# CHAPTER 116. GENERAL PROVISIONS--SUBSEQUENT INJURY FUND
# 28 TAC §116.11

**INTRODUCTION.** The Texas Department of Insurance, Division of Workers' Compensation (DWC) proposes to amend 28 Texas Administrative Code §116.11, to update its method for receiving Subsequent Injury Fund (SIF) requests from system participants.

**EXPLANATION.** Section 116.11 applies to an insurance carrier's request to SIF for reimbursement pursuant to Texas Labor Code §403.006. Currently, §116.11 requires reimbursement requests be filed with the SIF administrator in writing, but the rule does not require an insurance carrier to use DWC forms when requesting reimbursement or specify the manner of delivery of the SIF request. DWC seeks to improve the security of protected private claim data contained in a SIF request. Submissions by mail lack the security and privacy protections required for protected health information. Use of electronic transmission and elimination on paper serves the interest of protecting private health data. Electronic submission is defined as transmission of information by facsimile, electronic mail, electronic data interchange, or any other similar method and does not include telephonic communication. SIF developed DWC forms for each type of SIF request. DWC has not required use of DWC forms for SIF requests. Requiring insurance carriers to use DWC forms to submit SIF requests should increase DWC's efficiency in processing of the requests.

To address these issues, DWC proposes amending 28 TAC §116.11, Request for Reimbursement from the Subsequent Injury Fund, to require insurance carriers to electronically submit requests for reimbursement using Forms DWC Form-095 through DWC Form-098 as it applies to their specific request. Requiring insurance carriers to

electronically submit requests using the applicable DWC form should reduce the time and costs currently spent managing paper mail.

The proposed amendments will require that all §116.11(a)(1-5) requests will be electronically submitted and on the appropriate SIF-request form. Subsections (c) and (f) will require electronic submission and use of DWC Form-095, *Overturned Order or Designated Doctor Opinion*. Subsection (d) will require electronic submission and use of DWC Form-096, *Refund of Death Benefits*. Subsection (e) will require electronic submission and use of DWC Form-097, *Multiple Employment*. Subsection (g) will require electronic submission and use of DWC Form-098, *Pharmaceutical*.

**FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT.** Dan Paschal, deputy commissioner of Policy and Customer Services, has determined that during each year of the first five years the proposed amendments are in effect, there will be no measurable fiscal impact on state and local governments as a result of enforcing or administering the section. This determination was made because the proposed amendments do not add to or decrease state revenues, and because local governments are not involved in enforcing the proposed amendments. Further, by complying with the proposed amendments, expenditures of local governments, as self-insureds, may decrease by eliminating paper and mailing expense.

Mr. Paschal does not anticipate any measurable effect on local employment or the local economy as a result of this proposal.

**PUBLIC BENEFIT AND COST NOTE.** For each year of the first five years the proposed amendments are in effect, Mr. Paschal expects that administering the proposed amendments will have the public benefit of increased efficiency in processing SIF requests.

**ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS.** DWC has determined that the proposed amendments will not have an adverse economic effect or a disproportionate economic impact on small or micro businesses, or on rural communities. Instead, the proposed amendments result in cost savings to system participants, including small or micro businesses, by eliminating paper and mailing expense. As a result, and in accordance with Government Code §2006.002(c), DWC is not required to prepare a regulatory flexibility analysis.

**EXAMINATION OF COSTS UNDER GOVERNMENT CODE §2001.0045.** DWC has determined that this proposal does not impose a possible cost on regulated persons.

**GOVERNMENT GROWTH IMPACT STATEMENT.** DWC has determined that for each year of the first five years that the proposed amendments are in effect, the proposed rule:

- will not create or eliminate a government program;
- will not require the creation of new employee positions or the elimination of existing employee positions;
- will not require an increase or decrease in future legislative appropriations to the agency;
- will not require an increase or decrease in fees paid to the agency;
- will not create a new regulation;
- will not expand, limit, or repeal an existing regulation;
- will not increase or decrease the number of individuals subject to the rule's applicability; or
- will not positively or adversely affect the Texas economy.

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

**REQUEST FOR PUBLIC COMMENT.** DWC will consider any written comments on the proposal that are received no later than 5 p.m., Central time, on January 7, 2021. Send your comments to RuleComments@tdi.texas.gov; or to Cynthia Guillen, MS-4D, Texas Department of Insurance, Division of Workers' Compensation, Legal Services, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645.

To request a public hearing on the proposal, submit a request before the end of the comment period, and separate from any comments, to RuleComments@tdi.texas.gov; or to Cynthia Guillen, Texas Department of Insurance, Division of Workers' Compensation, Legal Services, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645. The request for public hearing must be separate from any comments and received by DWC no later than 5 p.m., Central time, on December 22, 2020. If DWC holds a public hearing, it will consider written and oral comments presented at the hearing.

## CHAPTER 116.

## 28 TAC §116.11

**STATUTORY AUTHORITY.** DWC proposes amended §116.11 under the following statutory authority:

Labor Code §402.00111(a) states that, except as otherwise provided, the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code.

Labor Code §402.00116 provides that the commissioner of workers' compensation shall administer and enforce this title, other workers' compensation laws of this state, and other laws granting jurisdiction to or applicable to DWC or the commissioner.

Labor Code §402.061 authorizes the commissioner to adopt rules as necessary for the implementation and enforcement of the Act.

Labor Code §401.024 defines electronic submission and provides that the commissioner of workers' compensation by rule may permit or require use of electronic transmission for transmitting any authorized or required data.

Labor Code §403.006 describes the SIF account and outlines reimbursement liability.

Labor Code §408.0041 provides that an insurance carrier is entitled to apply for and receive reimbursement from SIF for any overpayment of benefits paid based on the opinion of the designated doctor if that opinion is reversed or modified by a final order of the division or a court.

Labor Code §408.042 provides that an insurance carrier is entitled to apply for and receive reimbursement from SIF for the amount of income and death benefits paid to an injured worker that are based on wages paid from a non-injury employer.

**TEXT.**

**§116.11. Request for Reimbursement from the Subsequent Injury Fund.**

(a) An insurance carrier may request:

(1) reimbursement from the Subsequent Injury Fund (SIF)[~~,~~] under [~~pursuant to~~] Labor Code §403.006(b)(2)[~~,~~] for an overpayment of income, death, or medical benefits

when the insurance carrier has made an unrecoupable overpayment pursuant to the decision of an administrative law judge, [~~or~~] the Appeals Panel, [~~appeals panel~~] or an interlocutory order, and that decision or order is reversed or modified by final arbitration, order, or decision of the commissioner, State Office of Administrative Hearings, or a court of last resort;

(2) reimbursement from the SIF under [~~pursuant to~~] Labor Code §403.007(d)[~~,~~] for death benefits paid to the SIF before a legal beneficiary was determined to be entitled to receive death benefits;

(3) for a compensable injury that occurs on or after July 1, 2002, reimbursement from the SIF for the amount of income benefits paid to an injured employee based on [~~attributable to~~] multiple employment and paid under [~~pursuant to~~] Labor Code §408.042;

(4) for a compensable injury that occurs on or after September 1, 2007, reimbursement from the SIF for the amount of income, death benefits, or a combination paid to an injured employee or a legal beneficiary based on [~~attributable to~~] multiple employment and paid under [~~pursuant to~~] Labor Code §408.042;

(5) reimbursement from the SIF, under [~~pursuant to~~] Labor Code §408.0041(f) and (f-1), for an overpayment of benefits made by the insurance carrier based on the opinion of the designated doctor if that opinion is reversed or modified by a final arbitration award or a final order or decision of the commissioner or a court; or

(6) reimbursement from the SIF made in accordance with rules adopted by the commissioner under [~~pursuant to~~] Labor Code §413.0141. For purposes of this subsection only, an injury is determined not to be compensable following:

(A) The final decision of the commissioner or the judgment of the court of last resort; or

(B) A claimant's failure to respond within one year of a timely dispute

of compensability filed by an insurance carrier. In this instance only, the effective date of the determination of noncompensability [~~non-compensability~~] is one year from the date the insurance carrier filed the dispute [~~is filed~~] with the division. [~~by the insurance carrier.~~]

(i) A determination under this paragraph does not constitute final adjudication. It does not preclude a party from pursuing their claim through the division's dispute resolution process, and it does not permit a health care provider to pursue a private claim against the claimant.

(ii) If the claim is later determined to be compensable, the insurance carrier must [~~shall~~] reimburse the SIF for any initial pharmaceutical payment that [~~which~~] the SIF previously reimbursed to the insurance carrier. The insurance carrier's reimbursement of the SIF must [~~shall~~] be paid within the timeframe the insurance carrier has to comply with the agreement, decision and order, or other judgment that [~~which~~] found the claim to be compensable.

(b) The amount of reimbursement [~~that~~] the insurance carrier may be entitled to is equal to the amount of unrecoupable overpayments paid and does not include any amounts the insurance carrier overpaid voluntarily or as a result of its own errors. An unrecoupable overpayment of income or death benefits for the purpose of reimbursement from the SIF only includes those benefits that were overpaid by the insurance carrier pursuant to an interlocutory order, a designated doctor's [~~doctor~~] opinion, or a decision, which were finally determined to be not owed and which, in the case of an overpayment of income or death benefits to the injured employee or legal beneficiary, were not recoverable or convertible from other income or death benefits.

(c) To request [~~Requests for~~] reimbursement under [~~attributable to~~] subsection (a)(1) of this section[~~,~~] for insurance carrier claims of benefit overpayments made under an interlocutory order or decision of the commissioner that is later reversed or modified by final arbitration, order, decision of the commissioner, the State Office of Administrative

Hearings, or court of last resort, an insurance carrier must:

(1) submit the request electronically in the form and manner prescribed by the division; [~~shall be filed with the SIF administrator: in writing and include:~~]

(2)[~~(1)~~] provide a claim-specific summary of the reason the insurance carrier is seeking reimbursement and the total amount of reimbursement requested, including how it was calculated;

(3)[~~(2)~~] provide a detailed payment record showing the dates and [~~of payments, the~~] amounts of the payments, [~~purpose of payments, the~~] payees, type of benefits and [~~the~~] periods of benefits paid, all plain language notices (PLNs) about [~~regarding~~] the payment of benefits, all certifications of maximum medical improvement[~~,~~] and [~~all~~] assignments of impairment rating, and documentation that shows [~~demonstrates that~~ ] the overpayment was unrecoupable as described in subsection (b) of this section, if applicable;

(4)[~~(3)~~] provide the name, address, and federal employer identification number of the payee (insurance carrier) for any reimbursement that may be due;

(5)[~~(4)~~] provide copies of all relevant orders and decisions (benefit review conference reports, [~~Benefit Review Conferences,~~] interlocutory orders, [~~Interlocutory Orders,~~] contested case hearing decisions and orders, [~~Contested Case Hearing Decisions & Orders,~~] Appeals Panel decisions, [~~Decisions,~~] and court [~~Court~~] orders) relating to the requested reimbursement [~~regarding the payment for which reimbursement is being requested~~] and show [~~along with an indication of~~] which document is the final decision on the matter;

(6)[~~(5)~~] provide copies of all relevant reports and DWC forms [~~filed by~~] the employer filed with the insurance carrier; and

(7) provide [~~(6) if the request is based on an overpayment of medical benefits,~~] copies of all medical bills, [~~and~~] preauthorization request documents, relevant

independent review organization (IRO) decisions, medical fee dispute decisions, contested case hearing decisions and orders, Appeals Panel decisions, and court orders on medical disputes associated with the overpayment, if the request is based on an overpayment of medical benefits. [~~as well as all relevant Independent Review Organization (IRO) decisions, fee dispute decisions and Contested Case Hearing Decisions and Orders, Appeals Panel Decisions, and court orders regarding medical disputes.~~]

(d) To request [~~Requests for~~] reimbursement under [~~pursuant to~~] subsection (a)(2) of this section[~~,~~] for [~~related to a~~] reimbursement of death benefits paid to the SIF before [~~prior to~~] a legal beneficiary is [~~being~~] determined to be entitled to receive death benefits, an insurance carrier must: [~~shall be filed with the SIF administrator in writing and include:~~]

(1) submit the request electronically in the form and manner prescribed by the division;

(2)[~~(1)~~] provide a claim-specific summary of the reason the insurance carrier is seeking reimbursement and the total amount of reimbursement requested, including how it was calculated;

(3)[~~(2)~~] provide a detailed payment record showing the dates and amounts of payments, [~~the amounts of the payments, purpose of payments, the~~] payees, and [~~the~~] periods of benefits paid;

(4)[~~(3)~~] provide the name, address, and federal employer identification number of the payee (insurance carrier) for any reimbursement that may be due;

(5)[~~(4)~~] provide the documentation the legal beneficiary submitted [~~provided~~] with the claim for death benefits under [~~in accordance with~~] §122.100 of this title (relating to Claim for Death Benefits); and

(6)[~~(5)~~] provide [~~if applicable,~~] the final award of the commissioner[~~,~~] or the final judgment of a court of competent jurisdiction determining that the legal beneficiary is entitled to the death benefits.

(e) To request [~~Requests for~~] reimbursement under [~~pursuant to~~] subsections [~~subsection~~] (a)(3) or (4) of this section[~~,~~] regarding multiple employment, the requester must [~~shall be~~] submit [~~submitted~~] the request on an annual basis for the payments made during the same or previous fiscal year. The fiscal year begins each September 1 [~~1st~~] and ends on August 31 [~~31st~~] of the next calendar year. For example, insurance carrier payments made during the fiscal year from September 1, 2009, through August 31, 2010, must be submitted by August 31, 2011. Any claims for insurance carrier payments related to multiple employment that are not submitted within the required timeframe will not be reviewed for reimbursement. [~~These requests shall be filed with the SIF administrator in writing and include:~~] To request reimbursement under subsections (a)(3) or (4), an insurance carrier must:

(1) submit the request electronically in the form and manner prescribed by the division;

(2)[~~(1)~~] provide a claim-specific summary of the reason the insurance carrier is seeking reimbursement and the total amount of reimbursement requested, including how it was calculated;

(3)[~~(2)~~] provide a detailed payment record showing the dates and amounts of payments, [~~the amounts of the payments, purpose of payments, the~~] payees, type of benefits and [~~the~~] periods of benefits paid, all PLNs about [~~regarding~~] the payment of benefits, and [~~as well as~~] documentation that shows [~~that~~] the overpayment was unrecoupable as described in subsection (b) of this section, if applicable;

(4)[~~(3)~~] provide the name, address, and federal employer identification number of the payee (insurance carrier) for any reimbursement that may be due;

(5)[~~(4)~~] provide information documenting the injured employee's average weekly wage amounts paid from all nonclaim [~~non-claim~~] employment held at the time of the work-related [~~work-related~~] injury under [~~pursuant to~~] §122.5 of this title (relating to

Employee's Multiple Employment Wage Statement); and

(6)[~~(5)~~] provide information documenting the injured employee's average weekly wage amounts paid based on employment with the claim employer.

(f) To request [~~Requests for~~] reimbursement under [~~attributable to~~] subsection (a)(5) of this section, for insurance carrier claims of benefit overpayments made pursuant to a designated doctor's [~~doctor~~] opinion that is later reversed or modified by a final arbitration award or a final order or decision of the commissioner or a court, an insurance carrier must: [~~shall be filed with the SIF administrator in writing and include:~~]

(1) submit the request electronically in the form and manner prescribed by the division;

(2)[~~(1)~~] provide a claim-specific summary of the reason the insurance carrier is seeking reimbursement and the total amount of reimbursement requested, including how it was calculated;

(3)[~~(2)~~] provide a detailed payment record showing the dates and [~~of payments, the~~] amounts of [~~the~~] payments, [~~purpose of payments, the~~] payees, type of benefits and [~~the~~] periods of benefits paid,[~~;~~] PLNs about [~~regarding~~] the payment of benefits, and all certifications of maximum medical improvement and [~~all~~] assignments of impairment rating;

(4)[~~(3)~~] provide the name, address, and federal employer identification number of the payee (insurance carrier) for any reimbursement that may be due;

(5)[~~(4)~~] provide copies of all relevant designated doctors' [~~doctor~~] opinions (including responses to letters of clarification) and orders and decisions (IRO decisions, interlocutory orders, contested case hearing decisions and orders, [~~Interlocutory Orders, Contested Case Hearing Decisions and Orders,~~] arbitration awards, Appeals Panel decisions, [~~Decisions,~~] and court [~~Court~~] orders) relating to [~~regarding~~] the designated doctor's [~~doctor~~] opinion and the payment[~~,~~] made pursuant to the designated doctor's

[~~doctor~~] opinion for which reimbursement is being requested, and indicate [~~along with an indication of~~] which document is the final decision on the matter;

(6)[~~(5)~~] provide copies of all relevant reports and DWC forms [~~filed by~~] the employer filed with the insurance carrier; and

(7)[~~(6)~~] provide [~~for an overpayment of medical benefits,~~] copies of all medical bills and preauthorization request documents associated with an [~~the~~] overpayment of medical benefits.

(g) To request [~~Requests for~~] reimbursement under subsection (a)(6) of this section regarding [~~attributable to~~] initial pharmaceutical coverage, a requester must submit the request [~~shall be submitted~~] in the same or [~~in the~~] following fiscal year after a determination that the injury is not compensable. [~~in accordance with subsection (a)(6) of this section.~~] The fiscal year begins each September 1 [~~1st~~] and ends on August 31 [~~31st~~] of the next calendar year. For example, if an injury is determined to be not compensable during the fiscal year from September 1, 2009, through August 31, 2010, the request for reimbursement under [~~pursuant to~~] Labor Code §413.0141 must be submitted by August 31, 2011. Any claims for insurance carrier payments related to initial pharmaceutical coverage that are not submitted within the required timeframe will not be reviewed for reimbursement. An insurance carrier must: [~~The requests shall be filed with the SIF administrator in writing and include:~~]

(1) submit the request electronically in the form and manner prescribed by the division;

(2)[~~(1)~~] provide a claim-specific summary of the reason the insurance carrier is seeking reimbursement and the total amount of reimbursement requested;

(3)[~~(2)~~] provide a detailed payment record showing the dates of payments, [~~specifically~~] including documentation on [~~of~~] dates of payment of initial pharmaceutical coverage (i.e., during the first seven days following the date of injury),[~~; the~~] payment

amounts, [~~of the payments ,the purpose of payments, the~~] and payees; [~~, and the periods of benefits paid~~;]

(4)[~~(3)~~] provide the name, address, and federal employer identification number of the payee (insurance carrier) for any reimbursement that may be due;

(5)[~~(4)~~] provide documentation that the pharmaceutical services were provided during the first seven days following the date of injury, not counting the actual date the injury occurred, and identify [~~which is to include a description of~~] the prescribed pharmaceutical services; [~~service(s);~~] and

(6)[~~(5)~~] provide documentation of:

(A) the final resolution of any dispute either from the commissioner or court of last resort that [~~which~~] determines the injury is not compensable; [~~either from the commissioner or court of last resort,~~] or [~~documentation of~~]

(B) a claimant's failure to respond in accordance with subsection (a)(6)(B) of this section.

(h) The prescribed forms under this section are on the division's website at www.tdi.texas.gov/wc/index.html. An insurance carrier seeking reimbursement from the SIF must [~~shall~~] timely provide to the SIF administrator by electronic transmission, as that term is used in §102.5(h) of this title, all forms and documentation reasonably required by the SIF administrator to determine entitlement to reimbursement or payment from the SIF and the amount of reimbursement to which the insurance carrier is entitled. The insurance carrier must also provide notice to the SIF of any relevant pending dispute, litigation, or other information that may affect the request for reimbursement.

**CERTIFICATION.** This agency certifies that legal counsel has reviewed the proposal and found it to be within the agency's authority to adopt.

Issued in Austin, Texas, on November 18, 2020.

Kara Mace
Deputy Commissioner for Legal Services
Texas Department of Insurance,
Division of Workers' Compensation