

No. **2021-7050**

Confidential Information Redacted  
Texas Labor Code §§402.083 and 402.092

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

**Date: 11/4/2021**

**Subject Considered:**

Berkley National Insurance Company  
1250 East Diehl Road, Suite 200  
Naperville, Illinois 60563-9338

Consent Order  
DWC Enforcement File No. 25589

**General remarks and official action taken:**

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

**Waiver**

Berkley National acknowledges that the Texas Labor Code and other applicable laws provide certain rights. Berkley National 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. Berkley National 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. Berkley National was rated "average" in the 2020 Performance Based Oversight (PBO) assessment. Berkley National was not selected to be tiered in the 2007, 2009, 2010, 2012, 2014, 2016, or 2018 PBO assessments.

DWC Audit No. IBA-20-104

3. On [REDACTED], DWC initiated DWC Audit No. IBA-20-104 to determine whether Berkley National complied with the Texas Labor Code and related rules on the timely payment of lifetime income benefits (LIBs) and death benefits (DBs), as well as timely submitting claim data to DWC.
4. The audit examined DB payments that Berkley National reported issuing between [REDACTED] and [REDACTED]. DWC identified five initial DB claims for audit. The five claims were reviewed to determine Berkley National's compliance.
5. The audit focused on the accuracy of Berkley National's payment of DBs, as well as timely submitting claim data to DWC. The electronic data interchange (EDI) portion of the audit focused on timely reporting DB terminations.

*Failure to Timely Pay Accurate DBs*

6. Berkley National failed to timely pay accurate DBs for 20% of examined payments (one out of five).
7. Specifically, Berkley National underpaid 10 weeks of DBs to beneficiaries in one instance.

**Assessment of Sanction**

1. Failure to provide DBs in a timely and cost-effective manner is harmful to injured employees, their beneficiaries, 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 or their beneficiaries;
  - the history of compliance with EDI 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 penalty necessary to deter future violations; and whether the administrative violation had a negative impact on the delivery of benefits to an injured employee or their beneficiaries.
4. DWC found the following factor in TEX. LAB. CODE § 415.021(c) and 28 TEX. ADMIN. CODE § 180.26(e) to be **mitigating**: Berkley National's demonstration of good faith, including actions it took to rectify the consequences of the prohibited act.
5. Berkley National acknowledges it communicated with DWC about the relevant statutes and rules it violated; the facts establish that the administrative violation occurred; and 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. Berkley National 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, 409.021, 414.002, 414.003, 415.002, and 415.021.
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. Berkley National 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.
7. 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.
8. Pursuant to TEX. LAB. CODE § 408.181(a) and (b), an insurance carrier must pay accurate DBs to a legal beneficiary. Under TEX. LAB. CODE § 408.061, the amount of a DB is equal to 75% of the employee's average weekly wage.
9. Pursuant to TEX. LAB. CODE § 409.021 and 28 TEX. ADMIN. CODE §§ 124.3 and 124.7, an insurance carrier is required to initiate payment of DBs no later than the 15th day after it receives written notice of the injury or the seventh day after the accrual

date. It must also notify DWC in writing of its initiation of income or DB payments in the manner DWC rules prescribe.

10. Berkley National violated TEX. LAB. CODE § 415.002(a)(20) and (22) each time it failed to timely pay accurate DBs.

**Order**

It is ordered that Berkley National Insurance Company must pay an administrative penalty of \$1,300 within 30 days from the date of this order. Berkley National Insurance Company must pay the administrative penalty by 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, P.O. Box 12030, Austin, Texas 78711-2030.



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Dan Paschal, J.D.  
Deputy Commissioner  
Policy & Customer Services  
TDI, Division of Workers' Compensation

Approved Form and Content:



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

**Unsworn Declaration**

STATE OF New Jersey §  
§  
COUNTY OF Mercer §

Pursuant to the TEX. CIV. PRAC. & REM. CODE § 132.001(a), (b), and (d), my name is Suzanne Scelza. I hold the position of VP Regulatory Compliance and am the authorized representative of Berkley National Insurance Company. My business address is:

2445 Kuser Road, Suite 201, Hamilton Square Mercer, NJ, 08690  
(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 September 30, 2021.