

CHAPTER 116. Subsequent Injury Fund

28 TAC §§116.11 – 116.12

1. INTRODUCTION. The Commissioner of Workers' Compensation, Texas Department of Insurance (Department), Division of Workers' Compensation Division) adopts amendments to §116.11 of this title (relating to Request for Reimbursement from the Subsequent Injury Fund) and §116.12 of this title (relating to Subsequent Injury Fund Payment/Reimbursement Schedule) with changes to the proposed text as published in the July 31, 2009 issue of the *Texas Register* (34 TexReg 5026).

In accordance with Government Code §2001.033, this preamble contains a summary of the factual basis of the rule, a summary of comments received from interested parties, names of those groups and associations who commented and whether they were in support of or in opposition to adoption of the rule, and the reasons why the Division agrees or disagrees with the comments and suggestions. Changes made to the proposed rule are in response to public comments received in writing; and are described in the summary of comments and responses section of this preamble.

The public comment period closed August 31, 2009. There was not a request for a public hearing submitted to the Division.

2. REASONED JUSTIFICATION. These amendments are necessary to implement statutory provisions enacted by Senate Bill 1169, 80th Legislature, Regular Session, effective September 1, 2007, (SB 1169) to Labor Code §§403.006, 408.0041, and 408.042.

Labor Code §403.006 provides that the Subsequent Injury Fund (SIF) is liable for the reimbursement of an insurance carrier as provided for by Labor Code §408.0041(f-1). Labor Code §408.0041(f-1) requires the SIF to reimburse an insurance carrier for an overpayment of benefits made by the insurance carrier based on the opinion of a designated doctor if that opinion is reversed or modified by a final arbitration award or a final order or decision of the Commissioner of Workers' Compensation (Commissioner) or a court. Labor Code §408.042(g) adds the provision that an insurance carrier is entitled to apply for and receive reimbursement from the SIF for the amount of death benefits, in addition to the amount of income benefits, if any, paid to an employee that are based on employment other than the employment during which the compensable injury occurred.

In response to written comments the Division has changed some of the proposed language in the text of the rule. The changes introduce no new subject matter nor do the changes affect persons in addition to those subject to the proposal as published. Further changes were made for consistency, clarity, editorial reasons, and to correct typographical and/or grammatical errors.

In response to comments the following amendments have been made to the proposed rule language in §116.11. The proposed deletion of "the State Office of Administrative Hearings" has been withdrawn, and the language has been added in the adopted subsections of (a)(1) and (c) because the Division agrees that it could be confusing to delete the reference to the State Office of Administrative Hearings (SOAH). Additionally, for

clarity, the term “arbitration award” has been added to proposed (g)(4), which is adopted (f). The proposed deletion of “relevant” has been withdrawn and the language has been added in the adopted section of (c)(4); additionally, the term “relevant” has been added before specifying documents that must be filed with a request for reimbursement in subsections (c)(5) - (6), (f)(4) - (5), and (h) because the Division agrees that all relevant information should be submitted to the SIF in support of a proper reimbursement request.

In response to comments, the following amendments have been made to the proposed rule language in §116.12. The proposed provision in (d) that claims attributable to multiple employment under §116.11(a)(4) should be processed in the first fiscal quarter following the fiscal year in which the request was submitted has been deleted because the Division agrees that a delay in processing may cause reimbursements to exceed the timeframe provided for in §408.042(g). The proposed requirement that the insurance carrier must notify the SIF administrator of any pending disputes has been deleted in (f), which was proposed as §116.12(g), because the Division agrees that disputes should be submitted as part of the application process in §116.11. The Division has determined that there are no additional rules or rule amendments required in order to implement the adopted changes of these rules.

3. HOW THE SECTIONS WILL FUNCTION.

The adopted sections implement statutory changes enacted by SB 1169 which, in part, expanded the liability of the SIF by providing entitlement for insurance carriers to be reimbursed for overpayment of benefits based on the opinion of a 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. SB 1169 also provides that insurance carriers may seek reimbursement when death benefits are paid to eligible beneficiaries, in addition to reimbursement when income benefits are paid to an injured employee, when those amounts are based on employment other than the employment during which the compensable injury occurred.

Rule 116.11 clarifies when and how a reimbursement request is to be submitted and what constitutes a proper and timely reimbursement request; this section is adopted with changes.

Rule 116.12 clarifies the reimbursement schedule, payment allocations, and processing of reimbursements for claims; this section is adopted with changes.

4. SUMMARY OF COMMENTS AND AGENCY'S RESPONSE.

§116.11

Comment: Several commenters suggest that “the State Office of Administrative Hearings” should not be deleted from §116.11(a) and (c) because the omission could be confusing.

Agency Response: The Division agrees that SOAH should not be deleted from the rule. The Division has removed the proposed deletion in the adopted rule and included SOAH in

the final language of §116.11(a) and (c) because an unappealed SOAH decision or order may entitle insurance carriers to SIF reimbursement under Labor Code §413.055.

Comment: A few commenters suggest that “final order and decision of the commissioner” should be clarified and defined to include final SOAH decisions and orders. In the alternative, the commenters suggest that subsections §116.11(a)(1) and (c) include final decisions and orders of the SOAH that have not been appealed.

Agency Response: The Division agrees in part and disagrees in part. The Division agrees that the addition of SOAH will clarify the rule as set forth in the above comment. The Division disagrees that a SOAH order or decision is an order or decision of the Commissioner.

Comment: A few commenters suggest that “final order and decision of the commissioner” should be defined and clarified to include a decision by an Independent Review Organization (IRO). In the alternative, the commenters suggest that subsections §116.11(a) and (c) also include final decisions of IROs that have not been appealed.

Agency Response: The Division disagrees with the comments regarding IROs and declines to make the suggested changes because there is no requirement or express authority to define an IRO decision as a order or decision of the commissioner under the Labor Code. Additionally, such a definition would be contrary to 28 Texas Administrative Code (TAC) §133.308 (relating to Medical Dispute Resolution by Independent Review

Organizations), which states that the Department and Division are not are considered a party to the IRO decision and the IRO decision is not considered an agency decision.

Finally the references to IROs in §116.11(c)(6) and (g)(4) should not be construed as orders or decisions of the commissioner which may trigger SIF reimbursement but are merely requirements of the application for SIF reimbursement.

Comment: A commenter states that the ability of an insurance carrier to be reimbursed from the SIF for “unrecoupable payments” is unclear. The commenter recommends that either the Division should remove all references to “unrecoupable overpayments” in §116.11(a) and (b), or in the alternative, the Division should reaffirm its previously articulated policy that an insurance carrier may generally recoup income against non-wage replacement benefits and, in the case of benefits paid pursuant to a designated doctor’s report, may recoup any income or death benefits against any other income or death benefits, regardless of type.

Agency Response: The Division disagrees and declines to make the change. To the extent that the comment is for a change to benefits an insurance carrier may recoup from persons other than the SIF, the comments are outside the scope of this proposed rule. An expansion of the SIF rule to include additional recoupable or unrecoupable overpayments is not contemplated by the Act, Division rules, or current administrative decisions interpreting same.

Comment: Two commenters request that the Commissioner amend §116.11(b) to provide that an insurance carrier may recover all overpayments and payments made in error.

Commenters suggest that current language in §116.11(b) stating that SIF reimbursement does not include “any amounts the carrier overpaid voluntarily or as a result of its own errors” should be deleted. The commenters state that there is no statutory authority to support this restriction on reimbursement. A commenter requests that if the section cannot be amended that the request be considered a rule petition.

Agency Response: The Division disagrees with the recommendations and notes that there is no statutory authority to provide for reimbursement of amounts the carrier overpaid voluntarily or as a result of its own errors. The liability of the SIF is prescribed by Labor Code §403.006(b). A claimant for reimbursement from the SIF is only entitled to that which is specifically authorized by statute. *Second Injury Fund v. Keaton* 345 S.W. 2d 711. Additionally, the comment submitted cannot be considered a rule petition at this time because the request was not a proper petition for rulemaking with the Texas Department of Insurance, Division of Workers Compensation. The correct procedure for a rule-making petition is set forth in §2001.021 Government Code and 28 TAC §104.1 of this title (regarding Contents of Rule-Making Petitions).

Comment: Several commenters state that the term “relevant” should not be deleted in §116.11(c)(4) and the term “relevant” should be used to describe all documentation that must accompany the request for reimbursement. Commenters argue that a requirement to

file irrelevant documentation creates additional expense on the workers compensation system for insurance carriers and the Division.

Agency Response: The Division agrees and has modified the final rule accordingly.

Comment: A commenter suggests that the term “arbitration awards and settlements” should be added to proposed §116.11(g)(4), adopted §116.11(f)(4).

Agency Response: The Division agrees in part and disagrees in part. Adopted §116.11(f)(4) has been modified to include “arbitration awards” to be consistent with statutory language in Labor Code Section 408.0041(f-1). However, adopted §116(f)(4) has not been modified to include arbitration “settlements” since the Legislature did not include that term in the statute.

Comment: A commenter suggests reversing the order of §116.11(f) and (g), stating that it would be more consistent with the ordering of the previous subsections.

Agency Response: The Division agrees and has modified the final rule accordingly.

§116.12

Comment: Several commenters suggest that claims filed under §116.12(c) should be processed within 60 days, within which the SIF should be required to send written verification that the application is complete or requires additional documentation. Under the commenter’s suggestion, failure of the SIF to respond within 60 days would constitute

verification that the request is complete and the amount of requested reimbursement is authorized.

Agency Response: The Division disagrees. Labor Code §408.042 provides for reimbursement payments at least annually. Payments may be made earlier within that time. The Division will process applications as timely as possible in accordance with the Labor Code, Title 5.

Comment: Two commenters state that the time for processing under proposed §116.12(d) is not authorized by statute.

Agency Response: The Division agrees. Subsection 116.12(d) has been deleted as proposed. The Division will process applications as timely as possible in accordance with the Labor Code, Title 5.

Comment: Two commenters state that the required “notice of any pending disputes” in §116.12(g), which was §116.12(f) in the proposal, should be part of the application process in §116.11(c)(5) and §116.12(g) should be deleted.

Agency Response: The Division agrees in part and disagrees in part. The “notice of any pending disputes” language has been deleted from adopted §116.12(g). The Division disagrees that the language should be added to §116.11(c)(5) because the requirement is not limited to disputes involving overpayment of benefits.

Comment: A commenter objects to the language in §116.12(g) providing that the SIF will refrain from acting on a request for reimbursement until resolution of all disputes affecting the request for reimbursement. The commenter states that such a provision conflicts with Labor Code §410.209.

Agency Response: The Division disagrees. A final determination of the facts justifying a proper request for reimbursement cannot be made as long as there are relevant disputes that have not been resolved.

Comment: Several commenters suggest that §116.12(g) be revised to provide that it only pertains to disputes and information that are relevant to the Division's determination on the request for reimbursement.

Agency Response: The Division agrees and has modified the final rule accordingly.

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

For, with changes: American Insurance Association, Flahive, Ogden & Latson, Insurance Council of Texas, Property and Casualty Insurers Association of America, and the State Office of Risk Management.

Against: None

6. STATUTORY AUTHORITY. The amendments are adopted under the Labor Code §§402.00111, 402.061, 403.006, 408.0041, and 408.042. Labor Code §403.006

provides that the SIF is liable for the reimbursement of an insurance carrier as provided for by Labor Code §408.0041(f-1). Labor Code §408.0041(f-1) requires the SIF to reimburse an insurance carrier for an overpayment of benefits made by the insurance carrier based on the opinion of a 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. Labor Code §408.042(g) adds the provision that an insurance carrier is entitled to apply for and receive reimbursement from the SIF for the amount of death benefits, in addition to the amount of other income benefits, paid to an employee that are based on employment other than the employment during which the compensable injury occurred.

Section 402.00111 provides that the Commissioner of Workers' Compensation (Commissioner) shall exercise all executive authority, including rulemaking authority, under the Labor Code and other laws of this state. Section 402.061 authorizes the Commissioner to adopt rules necessary to administer the Act.

7. 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), 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 decision of a hearing officer or the 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 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 attributable to multiple employment and paid 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 attributable to multiple employment and paid pursuant to Labor Code §408.042;

(5) reimbursement from the SIF, 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 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 non compensability is one year from the date 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 shall reimburse the SIF for any initial pharmaceutical payment which the SIF previously reimbursed to the insurance carrier. The insurance carrier's reimbursement of the SIF shall be paid within the timeframe the insurance carrier has to comply with the agreement, decision and order, or other judgment 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 opinion or 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) Requests for reimbursement attributable to subsection (a)(1) of this section, 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 shall be filed with the SIF administrator in writing and include:

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

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

(3) the name, address, and federal employer identification number of the payee for any reimbursement that may be due;

(4) copies of all relevant orders and decisions (Benefit Review Conferences, Interlocutory Orders, Contested Case Hearing Decisions & Orders, Appeals Panel Decisions, and Court orders) regarding the payment for which reimbursement is being requested along with an indication of which document is the final decision on the matter;

(5) copies of all relevant reports and DWC forms filed by the employer with the insurance carrier; and

(6) if the request is based on an overpayment of medical benefits, copies of all medical bills and preauthorization request documents associated with the overpayment 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) Requests for reimbursement pursuant to subsection (a)(2) of this section, related to a reimbursement of death benefits paid to the SIF prior to a legal beneficiary being determined to be entitled to receive death benefits, shall be filed with the SIF administrator in writing and include:

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

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

(3) the name, address, and federal employer identification number of the payee for any reimbursement that may be due;

(4) the documentation the legal beneficiary provided with the claim for death benefits in accordance with §122.100 of this title (relating to Claim for Death Benefits); and

(5) 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) Requests for reimbursement pursuant to subsection (a)(3) or (4) of this section, regarding multiple employment, shall be submitted on an annual basis for the payments made during the same or previous fiscal year. The fiscal year begins each September 1st and ends on August 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:

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

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

(3) the name, address, and federal employer identification number of the payee for any reimbursement that may be due;

(4) information documenting the injured employee's average weekly wage amounts paid from all non claim employment held at the time of the work related injury pursuant to §122.5 of this title (relating to Employee's Multiple Employment Wage Statement); and

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

(f) Requests for reimbursement attributable to subsection (a)(5) of this section, insurance carrier claims of benefit overpayments made pursuant to a designated 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, shall be filed with the SIF administrator in writing and include:

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

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

(3) the name, address, and federal employer identification number of the payee for any reimbursement that may be due;

(4) copies of all relevant designated doctor opinions (including responses to letters of clarification) and orders and decisions (IRO decisions, Interlocutory Orders,

Contested Case Hearing Decisions and Orders, arbitration awards, Appeals Panel Decisions, and Court orders) regarding the designated doctor opinion and the payment, made pursuant to the designated doctor opinion for which reimbursement is being requested along with an indication of which document is the final decision on the matter;

(5) copies of all relevant reports and DWC forms filed by the employer with the insurance carrier; and

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

(g) Requests for reimbursement attributable to initial pharmaceutical coverage 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 1st and ends on August 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 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. The requests shall be filed with the SIF administrator in writing and include:

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

(2) a detailed payment record showing the dates of payments, specifically including documentation of payment of initial pharmaceutical coverage, (i.e., first seven days following the date of injury); the amounts of the payments, the purpose of payments, the payees, and the periods of benefits paid;

(3) the name, address, and federal employer identification number of the payee for any reimbursement that may be due;

(4) 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, which is to include a description of the prescribed pharmaceutical service(s); and

(5) documentation of the final resolution of any dispute which determines the injury is not compensable either from the commissioner or court of last resort , or documentation of a claimant's failure to respond in accordance with subsection (a)(6)(B) of this section.

(h) An insurance carrier seeking reimbursement from the SIF shall timely provide all 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.

§116.12.Subsequent Injury Fund Payment/Reimbursement Schedule.

(a) Claims against the Subsequent Injury Fund (SIF) shall be paid in the following priority:

(1) claims by insurance carriers for reimbursement made pursuant to Labor Code §403.007 and §132.10(g) of this title (relating to Payment of Death Benefits to the Subsequent Injury Fund);

(2) claims by injured employees for lifetime benefits, as provided by Labor Code §408.162;

(3) claims by insurance carriers for reimbursement, made pursuant to Labor Code §§408.0041, 410.209, and 413.055 and §116.11 of this title (relating to Request for Reimbursement from the Subsequent Injury Fund); and

(4) claims by insurance carriers for reimbursement made pursuant to Labor Code §408.042(g) relating to multiple employment and those in accordance with division rule(s) adopted pursuant to Labor Code §413.0141.

(b) The SIF uses the fiscal year September 1 through August 31.

(c) Claims described in subsection (a) of this section should be reviewed and, if appropriate, paid in the fiscal quarter following the quarter in which the request was submitted and no later than one year following the submission.

(d) In accordance with Labor Code §403.006(d), if the commissioner determines that partial payments of the claims described in subsection (a)(4) of this section are necessary, partial payments shall be calculated in the following manner:

(1) The total amount of completed eligible requests for reimbursement submitted under subsection (a)(4) of this section that are received during the previous fiscal year will be used to establish a baseline amount.

(2) The baseline amount will be divided by the total amount of SIF funding available as determined in accordance with the Labor Code.

(3) The resulting fraction will be equally applied to all claims submitted under subsection (a)(4) to determine the partial reimbursement amount.

(4) If reimbursement requests are paid with partial payments, no further future recovery is available from the SIF for the non-reimbursed portion of that particular request.

(e) If reimbursement requests are paid with partial payments, the SIF administrator shall, no later than October 30 of the following fiscal year, enter appropriate orders for claims described in subsection (a)(4) of this section. The order shall specify the amount the SIF shall pay to the insurance carrier.

(f) The SIF administrator will refrain from acting on an insurance carrier's request for reimbursement from the SIF until final resolution of all disputes affecting the request for reimbursement.

CERTIFICATION. The agency hereby certifies that the adopted amendment and sections have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas, on _____, 2009.

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

IT IS THEREFORE THE ORDER of the Commissioner of Workers' Compensation that §116.11 specified herein, concerning request for reimbursement from the Subsequent Injury Fund and §116.12, concerning Subsequent Injury Fund payment/reimbursement schedule, are adopted.

ROD BORDELON
COMMISSIONER OF WORKERS' COMPENSATION

ATTEST:

Dirk Johnson
General Counsel

COMMISSIONER ORDER NO. _____