

No. **2021-7143**

Confidential Information Redacted
Texas Labor Code §§402.083 and 402.092

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

Date: 12/31/2021

Subject Considered:

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

Consent Order
DWC Enforcement File No. 28047

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 classified as "average" tier 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. IP-21-203

3. On [REDACTED] DWC initiated DWC Audit No. IP-21-203 to determine whether Berkley National complied with the Texas Labor Code and related rules on the timely payment of initial temporary income benefits (TIBs) and timely and accurate submission of initial payment information to DWC.
4. The audit examined TIBs payments that Berkley National reported issuing between [REDACTED] and [REDACTED] DWC identified 14 initial TIBs payments for audit. A total of three initial TIBs payments failed to meet selection criteria and were dropped from the audit sample. The remaining 11 payments were reviewed to determine Berkley National's compliance.
5. The audit focused on the timely payment of initial TIBs and electronic data interchange (EDI) reporting. The EDI portion of the audit focused on the timely reporting of initial TIBs payments and accuracy of five data elements reported to DWC (First Date of Disability, Date of First Written Notice, TIBs from Date, TIBs End Date, and Initial TIBs Payment Date).

Failure to Timely Pay Initial TIBs

6. Berkley National failed to timely initiate TIBs for 18% of examined payments (two out of 11).
7. Specifically, Berkley National issued payments to injured employees less than six days late in one instance and between six and 15 days late in one instance.

Failure to Timely or Accurately Report EDI Data to DWC

8. Berkley National failed to accurately report the First Date of Disability for 27% of examined payments (three out of 11).
9. Berkley National failed to accurately report the Date of First Written Notice for 9% of examined payments (one out of 11).

Assessment of Sanction

1. Failure to provide income benefits in a timely and cost-effective manner is harmful to injured employees and the Texas workers' compensation system.
2. Timely submitting information and documents to DWC is imperative for it to implement and enforce the Texas Workers' Compensation Act.
3. DWC relies on claims information insurance carriers submit for many purposes, including, but not limited to, providing required information and reports to the Legislature, ensuring that insurance carriers comply with the Texas Labor Code and DWC rules, and detecting patterns and practices in actions insurance carriers take on claims.
4. 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 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.
5. 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

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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.

6. DWC found the following factor in TEX. LAB. CODE § 415.021(c) and 28 TEX. ADMIN. CODE § 180.26(e) to be mitigating the violator's demonstration of good faith, including actions it took to rectify the consequences of the prohibited act.
7. 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).
8. 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 § 409.021 and 28 TEX. ADMIN. CODE §§ 124.3 and 124.7, an insurance carrier is required to initiate payment of TIBs no later than the 15th day after it receives written notice of the injury or the seventh day after the accrual date, unless the insurance carrier notifies DWC and the injured employee in writing of its refusal to pay.
8. Berkley National violated TEX. LAB. CODE §§ 415.002(a)(20) and 415.002(a)(22) each time it failed to timely initiate payment of TIBs.
9. Pursuant to 28 TEX. ADMIN. CODE § 124.2(a) and (b), insurance carriers are required to notify DWC and the injured employee of actions taken or events occurring in a claim, as specified by rule in the form and manner DWC prescribes. Inherent in this duty is the requirement that insurance carriers report this information accurately.
10. Berkley National violated TEX. LAB. CODE §§ 415.002(a)(20) and 415.002(a)(22) each time it failed to timely or accurately notify DWC and the injured employee of actions it took or events that occurred in a claim, as specified by rule in the form and manner DWC prescribed.

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.



Dan Paschal, J.D.
Deputy Commissioner
Policy & Customer Services
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 Kentucky

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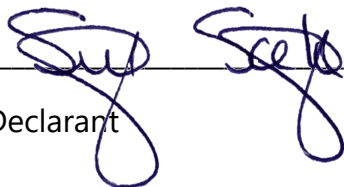
COUNTY OF Robertson

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Pursuant to the TEX. CIV. PRAC. AND 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:

230 Lexington Green Circle, Ste 215, Lexington, Fayette, KY, 40503.
(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 December 28, 2021.

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