

No. 2021-6791

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

Date: 04-15-2021

Subject Considered:

Berkshire Hathaway Homestate Insurance Company
P.O. Box 881716
San Francisco, California 94188-1716

Consent Order
DWC Enforcement File No. 25644

General remarks and official action taken:

This is a consent order with Berkshire Hathaway Homestate Insurance Company (BHHIC). The commissioner of the Texas Department of Insurance, Division of Workers' Compensation (DWC) considers whether DWC should take disciplinary action against BHHIC.

Waiver

BHHIC acknowledges that the Texas Labor Code and other applicable laws provide certain rights. BHHIC waives all of these rights, and any other procedural rights that apply, in consideration of the entry of this consent order.

Findings of Fact

1. BHHIC holds a certificate of authority issued by the Texas Department of Insurance to transact the business of insurance pursuant to TEX. INS. CODE §§ 801.051-801.053 and is licensed to write multiple lines of insurance in Texas, including workers' compensation/employers' liability insurance.

2. BHHIC was classified as "average" tier in the 2014, 2016, and 2018 Performance Based Oversight (PBO) assessments. BHHIC was not selected to be tiered in the 2007, 2009, 2010, or 2012 PBO assessments.

DWC Audit No. IBA-20-105

3. On [REDACTED], DWC initiated DWC Audit No. IBA-20-105 to determine whether BHHIC complied with the Texas Labor Code and related rules on the timely payment of lifetime income benefits and death benefits (DBs), as well as timely submitting claim data to DWC.
4. The audit examined initial DBs submitted to DWC between [REDACTED], and [REDACTED]. DWC identified three bills for audit.
5. The audit also focused on the accuracy of BHHIC's payment of DBs, as well as timely submitting claim data to DWC. The electronic data interchange (EDI) portion of the audit focused on timely reporting DB terminations. DWC identified two bills for audit.

Failure to Timely Pay Accurate DBs

6. BHHIC failed to accurately pay DBs for 100% of examined payments (three out of three).
7. Specifically, BHHIC issued payments to beneficiaries over 30 days late in three instances.

Failure to Accurately Report Claim Data to DWC

8. BHHIC failed to accurately report the total number of DB terminations for 50% of examined payments (one out of two).
9. Specifically, BHHIC failed to accurately report DB amount in 50% of the examined payments.

Assessment of Sanction

1. Failure to provide DBs in a timely and cost-effective manner is harmful to injured employees, their beneficiaries, and the Texas workers' compensation system.
2. DWC relies on claims information insurance carriers submit for many purposes, including, but not limited to, providing required information and reports to the Legislature, ensuring that insurance carriers comply with the Texas Labor Code and DWC rules, and detecting patterns and practices in actions insurance carriers take on claims.
3. In assessing the sanction for this case, DWC fully considered the following factors in TEX. LAB. CODE § 415.021(c) and 28 TEX. ADMIN. CODE § 180.26(e):
 - the seriousness of the violation, including the nature, circumstances, consequences, extent, and gravity of the prohibited act;
 - the history and extent of previous administrative violations;
 - the violator's demonstration of good faith, including actions it took to rectify the consequences of the prohibited act;
 - the penalty necessary to deter future violations;
 - whether the administrative violation had a negative impact on the delivery of benefits to an injured employee or their beneficiaries;
 - the history of compliance with EDI requirements;
 - to the extent reasonable, the economic benefit resulting from the prohibited act; and
 - other matters that justice may require, including, but not limited to:
 - PBO assessments;
 - prompt and earnest actions to prevent future violations;
 - self-report of the violation;
 - the size of the company or practice;
 - the effect of a sanction on the availability of health care; and
 - evidence of heightened awareness of the legal duty to comply with the Texas Workers' Compensation Act and DWC rules.
4. DWC found the following factors in TEX. LAB. CODE § 415.021(c) and 28 TEX. ADMIN. CODE § 180.26(e) to be aggravating: the seriousness of the violation, including the nature, circumstances, consequences, extent, and gravity of the prohibited act; the history and extent of previous administrative violations; the penalty necessary to deter future violations; whether the administrative violation had a negative impact

on the delivery of benefits to an injured employee or their beneficiaries; the history of compliance with EDI requirements; and other matters that justice may require, including the size of the company or practice.

5. DWC found the following factors in TEX. LAB. CODE § 415.021(c) and 28 TEX. ADMIN. CODE § 180.26(e) to be mitigating: the penalty necessary to deter future violations, because, of the three underpayments, one underpayment was calculated in error because the injured employee did not have 13 weeks of employment with the covered employer at the time of injury. Of the other two underpayments, one calculation was incorrect because the covered employer included post-injury earnings in the wage statement and the insurance carrier had to delete the incorrect information and then recalculate the average weekly wage. The other underpayment was miscalculated due to inaccurate information because the covered employer did not submit a completed wage statement for over a year after the injury. The insurance carrier has instituted electronic monitoring of the filing process and additional training and review of claim files in order to ensure the accuracy of average weekly wage statements.
6. BHHIC acknowledges it communicated with DWC about the relevant statutes and rules it violated; the facts establish that the administrative violation occurred; and the proposed sanction is appropriate, including the factors DWC considered under TEX. LAB. CODE § 415.021(c) and 28 TEX. ADMIN. CODE § 180.26(e).
7. BHHIC acknowledges that, in assessing the sanction, DWC considered the factors in TEX. LAB. CODE § 415.021(c) and 28 TEX. ADMIN. CODE § 180.26(e).

Conclusions of Law

1. The commissioner has jurisdiction over this matter pursuant to TEX. LAB. CODE §§ 402.001, 402.00114, 402.00116, 402.00128, 409.021, 414.002, 414.003, 415.002, and 415.021.
2. The commissioner has the authority to dispose of this case informally pursuant to TEX. GOV'T CODE § 2001.056, TEX. LAB. CODE §§ 401.021 and 402.00128(b)(7), and 28 TEX. ADMIN. CODE § 180.26(h).
3. BHHIC has knowingly and voluntarily waived all procedural rights to which it may have been entitled regarding the entry of this order, including, but not limited to,

- issuance and service of notice of intent to institute disciplinary action, notice of hearing, a public hearing, a proposal for decision, a rehearing by the commissioner, and judicial review.
4. Pursuant to TEX. LAB. CODE § 415.021, the commissioner may assess an administrative penalty against a person who commits an administrative violation.
 5. Pursuant to TEX. LAB. CODE § 415.002(a)(20), an insurance carrier or its representative commits an administrative violation each time it violates a DWC rule.
 6. Pursuant to TEX. LAB. CODE § 415.002(a)(22), an insurance carrier or its representative commits an administrative violation each time it fails to comply with a provision of the Texas Workers' Compensation Act.
 7. Pursuant to TEX. LAB. CODE § 408.181(a) and (b), an insurance carrier must pay accurate DBs to a legal beneficiary. Under TEX. LAB. CODE § 408.061, the amount of a DB is equal to 75% of the employee's average weekly wage.
 8. BHHIC violated TEX. LAB. CODE § 415.002(a)(20) and (22) each time it failed to timely pay accurate DBs.
 9. Pursuant to 28 TEX. ADMIN. CODE § 124.2(a) and (b), insurance carriers are required to notify DWC and the injured employee of actions taken or events occurring in a claim, as specified by rule in the form and manner DWC prescribes. Inherent in this duty is the requirement that insurance carriers report this information accurately.
 10. Pursuant to TEX. LAB. CODE § 409.021 and 28 TEX. ADMIN. CODE §§ 124.3 and 124.7, an insurance carrier is required to initiate payment of DBs no later than the 15th day after it receives written notice of the injury or the seventh day after the accrual date. It must also notify DWC in writing of its initiation of income or DB payments in the manner DWC rules prescribe.
 11. BHHIC violated TEX. LAB. CODE § 415.002(a)(20) and (22) each time it failed to timely or accurately notify DWC and the injured employee of actions it took or events that occurred in a claim, as specified by rule in the form and manner DWC prescribed.

Order

It is ordered that Berkshire Hathaway Homestate Insurance Company must pay an administrative penalty of \$188,000 within 30 days from the date of this order. Berkshire Hathaway Homestate Insurance Company must pay the administrative penalty by company check, cashier's check or money order and make it payable to the "State of Texas." Mail the administrative penalty to the Texas Department of Insurance, Attn: DWC Enforcement Section, MC AO-9999, P.O. Box 12030, Austin, Texas 78711-2030.



Cassie Brown
Commissioner of Workers' Compensation

Approved Form and Content:



Amy Norman
Staff Attorney, Enforcement
Compliance and Investigations
Division of Workers' Compensation

Affidavit

STATE OF NEBRASKA §
§
COUNTY OF DOUGLAS §

Before me, the undersigned authority, personally appeared ANDREW LINKHART, who being by me duly sworn, deposed as follows:

"My name is ANDREW LINKHART. I am of sound mind, capable of making this statement, and have personal knowledge of these facts which are true and correct.

I hold the office of CHIEF FINANCIAL OFFICER and am the authorized representative of Berkshire Hathaway Homestate Insurance Company. I am duly authorized by the organization to execute this statement.

Berkshire Hathaway Homestate Insurance Company has knowingly and voluntarily entered into this consent order and agrees with and consents to the issuance and service of this consent order."



Affiant

SWORN TO AND SUBSCRIBED before me on March 15, 2021.

(NOTARY SEAL)



Signature of Notary Public



Printed Name of Notary Public



Commission Expiration

