

TITLE 28. INSURANCE

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

CHAPTER 129: INCOME BENEFITS--TEMPORARY INCOME BENEFITS AMEND: §§129.3 and 129.11

1. INTRODUCTION. The Texas Department of Insurance, Division of Workers' Compensation (division) adopts amendments to 28 TAC §129.3 and §129.11, concerning temporary income benefits (TIBs). The amended sections are adopted without changes to the proposed text as published in the October 9, 2015, issue of the *Texas Register* (40 TexReg 7043). No request for a public hearing was submitted to the division. An informal working draft of amended 28 TAC §129.3 and §129.11 was posted on the division's website on June 8, 2015.

The public comment period closed on November 9, 2015. The division made no changes in response to public comments.

The division adopts non-substantive amendments throughout the rule text to conform to agency style. The division deleted the word "Commission", added the word "division" and added the word "insurance" before the word "carrier(s)." The division also relettered and renumbered rule text.

In accordance with Government Code §2001.033, the division's reasoned justification for these rules is set out in this order, which includes the preamble. The following paragraphs include a detailed section-by-section description and reasoned justification of all amendments to 28 TAC §129.3 and §129.11.

2. REASONED JUSTIFICATION. Amendments to §129.3 and §129.11 are necessary to implement Senate Bill (SB) 901, 84th Legislature, Regular Session (2015), which amends Labor Code §408.103. Labor Code §408.103 provides the method for calculating the amount of TIBs an injured employee is entitled to receive. SB 901 increased the hourly wage that qualifies an injured employee to be paid TIBs at 75% of the employee's pre-injury average weekly wage for the first 26 weeks of the injured employee's disability. SB 901 increased the qualifying wage from less than \$8.50 an hour to less than \$10 an hour for workers' compensation claims with a date of injury on or after September 1, 2015 under Labor Code §408.103(a)(2). Before SB 901, in order to be eligible for the higher TIBs rate of 75% of the pre-injury average weekly wage for the first 26 weeks of disability, an injured employee had to earn less than \$8.50 an hour. Under SB 901, an injured employee has to earn less than \$10.00 an hour in order to qualify for the higher TIBs rate of 75% of the pre-injury average weekly wage for the first 26 weeks of the injured employee's disability. Amended §129.3 and §129.11 only reflect the amount of statutory TIBs provided by the SB 901 amendments to Labor Code §408.103(a) and do not add any new requirements.

The division also deleted §129.11(f) because the "January 1, 2000" applicability date is no longer relevant. At this point in time all agreements made under §129.11 for monthly payment of TIBs under the provisions of the Act would automatically be entered into after January 1, 2000. Further, any injured employees whose benefits began to accrue prior to January 1, 2000 would no longer be eligible for TIBs under Labor Code §408.083.

Amended §129.3.

Amended §129.3(b) and §129.3(f)(2) increase the hourly wage that qualifies an injured employee to be paid the higher TIBs rate of 75% of the employee's pre-injury average weekly

wage for the first 26 weeks of disability. The qualifying wage increased from less than \$8.50 an hour to less than \$10 an hour for workers' compensation claims with a date of injury on or after September 1, 2015. The amendments align the division's rules regarding the calculation and payment of TIBs with statutory changes provided in Labor Code §408.103(a).

Amended §129.3(b) and §129.3(f)(1) clarify that the \$8.50 an hour wage rate still applies to workers' compensation claims with a date of injury before September 1, 2015. The amendments reflect the effective date of Labor Code §408.103(a) as amended by SB 901 and are necessary for ease of stakeholder compliance. Claims that have not yet been brought with dates of injury before September 1, 2015, and claims that were already receiving TIBs before September 1, 2015, will continue to use the \$8.50 an hour wage rate to calculate TIBs.

Amended §129.11.

Amended §129.11(b)(2) increases the hourly wage that qualifies an injured employee to be paid at the higher TIBs rate of 75% of the employee's pre-injury average weekly wage for the first 26 weeks of disability. The qualifying wage increased from less than \$8.50 an hour to less than \$10 an hour for workers' compensation claims with a date of injury on or after September 1, 2015. The amendment aligns the division's rules regarding the calculation and payment of TIBs with statutory changes provided by Labor Code §408.103(a).

Amended §129.11(b)(1) clarifies that the \$8.50 an hour wage rate still applies to workers' compensation claims with a date of injury before September 1, 2015. The amendments reflect the effective date of Labor Code §408.103(a) as amended by SB 901 and are necessary for ease of stakeholder compliance. Claims that have not yet been brought with dates of injury before

September 1, 2015, and claims that were already receiving TIBs before September 1, 2015, will continue to use the \$8.50 an hour wage rate to calculate TIBs.

The division deleted §129.11(f), which stated that §129.11 only applied to agreements entered into on or after January 1, 2000, for payment of TIBs under the provisions of the Act. Section 129.11(f) implemented House Bill 2510, 76th Legislature, Regular Session (1999), which amended Section Labor Code 408.081 to allow monthly payments of income benefits by agreement. The "January 1, 2000" date was relevant when §129.11 was adopted because §129.11 became effective December 26, 1999. However, at this point in time, all agreements made under §129.11 for monthly payment of TIBs under the provisions of the Act would automatically be entered into after January 1, 2000. Further, any injured employees whose benefits began to accrue prior to January 1, 2000 would no longer be eligible for TIBs under Labor Code §408.083.

3. SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Comment: Commenter expresses its support for the proposed amendments.

Division Response: The division appreciates the supportive comment.

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

For: The Office of Injured Employee Counsel

For with changes: None

Against: None

5. STATUTORY AUTHORITY. The amendments are adopted under Labor Code §§402.00128, 402.021, 402.061, and 408.103. Section 402.00128 lists the general powers of the commissioner, including the power to hold hearings. Section 402.021 establishes the basic goals and legislative intent of the workers' compensation system, including the goal that the system must provide appropriate income benefits and medical benefits in a manner that is timely and cost-effective. Section 402.061 requires the division to adopt rules necessary for the implementation and enforcement of the Texas Workers' Compensation Act. Section 408.103 provides that the amount of TIBs is equal to: (1) 70% of the amount computed by subtracting the employee's weekly earnings after the injury from the employee's average weekly wage; or (2) for the first 26 weeks, 75% of the amount computed by subtracting the employee's weekly earnings after the injury from the employee's average weekly wage if the employee earns less than \$10 an hour.

6. TEXT.

§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 for a workers' compensation claim with a date of injury before September 1, 2015, or less than \$10 per hour for a workers' compensation claim with a date of injury on or after September 1, 2015, 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) for a workers' compensation claim with a date of injury before September 1, 2015,

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

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

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

(ii) 70% of the lost wages for all TIBs payments thereafter; and

(2) for a workers' compensation claim with a date of injury on or after September 1, 2015,

(A) an employee who earns \$10 or more per hour is entitled to TIBs in the amount of 70% of the lost wages; or

(B) an employee who earns less than \$10 per hour is entitled to TIBs as follows:

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

(ii) 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.

§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 division if the division 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) for a workers' compensation claim with a date of injury before September 1, 2015,

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

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

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

(ii) 70% of the lost wages for all TIBs payments thereafter; and

(2) for a workers' compensation claim with a date of injury on or after September 1, 2015,

(A) if the employee earns \$10 per hour or more, the carrier shall pay 70% of the lost wages; or

(B) if the employee earns less than \$10 per hour, the carrier shall pay:

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

(ii) 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 division 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.

CERTIFICATION. This agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas, on _____, 2016.

Marisa Lopez Wagley
Acting General Counsel

Workers' Compensation
Texas Department of Insurance, Division of

The commissioner adopts amendments to 28 TAC §129.3 and §129.11.

W. Ryan Brannan
Commissioner of Workers' Compensation

COMMISSIONER'S ORDER NO. _____

ATTEST:

X

Texas Department of Insurance, Division of Workers' Compensation

COMMISSIONER'S ORDER NO. _____