

**TITLE 28. INSURANCE**

**PART 2. TEXAS DEPARTMENT OF INSURANCE,  
DIVISION OF WORKERS' COMPENSATION**

**CHAPTER 128. BENEFITS--CALCULATION OF AVERAGE WEEKLY WAGE**

**28 TAC §128.1**

**ADOPTION**

**1. INTRODUCTION.**

The Commissioner of Workers' Compensation (Commissioner), Texas Department of Insurance, Division of Workers' Compensation (Division) adopts amendments to §128.1 of this title (relating to Average Weekly Wage: General Provisions) deleting §128.1(e)(1) and (2) and part of (f) of this title. Those provisions applied to cases where there was a miscalculation of the average weekly wage and contained procedures to govern the recoupment of an overpayment of income benefits and the payment of an underpayment of income benefits attributable to the average weekly wage miscalculation.

Deleting §128.1(e)(1) and (2) and part of (f) of this title is necessary to implement statutory provisions of House Bill 2089, enacted by the 82nd Legislature, Regular Session, effective September 1, 2011 (HB 2089). The amendments to §128.1 are adopted without changes to the proposed text published in the October 28, 2011 issue of the *Texas Register* (36 TexReg 7269), and the section will not be republished.

The Division held two informal work group meetings on September 1, 2011 and September 12, 2011 for the purpose of formulating rule language for the rules required by HB 2089. Subsequently, the Division published an informal draft of the amendments on the Division's

website from September 21, 2011 until October 5, 2011. The Division received no informal comments.

After the publication of the proposal in the *Texas Register*, the Commissioner conducted a public hearing on the proposed amendments on November 14, 2011. Two individuals provided public testimony at this hearing. The public comment period for the amendments ended on November 28, 2011. The Division received one written public comment. No changes were made to the adopted text as a result of the comments.

HB 2089 created new Labor Code §408.0815, which relates to the resolution of overpayment or underpayment of income benefits under the Texas workers' compensation program. Newly enacted §408.0815 requires the Division to establish procedures for an injured employee to recover an underpayment of income benefits, and for an insurance carrier to recoup an overpayment of income benefits from future income benefit payments that are not reimbursable under Labor Code §410.209.

Previous §128.1(e)(1) and (2) and part of (f) of this title were not sufficient to implement Labor Code §408.0815 because they do not address overpayment and underpayment of income benefits caused by anything other than a miscalculation of the average weekly wage. Furthermore, §128.1 as a whole relates to the calculation of average weekly wage. Recoupment of overpayments of income benefits and correction of underpayments of income benefits for any reason, including a miscalculation of the average weekly wage, are best addressed in independent rules in order to avoid confusion by system participants. Deleting §128(e)(1) and (2) and (f) is necessary to prevent overlap and conflict between provisions, to provide clarity in the procedures for resolution of underpayments and overpayments of income benefits, and to implement changes in new Labor Code §408.0815.

The Division is contemporaneously adopting new §126.15 and §126.16 of this title (relating to Procedures for Resolution of Underpayments of Income Benefits and Procedures for Recouping Overpayments of Income Benefits) which contain procedures designed to implement the requirements of HB 2089. Those adopted new rules are published elsewhere in this issue of the *Texas Register* and apply to recoupment of overpayments of income benefits and correction of underpayments of income benefits for any reason. The adopted amendments also include nonsubstantive changes to text by deleting references to "commission" and inserting "division."

## **2. REASONED JUSTIFICATION.**

HB 2089 enacted Labor Code §408.0815, which relates to the resolution of overpayment or underpayment of income benefits under the Texas workers' compensation program. Labor Code §408.0815(a) requires the Commissioner by rule to establish a procedure by which an insurance carrier (1) may recoup an overpayment of income benefits from future income benefit payments that are not reimbursable under Labor Code §410.209; and (2) shall pay an underpayment of income benefits, including interest on accrued but unpaid benefits.

Labor Code §408.0815(b) requires the procedures under subsection (a) to include: (1) a process by which an injured employee may notify the insurance carrier of an underpayment; (2) the time frame and methodology by which an insurance carrier shall pay to an injured employee an underpayment; (3) a process by which an insurance carrier shall notify an injured employee of an overpayment of income benefits; (4) the time frame and methodology by which an insurance carrier may recoup an overpayment through the reduction of a future income benefit payment; and (5) a method for coordinating overpayments that may be recouped from future income benefits and reimbursements described by Labor Code §410.209.

Labor Code §408.0815(c) provides that the procedure for recouping overpayments under subsection (a)(1) must take into consideration the cause of the overpayment and minimize the financial hardship to the injured employee. However, this does not require continuation of an overpayment of income benefits due to a miscalculation of an injured employee's average weekly wage until the insurance carrier can initiate a recoupment of overpayments. Under §128.1 of this title, an insurance carrier shall make adjustments in the injured employee's average weekly wage and begin payment based on the adjusted average weekly wage not later than the first payment due at least seven days following the date the carrier received new average weekly wage information for the injured employee.

Previous §128.1(e) and (f) of this title permitted insurance carriers to recoup an overpayment of income benefits when the overpayment resulted from a miscalculation of the injured employee's average weekly wage. The procedures in previous §128.1(e) and (f) of this title did not provide for recoupment of an overpayment made for reasons other than average weekly wage miscalculations.

### **3. HOW THE SECTIONS WILL FUNCTION.**

The adopted amendments deleting §128.1(e)(1) and (2) remove procedures for an insurance carrier to recoup an overpayment of income benefits caused by a miscalculation of income benefits. Those provisions are superseded by the adopted provisions in §126.15 of this title.

The adopted amendment to §128.1(f) deletes a sentence providing for a notice to an employee of an overpayment. That deleted provision has been superseded by the adopted

provisions in §126.15. A nomenclature correction was also made replacing "commission" with "division".

#### **4. SUMMARY OF COMMENTS AND AGENCY RESPONSES.**

##### **General**

**COMMENT:** Commenters support the rule amendments as proposed.

**AGENCY RESPONSE:** The Division appreciates the support.

#### **5. NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.**

**For:** American Insurance Association, Burns Anderson Jury & Brenner, LLP and Insurance Council of Texas.

**For, with changes:** None.

**Against:** None.

**Neither for or Against:** None.

#### **6. STATUTORY AUTHORITY.**

The amendments are adopted under the Labor Code §§408.081, 408.0815, 402.00116, 402.00111, 402.061 and 402.00128. Section 408.081 states that an employee is entitled to timely and accurate income benefits as provided by Labor Code Chapter 408. Section 408.0815 directs the Commissioner to establish procedures by which an insurance carrier may recoup an overpayment of income benefits from future income benefit payments that are not reimbursable under Section 410.209, and shall pay an underpayment of income benefits, including interest on accrued but unpaid benefits. Section 402.00116 grants the powers and duties of chief executive and administrative officer to the Commissioner and the authority to enforce Title 5, Labor Code, and other laws applicable to the Division or Commissioner. Section 402.00111 provides that the

Commissioner shall exercise all executive authority, including rulemaking authority, under Title 5, Labor Code. Section 402.061 provides the Commissioner the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act. Section 402.00128 vests general operational powers to the Commissioner including the authority to delegate, and assess and enforce penalties as authorized by Title 5, Labor Code.

## **7. TEXT**

### **§128.1. *Average Weekly Wage: General Provisions.***

(a) The average weekly wage (AWW) calculation for an injured employee (employee) shall be calculated depending on whether the employee was employed in one of the following five courses of employment:

(1) full-time (see §128.3 of this title (relating to Average Weekly Wage Calculation for Full-Time Employees, And For Temporary Income Benefits For All Employees));

(2) part-time (see §128.4 of this title (relating to Average Weekly Wage Calculation For Part-Time Employees));

(3) seasonal (see §128.5 of this title (relating to Average Weekly Wage Calculation for Seasonal Employees));

(4) school district employed (see §128.7 of this title (relating to Average Weekly Wage for School District Employees)); and

(5) multiple employment (see Texas Labor Code §408.042 and subsection (h) of this section).

(b) Except as provided by §128.7, an employee's wage, for the purpose of calculating the AWW, shall include:

(1) all pecuniary wages (as defined by §126.1 of this title (relating to Definitions Applicable to All Benefits)) paid by the employer to the employee even if the employer has continued to provide the wages after the date of injury (in which case these wages could be considered post-injury earnings under §129.2 of this title (relating to Entitlement to Temporary Income Benefits)); and

(2) all nonpecuniary wages (as defined by §126.1 of this title) paid by the employer to the employee prior to the compensable injury but not continued by the employer after the injury (though only during a period in which the employer has discontinued providing the wages).

(c) An employee's wage, for the purpose of calculating the AWW, shall not include:

(1) payments made by an employer to reimburse the employee for the use of the employee's equipment, for paying helpers, for reimbursing actual expenses related to employment such as travel related expenses (e.g. meals, lodging, transportation, parking, tolls, and porters), or reimbursing mileage up to the state rate for mileage; or

(2) any nonpecuniary wages continued by the employer after the compensable injury. However, except as provided by §128.7 of this title and Texas Labor Code §408.042(e), if the employer discontinues providing nonpecuniary wages, the AWW shall be recalculated and these discontinued nonpecuniary wages shall be included.

(d) The AWW shall be calculated using gross wages.

(e) If a carrier determines or is notified that the employee's AWW is different than what the carrier had previously determined (either as a result of subsection (c)(2) of this section, receipt of an updated wage statement, or by operation of other adjustments permitted/required under this title), the carrier shall adjust the AWW and begin payment of benefits based upon the adjusted

AWW no later than the first payment due at least seven days following the date the carrier receives the new information regarding the AWW.

(f) The carrier shall provide notice to the employee and the division of any adjustments to the AWW and its affect on benefits in accordance with the requirements of §124.2 of this title (relating to Carrier Reporting and Notification Requirements).

(g) Additional adjustments to the AWW may be made in specific circumstances for seasonal employees and school district employees (see §128.5 and §128.7 of this title, respectively), and for employees who are also minors, apprentices, trainees, or students on the date of injury (see §128.6 of this title (relating to Average Weekly Wage Adjustment For Certain Employees Who Are Also Minors, Apprentices, Trainees, or Students)).

(h) For employees injured on or after July 1, 2002, who are employed by more than one employer on the date of injury and the employee submits the wage information from the other employer(s) in the form and manner prescribed by §122.5 of this title (relating to Employee's Multiple Employment Wage Statement), the carrier shall calculate the AWW using the wages from all the employers in accordance with this section. The employee's AWW shall be the sum of the AWWs for each employer.

(1) The portion of the AWW that is based upon employment with the "Claim Employer" (as the term is defined in §122.5 of this title) shall be calculated in accordance with the rule in this chapter which would be used to calculate the employee's AWW if the employee did not have multiple employment.

(A) This portion of the AWW may be different for calculating Temporary Income Benefits (TIBs) than it is for calculating other types of benefits as provided in other sections

of this title (such as where the wages may be adjusted for a part-time employee under §128.4 of this title).

(B) This portion of the AWW shall be adjusted if the Claim Employer discontinues providing a nonpecuniary wage that the employer had previously continued after the date of injury.

(2) The portion of the employee's AWW based upon employment with each "Non-Claim Employer" (as the term is defined in §122.5 of this title) shall be calculated in accordance with §128.3 of this title (relating to Average Weekly Wage Calculations for Full-Time Employees, and for Temporary Income Benefits for All Employees) except that the employee's wages from the Non-Claim Employer(s) shall only include those wages that are reportable for federal income tax purposes.

(A) This portion of the AWW of an employee whose employment was limited by the Non-Claim Employer to less than full-time but whose employment was not so limited as a regular course of conduct shall be adjusted to the weekly wage level the employee would have attained by working a full-time workweek at the employee's average rate of pay.

(B) Once calculated correctly, the portion of the AWW based upon employment with the Non-Claim Employer(s) does not vary by benefit type.

## **8. CERTIFICATION.**

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

Issued at Austin, Texas, on December 12, 2011.

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Dirk Johnson  
General Counsel  
Texas Department of Insurance,  
Division of Workers' Compensation

**IT IS THEREFORE THE ORDER** of the Commissioner of Workers' Compensation that the amendments to §128.1 specified herein, concerning Average Weekly Wage: General Provisions, are adopted.

AND IT IS SO ORDERED.

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ROD BORDELON  
COMMISSIONER OF WORKERS' COMPENSATION

ATTEST:

X

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Dirk Johnson  
General Counsel

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COMMISSIONER ORDER NO.