

TITLE 28. INSURANCE
PART 2. TEXAS DEPARTMENT OF INSURANCE,
DIVISION OF WORKERS' COMPENSATION
CHAPTER 131: BENEFITS--LIFETIME INCOME BENEFITS

28 TAC §131.1 INITIATION OF LIFETIME INCOME BENEFITS; NOTICE OF DENIAL

1. INTRODUCTION

The Texas Department of Insurance, Division of Workers' Compensation adopts new §131.1, concerning initiation of lifetime income benefits; notice of denial. This section is adopted without substantive changes to the proposed text published in the October 10, 2014, issue of the *Texas Register* (39 TexReg 8051). Workers' compensation stakeholder feedback was considered and incorporated throughout the rule development process. Informal drafts of new §131.1 were posted on the Texas Department of Insurance's website on June 20, 2014 and August 19, 2014. The Division held a public hearing on December 22, 2014.

The Division has adopted one non-substantive change to the text of new §131.1 to conform to agency style. The Division adds the word "employee" and deletes the word "worker" in new §131.1(b) for consistency with agency style and 28 TAC Chapter 131. This change does 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 this rule is set out in this order, which includes the preamble. The following paragraphs include a detailed section by section description and reasoned justification of new §131.1.

2. REASONED JUSTIFICATION.

New §131.1 is necessary to achieve the goals of Labor Code §402.021(b)(3) and (b)(8), entitled goals; legislative intent; general workers' compensation mission of department. Labor Code §402.021(b)(3) requires that injured employees are provided income and medical benefits in a timely and cost-effective manner. Labor Code §402.021(b)(8) outlines the Texas workers' compensation system's goal to effectively educate and clearly inform each person who participates in the system of the person's rights and responsibilities under the system and how to appropriately interact within the system.

Section 131.1 addresses **initiation of lifetime income benefits; notice of denial**. New §131.1(a) requires insurance carriers to initiate the payment of lifetime income benefits without a final decision, order, or other action of the commissioner if an injured employee meets the eligibility criteria for lifetime income benefits listed under Labor Code §408.161 as a result of the compensable injury. New §131.1(a) reaffirms an insurance carrier's existing duties to adjust claims and initiate benefit payments promptly as and when they are due. Prompt initiation of claims compensation is an existing requirement of Labor Code §409.021, concerning initiation of benefits; insurance carrier's refusal; administrative violation. Additionally, under Labor Code §415.002(a), concerning administrative violation by insurance carrier, an insurance carrier or its representative commits an administrative violation if it fails to process claims promptly in a reasonable and prudent manner or if it fails to initiate or reinstate benefits when due if a legitimate dispute does not exist as to the liability

of the insurance carrier. New §131.1(a) also reaffirms the current requirements of Labor Code §408.081(a), concerning income benefits, and Labor Code §402.021(b)(3), that insurance carriers pay and the injured employees receive all income benefits they are entitled to timely and accurately.

New §131.1(a) is adopted under the Division's general rulemaking authority under Labor Code §402.00111, regarding the relationship between the Commissioner of Insurance and the Commissioner of Workers' Compensation; separation of authority; rulemaking, which provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority under Title 5 of the Labor Code. New §131.1(a) is also adopted under the Division's general rulemaking authority under Labor Code §402.061, regarding adoption of rules, which provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act.

New §131.1(b) provides that an insurance carrier must either initiate or deny lifetime income benefits within 60 days from the receipt of the injured employee's written request and after considering all the requirements of Labor Code §408.161. An insurance carrier's piecemeal review of an injured employee's request for lifetime income benefits under Labor Code §408.161 and fragmented responses concerning one eligibility requirement at a time can delay the review process and hinder the injured employee from receiving timely lifetime income benefits.

New §131.1(b) provides that an insurance carrier's failure to respond to an injured employee's request for lifetime income benefits within 60 days from the receipt of the injured employee's written request does not constitute a waiver of the insurance carrier's right to dispute eligibility to lifetime income benefits. The Division determined that 60 days is an adequate amount of time for an insurance carrier to review an injured employee's eligibility under Labor Code §408.161. The

Division weighed the factors of the injured employee's need for prompt payment of lifetime income benefits against the insurance carrier's need to have an adequate amount of time to investigate an injured employee's request for lifetime income benefits that may not contain all of the necessary information needed to process the request. The Division determined that the requirement to either initiate or deny lifetime income benefits within 60 days from receipt of the injured employee's written request was an adequate amount of time based on a review of the determination process and stakeholder feedback. The requirement to either initiate or deny lifetime income benefits within 60 days from receipt of the injured employee's written request is also consistent with existing Division timelines for investigating a potential beneficiary's eligibility for death benefit payments and will ensure consistent requirements for ease of compliance.

The Division notes that adopted new §131.1(b) is applicable to an injured employee's eligibility for lifetime income benefits, and should be read separate and apart from the Labor Code §409.021(c) provisions related to the compensability of a claim. An insurance carrier may waive its right to contest compensability of a claim under Labor Code §409.021 if the insurance carrier does not timely contest compensability as required by that section.

New §131.1(b) is adopted under the Division's general rulemaking authority under Labor Code §402.00111, regarding the relationship between the Commissioner of Insurance and the Commissioner of Workers' Compensation; separation of authority; rulemaking, which provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority under Title 5 of the Labor Code. New §131.1(b) is also adopted under the Division's general rulemaking authority under Labor Code §402.061, regarding adoption of rules,

which provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act.

New §131.1(b) is necessary to ensure that insurance carriers pay, and the injured employees receive, all benefits they are entitled to as required by Labor Code §§408.081(a), 415.002(a)(11), 415.002(a)(12), 402.021(b)(3), and 409.021.

New §131.1(c) requires the insurance carrier to make the first payment of lifetime income benefits on or before the 15th day after the date the insurance carrier reasonably believes the injured employee is eligible for lifetime income benefits as a result of the compensable injury. The Division notes that the initiation of lifetime income benefits without a final decision, order, or other action of the commissioner does not waive the insurance carrier's right, in accordance with Labor Code §409.021, to contest the compensability of the claim. The requirement that the insurance carrier make the first payment of lifetime income benefits on or before the 15th day after the date the insurance carrier reasonably believes the injured employee is eligible for lifetime income benefits as a result of the compensable injury is a similar deadline to the existing requirement for initiation of all benefits under Labor Code §409.021(a), which requires an insurance carrier to begin the payment of benefits not later than the 15th day after the date on which an insurance carrier receives written notice of an injury. Having a similar 15-day initiation of payment requirement for all types of income benefits will ensure consistent requirements for ease of compliance.

Labor Code §409.021(a) concerns the initiation of the first type of workers' compensation income benefits paid under the claim, while the requirement in §131.1(c) concerns the initiation of lifetime income benefits regardless of whether the insurance carrier has been making another type of income benefit payment. New §131.1(c) provides that the 15-day initial payment of lifetime income

benefits deadline is the same for both when lifetime income benefits are the first benefit type on the claim and when lifetime income benefits are not the first type of income benefit on the claim to ensure consistent requirements for ease of compliance. The requirement in new §131.1(c) that lifetime income benefits must be initiated within 15 days regardless of whether the insurance carrier has been making another type of benefit payment is adopted under the Division's general rulemaking authority under Labor Code §402.00111 and §402.061.

New §131.1(c) is necessary to fulfill the goals of Labor Code §402.021(b)(3), which states that the Texas workers' compensation system must provide appropriate income benefits and medical benefits in a manner that is timely and cost-effective. New §131.1(c) is also necessary to implement Labor Code §408.081, which provides that an employee is entitled to timely and accurate income benefits.

New §131.1(b) does not authorize an insurance carrier to delay initiation of lifetime income payments to an injured employee beyond 15 days after the insurance carrier reasonably believes the injured employee is eligible for lifetime income benefits. Although an insurance carrier must initiate or deny an injured employee's request for lifetime income benefits within 60 days from the receipt of the injured employee's written request under new §131.1(b), insurance carriers are still required to make the first payment on or before the 15th day if the insurance carrier reasonably believes the injured employee is eligible for lifetime income benefits as a result of a compensable injury. This includes situations where an insurance carrier reasonably believes the injured employee is eligible for lifetime income benefits, but the injured employee has not submitted a written request for these benefits. The Division also notes that nothing in this rule is intended to change the requirement that weekly income

benefits begin to accrue on the eighth day after the date of injury under Labor Code §408.082, concerning the accrual of right to income benefits.

New §131.1(d) outlines the form and manner in which an insurance carrier must issue a denial of lifetime income benefits to an injured employee. If the insurance carrier receives a request for lifetime income benefits from an injured employee, and the insurance carrier believes the injured employee is not eligible, the insurance carrier shall deny eligibility by sending a plain language notice of denial of eligibility to the injured employee, the injured employee's representative, and to the Division. The notice of denial of eligibility must be in the form and manner prescribed by the Division and must be sent within 60 days of receipt of the injured employee's written request for lifetime income benefits. The notice of denial of eligibility must include a full and complete statement describing the insurance carrier's reasons for denial. The statement must contain sufficient claim-specific substantive information to enable the injured employee to understand the insurance carrier's position or action taken under the claim. A generic statement that simply states the insurance carrier's position with phrases such as "not part of compensable injury," "not meeting criteria," "liability is in question," "under investigation," "eligibility questioned," or other similar phrases with no further description of the factual basis for the denial do not satisfy these requirements. The notice of denial of eligibility must also include contact information, including the adjuster's name, toll-free telephone and fax numbers, and email address, and a statement informing the injured employee of his or her right to request a benefit review conference to resolve the dispute.

New §131.1(d) may streamline the process for processing an injured employee's written request for lifetime income benefits because insurance carriers are already familiar with its requirements as they closely track existing requirements in §124.2(h), relating to insurance carrier

reporting and notification requirements. Additionally, §124.2(e)(1) and §124.2(e)(4) impose existing requirements on insurance carriers to notify the Division and the injured employee within 10 days of making the initial income benefit payment on a claim and the initial payment after making a change from one income benefit type to another. New §131.1(d) helps promote communication between insurance carriers and injured employees that is consistent and thorough and that assists the injured employees in understanding the reason for the denial and their right to dispute the insurance carrier's decision by requesting a benefit review conference. Additionally, under adopted new §131.1(d), the insurance carrier's notice of denial does not constitute a request for a benefit review conference.

New §131.1(d) is adopted under the Division's general rulemaking authority under Labor Code §402.00111 and §402.061.

New §131.1(e) states that an injured employee may contest an insurance carrier's denial of eligibility for lifetime income benefits by requesting a benefit review conference as provided by 28 TAC Chapter 141 relating to dispute resolution--benefit review conference. New §131.1(e) is necessary to fulfill the goals of the workers' compensation system outlined in Labor Code §402.021(b)(8) to effectively educate and clearly inform each person who participates in the system of the person's rights and responsibilities under the system and how to appropriately interact within the system. New §131.1(e) is also adopted under the Division's general rulemaking authority under Labor Code §402.00111 and §402.061.

New §131.1(f) clarifies that adopted new §131.1 does not limit an insurance carrier's duty to initiate payment of lifetime income benefits on or before the 15th day after the date the insurance carrier reasonably believes that the injured employee is eligible for lifetime income benefits as a

result of the compensable injury. For example, if an insurance carrier receives a written request for lifetime income benefits from the injured employee and then five days later has a reasonable belief that the injured employee is entitled to lifetime income benefits, the insurance carrier must initiate payment within 15 days, and the deadline is not extended to day 60 after receipt of request. The requirement that insurance carriers must initiate payment of lifetime income benefits on or before the 15th day after the date the insurance carrier reasonably believes that the injured employee is eligible for lifetime income benefits as a result of the compensable injury is necessary to fulfill the goals of Labor Code §402.021(b)(5), which requires that the Texas workers' compensation system minimize the likelihood of disputes and resolve them promptly and fairly when identified. New §131.1(f) is necessary to fulfill the goals of Labor Code §402.021(b)(3), which states that the Texas workers' compensation system must provide appropriate income benefits and medical benefits in a manner that is timely and cost-effective. New §131.1(f) is also necessary to implement Labor Code §408.081, which provides that an employee is entitled to timely and accurate income benefits. New §131.1(f) is also adopted under the Division's general rulemaking authority under Labor Code §402.00111 and §402.061.

New §131.1(g) provides the effective date for new §131.1. The June 1, 2015 effective date is necessary in order to provide additional time for insurance carriers to fulfill the requirements of new §131.1 including possible procedural and tracking changes in the systems that insurance carriers employ for adjusting claims. New §131.1(g) is adopted under the Division's general rulemaking authority under Labor Code §402.00111 and §402.061.

3. SUMMARY OF COMMENTS AND AGENCY RESPONSES.

General

Comment: A commenter questions whether new §131.1 will impact how medical bills are handled for patients who qualify for lifetime income benefits. The commenter notes that some insurance carriers deny coverage for paraplegic and quadriplegic patients that should qualify for lifetime income benefits as “unrelated” or “normal disease of life” even when the patient is going through the Division dispute process.

Division Response: The Division notes that new §131.1 outlines the procedures for the initiation of lifetime income benefits, the form and manner in which an insurance carrier must issue a denial of lifetime income benefits to an injured employee, and how an injured employee can raise a dispute following the denial of lifetime income benefit eligibility. Medical billing is beyond the scope of new §131.1. If injured employees need assistance while going through the Division dispute process, the Office of Injured Employee Counsel is available to assist an injured employee who is not represented. The Office of Injured Employee Counsel (OIEC) can be contacted at 1-866-393-6432.

Comment: A commenter appreciates that the Division has considered the feedback of the insurance industry on the two different informal draft rules and that much of the insurance industry’s feedback was incorporated into the rules.

A commenter states that it is good that insurance carriers are required to promptly pay lifetime income benefits or be specific in their dispute.

A commenter applauds this proposal whose aim is the welfare of the injured employee. The commenter notes that the Texas Workers’ Compensation Act is intended to protect the economic interest of injured employees and their families, not to consider the economic effects a rule would

have for insurance carriers, state agencies, small businesses, or even the interests of the State of Texas. The commenter adds that the Texas Workers' Compensation Act is meant to be just and equitable.

A commenter is supportive of the Division's efforts with new §131.1. Particularly, the commenter notes that timely decision-making is important for injured employees who are seeking lifetime income benefits and oftentimes have had all other income benefits exhausted. The commenter adds that these injured employees seeking lifetime income benefits are definitely in the greatest need.

A commenter supports the rule, noting that it is important to create a deadline for making a decision on something as significant as an injured employee's entitlement to lifetime income benefits.

Division Response: The Division appreciates the supportive comments.

Comment: A commenter supports the removal of a mandate from the proposed rule that insurers evaluate "all claims" for lifetime income benefit eligibility. The commenter notes that this requirement, set forth in an earlier informal draft rule, was overly broad and burdensome because only a small minority of all claims meet the criteria for lifetime income benefits set forth in Labor Code §408.161.

Division Response: The Division notes that while the posted informal draft of §131.1(a) was amended before proposal, the Division's original intent to help ensure that insurance carriers pay and injured employees receive all income benefits they are entitled to timely and accurately, did not change. The Division highlights that insurance carriers have an existing duty to adjust claims and

initiate benefit payments promptly as and when they are due under Labor Code §409.021 and §415.002(a).

Comment: A commenter asks which provisions in new §131.1 guarantee an injured employee that any subsequent dispute resolution will be resolved promptly and fairly. The commenter also asks if new §131.1 assigns any particular individual to investigate if the subsequent dispute resolution is conducted in an equitable and justifiable manner.

Division Response: The Division notes that new §131.1 outlines the procedures for the initiation of lifetime income benefits, the form and manner in which an insurance carrier must issue a denial of lifetime income benefits to an injured employee, and how an injured employee can raise a dispute following the denial of lifetime income benefit eligibility. Injured employees are entitled to dispute their workers' compensation issues through the Division's dispute resolution process outlined in 28 TAC Chapter 141.

Comment: A commenter asks the Division to consider Labor Code §21.002(6) and §401.011(16). The commenter notes that these sections are cited in the decision in *Mid Century Ins. Co. v Workers' Comp. Comm'n*, 187 S.W 3d 754 (Tex. App.-Austin 2006), which states that "where disability is linked to LIB's depends upon the nature of the employee's pre-injury job".

The commenter also notes that the Division stated in Advisory 97-02, *Disability Disputes: Clarification of Advisory 96-05*, that "a disability dispute occurs when the insurance carrier accepts the claim as compensable but disputes the injury is cause for the employees' inability to work." The commenter further notes that the Division refused to accept the fact that disability is linked to income benefits and does not end at maximum medical improvement.

The commenter recommends that initiation of lifetime income benefits conform to the date of initiation decided on in the Texas Court of Appeals holding in *Mid-Century*. Additionally, the commenter recommends that all claims found to be wrongly adjudicated or an abuse of discretion be voided and a judgment be entered in favor of the injured employee.

Division Response: The Division notes that new §131.1 outlines the procedures for the initiation of lifetime income benefits, the form and manner in which an insurance carrier must issue a denial of lifetime income benefits to an injured employee, and how an injured employee can raise a dispute following the denial of lifetime income benefit eligibility. The statutory definition of disability and its applications are beyond the scope of new §131.1.

The court in *Mid-Century* ruled that Labor Code §408.161 establishes the date at which lifetime income benefits becomes payable. The court stated that, “‘Disability’ is not mentioned in Section 408.161, nor do the enumerated injurious conditions in that provision necessarily constitute disabilities in all cases.” *Mid-Century Insurance Co. v. Texas Workers’ Comp. Comm’n*, 187 S.W.3d 754,760 (Tex. App.--Austin, 2006, no writ). New §131.1 follows the ruling of the court in *Mid-Century* and does not use Labor Code §408.082 as a basis for establishing when lifetime income benefits become payable. New §131.1 is also consistent with an accrual date of lifetime income benefits being the earliest date from which the injured employee became entitled to receive lifetime income benefits as noted in *Region XIX Service Center v. Banda*, 343 S.W.3d 480, 490 (Tex. App. El Paso, 2011, pet. den.). The recommendation that all claims found to be wrongly adjudicated or an abuse of discretion be voided is beyond the scope of the rule, which outlines the procedures for the initiation of lifetime income benefits and the form and manner in which an insurance carrier must issue a

denial of lifetime income benefits to an injured employee. The Division appeals process is detailed in Labor Code Chapter 410 and 28 TAC Chapters 141-147.

Section 131.1(b):

Comment: A commenter suggests that new §131.1(b) be changed to state that if an insurance carrier fails to make a determination of whether or not the injured employee is entitled to lifetime income benefits within 60 days from the date it received the injured employee's written request for lifetime income benefits, the insurance carrier is liable for lifetime income benefits from the 60th day after it received such notice until the day it makes a determination that the injured employee is not entitled to lifetime income benefits.

A commenter notes that administrative violations do not directly benefit the injured employee, and it is the injured employee not receiving benefits who is most significantly impacted by the delay in making an entitlement determination. The commenter states that creating liability for the period between the 60th day after the insurance carrier's receipt of the written request for lifetime income benefits and the date of its determination is analogous to the situation where an injured employee does not timely file an application for supplemental income benefits and the injured employee loses benefits for the period from the beginning date of the quarter to the date the supplemental income benefits application is received by the insurance carrier.

The commenter further notes that under §130.105, the injured employee loses benefits based on the failure to comply with a filing deadline and the commenter requests that the Division impose a similar requirement on the insurance carrier in the case where a timely determination on a lifetime income benefits application is not made. The commenter states that such an approach would eliminate the harsh consequence of a waiver, while still encouraging a prompt determination by the

insurance carrier and providing the injured employee with benefits during the period. The commenter believes that this approach strikes an acceptable balance between the interests of the injured employee and the insurance carrier. The commenter also notes that the Division has the authority under Labor Code §409.021(a) and §409.021(a-1), and §124.3(a)(1) and (a)(2). The commenter states that this approach in new §131.1 would create consistency in the impact of a party's failure to take prompt action on the initiation date of income benefits. The commenter notes that this recommendation is a natural extension of the policy expressed in §124.3 and §130.105 and within the Division's general authority to define the administrative violation appropriate to the circumstances.

Division Response: The Division determined that an administrative penalty, and not a waiver, should be the consequence for an insurance carrier failing to make a determination of whether or not the injured employee is entitled to lifetime income benefits within 60 days from the date it received the injured employee's written request for lifetime income benefits. The Division monitors compliance with the Workers' Compensation Act and rules and issues administrative penalties as required by Labor Code §402.00128, regarding general powers and duties of Commissioner. As discussed earlier in the preamble, the Division weighed the factors of the injured employee's need for prompt payment of lifetime income benefits against the insurance carrier's need to have adequate time to investigate an injured employee's request for lifetime income benefits that may not contain all of the necessary information needed to process the request. Furthermore, the Division anticipates that many injured employees with a compensable injury will be receiving an alternate form of income benefit payment under Labor Code §409.021(a) while the insurance carrier conducts its investigation of the injured employee's eligibility for lifetime income benefits.

Section 131.1(b) and 131.1(c)

Comment: A commenter states that the conflicting waiver language between proposed §131.1(b) and §131.1(c) creates a potential legal inference that the initiation of lifetime income benefits without a final decision, order, or other action of the commissioner does constitute a waiver of the insurance carrier's right to dispute the injured employee's eligibility for lifetime income benefits. A commenter states this inference goes far beyond the Supreme Court's ruling in *Liberty Mutual v. Adcock*, 412 S.W.3d 492 (Tex. Sup. 2013). In that case, the Supreme Court held that the insurance carrier and Division could not re-open the issue of eligibility to lifetime income benefits after there has been a Division determination of eligibility to LIBs. The commenter states that there is nothing in the express and clear language of Labor Code §408.161 or the Texas Workers' Compensation Act that gives the Division authority to treat voluntary payments made by insurance carriers as adjudicated determinations for the purpose of administrative expediency.

The commenter states that many Texas courts have recognized that it is improper under the Act to punish an insurance carrier for a voluntary payment by treating the voluntary payment as a waiver of the right to contest or as an adjudicated determination. Relevant cases include *Southern Underwriters v. Schoolcraft*, 158 S.W.2d 991 (Comm. App. 1942); *Hartford Underwriters v. Hale*, 389 S.W.2d 720 (Tex. App.- San Antonio 1965); *Houston General v. Association Casualty*, 977 S.W.2d 634 (Tex. App.- Tyler 1998, no pet.); and *TEIA v. Shannon*, 462 S.W.2d 559 (Tex. Sup. 1970).

The commenter notes that conflicting waiver language discourages insurance carriers from making voluntary payments, which is bad for employees who benefit from voluntary payments. It also deprives insurance carriers of due process of law when a voluntary payment of lifetime income benefits is treated as a waiver of the right to later contest eligibility to lifetime income benefits.

The commenter states that the second informal draft proposal published by the Division contained consistent waiver provisions. It is not clear why the Division put inconsistent waiver provisions in the formal proposal. This inappropriate legal inference found in the formal proposal can be avoided by making the waiver language in subsection (c) consistent with the waiver language in subsection (b).

Division Response: The Division disagrees that the waiver provisions in §131.1(b) and §131.1(c) are inconsistent or conflict in any way because they address separate issues. New §131.1(b) clarifies that not responding to an injured employee's request for lifetime income benefits in the 60-day timeframe will not prevent the insurance carrier from later contesting eligibility for lifetime income benefits. The waiver addressed in §131.1(b) is not concerned with payments, whether they are before or after a Division determination; it is instead concerned with the failure to respond to the request for lifetime income benefits within the timeframes. The insurance carrier in this situation has neither denied the request nor initiated benefits.

In contrast, new §131.1(c) merely reiterates the law as set forth in Labor Code §409.021(c), which states that a carrier has up to 60 days to contest compensability, and the initiation of payments does not affect the right to investigate or deny compensability during that period. Under Labor Code §401.011, regarding general definitions, a compensable injury is one arising out of and in the course and scope of employment for which compensation is payable. Compensability is a separate issue from whether an injured employee meets the qualifications for lifetime income benefits under Labor Code §408.161. New §131.1(c) does not address whether initiating lifetime income benefits without a final decision, order, or other action of the commissioner waives the insurance carrier's right to later contest eligibility to lifetime income benefits. The Division clarifies

that the Labor Code does not address the issue of “voluntary payments” or eligibility disputes that begin after the initiation of lifetime income benefits. The Division reiterates that lifetime income benefits are due at the time the claimant meets the qualifications under Labor Code §408.161 and not only when the Division makes a final determination.

Section 131.1(c)

Comment: A commenter recommends that the 15-day period in §131.1(c) be reduced to seven days. Requiring payment in seven days seems consistent with the requirement of §124.7(c) that an insurance carrier initiate income benefits no later than the seventh day after the accrual date of benefits, unless it is disputing the claim. A commenter states that it does not seem appropriate to give the same time period to pay lifetime income benefits once the insurance carrier reasonably believes they are owed as is given in §124.3 to pay or dispute following written notice of an injury. Once the insurance carrier reasonably believes that the injured employee is eligible for lifetime income benefits, it already has a reason to pay but in §124.3, the 15-day period is provided for the insurance carrier to make that determination

Division Response: The Division declines to make the suggested change. The Division has determined that 15 days is a reasonable timeframe based on the requirements in Labor Code §409.021(a) and stakeholder input. The Division anticipates situations where the injured employee may be receiving another form of workers' compensation benefit under Labor Code §409.021(a) at the time the insurance carrier reasonably believes the injured employee is eligible for lifetime income benefits. In these circumstances, the insurance carrier would be converting the benefit type and not initiating benefits. New §131.1(c) provides that the 15-day initial payment of lifetime income benefits applies to both circumstances; when lifetime income benefits are the first benefit type on the claim

and when lifetime income benefits are not the first benefit type on the claim to ensure consistent requirements for ease of compliance.

Comment: A commenter would prefer for waiver language to also be included in §131.1(c). A commenter states that consistent waiver language will eliminate any misinterpretation of the meaning of the proposed language and will eliminate potential ambiguity. The §131.1(b) waiver language also accurately states the law that an insurance carrier does not waive its right to later dispute eligibility for lifetime income benefits if it voluntarily initiates benefits without a final decision, order, or other commissioner action.

The commenter recommends that §131.1(c) should be modified to read, "The initiation of lifetime income benefits without a final decision, order, or other action of the commissioner does not waive the insurance carrier's right to contest compensability of the injury in accordance with Labor Code §409.021(c) and does not constitute a waiver of the insurance carrier's right to dispute the injured employee's eligibility for lifetime income benefits."

A commenter recommends the following wording for §131.1(c), "The insurance carrier shall make the first payment of lifetime income benefits on or before the 15th day after the date the insurance carrier reasonably believes that the injured employee is eligible for lifetime income benefits as a result of the compensable injury. The initiation of lifetime income benefits without a final decision, order, or other action of the commissioner does not waive the insurance carrier's right to contest the compensability of the injury in accordance with Labor Code §409.021(c) and does not constitute a waiver of the insurance carrier's right to dispute the injured employee's eligibility for lifetime income benefits."

Division Response: The Division declines to make the suggested change because new §131.1 merely restates the Labor Code §409.021(c) provision that initiation of benefits during the 60 day period does not prevent further investigation or denial of compensability during that period. The Division declines to extend §131.1 to go beyond that statutory provision.

Section 131.1(d)

Comment: A commenter states the proposed language in §131.1(d) is inappropriate and inconsistent with the law. The commenter notes that an insurance carrier can and should be required to provide a statement of the reasons for its denial of the claimant's request, and that the rest of the proposed language is unnecessary, argumentative, and inappropriate for regulatory language and inconsistent with Texas workers' compensation law.

A commenter notes that a response that the claimant has not met the criteria set forth in Labor Code §408.161, that the injury is not part of a compensable injury, or that the injured employee's liability is in doubt, is more than adequate explanations for why the insurer does not accept a claimant's request for lifetime income benefits. The commenter states that the response, "not meeting criteria" does not seem generic but seems a more than adequate statement that, in the insurance carrier's view, the claimant has not alleged an injury qualifying for lifetime income benefits under Labor Code §408.161. The response "not meeting criteria" fairly informs the claimant that the insurance carrier does not believe the claim rises to the level of any of the seven extremely severe injuries set forth in Labor Code §408.161.

A commenter notes that the burden of proof is on the claimant to prove he or she has met the Labor Code §408.161 criteria, that the alleged injury is part of the compensable claim, and that the employer is liable for the claim. The burden is not on the insurer to demonstrate why the claimant is

not entitled to lifetime income benefits. The commenter further notes that it is inconsistent with the workers' compensation law and well-established court precedent to require the insurance carrier, in its response to a claimant's request for lifetime income benefits, to prove why a claimant is not entitled to lifetime income benefits.

The commenter notes the proposed provision relating to the claimant's request for lifetime income benefits does not contain any language that "generic" explanations that "simply state" the respondent's position are unsatisfactory. In contrast, the proposed rule, at §131.1(b) provides "An injured employee may submit a written request for lifetime income benefits to the insurance carrier." The claimant has the burden of proof on the issue, yet the proposed rule does not contain language that the claimant's request cannot be "generic" or "simply state" the claimant's position or must contain "claim-specific substantive information to enable the insurance carrier to understand the claimant's position that he or she is entitled to lifetime income benefits."

Proposed §131.1(d) should be modified to read as follows, "The notice of denial of eligibility shall include: A statement describing the insurance carrier's denial and its reason(s) for such action."

Division Response: The Division declines to make the suggested change. The Division disagrees that new §131.1(d) is inappropriate and inconsistent with the law. The Division notes that §131.1(d) does not require the insurance carrier to prove why a claimant is not entitled to lifetime income benefits. Instead, §131.1(d) requires the insurance carrier to provide the injured employee with a full and complete statement describing the insurance carrier's reasons for denial. The Division notes that new §131.1(d) may streamline the denial process because insurance carriers are already familiar with its requirements as they closely track existing requirements in §124.2(h). Additionally, §124.2(e)(1) and §124.2(e)(4) impose existing requirements on insurance carriers to notify the

Division, the injured employee, and the injured employee's representative within 10 days of making the initial income benefit payment on a claim and the initial payment after making a change from one income benefit type to another. Because the reason for denial of payment of lifetime income benefits to the claimant must be written in plain language, it should not include the unnecessary use of technical terms, acronyms, and abbreviations. The full statement helps ensure that the claimant is informed of the reasons for denial and can then decide whether to request dispute resolution to contest the insurance carrier's denial. New §131.1(d) is necessary to fulfill the statutory goals of Labor Code §402.021(b)(5) to minimize the likelihood of disputes and resolve them promptly when identified and Labor Code §402.021(b)(8) to effectively educate and clearly inform each person who participates in the system.

Comment: A commenter notes that both draft plain language notices posted by the Division end with a warning to the injured employee for economic penalties and jail time for a criminal act. The commenter recommends that this warning should include the insurance carrier and its representatives and Division employees.

Division Response: The Division notes that the draft plain language notices posted on the Division website in conjunction with the proposal of §131.1 were not part of the formal proposal. The purpose of §130.1(d) is to outline the information that must be transmitted, and the Division declines to add specific language for warnings that must be on the form.

Comment: A commenter recommends the Division add language to either plain language notice form stating that an unrepresented injured employee might also contact OIEC for assistance in those instances where he or she receives a lifetime income benefits denial. Alternatively, the commenter requests that the Division develop a Frequently Asked Questions document with the

Office of Injured Employee Counsel contact information to accompany whichever plain language notice is adopted.

Division Response: The Division declines to require the insurance carrier to provide information stating that an unrepresented injured employee might also contact OIEC for assistance in those instances where he or she receives a lifetime income benefits denial to be a prescribed element of the notice of denial outlined in §131.1(d). Injured employees receive information about OIEC from other sources. The PLN-4 provides the injured employee with information about dispute resolution including the injured employee's right to a benefit review conference and the phone number to contact the Division office that is handling their claim. Under Labor Code §409.010(1)(B), the injured employee receives information about OIEC from the Division upon notice of injury. The injured employee is also provided information about OIEC in the *Notice to Employees Concerning Workers' Compensation in Texas* which must be posted in the workplace for the injured employee to read.

4. NAMES OF THOSE COMMENTING FOR AND AGAINST THE SECTIONS.

For:

None

For, with changes:

Property Casualty Insurers, Insurance Council of Texas, an Injured Employee, Office of Injured Employee Counsel, and American Insurance Association.

Against:

None

Neither for nor against:

One Individual

5. STATUTORY AUTHORITY.

The amendments are adopted under the Labor Code §§408.161, 415.002(a)(11), 415.002(a)(12), 415.002(a)(13), 402.021(b)(5), 402.021(b)(3), 402.021(b)(8), 402.022, 408.081, 409.021, 402.00111, and 402.061. Labor Code §408.161 states the requirements for lifetime income benefits eligibility, the amount the injured employee is owed, and how the insurance carrier may pay the injured employee. Labor Code §415.002(a)(13) states that an insurance carrier or its representative commits an administrative violation if they fail to process claims promptly in a reasonable and prudent manner. Labor Code §415.002(a)(12) states that an insurance carrier or its representative commits an administrative violation if they fail to initiate or reinstate benefits when due if a legitimate dispute does not exist as to the liability of the insurance carrier. Labor Code §415.002(a)(11) provides that an insurance carrier or its representative commits an administrative violation if that person misrepresents the reason for not paying benefits or terminating or reducing the payment of benefits. Labor Code §402.021(b)(5) requires that the Texas workers' compensation system minimize the likelihood of disputes and resolve them promptly and fairly when identified. Labor Code §402.021(b)(3) states that the Texas Workers' Compensation System must provide appropriate income benefits and medical benefits in a manner that is timely and cost-effective. Labor Code §402.021(b)(8) outlines the workers' compensation system's goal to effectively educate and clearly inform each person who participates in the system of the person's rights and responsibilities under the system and how to appropriately interact within the system. Labor Code §402.022 provides, in part, the commissioner by rule shall ensure that each division form, standard letter, and

brochure under this subtitle is written in plain language; is in a readable and understandable format; and complies with all applicable requirements relating to minimum readability requirements. Labor Code §408.081 provides that an employee is entitled to timely and accurate income benefits. Labor Code §409.021 requires that an insurance carrier initiate compensation promptly and begins the payment of benefits not later than the 15th day after the date on which an insurance carrier receives written notice of an injury. Labor Code §402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority under Title 5 of the Labor Code. Labor Code §402.061 provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act.

6. TEXT.

§131.1 Initiation of Lifetime Income Benefits; Notice of Denial

(a) The insurance carrier shall initiate the payment of lifetime income benefits without a final decision, order, or other action of the commissioner if an injured employee meets the eligibility criteria for lifetime income benefits listed under Labor Code §408.161 as a result of the compensable injury.

(b) An injured employee may submit a written request for lifetime income benefits to the insurance carrier. The insurance carrier shall either initiate lifetime income benefits or deny the injured employee's eligibility for lifetime income benefits considering all of the eligibility criteria listed under Labor Code §408.161 within 60 days from the receipt of the injured employee's written request. An insurance carrier's failure to respond to the request for lifetime income benefits within

the timeframes described in this subsection does not constitute a waiver of the insurance carrier's right to dispute the injured employee's eligibility for lifetime income benefits.

(c) The insurance carrier shall make the first payment of lifetime income benefits on or before the 15th day after the date the insurance carrier reasonably believes that the injured employee is eligible for lifetime income benefits as a result of the compensable injury. The initiation of lifetime income benefits without a final decision, order, or other action of the commissioner does not waive the insurance carrier's right to contest the compensability of the injury in accordance with Labor Code §409.021(c).

(d) If the injured employee submits a written request for lifetime income benefits and the insurance carrier denies that the injured employee is eligible for lifetime income benefits, the insurance carrier shall deny eligibility by sending a plain language notice of denial of eligibility to the division, the injured employee, and the injured employee's representative, if any, in the form and manner prescribed by the division up to the 60th day after receipt of the written request. The notice of denial of eligibility shall include:

(1) a full and complete statement describing the insurance carrier's reasons for denial. The statement must contain sufficient claim-specific substantive information to enable the injured employee to understand the insurance carrier's position or action taken under the claim. A generic statement that simply states the insurance carrier's position with phrases such as "not part of compensable injury," "not meeting criteria," "liability is in question," "under investigation," "eligibility questioned," or other similar phrases with no further description of the factual basis for the denial does not satisfy the requirements of paragraph (1) of this subsection;

(2) contact information including the adjuster's name, toll-free telephone and fax numbers, and email address; and

(3) a statement informing the injured employee of his or her right to request a benefit review conference to resolve the dispute.

(e) An injured employee may contest the insurance carrier's denial of eligibility for lifetime income benefits or failure to respond to the written request for lifetime income benefits by requesting a benefit review conference as provided by Chapter 141 of this title (relating to Dispute Resolution--Benefit Review Conference).

(f) Nothing in this section is intended to limit any insurance carrier's duty to initiate payment of lifetime income benefits before the time limit established in subsection (c) of this section.

(g) Effective date. This section is effective on June 1, 2015.

10. CERTIFICATION.

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

Issued at Austin, Texas, February 10, 2015.

Dirk Johnson
General Counsel
Texas Department of Insurance

IT IS THEREFORE THE ORDER of the Commissioner of Workers' Compensation that the amendments to 28 TAC §133.10 specified herein, concerning required billing forms and formats are adopted.

AND IT IS SO ORDERED.

X

W. Ryan Brannan
Commissioner of Insurance

ATTEST:

X

Dirk Johnson
General Counsel

COMMISSIONER ORDER NO.