of North America
115 Wild Basin Road, Suite 207
West Lake Hills, Texas 78746

Consent Order
DWC Enforcement File No. 31464

General remarks and official action taken:

This is a consent order with Indemnity Insurance Company of North America (Respondent). The commissioner of the Texas Department of Insurance, Division of Workers' Compensation (DWC) considers whether DWC should take disciplinary action against Respondent.

Waiver

Respondent acknowledges that the Texas Labor Code and other applicable laws provide certain rights. Respondent waives all of these rights, and any other procedural rights that apply, in consideration of the entry of this consent order.

Findings of Fact

1. Respondent holds a certificate of authority issued by the Texas Department of Insurance to transact the business of insurance pursuant to Tex. Ins. Code §§ 801.051-801.053 and is licensed to write workers' compensation/employers' liability insurance in Texas.
2. Respondent was classified as "average" tier in the 2007, 2009, 2010, 2012, 2014, 2016, 2018, 2020, and 2022 Performance Based Oversight (PBO) assessments.

Failure to Accurately Pay Temporary Income Benefits (TIBs)

3. On [REDACTED] an injured employee received a compensable injury.
4. Respondent calculated the injured employee's average weekly wage (AWW) as [REDACTED]
5. Respondent determined the injured employee's TIBs rate was [REDACTED]
6. The injured employee's TIBs rate should have been [REDACTED] because 70% of the injured employee's AWW was greater than the State Average Weekly Wage in effect from [REDACTED] to [REDACTED]
7. For the benefit periods [REDACTED] through [REDACTED] Respondent incorrectly paid TIBs, resulting in an underpayment of TIBs as follows:

	Benefit Period	Amount Paid	Correct Amount	Underpayment Amount
a.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
b.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
c.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
d.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
e.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
f.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
g.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
h.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
i.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
j.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
k.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
l.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
m.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
n.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
o.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
p.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
r.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

¹ The [REDACTED] Respondent used for the TIBs rate was the maximum TIBs rate in effect from [REDACTED] to [REDACTED]

s.							
t.							
u.							
v.							
TOTAL							

Failure to Timely Pay Impairment Income Benefits (IIBs) based on a Certifying Doctor (CD) Report and Failure to Properly Recoup an Overpayment

8. Respondent determined it had overpaid TIBs from [REDACTED] through [REDACTED], in the amount of [REDACTED].
- 9.ii Due to the overpayment, Respondent was entitled to deduct 25% from future income benefit payments.
- 10.ii On [REDACTED] Respondent received a DWC Form-69, *Report of Medical Evaluation*, from the injured employee's CD in connection with a CD examination.
- 11.ii The CD determined that the injured employee reached maximum medical improvement (MMI) on [REDACTED] with an impairment rating (IR) of [REDACTED].
- 12.ii Respondent was required to pay accrued IIBs no later than five days after receiving the CD report. The deadline to pay benefits was [REDACTED].
- 13.ii The maximum IIBs rate based on the injured employee's date of injury was [REDACTED] and the injured employee was entitled to 54 weeks of IIBs due to their [REDACTED] IR.
14. On [REDACTED] Respondent issued a Plain Language Notice (PLN) informing the injured employee that the injured employee was entitled to 30 weeks of IIBs at [REDACTED]. Respondent did not explain the discrepancy between the 30 weeks and 54 weeks in the PLN.
- 15.ii On [REDACTED] Respondent deducted [REDACTED] from the injured employee's IIBs, which was more than 25% of the IIBs owed at that date. Respondent applied

² Respondent determined the injured employee returned to work on [REDACTED].

³ The [REDACTED] Respondent used for the IIBs rate was the maximum IIBs rate in effect from [REDACTED] to [REDACTED].

the overpayment to the benefit periods beginning [REDACTED] through [REDACTED]
 [REDACTED]

16. Respondent did not inform the injured employee in writing of the intent to recoup the overpayment.
17. On [REDACTED] Respondent paid \$11,908.43 in IIBs. Respondent applied the payment to the benefit weeks of Feb. 2, 2022, to July 1, 2022.
18. Respondent failed to timely pay IIBs, as follows:

	Payment Period	Date Due	Date Paid	Days Late
a.	[REDACTED]	[REDACTED]	[REDACTED]	98
b.	[REDACTED]	[REDACTED]	[REDACTED]	98
c.	[REDACTED]	[REDACTED]	[REDACTED]	98
d.	[REDACTED]	[REDACTED]	[REDACTED]	98
e.	[REDACTED]	[REDACTED]	[REDACTED]	98
f.	[REDACTED]	[REDACTED]	[REDACTED]	98
g.	[REDACTED]	[REDACTED]	[REDACTED]	98
h.	[REDACTED]	[REDACTED]	[REDACTED]	98
i.	[REDACTED]	[REDACTED]	[REDACTED]	99
j.	[REDACTED]	[REDACTED]	[REDACTED]	99
k.	[REDACTED]	[REDACTED]	[REDACTED]	99
l.	[REDACTED]	[REDACTED]	[REDACTED]	93
m.	[REDACTED]	[REDACTED]	[REDACTED]	86
n.	[REDACTED]	[REDACTED]	[REDACTED]	79
o.	[REDACTED]	[REDACTED]	[REDACTED]	72
p.	[REDACTED]	[REDACTED]	[REDACTED]	65
q.	[REDACTED]	[REDACTED]	[REDACTED]	58
r.	[REDACTED]	[REDACTED]	[REDACTED]	49
s.	[REDACTED]	[REDACTED]	[REDACTED]	42
t.	[REDACTED]	[REDACTED]	[REDACTED]	35
u.	[REDACTED]	[REDACTED]	[REDACTED]	28
v.	[REDACTED]	[REDACTED]	[REDACTED] 2	21
w.	[REDACTED]	[REDACTED]	[REDACTED]	14
x.	[REDACTED]	[REDACTED]	[REDACTED]	7
y.	[REDACTED]	[REDACTED]	[REDACTED]	1

Failure to Pay IIBs Weekly

19. The single payment on [REDACTED] for benefit weeks [REDACTED] [REDACTED] and [REDACTED] was improper because the injured employee did not request, in writing, that Respondent pay IIBs monthly.

Failure to Accurately Pay IIBS

20. For the benefit periods [REDACTED] through [REDACTED] Respondent incorrectly paid IIBs, resulting in an underpayment of IIBs as follows:

	Benefit Period	Amount Paid	Correct Amount	Underpayment Amount
a.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
b.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
c.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
d.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
e.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
f.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
g.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
h.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
i.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
j.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
k.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
l.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
m.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
n.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
o.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
p.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
q.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
r.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
s.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
t.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
u.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
v.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
w.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

x.						
y.						
z.						
aa.						
ab.						
ac.						
ad.						
TOTAL						

First Failure to Timely Pay Accrued IIBs

21. Respondent was required to pay IIBs to the injured employee from [REDACTED] through [REDACTED] IIBs payments were due seven days after the first day of the pay period. Respondent failed to timely pay [REDACTED] in IIBs, as follows:

	Payment Period	Date Due	Date Paid	Days Late
a.	[REDACTED]	[REDACTED]	[REDACTED]	52
b.	[REDACTED]	[REDACTED]	[REDACTED]	45
c.	[REDACTED]	[REDACTED]	[REDACTED]	38
d.	[REDACTED]	[REDACTED]	[REDACTED]	31
e.	[REDACTED]	[REDACTED]	[REDACTED]	24
f.	[REDACTED]	[REDACTED]	[REDACTED]	17
g.	[REDACTED]	[REDACTED]	[REDACTED]	10
h.	[REDACTED]	[REDACTED]	[REDACTED]	3

Second Failure to Accurately Pay IIBs

22. For the benefit periods [REDACTED] through [REDACTED] Respondent incorrectly paid IIBs, resulting in an underpayment of IIBs as follows:⁴

	Benefit Period	Amount Paid	Correct Amount	Underpayment Amount
a.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
b.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
c.	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

⁴ The [REDACTED] Respondent used for the IIBs rate was the maximum IIBs rate in effect from [REDACTED] to [REDACTED]

d.							
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l.							
m.							
TOTAL							

Claim Underpayment

- 23. On [REDACTED] Respondent paid \$ [REDACTED] in TIBs, IIBs, and interest, leaving an underpayment of [REDACTED]
- 24. On [REDACTED] Respondent paid [REDACTED] in IIBs and interest.

Assessment of Sanction

- 1. Failure to provide income benefits and interest in a timely and cost-effective manner is harmful to injured employees and the Texas workers' compensation system.
- 2. In assessing the sanction for this case, DWC fully considered the following factors in Tex. Lab. Code § 415.021(c) and 28 Tex. Admin. Code § 180.26(e):
 - the seriousness of the violation, including the nature, circumstances, consequences, extent, and gravity of the prohibited act;
 - the history and extent of previous administrative violations;
 - the violator's demonstration of good faith, including actions it took to rectify the consequences of the prohibited act;
 - the penalty necessary to deter future violations;
 - whether the administrative violation had a negative impact on the delivery of benefits to an injured employee;
 - the history of compliance with electronic data interchange requirements;
 - to the extent reasonable, the economic benefit resulting from the prohibited act; and

- other matters that justice may require, including, but not limited to:
 - PBO assessments;
 - prompt and earnest actions to prevent future violations;
 - self-report of the violation;
 - the size of the company or practice;
 - the effect of a sanction on the availability of health care; and
 - evidence of heightened awareness of the legal duty to comply with the Texas Workers' Compensation Act and DWC rules.
3. DWC found the following factors in Tex. Lab. Code § 415.021(c) and 28 Tex. Admin. Code § 180.26(e) to be aggravating: the seriousness of the violation, including the nature, circumstances, consequences, extent, and gravity of the prohibited act; the history and extent of previous administrative violations; the penalty necessary to deter future violations; whether the administrative violation had a negative impact on the delivery of benefits to an injured employee; to the extent reasonable, the economic benefit resulting from the prohibited act; and other matters that justice may require, including, but not limited to the size of the company or practice and evidence of heightened awareness of the legal duty to comply with the Act and DWC rules.
 4. DWC is aware of no mitigating factors pursuant to Tex. Lab. Code § 415.021(c) and 28 Tex. Admin. Code § 180.26(e).
 5. Respondent acknowledges communicating with DWC about the relevant statute and rule violations alleged; that the facts establish that the administrative violation(s) occurred; and that the proposed sanction is appropriate, including the factors DWC considered under Tex. Lab. Code § 415.021(c) and 28 Tex. Admin. Code § 180.26(e).
 6. Respondent acknowledges that, in assessing the sanction, DWC considered the factors in Tex. Lab. Code § 415.021(c) and 28 Tex. Admin. Code § 180.26(e).

Conclusions of Law

1. The commissioner has jurisdiction over this matter pursuant to Tex. Lab. Code §§ 402.001, 402.00114, 402.00116, 402.00128, 414.002, and 414.003.

2. The commissioner has the authority to dispose of this case informally pursuant to Tex. Gov't Code § 2001.056, Tex. Lab. Code §§ 401.021 and 402.00128(b)(6)-(7), and 28 Tex. Admin. Code § 180.26(h) and (i).
3. Respondent has knowingly and voluntarily waived all procedural rights to which it may have been entitled regarding the entry of this order, including, but not limited to, issuance and service of notice of intent to institute disciplinary action, notice of hearing, a public hearing, a proposal for decision, a rehearing by the commissioner, and judicial review.
4. Pursuant to Tex. Lab. Code § 415.021, the commissioner may assess an administrative penalty against a person who commits an administrative violation.
5. Pursuant to Tex. Lab. Code § 415.002(a)(20), an insurance carrier or its representative commits an administrative violation each time it violates a DWC rule.
6. Pursuant to Tex. Lab. Code § 415.002(a)(22), an insurance carrier or its representative commits an administrative violation each time it fails to comply with a provision of the Texas Workers' Compensation Act.

Inaccurate Payment of TIBS

7. Pursuant to Tex. Lab. Code § 408.103 and 28 Tex. Admin. Code § 129.3, the insurance carrier is required to pay the correct amount of TIBs.
8. Respondent violated Tex. Lab. Code §§ 408.103; 415.002(a)(20) and (22); and 28 Tex. Admin. Code § 129.3 each time Respondent failed to accurately pay TIBs.

Failure to Pay IIBs Based on a CD Report

9. Pursuant to Tex. Lab. Code §§ 408.081, 409.023, and 415.002(a)(16), an insurance carrier must pay benefits weekly, as and when the benefits accrue, without order from the commissioner.
10. Pursuant to Tex. Lab. Code § 408.121(b), an insurance carrier must pay IIBs no later than five days after the insurance carrier receives the doctor's report certifying maximum medical improvement.

11. Pursuant to 28 Tex. Admin. Code § 130.8, an insurance carrier must pay benefits in accordance with the treating doctor's medical evaluation report no later than five days after receiving the treating doctor's medical evaluation report when maximum medical improvement is not disputed.
12. Respondent violated Tex. Lab. Code §§ 408.121(b), 409.023 and 415.002(a)(16), (20), and (22) and 28 Tex. Admin. Code § 130.8 by failing to timely pay accrued income benefits within five days of receiving the CD report.

Failure to Properly Recoup an Overpayment

13. Pursuant to Tex. Lab. Code § 408.0815(a)(1), the commissioner by rule shall establish a procedure by which an insurance carrier may recoup an overpayment of income benefits from future income benefit payments.
14. Pursuant 28 Tex. Admin. Code § 126.16(b)(1), 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 after the insurance carrier notifies the injured employee in writing that it will begin withholding benefits to recoup an overpayment.
15. Pursuant 28 Tex. Admin. Code § 126.16(b)(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.
16. Respondent violated Tex. Lab. Code § 415.002(a)(20) and 28 Tex. Admin. Code § 126.16(b)(1) and (2) by failing to follow the procedures for recouping overpayments of income benefit.

Failure to Accurately Pay IIBs

17. Pursuant to Tex. Lab. Code § 408.081(a) an injured employee is entitled to timely and accurate income benefits.
18. Pursuant to Tex. Lab. Code § 408.126, IIBs are equal to 70% of the injured employee's average weekly wage.
19. Respondent violated Tex. Lab. Code §§ 408.081(a) and 415.002(a)(22) each time Respondent failed to accurately pay IIBs.

Failure to Pay IIBs Weekly

20. Pursuant to Tex. Lab. Code § 408.081(c), DWC, by rule, shall establish requirements for agreements under which income benefits may be paid monthly. Income benefits may be paid monthly only: (1) on the request of the employee and the agreement of the employee and the insurance carrier; and (2) in compliance with the requirements adopted by the DWC.
21. Pursuant to 28 Tex. Admin. Code § 130.11(a), upon the request of the injured employee, the insurance carrier and an employee entitled to IIBs may agree to change the frequency of IIBs payments from the standard weekly period to a monthly period. The agreement to change the payment frequency must be in writing.
22. Respondent violated Tex. Lab. Code §§ 408.081(c); 415.002(a)(20) and (22); and 28 Tex. Admin. Code § 130.11(a) when Respondent paid IIBs monthly without a prior written request from the injured employee.

Failure to Timely Pay Accrued IIBs

23. Pursuant to Tex. Lab. Code §§ 408.081, 409.023, and 415.002(a)(16), an insurance carrier must pay benefits weekly, as and when the benefits accrue, without order from the commissioner.
24. Pursuant to Tex. Lab. Code § 408.121(b) and 28 Tex. Admin. Code § 130.8, an employee's entitlement to IIBs begins the day after the employee reaches MMI and, when the date of MMI is not disputed, the carrier shall initiate payment of IIBs

on or before the fifth day after the date of receipt of the employee's treating doctor's medical evaluation report.

25. Respondent violated Tex. Lab. Code §§ 408.121; 415.002(a)(16), (20), and (22); and 28 Tex. Admin. Code § 130.8 each time Respondent failed to timely pay accrued IIBs.

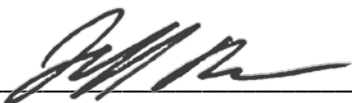
Failure to Timely Pay Interest

26. Pursuant to Tex. Lab. Code § 408.064 and 28 Tex. Admin. Code § 126.12(b), accrued but unpaid income benefits and interest shall be paid in a lump sum.
27. Respondent violated Tex. Lab. Code §§ 408.064; 415.002(a)(20) and (22); and 28 Tex. Admin. Code § 126.12(b) each time Respondent failed to timely pay interest with accrued but unpaid income benefits.

Order


It is ordered that Indemnity Insurance Company of North America must pay an administrative penalty of \$12,000 within 30 days from the date the Commissioner signs the order.

After receiving an invoice, Indemnity Insurance Company of North America must pay the administrative penalty by electronic transfer using the State Invoice Payment Service, company check, cashier's check, or money order and make it payable to the "State of Texas." Mail the administrative penalty to the Texas Department of Insurance, Attn: DWC Enforcement Section, MC AO-9999, PO Box 12030, Austin, Texas 78711-2030.



Jeff Nelson
Commissioner
TDI, Division of Workers' Compensation

Approved Form and Content:



Tyrus Housh
Staff Attorney, Enforcement
Compliance and Investigations
TDI, Division of Workers' Compensation

Unsworn Declaration

STATE OF Delaware §
§
COUNTY OF New Castle §

Pursuant to the Tex. Civ. Prac. and Rem. Code § 132.001(a), (b), and (d), my name is Daniel S. Hawthorne. I hold the position of AVP, Claims Compliance Manager and am the authorized representative of Indemnity Insurance Company of North America. My business address is:

1 Beaver Valley Road, Wilmington, New Castle, DE, 19803.
(Street) (City) (County) (State) (ZIP Code)

I am executing this declaration as part of my assigned duties and responsibilities. I declare under penalty of perjury that the facts stated in this document are true and correct.

Declarant

Executed on August 15, 2023.