

No. 2019 5992

Confidential Information Redacted  
Texas Labor Code §§402.083 & 402.092

**OFFICIAL ORDER**  
*of the*  
**TEXAS COMMISSIONER OF WORKERS' COMPENSATION**

Date: JUN 25 2019

**Subject Considered:**

**CITY OF MIDLAND**  
300 North Loraine Street  
Midland, Texas 79701-4725

**CONSENT ORDER**  
TDI-DWC ENFORCEMENT FILE NO. 15962

**General remarks and official action taken:**

The commissioner of workers' compensation (commissioner) considers whether disciplinary action should be taken against City of Midland.

**WAIVER**

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

**FINDINGS OF FACT**

The commissioner makes the following findings of fact:

1. City of Midland is a self-insured governmental entity that provides workers' compensation benefits to its employees in accordance with TEX. LAB. CODE Ch. 504.
2. City of Midland was not tiered in the 2007, 2009, 2010, 2012, 2014, 2016, or 2018 Performance Based Oversight (PBO) assessments.
3. The Texas Department of Insurance, Division of Workers' Compensation (DWC) reviewed a claim where City of Midland issued a Notice of Denial of Compensability/Liability and Refusal to Pay Benefits or Plain Language Notice-1 (PLN-1) on a claim for benefits filed in accordance with the statutory presumption established under TEX. GOV'T. CODE [REDACTED] ([REDACTED] presumption).
4. City of Midland first received notice of the injury, illness, or occupational disease in the underlying claim on [REDACTED], and issued the PLN-1 on [REDACTED].

**INSUFFICIENT NOTICE OF REFUSAL TO PAY BENEFITS**

5. City of Midland failed to explain, in the PLN-1, why it determined that the [REDACTED] presumption did not apply in the underlying claim.
6. City of Midland failed to describe, in the PLN-1, the evidence it reviewed in making the determination that the [REDACTED] presumption did not apply in the underlying claim.

**MISREPRESENTATION OF THE REASONS FOR NOT PAYING BENEFITS**

7. City of Midland included, in the PLN-1, the following assertions as reasons for refusing to pay benefits on the underlying claim:
  - a. the medical documentation does not support the existence of any damage or harm to the physical structure of the body;
  - b. the injured employee did not report his injury to his employer within 30 days from when he knew or should have known that his [REDACTED] was related to his employment and, therefore, City of Midland is relieved of liability; and
  - c. the injured employee's [REDACTED] was a pre-existing condition and an ordinary disease of life to which the general public is exposed, and it was not related to or naturally resulting from his employment.
8. City of Midland, at the time it issued the PLN-1, had minimal or no investigative support for these assertions and had not meaningfully considered these assertions when it made its decision to refuse to pay benefits on the underlying claim.

**REFUSAL TO PAY BENEFITS WITHOUT REASONABLE GROUNDS**

9. City of Midland also included, in the PLN-1, the following assertions as reasons for refusing to pay benefits on the underlying claim:
  - a. the injured employee failed to establish that his [REDACTED] resulted on or about [REDACTED], while in the course and scope of employment;
  - b. there has been no showing that the injured employee suffered from [REDACTED] that is known to be associated with firefighting or exposure to heat, smoke, radiation, or a [REDACTED] [REDACTED] and [REDACTED];
  - c. City of Midland disputes that the injured employee had disability as a result of [REDACTED].
10. City of Midland, at the time it issued the PLN-1, failed to establish any reasonable grounds for its refusal to pay benefits on the underlying claim, as determined by the commissioner, because it did not have sufficient investigative support for any of its assertions in the PLN-1.

**FAILURE TO PROCESS A CLAIM PROMPTLY IN A REASONABLE AND PRUDENT MANNER**

11. City of Midland was required or had a duty, but failed, to adequately investigate the applicability of the [REDACTED] presumption in the underlying claim. Specifically, City of Midland:
  - a. issued a PLN-1 within eight days of receiving first notice of the injury in the underlying claim;
  - b. issued a PLN-1 without having adequately investigated the injured employee's employment or medical history, acquiring employment or medical records, or seeking expert medical opinions when necessary in the underlying claim;
  - c. failed to adequately notate in the documentation of the adjuster's actions in the file (adjuster's notes) the investigative steps it took, if any, to investigate the applicability of the [REDACTED] presumption in the underlying claim;
  - d. failed to adequately investigate or inquire as to whether or not the injured employee was claiming the [REDACTED] presumption to be applicable in his underlying claim; and
  - e. failed to provide the injured employee reasonable notice as to which elements of the applicability of the [REDACTED] presumption it was disputing, or failed to provide the injured employee reasonable notice and opportunity to produce evidence relevant to the disputed elements of the applicability of the [REDACTED] presumption in the underlying claim.
  
12. City of Midland was required or had a duty, but failed, to adequately investigate compensability in the underlying claim. Specifically, City of Midland:
  - a. issued a PLN-1 within eight days of receiving first notice of the injury in the underlying claim;
  - b. issued a PLN-1 without having adequately investigated the injured employee's employment or medical history; acquiring employment or medical records, or seeking expert medical opinions when necessary in the underlying claim;
  - c. failed to adequately notate in the adjuster's notes the investigative steps it took, if any, to investigate compensability in the underlying claim; and
  - d. failed to provide the injured employee reasonable notice as to which elements or aspects of compensability it was disputing, or failed to provide the injured employee reasonable notice and opportunity to produce evidence relevant to the disputed elements or aspects of compensability in the underlying claim.
  
13. City of Midland was required or had a duty, but failed, to adequately investigate its own reasons for denial in the underlying claim. Specifically, City of Midland failed to

adequately investigate each assertion it made, in the PLN-1, that failed to establish reasonable grounds for its refusal to pay benefits.

14. City of Midland processed the underlying claim imprudently or unreasonably each time it failed to adequately investigate an aspect of the claim that it was required or had a duty to investigate.

#### ASSESSMENT OF SANCTION

15. Reasonable and transparent claims processing decreases disputes in the Texas workers' compensation system, promotes payment of appropriate income and medical benefits, and ensures that each injured employee is treated with dignity and respect.

16. In assessing the sanction for this case, DWC appropriately and fully considered the following factors set forth 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 demonstrated good faith of the violator, including actions taken to rectify the consequences of the prohibited act;
- the penalty necessary to deter future violations;
- whether the administrative violation has negative impact on the delivery of benefits to an injured employee;
- the history of compliance with electronic data interchange requirements;
- other matters that justice may require, including but not limited to:
  - PBO assessments;
  - the promptness and earnestness of 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; and
- to the extent reasonable, the economic benefit resulting from the prohibited act.

17. In assessing the sanction for this case, DWC found the following factors set forth 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 penalty necessary to deter future violations; whether the administrative violation has negative impact on the delivery of benefits to an injured employee; and other matters that justice may require including the fact that the injured employee's underlying claim arose from his employment with City of Midland as a [REDACTED].

18. In assessing the sanction for this case, DWC found the following factors set forth in TEX. LAB. CODE § 415.021(c) and 28 TEX. ADMIN. CODE § 180.26(e) to be mitigating: the history

and extent of previous administrative violations; and other matters that justice may require including the fact that City of Midland is a self-insured, political subdivision.

19. City of Midland acknowledges that DWC and City of Midland have communicated regarding the relevant statutes and rules violated; the facts establishing that the administrative violation occurred; and the appropriateness of the proposed sanction, including how DWC considered the factors under TEX. LAB. CODE § 415.021(c) and 28 TEX. ADMIN. CODE § 180.26(e).
20. City of Midland acknowledges that, in assessing the sanction, DWC considered the factors set forth in TEX. LAB. CODE § 415.021(c) and 28 TEX. ADMIN. CODE § 180.26(e).

### CONCLUSIONS OF LAW

The commissioner makes the following conclusions of law:

1. The commissioner has jurisdiction over this matter pursuant to TEX. LAB. CODE §§ 402.001, 402.00111, 402.00114, 402.00116, 402.00128, 414.002, 414.003, and 414.004.
2. The commissioner has authority to informally dispose of this matter as set forth under TEX. GOV'T CODE § 2001.056, TEX. LAB. CODE § 402.00128(b)(7), and 28 TEX. ADMIN. CODE § 180.26(h).
3. Pursuant to TEX. LAB. CODE § 415.021, the commissioner may assess an administrative penalty against a person who commits an administrative violation.
4. 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 the Texas Workers' Compensation Act.
5. Pursuant to TEX. LAB. CODE § 409.022(d)(1) and (2), if an insurance carrier's notice of refusal to pay benefits under TEX. LAB. CODE § 409.021 is sent in response to a claim for compensation resulting from [REDACTED] [REDACTED] a presumption is claimed to be applicable under Subchapter B, Chapter 607, Government Code, the notice must include a statement by the carrier that explains why the carrier determined a presumption under that subchapter does not apply to the claim for compensation and describes the evidence that the carrier reviewed in making that determination.
6. City of Midland violated TEX. LAB. CODE § 415.002(a)(22) when it failed to explain, in the PLN-1, why it determined that the [REDACTED] presumption did not apply in the underlying claim.
7. City of Midland violated TEX. LAB. CODE § 415.002(a)(22) when it failed to describe, in the PLN-1, the evidence it reviewed in making the determination the [REDACTED] presumption did not apply in the underlying claim.

8. Pursuant to TEX. LAB. CODE § 415.002(a)(13), an insurance carrier commits an administrative violation if that person misrepresents the reason for not paying benefits.
9. City of Midland violated TEX. LAB. CODE § 415.002(a)(13) each time it included, in the PLN-1, an assertion as a reason for refusing to pay benefits on the underlying claim that it had minimal or no investigative support for and that it had not meaningfully considered when it made its decision to refuse to pay benefits on the underlying claim.
10. Pursuant to TEX. LAB. CODE § 409.022(c), an insurance carrier commits an administrative violation if the insurance carrier does not have reasonable grounds for a refusal to pay benefits, as determined by the commissioner.
11. City of Midland violated TEX. LAB. CODE § 409.022(c) when it issued a PLN-1 that failed to establish any reasonable grounds for its refusal to pay benefits on the underlying claim, as determined by the commissioner.
12. Pursuant to TEX. LAB. CODE § 415.002(a)(11), an insurance carrier commits an administrative violation if that person fails to process claims promptly in a reasonable and prudent manner.
13. City of Midland violated TEX. LAB. CODE § 415.002(a)(11) each time it failed to adequately investigate an aspect of the underlying claim that it was required or had a duty to investigate.

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**ORDER**

City of Midland is ORDERED to pay an administrative penalty of \$17,500 within 30 days from the date of this Order.

The administrative penalty must be paid by company check, cashier's check, or money order made payable to the "State of Texas." Mail the administrative penalty to the Texas Department of Insurance, Attn: DWC Enforcement, MC 9999, P.O. Box 149104, Austin, Texas, 78714-9104.



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Cassie Brown  
Commissioner of Workers' Compensation

Approved as to Form and Content:



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Glen Imes  
Staff Attorney, DWC Enforcement  
Texas Department of Insurance

2019 5992

AFFIDAVIT

STATE OF Texas      §  
   §  
COUNTY OF Midland      §

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

"My name is Courtney Sharp. 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 City Manager, and am the authorized representative of City of Midland. I am duly authorized by said organization to execute this statement.

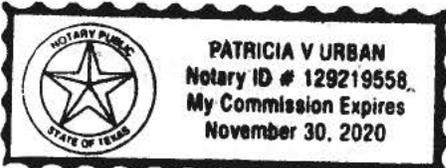
City of Midland waives rights provided by the Texas Labor Code and other applicable laws, and acknowledges the jurisdiction of the Texas commissioner of workers' compensation.

City of Midland is voluntarily entering into this consent order. City of Midland consents to the issuance and service of this consent order."

Courtney SP  
Affiant

SWORN TO AND SUBSCRIBED before me on June 3, 2019.

(NOTARY SEAL)



Patricia V. Urban  
Signature of Notary Public

Patricia V. Urban  
Printed Name of Notary Public

My Commission Expires: 11/30/2020