28 Texas Administrative Code

Chapter 129 - Income Benefits--Temporary Income Benefits

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§129.1. *Definitions for Temporary Income Benefits*.

The following terms shall have the following meanings unless the context clearly indicates otherwise:

(1) Salary Continuation (also Wage Continuation)--Monies paid by the employer to compensate the injured employee (employee) for wages lost as a result of a compensable injury. Salary continuation does not include monies paid to an employee as compensation for work such as wages paid while an employee is on modified duty.

(2) Salary Supplementation (also Wage Supplementation)--Monies paid by the employer to supplement the amount of income benefits an insurance carrier pays to an employee with a compensable injury. This includes monies paid to the employee based on the employee's voluntary use of sick leave or annual leave in a supplementary manner.

(3) Weekly Earnings After the Injury--Post-Injury Earnings (PIE), further described in §129.2 of this title (relating to Entitlement to Temporary Income Benefits).

The provisions of this §129.1 adopted to be effective December 26, 1999, 24 TexReg 11420.

§129.2. *Entitlement to Temporary Income Benefits*.

(a) Once temporary income benefits (TIBs) accrue, an injured employee (employee) is entitled to TIBs to compensate the employee for lost wages due to the compensable injury during a period in which the employee has disability and has not reached maximum medical improvement.

(b) Lost wages are the difference between the employee's gross average weekly wage (AWW) and the employee's gross Post-Injury Earnings (PIE). If the employee's PIE equals or exceeds the employee's AWW, the employee has no lost wages.

(c) PIE shall include, but not be limited to, the documented weekly amount of:

(1) all pecuniary wages paid to the employee after the date of injury including wages based on work performed while on modified duty and pecuniary fringe benefits which are paid to the employee whether the employee has returned to work or not;

(2) any employee contribution to benefits such as health insurance that the employee normally pays but that the employer agrees to pay for the employee in order to continue the benefits (which does not include the portion of the benefits that the employer normally pays for);

(3) the weekly amount of any wages offered as part of a bona fide job offer which is not accepted by the employee which the insurance carrier (carrier) is permitted to deem to be PIE under §129.6 of this title (relating to Bona Fide Offers of Employment);

(4) the value of any full days of accrued sick leave or accrued annual leave that the employee has voluntarily elected to use after the date of injury;

(5) the value of any partial days of accrued sick leave or accrued annual leave that the employee has voluntarily elected to use after the date of injury that, when combined with the employee's TIBs, exceeds the AWW; and

(6) any monies paid to the employee by the employer as salary continuation based on :

(A) a contractual obligation between the employer and the employee including through a collective bargaining agreement;

(B) an employer policy; or

(C) a written agreement with the employee.

(d) PIE shall not include:

(1) any non-pecuniary wages paid to the employee by the employer after the injury;

(2) any accrued sick leave or accrued annual leave that the employee did not voluntarily elect to use;

(3) any wages paid by the employer as salary supplementation as provided by Texas Labor Code, §408.003(a)(2);

(4) any moneys paid by the employer which would otherwise be considered PIE under subsection (c) of this section but which the employer attempts or intends to seek reimbursement from the employee or carrier; or

(5) any money paid to an employee under an indemnity disability program paid for by the employee separate from workers' compensation.

The provisions of this §129.2 adopted to be effective December 26, 1999, 24 TexReg 11420.

§129.3. Amount of Temporary Income Benefits.

(a) The insurance carrier (carrier) shall pay an injured employee (employee) the temporary income benefits (TIBs) the employee is entitled to in accordance with this chapter.

(b) The carrier shall determine whether the employee earns less than $8.50 per hour as follows:

(1) Once the carrier has received the Wage Statement required by this title, the carrier shall divide the average weekly wage (AWW) calculated from the Wage Statement by the average number of hours worked. The average hours worked is the total gross hours reported worked on the Wage Statement divided by the period in which the hours were worked;

(2) If the carrier has not received the Wage Statement, but has received the Employer's First Report of Injury, the carrier shall use the wage information provided by the employer through the first report; or

(3) If the carrier has not received the information necessary to perform the calculations required by subsection (b)(1) or (2) of this section, the carrier shall use wage information provided by the employee until the necessary information is obtained from the employer.

(c) The carrier shall calculate the AWW in accordance with Chapter 128 of this title (relating to Calculation of Average Weekly Wage) and shall calculate the Post-Injury Earnings (PIE) in accordance with §129.2 of this title (relating to Entitlement to Temporary Income Benefits). In determining the PIE, the carrier shall base its calculations on specific wage information reported by the employer and/or the employee. A generic statement by

the employer indicating the employer is "continuing full salary" or "the employee is earning full salary" is not adequate documentation to be considered PIE.

(d) The carrier shall calculate the employee's lost wages by subtracting the PIE from the AWW (or AWW - PIE).

(e) The amount of TIBs an employee is entitled to is based on the lost wages. If the employee's PIE equals or exceeds the employee's AWW, the employee has no lost wages and the carrier shall not pay TIBs.

(f) Subject to the minimum and maximum TIBs rates as provided in subsection (g) of this section, an employee is entitled to TIBs as follows:

(1) an employee who earns $8.50 or more per hour is entitled to TIBs in the amount of 70% of the lost wages; or

(2) an employee who earns less than $8.50 per hour is entitled to TIBs as follows:

(A) 75% of the lost wages for the first 26 weeks of TIBs due; and

(B) 70% of the lost wages for all TIBs payments thereafter.

(g) The carrier shall pay the TIBs in the amount calculated in subsection (f) of this section, unless:

(1) this amount is greater than the maximum weekly TIBs rate computed in accordance with Texas Labor Code, §408.061, in which case the carrier shall pay the maximum weekly TIBs rate; or

(2) this amount, when added to the employee's PIE, is less than the minimum weekly TIBs rate computed in accordance with Texas Labor Code, §408.062, in which case the carrier shall pay the minimum weekly TIBs rate.

The provisions of this §129.3 adopted to be effective December 26, 1999, 24 TexReg 11420.

§129.4. *Adjustment of Temporary Income Benefit Amount*.

(a) The insurance carrier shall adjust the weekly amount of temporary income benefits paid to the injured employee as necessary to match the fluctuations in the employee's weekly earnings after the injury.

(b) If a seasonal employee's average weekly wage is adjusted, as described in §128.5 of this title (relating to Average Weekly Wage Calculations for Seasonal Employees), the carrier shall adjust the temporary income benefits paid to the seasonal employee.

(c) If the injured employee is still employed by the employer at the time of injury, the employer is responsible for informing the carrier of changes in the employee's weekly earnings after an injury, on Form TWCC 6, Supplemental Report of Injury, within 10 days after the end of each pay period, as provided by §120.3 of this title (relating to Employer's Supplemental Report of Injury).

(d) If the employee is no longer employed by the employer, the employee is responsible to provide information to the insurance carrier about the existence or amount of any earnings, or any offers of employment. The employee may use Form TWCC 6, Supplemental Report of Injury, for this purpose.

The provisions of this §129.4 adopted to be effective January 24, 1991, 16 TexReg 175; amended to be effective April 3, 1992, 17 TexReg 2129.

§129.5. *Work Status Reports*.

(a) As used in this section:

(1) the term "doctor" means either the treating doctor or a referral doctor, as defined by §133.4 of this title (relating to Consulting and Referral Doctors);

(2) "substantial change in activity restrictions" means a change in activity restrictions caused by a change in the employee's medical condition which either prevents the employee from working under the previous restrictions or which allows the employee to work in an expanded and more strenuous capacity than the prior restrictions permitted (approaching the employee's normal job);

(3) "change in work status" means a change in the employee's work status from one of the three choices listed in subsection (a)(4) of this section to another of the choices in that subsection; and

(4) the term "work status" refers to whether the injured employee's (employee) medical condition:

(A) allows the employee to return to work without restrictions (which is not equivalent to maximum medical improvement);

(B) allows the employee to a return to work with restrictions; or

(C) prevents the employee from returning to work.

(b) The doctor shall file a Work Status Report in the form and manner prescribed by the Commission.

(c) The doctor shall be considered to have filed a complete Work Status Report if the report is filed in the form and manner prescribed by the Commission, signed, and contains at minimum:

(1) identification of the employee's work status;

(2) effective dates and estimated expiration dates of current work status and restrictions (an expected expiration date is not binding and may be adjusted in future Work Status Reports, as appropriate, based on the condition and progress of the employee);

(3) identification of any applicable activity restrictions;

(4) an explanation of how the employee's workers' compensation injury prevents the employee from returning to work (if the doctor believes that the employee is prevented from returning to work); and

(5) general information that identifies key information about the claim (as prescribed on the report).

(d) The doctor shall file the Work Status Report:

(1) after the initial examination of the employee, regardless of the employee's work status;

(2) when the employee experiences a change in work status or a substantial change in activity restrictions; and

(3) on the schedule requested by the insurance carrier (carrier), its agent, or the employer requesting the report through its carrier, which shall not to exceed one report every two weeks and which shall be based upon the doctor's scheduled appointments with the employee.

(e) The Work Status Report filed as required by subsection (d) of this section shall be provided to the employee at the time of the examination and shall be sent, not later than the end of the second working day after the date of examination, to the carrier and the employer.

(f) In addition to the requirements under subsection (d), the treating doctor shall file the Work Status Report with the carrier, employer, and employee within seven days of the day of receipt of:

(1) functional job descriptions from the employer listing available modified duty positions that the employer is able to offer the employee as provided by §129.6(a) of this title (relating to Bona Fide Offers of Employment); or

(2) a required medical examination doctor's Work Status Report that indicates that the employee can return to work with or without restrictions.

(g) Filing the Work Status Report as required by subsection (f) of this section does not require a new examination of the employee.

(h) The doctor shall file the Work Status Report as follows:

(1) A report filed with the carrier or its agent shall be filed by facsimile or electronic transmission;

(2) A report filed with the employer shall be filed by facsimile or electronic transmission if the doctor has been provided the employer's facsimile number or e-mail address; otherwise, the report shall be filed by personal delivery or mail; and

(3) A report filed with the employee shall be hand delivered to the employee, unless the report is being filed pursuant to subsection (f) of this section and the doctor is not scheduled to see the employee by the due date to send the report. In this case, the doctor shall file the report with the employee by facsimile or electronic transmission if the doctor has been provided the employee's facsimile number or e-mail address; otherwise, the report shall be filed by mail.

(i) Notwithstanding any other provision of this title, a doctor may bill for, and a carrier shall reimburse, filing a complete Work Status Report required under this section or for providing a subsequent copy of a Work Status Report which was previously filed because the carrier, its agent, or the employer through its carrier, asks for an extra copy. The amount of reimbursement shall be $15. A doctor shall not bill in excess of $15 and shall not bill or be entitled to reimbursement for a Work Status Report which is not reimbursable under this section. Doctors are not required to submit a copy of the report being billed for with the bill if the report was previously provided. Doctors billing for Work Status Reports as permitted by this section shall do so as follows:

(1) CPT code "99080" with modifier "73" shall be used when the doctor is billing for a report required under subsections (d)(1), (d)(2), and (f) of this section;

(2) CPT code "99080" with modifiers "73" and "RR" (for "requested report") shall be used when the doctor is billing for an additional report requested by or through the carrier under subsection (d)(3) of this section; and

(3) CPT code "99080" with modifiers "73" and "EC" (for "extra copy") shall be used when the doctor is billing for an extra copy of a previously filed report requested by or through the carrier.

(j) As provided in §126.6(f) of this title (relating to Order for Required Medical Examinations), a doctor who conducts a required medical examination (on anyone's behalf) in which the doctor determines that the employee can return to work immediately with or without restrictions, shall file the Work Status Report required by this section, but shall do so in accordance with the requirements of §126.6(f).

The provisions of this §129.5 adopted to be effective December 26, 1999, 24 TexReg 11420; amended to be effective July 16, 2000, 25 TexReg 6520.

§129.6. *Bona Fide Offers of Employment.*

(a) An employer or insurance carrier (carrier) may request the treating doctor provide a Work Status Report by providing the treating doctor a set of functional job descriptions which list modified duty positions which the employer has available for the injured employee (employee) to work. The functional job descriptions must include descriptions of the physical and time requirements of the positions.

(b) An employer may offer an employee a modified duty position which has restricted duties which are within the employee's work abilities as determined by the employee's treating doctor. In the absence of a Work Status Report by the treating doctor an offer of employment may be made based on another doctor's assessment of the employee's work status provided that the doctor made the assessment based on an actual physical examination of the employee performed by that doctor and provided that the treating doctor has not indicated disagreement with the restrictions identified by the other doctor.

(c) An employer's offer of modified duty shall be made to the employee in writing and in the form and manner prescribed by the Commission. A copy of the Work Status Report on which the offer is being based shall be included with the offer as well as the following information:

(1) the location at which the employee will be working;

(2) the schedule the employee will be working;

(3) the wages that the employee will be paid;

(4) a description of the physical and time requirements that the position will entail; and

(5) a statement that the employer will only assign tasks consistent with the employee's physical abilities, knowledge, and skills and will provide training if necessary.

(d) A carrier may deem an offer of modified duty to be a bona fide offer of employment if:

(1) it has written copies of the Work Status Report and the offer; and

(2) the offer:

(A) is for a job at a location which is geographically accessible as provided in subsection (e) of this section;

(B) is consistent with the doctor's certification of the employee's work abilities, as provided in subsection (f) of this section; and

(C) was communicated to the employee in writing, in the form and manner prescribed by the Commission and included all the information required by subsection (c) of this section.

(e) In evaluating whether a work location is geographically accessible the carrier shall at minimum consider:

(1) the affect that the employee's physical limitations have on the employee's ability to travel;

(2) the distance that the employee will have to travel;

(3) the availability of transportation; and

(4) whether the offered work schedule is similar to the employee's work schedule prior to the injury.

(f) The following is the order of preference that shall be used by carriers evaluating an offer of employment:

(1) the opinion of a doctor selected by the Commission to evaluate the employee's work status;

(2) the opinion of the treating doctor;

(3) opinion of a doctor who is providing regular treatment as a referral doctor based on the treating doctor's referral;

(4) opinion of a doctor who evaluated the employee as a consulting doctor based on the treating doctor's request; and

(5) the opinion of any other doctor based on an actual physical examination of the employee performed by that doctor.

(g) A carrier may deem the wages offered by an employer through a bona fide offer of employment to be Post-Injury Earnings (PIE), as outlined in §129.2 of this title (relating to Entitlement to Temporary Income Benefits), on the earlier of the date the employee rejects the offer or the seventh day after the employee receives the offer of modified duty unless the employee's treating doctor notifies the carrier that the offer made by the employer is not consistent with the employee's work restrictions. For the purposes of this section, if the offer of modified duty was made by mail, an employee is deemed to have received the offer from the employer five days after it was mailed. The wages the carrier may deem to be PIE are those that would have been paid on or after the date the carrier is permitted to deem the offered wages as PIE.

(h) Nothing in this section should be interpreted as limiting the right of an employee or a carrier to request a benefit review conference relating to an offer of employment. The Commission will find an offer to be bona fide if it is reasonable, geographically accessible, and meets the requirements of subsections (b) and (c) of this section.

The provisions of this §129.6 adopted to be effective December 26, 1999, 24 TexReg 11420.

§129.7. *Non-Reimbursable Employer Payments*.

(a) An employer who pays an injured employee (employee) salary continuation is not entitled to and shall not seek reimbursement from the employee or the insurance carrier (carrier).

(b) An employer who pays an employee salary supplementation to supplement income benefits paid by the carrier is not entitled to and shall not seek reimbursement from the employee or the carrier.

The provisions of this §129.7 adopted to be effective December 26, 1999, 24 TexReg 11420.

§129.11. *Agreement for Monthly Payment of Temporary Income Benefits*.

(a) Upon the request of an injured employee, the insurance carrier and an injured employee entitled to temporary income benefits (TIBs) may agree to change the frequency of TIBs payments from the standard weekly period to a monthly period. The agreement to change the payment frequency must be in writing and is only required to be filed with the Commission if the Commission requests a copy. To relieve the insurance carrier of the responsibility to pay TIBs weekly, a valid written agreement must include the following terms and conditions:

(1) the agreement for the monthly payment of TIBs shall be effective the first calendar day of the month following the month in which the written agreement was entered into by the insurance carrier and the injured employee;

(2) monthly TIBs payment shall be issued on or before the seventh day of the month following the month for which benefits are due;

(3) weekly TIBs payments shall continue through the end of the month in which the agreement was

signed.;

(4) payment of the last week of TIBs to transition from weekly payment of TIBs to monthly payments shall be prorated to the end of the month to ensure the injured employee receives TIBs through the last day of the month; and

(5) if less than the maximum weekly compensation rate in effect on the date of the compensable injury is being paid, a completed Employer's Wage Statement must be included with the injured employee's copy of the written agreement.

(b) To calculate the amount of monthly TIBs to pay, the carrier shall determine the average monthly wage by multiplying the average weekly wage by 4.34821 and subtracting any Post-Injury Earnings the employee earned during the month for which the employee was entitled to TIBs to determine the lost wages. The carrier shall then pay the employee in monthly TIBs as follows:

(1) if the employee earns $8.50 per hour or more, the carrier shall pay 70% of the lost wages; or

(2) if the employee earns less than $8.50 per hour, the carrier shall pay:

(A) 75% of the lost wages for the first 26 weeks of TIBs due; and

(B) 70% of the lost wages for all TIBs payments thereafter.

(c) Entering into an agreement under this section does not prohibit any party to the claim from raising disputes over periods, amounts of, or entitlement to TIBs. Disputes must be raised as and when they arise.

(d) The agreement for the monthly payment of TIBs shall expire upon the suspension or termination of TIBs in accordance with the Act and Commission rules. The last monthly payment shall be prorated to ensure the insurance carrier pays the appropriate amount of TIBs.

(e) At any time after signing the agreement for the monthly payment of TIBs, the injured employee or the insurance carrier may notify the other party in writing that it no longer agrees to the monthly payment of TIBs. In this case, the insurance carrier shall pay all accrued but unpaid TIBs at the end of the current monthly cycle and shall continue to pay TIBs weekly as and when they accrue and are due.

(f) This section applies only to agreements entered into on or after January 1, 2000, for payment of TIBs under the provisions of the Act.

The provisions of this §129.11 adopted to be effective December 26, 1999, 24 TexReg 11439.

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