SUBCHAPTER B. Supplemental Income Benefits
28 TAC §§130.101 - 130.109

1. INTRODUCTION. The Commissioner of Workers' Compensation (Commissioner), Texas Department of Insurance, Division of Workers' Compensation (Division) adopts amendments to §§130.101-130.109 concerning supplemental income benefits (SIBs) with changes to the proposed text published in the October 3, 2008 issue of the *Texas Register* (32 TexReg 8290).

In accordance with Government Code §2001.033, the 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 some of the comments and proposals.

Changes made to the proposed rule are in response to public comments received in writing and at a public hearing held on November 6, 2008, and are described in the summary of comments and responses section of this preamble. Other changes were made for consistency or to correct typographical or grammatical errors.

2. REASONED JUSTIFICATION. These amendments implement statutory provisions of House Bill (HB) 7, enacted by the 79th Legislature, Regular

Session, effective September 1, 2005, and clarify the process injured employees are required to follow to qualify for SIBs.

One of the changes to the Labor Code by HB 7 was the addition of new §408.1415, which requires the Commissioner to adopt compliance standards for SIBs recipients that require each recipient to demonstrate an active effort to obtain employment. Section 408.1415 also requires the Commissioner to: (1) establish the level of activity that a recipient should have with the Texas Workforce Commission (TWC) and the Department of Assistive and Rehabilitative Services (DARS); (2) define the number of job applications required to be submitted by a recipient to satisfy the work search requirements; and, (3) consider factors affecting the availability of employment, including the recognition of access to employment in rural areas, economic conditions, and other appropriate employment availability factors. HB 7 also amended §408.142 and §408.143 to eliminate the prior "good faith" work search standard and require injured employees seeking SIBs to comply with §408.1415 and the compliance standards for recipients established by the Commissioner.

Section 408.1415(a) requires a supplemental income benefit recipient to demonstrate an active effort to obtain employment by providing evidence satisfactory to the Division of: (1) active participation in a vocational rehabilitation program conducted by DARS or a private vocational rehabilitation provider; (2) active participation in work search efforts conducted through the TWC; or (3)

active work search efforts documented by job applications submitted by the recipient.

In evaluating job search efforts by injured employees, the current Division process is consistent with §408.1415(a) in that present rules include the consideration of documented job search efforts, participation in a DARS or other vocational rehabilitative program, and registration with TWC. Although the current rules consider the number of jobs an injured employee applies for during a qualifying period in order to qualify for SIBs, there is no defined number of required weekly applications.

Amendments to the current rules are necessary because §408.1415(b) requires the Commissioner to "establish the level of activity that a recipient should have with the Texas Workforce Commission and the Department of Assistive and Rehabilitative Services" and to "define the number of job applications required to be submitted by a recipient to satisfy the work search requirements." The Commissioner is also required to "consider factors affecting the availability of employment, including the recognition of access to employment in rural areas, economic conditions, and other appropriate employment availability factors."

The Division consulted with TWC regarding its work search requirements. TWC is part of a local-state network comprised of the statewide efforts of the Commission coupled with planning and service provisions on a regional basis by

28 Local Workforce Development Boards. Each Board sets work search requirements for the counties in its respective region which are derived in part from an assessment of economic conditions in that region. The work search requirements include a minimum number of weekly work search contacts, which have ranged from one (1) to seven (7), depending on the region. Only "rural" counties, which are defined by the TWC as "counties having a population estimated by the Texas State Data Center at Texas A&M University to be not more than 10,000 as of July 1 of the most recent year for which county population estimates have been published," are permitted to set a work search contact requirement lower than three (3) per week. Likewise, based on specific labor market information and conditions, a Local Workforce Development Board may advise that an unemployment benefits recipient within the area covered by the Board is required to make more than three (3) work search contacts per week. TWC has implemented rules and provides guidelines that describe the types of activities that may constitute a work search contact. See 40 TAC §815.28.

In establishing the level of activity an injured employee should have with TWC and to define the number of job applications required to satisfy the work search requirements, the Commissioner has determined that it is appropriate to require compliance consistent with that of TWC requirements. Therefore, the rule amendments explain that "work search efforts" encompasses both job

applications and work search contacts described by TWC rules. Further, the number of job applications required of a SIBs recipient will be consistent with the number of TWC's work search contacts required for an injured employee's county of residence. TWC standards take into account the labor market and economic conditions in the area and whether the county is rural or urban, both of which are specifically mentioned in §408.1415(b)(3) as factors that the Commissioner is to consider in adopting compliance standards.

The Division has established open communication with TWC in order to obtain and maintain up-to-date TWC work search requirements for Texas counties. In addition to being provided with the number of work search contacts required by TWC and contact information for the local workforce Board, injured employees will be able to contact Division field offices and the Office of the Injured Employee Counsel (OIEC) for assistance regarding qualifications and applications for SIBs.

Following publication of the proposed amendments in the *Texas Register* on October 3, 2008, the Division held a public hearing on November 6, 2008. In response to written comments received from interested parties prior to the hearing and comments made at the hearing, the Division has changed some of the proposed language in the text of the rule as adopted. The changes, however, do not introduce new subject matter or affect persons in addition to those subject to the proposal as published. In response to comments received

suggesting the use of generally accepted accounting principles language in §130.101(1)(D) was unclear, the subsection was amended to remove references to generally accepted accounting principles. In response to comments concerning the effect of changes in the injured employee's work search requirements, the definition of "Qualifying Period" in §130.101(4) was amended to add language clarifying that the requirements for a qualifying period beginning before the effective date of these amended rules continued in effect until the injured employee's next qualifying period that begins on or after the effective date of the adopted rules. In response to comments, §130.101(8) reinstates the current rule language along with the legislative change regarding the name of DARs. In addition, clarification was added that a vocational rehabilitation plan is also known as an Individual Plan for Employment. The Division also received additional comments concerning the clarity of references in §130.102(b), and the Division amended the language of that subsection to clarify that the work search standards are those in Labor Code §408.1415 and this section. Based on comments received, the language in §130.102(d) (now renumbered as §130.102(d)(1)) was amended to read "An injured employee demonstrates an active effort to obtain employment by meeting at least one or any combination of the following work search requirements each week during the entire qualifying period" to clarify that the injured employee is required make an active effort to meet the work search requirements each week during the entire qualifying period

by making use of any one or more of the criteria in §130.102(d)(1)(A) – (E)) rather than being restricted to only one of the criteria during a qualifying period. The new provisions should not be interpreted to suggest an injured employee must engage in active efforts eight hours a day, seven days a week in order to qualify for SIBS. In an effort to make a more logical grouping of the qualifying items in §130.102(d), subsections (4) and (5) (now re-lettered as §130.102(d)(1)(D) and (E)) were reversed and re-lettered with no change in their wording. In response to comments, new subsection §130.102(d)(2) was added to confirm that hearing officers would continue to retain discretion in determining if an injured employee had demonstrated reasonable grounds for failure to meet at least one of the work search requirements in this section during any week during the qualifying period. To add in this new subsection (d)(2), the text of §130.102(d) was renumbered as §130.102(d)(1) with the subsections §130.102(d)(1) – (5) re-lettered to §130.102(d)(1)(A) – (E). As a result of comments received concerning the clarity and effect of §130.102(e), the subsection (e) was split into two subsections with the addition of a new subsection (f) and a re-lettering of the subsequent subsections. The title for the retained subsection (e) was adopted as "Vocational Rehabilitation" rather than the proposed title "Active Participation and Active Work Search Efforts." The retained subsection (f) added language to clarify that the documentation required of the injured employee was to show active participation in a vocational

rehabilitation program during the qualifying period. "Active participation" means the injured employee is making a reasonable effort to fulfill his or her obligations in accordance with the terms of their vocational rehabilitation plan or Individual Plan for Employment. Newly adopted subsection (f) is titled "Work Search Efforts" to reflect the work search efforts language retained from the proposed subsection (e) and moved to new subsection (f). The new subsection (f) includes language regarding the required documentation an injured employee must provide to sufficiently establish active participation in work search efforts and active work search efforts. Language was added to clarify that the active participation in work search efforts was required to be documented "each week during the qualifying period." Active participation in work search efforts and active work search efforts mean that the injured employee is making a reasonable effort to fulfill his or her work search requirements established in the rule. Disputes regarding an injured employee's active participation and reasonable efforts to fulfill their obligations under the rule will be determined by the finder of fact during the dispute resolution process. Evidence from DARS regarding the injured employee's participation level will be considered equally along with all other evidence. As a result of multiple comments received seeking clarification, language was added to subsection (f) to clarify that work search efforts would be consistent with job applications or the work search contacts established by TWC. Also, as the result of additional comments received that

asked for clarification of the effect of a change in the number of work search efforts during a qualifying period, language was added to the new subsection (f) to clarify that if the work search requirements changed during a qualifying period, the injured employee would be responsible for the lesser of the two requirements. Sections (f), (g), and (h) of §130.102 were re-lettered (g), (h), and (i), respectively, with no change to their text. In response to numerous comments concerning how the injured employee would determine the number of work search efforts would be required in the qualifying period, a new subsection §130.104(b)(5) was inserted adding language requiring the insurance carrier to advise the injured employee of the minimum number of work search efforts required under §130.102(d) and (f) during the next qualifying period.

3. HOW THE SECTIONS WILL FUNCTION. The adopted amendments change all references in these sections from "commission" to "Division" pursuant to HB 7 merger of the functions of the former Texas Workers' Compensation Commission within the Texas Department of Insurance to form the new Division.

Amendments to §130.101 paragraph (1) amend the definition for "Application for Supplemental Income Benefits" by removing the citation to a specific agency form and instead provide a general statement that the Division application form required for SIBs is pursuant to Labor Code §408.143(b). Section 130.101 is also amended by removing rule language pertaining to an

employee's statement regarding "good faith" job searches and adding rule language that requires the employee's statement that "the employee has complied with Labor Code §408.1415 and this subchapter." New language is also added to this section that pertains to the documentation required of self-employed individuals to establish earnings income along with the deletion of specific documentation examples.

An amendment to §130.101 paragraph (4) amends the definition for "Qualifying period" by adding the provision that the filing period is as provided in Labor Code §408.143(b) and shows that the provisions of the subchapter that applied to a qualifying period beginning prior to the effective date of the rules continues in effect until a new qualifying period begins on or after the effective date of the rules.

Amendments to §130.101 paragraph (8) change the term to be defined from "Full time vocational rehabilitation program" to "Vocational rehabilitation program" and amends the definition by replacing the reference to the previous Texas Rehabilitation Commission (TRC) with a reference to DARS. The amendments add that a vocational rehabilitation program may also be provided by "a comparable federally funded rehabilitation program in another state under the Rehabilitation Act of 1973, as amended."

Amendments to §130.102(a) change the language from "An injured employee shall not be entitled …" to "An injured employee is not entitled..." for

clarification. Amendments to subsection (b) clarify that the eligibility criteria exclude injured employees who have permanently lost entitlement to supplemental income benefits; and, that the eligibility criteria include completion and filing of an Application for Supplemental Income Benefits in accordance with this subchapter. Subsection (b)(2) is amended to delete language regarding "good faith" efforts to obtain employment and to add the requirement that an injured employee demonstrate an active effort to obtain employment in accordance with Labor Code §408.1415 and this section.

Amendments to §130.102(d) change the subsection title from "Good Faith Effort" to "Work Search Requirements." The adopted amendments delete language regarding "good faith" efforts to obtain employment and add language regarding work search requirements. The text in subsection (d) is renumbered §130.102(d)(1) to allow for the new subsection §130.102(d)(2) which was added to confirm that hearing officers would continue to retain discretion in determining if an injured employee had demonstrated reasonable grounds for failure to meet at least one of the work search requirements in this section during any week during the qualifying period. Subsection (d)(1) is also amended to add "each week" before "during" and "entire" before "qualifying period" to clarify that the injured employee's work search efforts were to continue each week during the entire qualifying period. The subsection as amended states "An injured employee demonstrates an active effort to obtain employment by meeting at

least one or any combination of the following work search requirements each week during the entire qualifying period" and clarifies that the injured employee's active efforts to meet the work search requirements could use a combination of the criteria in §130.102(d)(1)(A) – (E) rather than being restricted to only one. Subsection (d)(1)(B) is amended by adding the word "actively" and deleting the language "enrolled in, and satisfactorily" before "participated in," and deleting "full time" before "vocational rehabilitation program." The amendments also delete "sponsored by the Texas Rehabilitation Commission during the qualifying period" after "vocational rehabilitation program" and instead adds "as defined in §130.101 of this Chapter." Subsection (d)(1)(C) is amended to delete the language "has during the qualifying period been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program provided by a private provider that is included in the Registry of Private Providers of Vocational Rehabilitation Services" and adds the following language "has actively participated in work search efforts conducted through the Texas Workforce Commission (TWC)." Subsection (d)(1)(E) is amended to delete the following language "provided sufficient documentation as described in subsection (f) of this section to show that he or she has made a good faith effort to obtain employment" after the word "has" and instead adds the language "performed active work search efforts documented by job applications."

Amendments to §130.102(e), made in response to comments received, change the subsection title for subsection (e) from the proposed "Active Participation and Active Work Search Efforts" to "Vocational Rehabilitation." The retained subsection (e) adds language to clarify that the documentation required of the injured employee was to show active participation in a vocational rehabilitation program during the qualifying period. The amendments to adopted subsection (e) delete language regarding an injured employee's "good faith" efforts to obtain employment commensurate with the employee's ability to work and a reviewing authority's evaluation of the employee's "good faith" efforts in this regard. A new subsection (f), entitled "Work Search Efforts," reflects the requirements of the subsection that were retained from the original subsection (e). The amendments add language to subsection (f) regarding the required documentation an injured employee must provide to sufficiently establish active participation in work search efforts and active work search efforts. Amendments also add language to subsection (f) to clarify that work search efforts are consistent with job applications or the work search contacts established by TWC and that if the work search requirements changed during a qualifying period, the injured employee would be responsible for the lesser of the two requirements.

Amendments to §130.103(a) include the addition of the word "insurance" before the term "carrier" and the addition of "electronic transmission" as a method of notifying the injured employee and the insurance carrier of the Division's

determination of entitlement to SIBs for the first quarter. The term "electronic transmission" encompasses facsimile transmission, e-mail, and other electronic modes of electronic transmission that may not be currently feasible or available but may be so in the future. Use of the general term will allow for broader methods of electronic delivery as they become available, provided the injured employee and the insurance carrier have the means for receipt of the notification in the particular mode or format. An additional amendment to §130.103 is the deletion of subsection (d) regarding the referral to the TRC. This language is deleted because the TRC is no longer in existence and the injured employee's requirement to actively participate in a vocational rehabilitation program conducted by the DARS or a private vocational rehabilitation provider is contained in the statute.

Amendments to §130.104 include the addition of the word "insurance" before the term "carrier." An additional amendment in subsection (c) is the deletion of the term "facsimile" and the addition of the term "electronic transmission." The term "electronic transmission" encompasses facsimile transmission, e-mail, and other electronic modes of electronic transmission that may not be currently feasible or available but may be so in the future. Use of the general term broadens the methods of delivery the injured employee may use for submitting an application for SIBs to the insurance carrier, provided the insurance carrier has the means for receipt of the application in the particular

mode or format. Amendments to subsection (e) expand the methods of delivery from "mailing" of the notice of determination to the injured employee from the insurance carrier to require the notice be sent by first class mail, personal delivery, or electronic transmission. Also, the language "form DWC-52" is deleted to allow a broader citation to the Division's form by using only the form's title. This is also consistent with the amendment to the definition of Application for Supplemental Income Benefits at §130.101. Language is also amended to clarify that the insurance carrier must include the "reason" for its determination in the carrier's notice to the injured employee and a new example of language that does not satisfy this requirement is added. Amendments also include the deletion of language referring to "good faith effort" as this term is obsolete as a result of Labor Code §408.1415.

Amendments to §130.105 include the addition of the word "insurance" before the term "carrier."

Amendments to §130.106 include an amendment to reflect a change in the rule title and the addition of new subsection (c). The rule title deletes the word "permanent" to allow this rule to address the loss of an individual quarter of SIBs in addition to a permanent loss of SIBs. Subsection (c), regarding refusal of vocational rehabilitation services, is added to clarify that an injured employee in a vocational rehabilitation program who refuses vocational services or refuses to cooperate with services provided at any time during a qualifying period is not

entitled to SIBs for the related quarter. This provision is consistent with Labor Code §408.1415.

Amendments to §130.107 and §130.108 include the addition of the word "insurance" before the term "carrier."

Additional amendments to §130.108 include the deletion of subsection (a), regarding general dispute information, and the subsequent renumbering of the subsections. Adopted subsection (a) language concerning insurance carrier and injured employee conduct was determined to be no longer appropriate for placement in this section. Insurance carrier and injured employee conduct is more succinctly covered at Labor Code, Chapter 415, "Administrative Violations." Subsection (a) is amended to allow the injured employee to contest the SIBs determination of the insurance carrier, as well as that of the Division. The citation to a specific rule is amended in favor of a broader citation to the applicable rule chapter. The reference to the rule title is also amended to reflect a reference to the rule chapter title. The citations to specific rules in subsections (b) and (c) are also amended in favor of a broader citation to the applicable rule chapter with corresponding amendments to reference the rule chapter title rather than the rule title. The reference in subsection (d) to re-lettered subsection (a) is also amended to reflect the change in subsection (a).

Amendments to §130.109 include the deletion of a specific rule reference. The citation to a specific rule is amended in favor of a broader citation to the

applicable rule chapter. The reference to the rule title is also amended to reflect the reference to the rule chapter title.

4. SUMMARY OF COMMENTS AND AGENCY'S RESPONSE.

General comments

Comment: Commenters state that they generally supported the adoption of the rule amendments.

Agency Response: The Division appreciates the supportive comments.

Comment: Commenter states that the rules should enhance and promote the return to work objectives put in place by the Legislature with the enactment of HB 7.

Agency Response: The Division appreciates the supportive comments and agrees that the rules will enhance and promote the return to work objectives.

Comment: Commenter states that stakeholders had been provided with adequate opportunity to comment but recommends that the Division confer further with vocational rehabilitation counselors prior to finalizing it.

Agency Response: The Division appreciates the comment but disagrees that further consultation with vocational rehabilitation counselors is needed prior to

finalizing the rule. As the commenter noted, stakeholders have been provided with an adequate opportunity to comment on the proposed rules.

Comment: Commenter states that any amendments to the existing rules are Legislatively required to be geared towards actually returning an injured employee to employment as opposed to simply qualifying them for additional benefits while the claimant is not actually doing anything meaningful towards the goal of employment and that the rules, as proposed, fail to reach that legislative goal and are not adequate to ensure compliance with the statue.

Agency Response: The Division disagrees that the rules fail to move an injured employee toward a return to work. The rules provide specific requirements that the injured employee must meet in order to both qualify for and continue to receive SIBs. All of those requirements are geared to ultimately returning the injured employee to work in a timely manner.

Comment: Commenter suggests that the rule amendments should include a good faith effort by employees to return to work.

Agency Response: The Division disagrees. Good faith efforts were specifically removed by the Legislature in HB 7 and are no longer the statutory standard in determining whether a productive work search effort has been undertaken.

Comment: Commenter suggests that the rule amendments will require an injured employee to contact four different agencies to obtain benefits.

Agency Response: The Division disagrees. The adopted amendments have added only one additional contact (TWC) to the previous requirements. The method the injured employee selects to fulfill their qualifying requirements will determine the agency or agencies involved. The Division anticipates that its staff and OIEC staff will be available to assist injured employees in navigating the changes. The Division will also add information to its website and publish informational material following or in conjunction with the rule adoption to assist the injured employees.

§130.101

Comment: Commenter recommends adding definitions for the phrases "work search contacts" and "work search efforts."

Agency Response: The Division disagrees that the rule should add definitions for the phrases "work search contacts" and "work search efforts." However, the Division clarifies that, as set forth in newly adopted §130.102(f), "work search efforts" encompasses both job applications and work search contacts described by TWC rules. In establishing what may be considered a work search effort, the Commissioner has determined it is appropriate to require compliance consistent with that of TWC requirements regarding work search contacts. TWC has

implemented rules and provides guidance that describes the type of activities that may constitute a work search contact. TWC's rule at 40 TAC §815.28 provides examples of work search contacts and the Division does not feel that it is necessary to merely restate those examples.

§130.101(1)(B)

Comment: Commenter suggests amending the term "wages" in §130.101(1)(B) to reflect gross wages and to specify that the term includes employer provided fringe benefits in order to provide a reasonable comparison of pre-injury and post-injury average weekly wage.

Agency Response: The Division disagrees. The term "wages" is defined in §130.101(9) and Labor Code §401.011(43).

§130.101(1)(C)

Comment: Commenters state that the term "supporting documentation" alone is vague and requires explicit directions as to what supporting documentation should accompany the SIBs application.

Agency Response: The Division disagrees. Supporting documentation should include any information that is pertinent to the job search and this information will vary on a case-to-case basis depending on the method the injured employee selects to fulfill their qualifying requirements. Furthermore, the Division currently

collects data relevant to the determination of compliance through the use of the Application for Supplemental Income Benefits.

§130.101(1)(D)

Comment: Commenters suggest adding clarifying language, including the use of examples, to the generally accepted accounting principles ("GAAP") requirement and to clarify where the cash or accrual method of accounting is to be used.

Agency Response: The Division disagrees that clarifying language in the form of examples is necessary but does agree based on comments that the added reference to GAAP was confusing to stakeholders unfamiliar with the term. The Division has removed the proposed language referring to GAAP.

§130.101(8)

Comment: Commenters suggest that vocational rehabilitation specialists providing vocational rehabilitation services to an injured employee must be listed on the Registry of Vocational Providers and have the appropriate credentials, even if that employee is working for DARS.

Agency Response: The Division disagrees that a change in this subsection is appropriate. The issue of registration of vocational rehabilitation specialists is addressed in §136.2 of this title (relating to Registry of Private Providers of

Vocational Rehabilitation Services), which is not included in these Chapter 130 amendments.

Comment: Commenters suggest that the definition for a "vocational rehabilitation program" is incorrect and propose revisions. Commenter recommends the nationally recognized definition of "vocational rehabilitation" established by the Commission on Certification of Rehabilitation Counselors be used.

Agency Response: The Division agrees the definition of "vocational rehabilitation program" as proposed required revision. The adopted version reinstates the original definition of "vocational rehabilitation program" but includes the Legislative changes and recognizes federally funded vocational rehabilitation programs of other states. The subsection also adds clarification that a vocational rehabilitation plan developed for an injured employee by a private provider of vocational rehabilitation services is the same as an Individual Plan for Employment (IPE) developed by the Department of Assistive and Rehabilitation Services. The Division disagrees to redefine vocational rehabilitation as established by the Commission on Certification of Rehabilitation Counselors because the Legislative changes to §408.1415 do not necessitate or direct such changes.

Comment: Commenter suggests that the Division require more proof of active participation by the injured employee from the DARS representative.

Agency Response: The Division disagrees. The injured employee is responsible for providing documentation that he or she has actively participated in the requirements of the vocational rehabilitation program during the qualifying period. Active participation means the injured employee is making a reasonable effort to fulfill his or her obligations in accordance with the terms of their vocational rehabilitation plan or Individual Plan for Employment.

Comment: Commenter states that the deletion of the words "full time" from the definition of vocational rehabilitation program will enable injured employees to game the system and linger in a non-work status. The rule should indicate that the vocational rehabilitation program must be equivalent to working a full day and full work week during the duration of the vocational rehabilitation program.

Agency Response: The Division disagrees that retaining the "full time" term in the rule is necessary. The Act does not require the participation to be full-time. The previous inclusion of the term has resulted in disputes that detracted from the goal of prompt return to work. Further, the amount of time required by a program is more appropriately established by the vocational rehabilitation provider.

Comment: Commenter suggests that the Division retain the "full time" requirement for injured employee's participation in vocational rehabilitation programs because removing the current full time attendance requirement seems contrary to the legislative intent of enacting HB 7 to foster prompt and appropriate return to work.

Agency Response: The Division disagrees that removing the term" full time" is contrary to the legislative intent of HB 7 to foster prompt and appropriate return to work. The Act does not require the participation to be full-time and the previous inclusion of the term has resulted in disputes that detract from the goal of prompt return to work.

Comment: Commenters suggest that the rule allows DARS to determine what is an acceptable level of activity without Division review.

Agency Response: The Division disagrees that the rule allows DARS to determine what is an acceptable level of activity without Division review. While the activity level is set by the program, the injured employee must still provide documentation to establish that he or she has actively participated in a vocational rehabilitation program under §130.102(e).

Comment: Commenter states that it supports the deletion of the term "full time" to describe the vocational rehabilitation program and that the change should reduce disputes.

Agency Response: The Division appreciated the supportive comment.

§130.102

Comment: Commenter suggests adding the statutory language of Labor Code §408.1415 to the SIB's application as a reminder to the injured employee of the requirements to be met in order to qualify for benefits.

Agency Response: The Division appreciates the comment and will take it under consideration at the time the application form is revised.

Comment: Commenter suggests that a good cause exception for failure to comply with the work search requirements be included in the rules.

Agency Response: The Division disagrees that a good cause exception is necessary because active participation means the injured employee is making a reasonable effort to fulfill their work search requirements established in the rule. The addition of §130.102(d)(2) clarifies that hearing officers will continue to have discretion to determine if injured employees have made reasonable efforts to meet work search requirements each week during a qualifying period.

Comment: Commenter suggests that the proposed rule incorrectly uses the term "provide" when the statute uses the term "conduct."

Agency Response: The Division disagrees. The rules do not attempt to reflect a change from the Act which appears to use the terms interchangeably, as in §408.150(b), for example. Further, the Division believes that the reference to "provide" in this instance attempts to refer to the actions taken under the services conducted by DARS and vocational rehabilitation service providers and does not deviate from the Act.

Comment: Commenters suggest that lost entitlement to SIBs based on a refusal of vocational services should be permanent and not limited to one quarter and that the word "permanently" be deleted from §130.102(b).

Agency Response: The Division disagrees that striking the word "permanently" from §130.102(b) is appropriate, as this section deals with eligibility to file an application for SIBs benefits and does not preclude the claimant from filing for subsequent quarters in the event he or she had previously declined or failed to cooperate with vocational services that were offered. A permanent loss of entitlement would be inconsistent with the Legislative goal of returning the injured employee to productive work.

§130.102 (b)

Comment: Commenter suggests that the §130.102 language differs from the statutory language of §408.142(b).

Agency Response: The Division agrees. Therefore, as adopted, language has been added to §130.102(b) to clarify that an application for SIBs must be filed in order to be considered for SIBs. The proposed rule language was unclear and the adopted rule language is reworded for clarity.

§130.102(b)(2)

Comment: Commenters suggest adding language: to clarify that injured employees should only apply for jobs that are commensurate with their ability and qualifications, to clarify whether a job contact by an injured employee for a job that the injured employee is not capable of performing would be considered a valid job contact, and to clarify whether a valid job contact would require that the employer actually have a job opening.

Agency Response: The Division disagrees. In establishing what may be considered a work search effort, the Commissioner has determined it is appropriate to require compliance consistent with that of TWC requirements regarding work search contacts. TWC has implemented rules and provides guidance that describes the type of activities that may constitute a work search contact.

§130.102(c)

Comment: Commenters suggest changes to §130.102(c) to clarify what constitutes wages during the qualifying period for SIBs.

Agency Response: The Division disagrees. The Division has reviewed the amendments to §408.142 made by the Legislature in HB 7 and believes that there were no changes in it would indicate Legislative guidance showing that a change to the rule was required or suggested.

§130.102(d)

Comment: Commenter suggests that the rules include a provision that injured employees should be required to travel up to 75 miles when searching for work.

Agency Response: The Division disagrees. The Division has relied upon TWC in considering factors affecting the availability of employment as required under §408.1415(b)(3).

Comment: Commenter suggests that the proposed rules include a requirement that students who are not working must be enrolled full-time rather than in a part-time or limited situation in order to be eligible for SIBs.

Agency Response: The Division disagrees. The terms or obligations under an individual's vocational rehabilitation plan or Individual Plan for Employment will be established through the vocational rehabilitation program.

Comment: Commenters ask how often the number of required job contacts is reviewed or altered and whether an injured employee will have to change the number of contacts following a TWC change.

Agency Response: TWC has indicated that the number of job searches required by Local Workforce Development Boards is reviewed each January. The Boards then meet quarterly. TWC has indicated that changes after the January meeting are infrequent. To clarify the consequences of what occurs If the required number of contacts changes during a qualifying period, the Division has added additional language to §130.102(e) (now contained in new §130.102(f)) to show that the injured employee will be required to make job contacts based on the lesser of the number required on the first day of the qualifying period or the newly established number. Similarly, if the number of work search contacts provided on the application for SIBs differs from the actual number of work search contacts required on the first day of the qualifying period, the lesser number of work search contacts will apply. Further, to clarify the injured employee's work search requirements during the transition period when the rules become effective, language has been added to §130.101(4) showing that the rules in effect for a qualifying period beginning before the effective date of the rules continues in effect until the injured employee's next qualifying period that begins on or after the effective date of the rules.

§130.102(d)(1) (now §130.102(d)(1)(A))

Comment: Commenter suggests changes to §130.102(d)(1), (adopted as (d)(1)(A)), to clarify the injured employee's ability to work by requiring a functional capacity examination confirmed by a certifying doctor.

Agency Response: The Division disagrees. Rules currently provide a method to determine an injured employee's ability to work through the designated doctor examination process.

§130.102(d)(2) (now §130.102(d)(1)(B))

Comment: Commenters suggest that rule be amended to require an employee to meet the requirements "throughout the qualifying period" rather than "during the qualifying period."

Agency Response: The Division disagrees. The amendment was not intended to change the interpretation of how eligibility criteria are reviewed for entitlement purposes. The language "during the qualifying period" was moved from proposed (d)(2) to adopted (d)(1) only to clarify that it applies to all eligibility criteria and not only to a vocational rehabilitation program under §130.102(d)(2) (now §130.102(d)(1)(B)). Additionally, the word "entire" was inserted before "qualifying period" and "each week" was inserted before "during" to clarify that active efforts were expected of the injured employee each week during the entire

qualifying period. The language was also clarified to show that the five criteria under §130.102(d)(1) could be used alone or in combination to satisfy the work search requirements during the qualifying period.

Comment: Commenter states that it supports the proposed changes deleting the terms "Full time" and "sponsored" in regards to the vocational rehabilitation program and replacing "satisfactorily participated" with "actively participated" in a vocational rehabilitation program.

Agency Response: The Division appreciates the supportive comment.

Comment: Commenter suggests that some provision allowing insurance carriers access to the injured employee's file with both DARS and TWC be included in the rule to assist in assessing compliance.

Agency Response: The Division understands the commenter's concerns, however, the Division has no statutory authority to require DARS and TWC to provide injured employee's files to insurance carriers. Section 130.102(e) and new §130.102(f) of the rules require the employee to provide documentation that establishes that the employee has actively participated in the vocational rehabilitation program or the work search efforts conducted through TWC.

Comment: Commenter requests that at an Individual Plan of Employment (IPE) be required by the injured employee in order to receive SIBs.

Agency Response: The Division agrees that an IPE should be required for injured employees enrolled in a vocational rehabilitation program and the rule has been revised to reflect that requirement.

Comment: Commenter suggests that a private vocational rehabilitation professional be the gatekeeper due to the difficulty in obtaining information from DARS.

Agency Response: The Division disagrees. The statute requires participation in a vocational rehabilitation program conducted by DARS or by a private vocational rehabilitation provider.

Comment: Commenter expresses concern that active participation in a vocational rehabilitation program fails to establish a level of activity with DARS and that the rule limits the authority of a hearing officer to review factual issues.

Agency Response: The Division disagrees. The Commissioner is charged with establishing the level of activity that is required of an injured employee with DARS. As stated previously, active participation means the injured employee is making a reasonable effort to fulfill his or her obligations in accordance with the terms of his or her vocational rehabilitation plan or Individual Plan for

Employment. The adopted rule is not intended to limit a hearing officer's role in reviewing the facts of a case. Evidence from DARS regarding the injured employee's participation level will be considered equally along with all other evidence.

Comment: Commenters suggest that the proposed rules related to work search contacts do not address appropriate statutory requirements of job applications.

Agency Response: The Division disagrees. As stated earlier in this preamble, the adopted amendments provide that compliance with the required job applications is consistent with the number of TWC's work search contacts.

Comment: Commenter suggests that applying TWC standards for qualifying for unemployment benefits as qualifiers for SIBs is inadequate since SIBs has the potential to last for five years, whereas unemployment compensation benefits are geared towards a period of six months or less.

Agency Response: The Division disagrees. The Division is charged to establish the level of activity a recipient should have with TWC and to define the number of job applications required to be submitted to satisfy work search requirements. The Division has relied upon the TWC in considering factors affecting the availability of employment as required under §408.1415(b)(3).

Comment: Commenter suggests that the rule requires out of state injured employees to subscribe to a separate standard in qualifying for benefits under unemployment compensation rules.

Agency Response: The Division agrees that employees who are out of state would have to meet local work search requirements in order to qualify for SIBs. Out of state employee are not able to comply with local workforce development boards in Texas, which is why the rule provides a comparable method for an out of state employee. Accordingly, the public employment service in the employee's state of residence is the proper agency to set the number of searches required.

§130.102(d)(3) (now §130.102(d)(1)(C))

Comment: Commenter requests clarification of whether the phrase "work search efforts" as it is used in proposed §130.102(d)(3) (adopted as §130.102(d)(1)(C)) is limited to job applications or whether it is synonymous with the phrase "work search contacts" as it is defined in 40 TAC §815.28, which encompasses other activities of a productive search for employment other than completing job applications.

Agency Response: The Division clarifies that, as set forth in newly adopted §130.102(f), "work search efforts" encompasses both job applications and work search contacts as described by TWC rules.

§130.102(d)(4) (now §130.102(d)(1)(E))

Comment: Commenters suggest that §130.102(d)(4) (adopted as (d)(1)(E)) concerning the inability to work as a qualification for SIBs conflicts with the statute and should be removed.

Agency Response: The Division disagrees. Under the provisions of Labor Code §408.1415(b), the Commissioner is charged with establishing the level of activity that is required of an injured employee with TWC and DARS and to define the number of job applications required to be submitted to satisfy the work search requirements. The injured employee is required to make reasonable work search efforts. However, the Division recognizes there will be rare cases where an injured employee may be legitimately unable to work in any capacity during the qualifying period.

§130.102(d)(5) (now §130.102(d)(1)(D))

Comment: Commenters suggest expanding the subsection by amending it to show that the active work search applications must be submitted to an employer that has a position currently open, will have one open in the near future, or is hiring during the qualifying period.

Agency Response: The Division disagrees. In establishing what may be considered a job application, the Commissioner has determined it is appropriate to require compliance consistent with that of TWC requirements regarding work

search contacts. TWC has implemented rules and provides guidance that describes the type of activities that may constitute a work search contact.

Comment: Commenter requests clarification of the phrase "has performed active work search efforts documented by job applications" that requires an injured employee, who engages in a job search outside of TWC in an effort to establish SIBs entitlement, to document those work search efforts by submitting completed job applications and that other job search activities will not be sufficient to establish SIBs entitlement.

Agency Response: This Division clarifies that, as set forth in adopted §130.102(f), "work search efforts" encompasses both job applications and work search contacts as described by the TWC rules.

Comment: Commenters support the elimination of the subjective concept of "Good Faith Effort" to find employment. Defining work search efforts more objectively by using TWC's unemployment compensation criteria for the required number of work search contacts should be helpful as long as the information is easily accessible to the injured employee.

Agency Response: The Division appreciates the supportive comment. The Division expects to provide injured employees with access to appropriate information including 800 telephone numbers and web links. Additionally,

§130.104(b) has been amended to require the insurance carrier to advise the injured employee of the number of work search contacts required when it sends out the Application for SIBs Benefits form prior to the beginning of a qualifying period.

§130.102(e) (now re-lettered as §130.102(f))

Comment: Commenter suggests a revision to the proposed rule amendments that sets a specific number of job searches to assist injured employees in knowing how many job searches are required. Other commenters questioned the number of job applications required.

Agency Response: The Division disagrees. The Division uses the TWC required number of work search contacts to allow it to meet the Legislative requirement at Labor Code §408.1415(b)(3). The TWC establishes these requirements taking into consideration factors affecting availability of employment, including recognition of access to employment in rural areas, economic conditions, and other appropriate employment availability factors. Therefore, the Division does not find it is in the state's best interest to duplicate these efforts to develop identical information. The Division expects to provide injured employees with access to appropriate information including toll free telephone numbers and web links. Additionally, adopted §130.104(b) requires the insurance carrier to advise the injured employee of the number of work

search contacts required when it sends out the Application for SIBs Benefits form prior to the beginning of a qualifying period. Further, to clarify the injured employee's work search requirements during the transition period when the rules become effective, language has been added to §130.101(4) showing that the rules in effect for a qualifying period beginning before the effective date of the rules continues in effect until the injured employee's next qualifying period that begins on or after the effective date of the rules.

Comment: Commenters suggest that the proposed rule amendments establish that the TWC work search contact numbers include a union hiring hall referral or allow a union hiring hall referral to take the place of applications. One commenter states that union hiring halls are not provided for in the Labor Code.

Agency Response: The Division clarifies that the Texas Workers' Compensation Act does not include an exception for union employees. A properly documented hiring hall referral may be used as a work search contact in place of filing an application. The employee log should reflect this type of situation.

Comment: Commenter states that TWC is ill equipped to deal with some of the secondary gains issues present in many workers compensation/SIBS recipients

that prevent them from being employed. Training would be needed for this agency to learn to deal with the caveats of the workers compensation claimant.

Agency Response: The Division does not comment on TWC matters. The Division does expect, however, to provide support to TWC through consultation on workers' compensation matters as necessary.

Comment: Commenter stated that additional training for hearing officers in the Benefit Review Conferences (BRCs) and Contested Case Hearings (CCHs) will be needed as well so that they can make appropriate decisions in their rulings that adhere to the intent of these changes in the SIBS rules.

Agency Response: The Division agrees and anticipates providing appropriate training to staff on the amended SIBs rules.

Comment: Commenters oppose inclusion of "substantially met" language and suggests revision of §130.102(f).

Agency Response: The Division agrees. The rule language has been revised to remove "met or substantially met" and has added the statutorily consistent language of "actively participated in."

Comment: Commenters suggest that rule be amended to require an employee to meet the requirements "throughout" the qualifying period rather than "during" the qualifying period.

Agency Response: The Division disagrees. There was no statutory provision to indicate an intended change in the interpretation of how eligibility criteria are reviewed for entitlement purposes. The Division clarifies the language "during the entire qualifying period" was only moved from previous subsection (d)(2) to adopted (d)(1) to clarify that the language applies to all eligibility criteria and not only to a vocational rehabilitation program under previous subsection (d)(2).

Comment: Commenter suggests that the proposed rule amendments are unconstitutional because requiring substantial compliance with an IPE to be entitled to SIBs is beyond the active participation required by the statute. Commenter suggests that enrollment into a vocational rehabilitation program is sufficient to meet the statutory requirement.

Agency Response: The Division agrees in part. As adopted, subsections (e) and (f) do not include the language "substantially met." However, the Division disagrees that enrollment into a vocational rehabilitation program is sufficient to meet the statutory requirement. Injured employees are required to establish that they have made reasonable efforts to fulfill their obligations in accordance with

the terms of their vocational rehabilitation plan or their Individual Plan for Employment.

Comment: Commenters suggest that the inclusion of "or substantially met" in §130.102(e) (now new §130.102(f)), as it relates to meeting the work search requirements, weakens the proposed rule.

Agency Response: The Division disagrees that the rule language as proposed weakens the rule; however, the adopted rule language does not include the language "substantially met." This phrase was deleted in response to another comment.

§130.102(f) (now re-lettered as §130.102(g))

Comment: Commenters suggest adding language to clarify that injured employees should only apply for jobs that are commensurate with their ability and qualifications, to clarify whether a job contact by an injured employee for a job that the injured employee is not capable of performing would be considered a valid job contact, and to clarify whether a valid job contact would require that the employer actually have a job opening.

Agency Response: The Division disagrees. In establishing what may be considered a work search contact, the Commissioner has determined it is appropriate to require compliance consistent with that of TWC requirements

regarding work search contacts. TWC has implemented rules and provides guidance that describes the type of activities that may constitute a work search contact.

§130.102(g) (now re-lettered as §130.102(h))

Comment: Commenters suggest revision of §130.102(f) (now re-lettered as §130.102(h)) regarding the impairment rating finality provision.

Agency Response: The Division disagrees. The Division has reviewed the legislative changes to §408.1415 and did not find any amendments by0 HB 7 that would necessitate or direct changes to §130.102(f) (now re-lettered as §130.102(g)). As such, the Division believes that the requested revision is beyond the scope of the legislative changes.

§130.102(h) (now re-lettered as §130.102(i))

Comment: Commenter suggests a revision to the rule regarding reasonable travel expenses.

Agency Response: The Division disagrees. The Division has reviewed the legislative changes to §408.1415 and did not find any amendments by HB 7 that would necessitate or direct changes to §130.102(h) (now re-lettered as §130.102(i)). As such, the Division believes that the requested revision is beyond the scope of the legislative changes.

§130.103(b) & (c)

Comment: Commenters suggest adding a requirement that the Division provide the insurance carrier with a complete copy of the SIBs application after a determination of entitlement.

Agency Response: The Division disagrees. The Division has reviewed the legislative changes to §408.1415 and did not find any amendments by HB 7 that would necessitate or direct changes to §130.103(b). As such, the Division believes that the requested revision is beyond the scope of the legislative changes.

§130.103(b)(5)

Comment: Commenter agrees with statutory changes but expresses concern about injured employees being able to access appropriate information.

Agency Response: The Division appreciates the supportive comment. The Division expects to provide injured employees with access to appropriate information including toll free telephone numbers and web links. Additionally, §130.104(b) has been amended to require the insurance carrier to advise the injured employee of the number of work search contacts required when it sends out the Application for SIBs Benefits form prior to the beginning of a qualifying period.

§130.103(d)

Comment: Commenter suggests that the Division continue sending out the Referral to DARS letters at the same time they send out the Determination of Entitlement or Non-Entitlement to SIBS letters.

Agency Response: The Division disagrees. The Division continues to comply with the statutory obligation to provide employees with notice of DARS services and the Division notification process has not changed. Section 130.103(d) has been deleted because the notice required came after a determination of eligibility. The Division believes that its procedures sufficiently provide employees with appropriate notification of the SIBs criteria requirements.

§130.104(a)

Comment: Commenter suggests stronger enforcement in regards to incomplete applications and that the carrier 10 day deadline start over whenever an employee submits additional SIBs application documentation. The commenter says that attorney fees should not be awarded or should be greatly reduced if an attorney intentionally provides an incomplete application to the carrier.

Agency Response: The Division disagrees. Allowing the 10 day deadline to start over would be detrimental to the prompt payment of benefits or the initiation of dispute resolution process. The comment related to attorney fees is beyond

the scope of the statutory amendments addressed in HB 7 and inappropriate to consider in these rule amendments.

§130.104(b)

Comment: Commenter suggests that §130.104(b) be amended to require the insurance carrier, when sending the SIBs application to the injured employee, to identify the work search requirements applicable, in addition to the information currently required to address concern about injured employees being able to access appropriate information.

Agency Response: The Division agrees. Section 130.104(b) has been amended to require that the insurance carrier advise the injured employee of the number of work search contacts required when it sends out the Application for Supplemental Income Benefits prior to the beginning of a qualifying period. The Division also expects to provide injured employees with access to appropriate information including toll free telephone numbers and web links.

§130.105(a)(1)

Comment: Commenter inquiries whether the rule amendments affect the §130.105(a)(1) requirement directing insurance carrier's to timely mail applications for SIBs to injured employees.

Agency Response: The Division disagrees. There were no changes or amendments in this rule subsection from the previous version.

§130.106(c)

Comment: Commenters suggest that DARS and private vocational rehabilitation providers be required to notify the Division and the insurance carrier of the refusal of an injured employee to participate in vocational rehabilitation services. Commenters also suggest a memorandum of understanding between the Division and DARS be developed for this purpose.

Agency Response: The Division disagrees that a rule is necessary to require private providers to provide carriers with copies of their reports, including whether an employee has refused to participate in vocational rehabilitation services. As noted in the 1999 rule preamble for §130.102, "An insurance carrier should have access to progress reports indicating the level of cooperation with the program." The suggested memorandum of understanding is beyond the scope of these rule amendments.

Comment: Commenter supports this amendment that would disqualify an injured employee for refusal of offered vocational services.

Agency Response: The Division appreciates the supportive comment.

§130.108(c) & (d)

Comment: Commenters suggest revisions to the rule that clarify insurance carrier requirements regarding when to request dispute resolution regarding supplemental income benefits and who is required to request dispute resolution. Commenter states an insurance carrier waives its right to dispute entitlement to SIBs if the insurance carrier does not request the dispute resolution. Commenter stated that the current SIBs rules require carriers to file a DWC-45 when denying SIBs for subsequent quarters. Commenter questions why the carrier is required to request a BRC, when the carrier is denying SIBs. Since the claimant is the party requesting the SIBs, the claimant should be the party required to submit the DWC-45. Commenter stated that this is an additional, unnecessary burden placed on carriers and that the party seeking the benefits should be the party required to request a BRC.

Agency Response: The Division disagrees. The Division has reviewed the legislative changes to §408.147 and did not find any amendments by HB 7 that would necessitate or direct changes to §130.108. As such, the Division believes that the requested revision is beyond the scope of the legislative changes.

§130.108(e)(2)

Comment: Commenter recommends the Division revise the rule to clarify the award of attorney fees.

Agency Response: The Division disagrees with the need for additional clarification. Attorney fees are beyond the scope of the legislative changes under §408.1415. The Division has reviewed HB 7 and believes that the bill did not make any amendments to either §408.147 or §408.221 that would require additional changes to §130.108(e)(2).

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

For, with changes: Bituminous Insurance Companies; Argo Group US; City of Houston; TASB Risk Management Fund; Service Lloyds Insurance Company; Relyon, LLC; ESIS; Review Med, L.P.; Office of Injured Employee Counsel; Innovative Risk Management; Insurance Council of Texas; American Insurance Association; State Office of Risk Management; Employers Edge Administrative Services, Inc.; Department of Assistive and Rehabilitative Services; Texas Mutual Insurance Company; Texas Association of Business; Texas AFL-CIO; Law Offices of Ricky Green; two individuals.

Against: J. A. Davis & Associates, LLP; Flahive, Ogden & Latson

7. STATUTORY AUTHORITY.

The amendments are adopted pursuant to Labor Code §§402.00111, 402.061, 408.141, 408.1415, 408.142, 408.143, 408.150, and 408.151. Labor Code §402.00111 provides that the Commissioner of Workers' Compensation

shall exercise all executive authority, including rulemaking authority, under Labor Code, Title 5. Labor Code §402.061 provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act. Labor Code §408.141, Award of Supplemental Income Benefits, provides that an award of SIBs must be made in accordance with Subchapter H, Supplemental Income Benefits. Labor Code §408.1415, Work Search Compliance Standards, provides that the Commissioner shall adopt by rule compliance standards for SIBs recipients that require each recipient to demonstrate an active effort to obtain employment. Labor Code §408.142, Supplemental Income Benefits, provides that an employee is entitled to SIBs if on the expiration of the impairment income benefit period, the employee: (1) has an impairment rating of 15% or greater from the compensable injury; (2) has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage as a direct result of the employee's impairment; (3) has not elected to commute a portion of the impairment income benefits; and (4) has compiled with the requirements adopted under §408.1415. Labor Code §408.143, Employee Statement, provides that after the Commissioner's initial determination of SIBs, an employee must file a statement with the insurance carrier stating that the employee has earned less than 80% of the employee's average weekly wage as a result of the impairment, the amount of wages earned during the quarterly filing period and that the

employee has compiled with the requirements adopted under §408.1415. Labor Code §408.147, Contest of Supplemental Income Benefits By Insurance Carrier; Attorney's Fees, provides that an insurance carrier may request a Benefit Review Conference to dispute an injured employee's entitlement to SIBs, the time frame in which to do so and the consequences should the insurance carrier not prevail. Labor Code §408.150, Vocational Rehabilitation, provides that if the Division determines that an employee can be materially assisted by vocational rehabilitation or training services in returning to employment, the Division shall refer the employee to DARS and notify the insurance carrier of the need for vocational rehabilitation services. The carrier may provide the services through a private provider of vocational services. The statute also provides that an employee who refuses services or refuses to cooperate with services provided by DARs or a private provider loses entitlement to SIBs.

8. TEXT.

§130.101. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Application for Supplemental Income Benefits--The Division form required pursuant to Labor Code §408.143(b) containing the following information:

(A) a statement, with supporting payroll documentation, that the employee has earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury;

(B) the amount of the employee's wages during the qualifying period;

(C) a statement, with supporting documentation, that the employee has complied with Labor Code §408.1415 and this subchapter, and

(D) for self-employed individuals, copies of all supporting documentation to establish the amount of self-employment income earned during the qualifying period and any other pertinent documentation of efforts to establish or maintain a self-employed enterprise during the qualifying period.

(2) First Quarter--The 13 weeks beginning on the day after the last day of the impairment income benefits period.

(3) Impairment income benefits period--The number of weeks computed under Labor Code §408.121 for which the injured employee is entitled to receive impairment income benefits, starting with the day after the date the employee reached maximum medical improvement.

(4) Qualifying period--A period of time for which the employee's activities and wages are reviewed to determine eligibility for supplemental income benefits. The qualifying period ends on the 14th day before the beginning date of the quarter and consists of the 13 previous consecutive weeks.

In accordance with §130.100(a) of this title (relating to Applicability), a qualifying period that begins on or after July 1, 2009, is subject to the provisions of this subchapter, and a qualifying period that begins prior to July 1, 2009, remains subject to the rules in effect on the date the qualifying period begins.

(5) Reviewing authority--The person who reviews the Application for Supplemental Income Benefits and other information to make the determination of entitlement or non-entitlement to supplemental income benefits including Division staff for the first quarter determination and the insurance adjuster for subsequent quarter determinations.

(6) Subsequent Quarter--A 13-week period beginning on the day after the last day of a previous quarter. The term subsequent quarter applies to all quarters after the first quarter.

(7) Vocational Rehabilitation Services--Services which can reasonably be expected to benefit the employee in terms of employability including, but not limited to, identification of the employee's physical and vocational abilities, training, physical or mental restoration, vocational assessment, transferable skills assessment, development of and modifications to an individualized vocational rehabilitation plan, or other services necessary to enable an injured employee to become employed in an occupation that is reasonably consistent with his or her strengths, physical abilities including ability to travel, educational abilities, interest, and pre-injury income level.

(8) Vocational rehabilitation program--Any program, provided by the Texas Department of Assistive and Rehabilitative Services (DARS), a comparable federally-funded rehabilitation program in another state under the Rehabilitation Act of 1973, as amended, or a private provider of vocational rehabilitation services that is included in the Registry of Private Providers of Vocational Rehabilitation Services, for the provision of vocational rehabilitation services designed to assist the injured employee to return to work that includes a vocational rehabilitation plan. A vocational rehabilitation plan, also known as an Individual Plan for Employment at DARS, includes, at a minimum, an employment goal, any intermediate goals, a description of the services to be provided or arranged, the start and end dates of the described services, and the injured employee's responsibilities for the successful completion of the plan.

(9) Wages--All forms of remuneration payable for personal services rendered during the qualifying period as defined in Labor Code §401.011(43), including the wages of a bona fide offer of employment which was not accepted.

§130.102. Eligibility for Supplemental Income Benefits; Amount.

(a) General. An injured employee is not entitled to supplemental income benefits until the expiration of the impairment income benefit period.

(b) Eligibility Criteria. An injured employee who has an impairment rating of 15% or greater, who has not commuted any impairment income benefits, who has not permanently lost entitlement to supplemental income benefits and who has completed and filed an Application for Supplemental Income Benefits in accordance with this subchapter is eligible to receive supplemental income benefits if, during the qualifying period, the injured employee:

(1) has earned less than 80% of the injured employee's average weekly wage as a direct result of the impairment from the compensable injury; and

(2) has demonstrated an active effort to obtain employment in accordance with Labor Code §408.1415 and this section.

(c) Direct Result. An injured employee has earned less than 80% of the injured employee's average weekly wage as a direct result of the impairment from the compensable injury if the impairment from the compensable injury is a cause of the reduced earnings.

(d) Work Search Requirements.

(1) An injured employee demonstrates an active effort to obtain employment by meeting at least one or any combination of the following work search requirements each week during the entire qualifying period:

(A) has returned to work in a position which is commensurate with the injured employee's ability to work;

(B) has actively participated in a vocational rehabilitation program as defined in §130.101 of this title (relating to Definitions);

(C) has actively participated in work search efforts conducted through the Texas Workforce Commission (TWC);

(D) has performed active work search efforts documented by job applications; or

(E) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.

(2) An injured employee who has not met at least one of the work search requirements in any week during the qualifying period is not entitled to SIBs unless the injured employee can demonstrate that he or she had reasonable grounds for failing to comply with the work search requirements under this section.

(e) Vocational Rehabilitation. As provided in subsection (d)(1)(B) of this section, regarding active participation in a vocational rehabilitation program, an injured employee shall provide documentation sufficient to establish that he or she has actively participated in a vocational rehabilitation program during the qualifying period.

(f) Work Search Efforts. As provided in subsections (d)(1)(C) and (D) of this section regarding active participation in work search efforts and active work search efforts, an injured employee shall provide documentation sufficient to establish that he or she has, each week during the qualifying period, made the minimum number of job applications and or work search contacts consistent with the work search contacts established by TWC which are required for unemployment compensation in the injured employee's county of residence pursuant to the TWC Local Workforce Development Board requirements. If the required number of work search contacts changes during a qualifying period, the lesser number of work search contacts shall be the required minimum number of contacts for that period. If residing out of state, the minimum number of work search contacts required will be the number required by the public employment service in accordance with applicable unemployment compensation laws for the injured employee's place of residence.

(g) Calculation of amount. Subject to any approved reduction for the effects of contribution, the monthly supplemental income benefit payment is calculated quarterly as follows:

(1) multiply the injured employee's average weekly wage by 80% (.80);

(2) add the injured employee's wages for all 13 weeks of the qualifying period;

(3) divide the total wages by 13;

(4) subtract this figure from the result of paragraph (1) of this subsection;

(5) multiply the difference by 80% (.80);

(6) if the resulting amount is greater than the maximum rate under the Act, Labor Code, §408.061, use the maximum rate; and,

(7) multiply the result by 4.34821.

(h) Maximum Medical Improvement and Impairment Rating Disputes. If there is no pending dispute regarding the date of maximum medical improvement or the impairment rating prior to the expiration of the first quarter, the date of maximum medical improvement and the impairment rating shall be final and binding.

(i) Services Provided by a Carrier Through a Private Provider of Vocational Rehabilitation Services. The insurance carrier may provide vocational rehabilitation services through a provider of such services provided that the individual is registered as a private provider in accordance with §136.2 of this title (relating to Registry of Private Providers of Vocational Rehabilitation Services) and that the insurance carrier will be responsible for reasonable travel expenses incurred by the injured employee if the employee is required to travel in excess of 20 miles one way from the injured employee's residence to obtain vocational rehabilitation services.

§130.103. Determination of Entitlement or Non-entitlement for the First Quarter.

(a) Division Determination. For each injured employee with an impairment rating of 15% or greater, and who has not commuted any impairment income benefits, the Division will make the determination of entitlement or non-entitlement for the first quarter of supplemental income benefits. This determination shall be made not later than the last day of the impairment income benefit period and the notice of determination shall be sent to the injured employee and the insurance carrier by first class mail, electronic transmission, or personal delivery.

(b) Determination of Entitlement. If the Division determines that the injured employee is entitled to supplemental income benefits for the first quarter, the notice of determination shall include:

(1) the beginning and end dates of the first quarter;

(2) the amount of the monthly payments;

(3) the amount of the wages used to calculate the monthly payment;

(4) instructions for the parties of the procedures for contesting the Division's determination as provided by §130.108 of this title (relating to

Contesting Entitlement or Amount of Supplemental Income Benefits; Attorney Fees); and

(5) an Application for Supplemental Income Benefits, filing instructions, a filing schedule, and a description of the consequences of failing to timely file.

(c) Determination of non-entitlement. If the Division determines that the injured employee is not entitled to supplemental income benefits for the first quarter, the notice of determination shall include:

(1) the grounds for this determination;

(2) the beginning and end dates of the first quarter;

(3) instructions for the parties of the procedures for contesting the Division's determination as provided by §130.108 of this title (relating to Contesting Entitlement to Supplemental Income Benefits); and

(4) an Application for Supplemental Income Benefits, filing instructions, a filing schedule, and a description of the consequences of failing to timely file.

§130.104. Determination of Entitlement or Non-entitlement for Subsequent Quarters.

(a) Subsequent Quarter Determination. After the Division has made a determination of entitlement or non-entitlement for supplemental income benefits

for the first quarter, the insurance carrier shall make determinations for subsequent quarters consistent with the provisions contained in §130.102 of this title (relating to Eligibility for Supplemental Income Benefits; Amount). The insurance carrier shall issue a determination of entitlement or non-entitlement within 10 days after receipt of the Application for Supplemental Income Benefits for a subsequent quarter.

(b) Application for Supplemental Income Benefits. An injured employee claiming entitlement to supplemental income benefits for a subsequent quarter must send the insurance carrier an Application for Supplemental Income Benefits as required under this section. With the first monthly payment of supplemental income benefits for any eligible quarter and with any insurance carrier determination of non-entitlement, the insurance carrier shall send the injured employee a copy of the Application for Supplemental Income Benefits and the proper address to file the subsequent application. On the Application for Supplemental Income Benefits sent by the insurance carrier, the insurance carrier shall include:

(1) the number of the applicable quarter;

(2) the dates of the qualifying period;

(3) the dates of the quarter;

(4) the deadline for filing the application with the insurance carrier; and

(5) the minimum number of work search efforts required by §130.102(d)(1) and (f) of this title (relating to Eligibility for Supplemental Income Benefits; Amount) during the next qualifying period.

(c) Filing the Application for Supplemental Income Benefits. The employee shall file the Application for Supplemental Income Benefits and any applicable documentation with the insurance carrier by first class mail, personal delivery or electronic transmission. Except as otherwise provided in this section, the Application for Supplemental Income Benefits shall be filed no later than seven days before, and no earlier than 20 days before, the beginning of the quarter for which the injured employee is applying for supplemental income benefits. If the Application for Supplemental Income Benefits is received by the insurance carrier more than 20 days before the beginning of the quarter, the insurance carrier shall return the form to the injured employee with detailed instructions on when the form is required to be filed. Any form returned to the injured employee because the form was filed early shall not be subject to the provisions of §130.108 of this title (relating to Contesting Entitlement to Supplemental Income Benefits).

(d) Date-Stamp. Upon receipt, the insurance carrier shall date-stamp all Application for Supplemental Income Benefits forms with the date the insurance carrier received the form.

(e) Notice of Determination. Upon making subsequent quarter determinations, the insurance carrier shall issue a notice of determination to the injured employee. The notice shall be sent by first class mail, personal delivery or electronic transmission and shall contain all the information required in the Notice of Entitlement or Non-entitlement portion of the Application for Supplemental Income Benefits. The notice of determination of non-entitlement shall contain sufficient claim specific information to enable the employee to understand the reason for the insurance carrier's determination. A generic statement such as "failure to satisfy the compliance standards of Labor Code §408.1415", "not a direct result", or similar phrases without further explanation does not satisfy the requirements of this section.

(f) Accrual date. If the injured employee is entitled to supplemental income benefits for a subsequent quarter, the benefits begin to accrue on the later of:

(1) the first day of the applicable quarter; or

(2) the date the Application for Supplemental Income Benefits is received by the insurance carrier, subject to the provisions of §130.105 of this title (relating to Failure to Timely File Application for Supplemental Income Benefits; Subsequent Quarters).

(g) Changes in Amount. A change in the monthly amount of supplemental income benefits from one quarter to the next does not constitute a

dispute subject to §130.108 of this title (relating to Contesting Entitlement to Supplemental Income Benefits). An insurance carrier that does not contest the entitlement to supplemental income benefits for a subsequent quarter, but determines a different monthly amount is due, shall:

(1) send the notice as required in subsection (e) of this section;

(2) include instructions about the procedures for contesting the insurance carrier's determination as provided by §130.108 of this title (relating to Contesting Entitlement to Supplemental Income Benefits); and

(3) issue payment based on the newly calculated amount.

§130.105. Failure to Timely File Application for Supplemental Income Benefits; Subsequent Quarters.

(a) Failure to timely file. An injured employee who does not timely file an Application for Supplemental Income Benefits with the insurance carrier shall not receive supplemental income benefits for the period of time between the beginning date of the quarter and the date on which the form was received by the insurance carrier, unless the following apply:

(1) the failure of the insurance carrier to timely mail the form to the injured employee as provided by §130.104 of this title (relating to Determination of Entitlement or Non-entitlement for Subsequent Quarters);

(2) the failure of the Division to issue a determination of entitlement or non-entitlement for the first quarter and the quarter applied for immediately follows the first quarter; or,

(3) a finding of an impairment rating of 15% or greater in an administrative or judicial proceeding when the previous impairment rating was less than 15%.

(b) Calculation. If the injured employee has failed to timely file the Application for Supplemental Income Benefits and none of the exceptions listed in subsection (a) of this section apply, the payment of supplemental income benefits for that particular payment period shall be prorated as follows:

(1) divide the weekly amount of supplemental income benefits (as calculated pursuant to §130.102(g)(5) and (6) of this title (relating to Eligibility for Supplemental Income Benefits; Amount) by seven to determine the daily rate;

(2) calculate the number of days between the date the Application for Supplemental Income Benefits was received and the end of that particular payment period; and

(3) multiply the number of days and the daily rate to determine the amount of the payment.

§130.106. Loss of Entitlement to Supplemental Income Benefits.

(a) 12-Month Provision. Except as provided in §130.109 of this title (relating to Reinstatement of Entitlement if Discharged with Intent to Deprive of Supplemental Income Benefits), an injured employee who is not entitled to supplemental income benefits for a period of four consecutive quarters permanently loses entitlement to such benefits.

(b) 401-Week Provision. An injured employee permanently loses entitlement to supplemental income benefits upon the expiration of the 401-week period calculated pursuant to Labor Code §408.083. Except for situations where the injured employee has previously permanently lost entitlement to supplemental income benefits, the insurance carrier shall send two notices to the injured employee prior to the expiration of the 401-week period if the injured employee has submitted an Application for Supplemental Income Benefits during the 12 months immediately preceding the expiration of the 401-week period. This notification shall be in the form and manner prescribed by the Division and shall be sent:

(1) no later than four months prior to the expiration of the 401-week period; and

(2) one month prior to the expiration of the 401-week period.

(c) Refusal of Vocational Rehabilitation Services. An injured employee, in a vocational rehabilitation program as defined in §130.101(8) of this title (relating to Definitions), who refuses vocational rehabilitation services or refuses to

cooperate with services provided at any time during a qualifying period is not entitled to supplemental income benefits for the related quarter.

§130.107. Payment of Supplemental Income Benefits.

(a) First Quarter. After the Division's initial determination of entitlement, the insurance carrier shall pay supplemental income benefits as follows:

(1) the first payment shall be made on or before the tenth day after the day on which the insurance carrier received the Division determination of entitlement or the seventh day of the quarter, whichever is later;

(2) the second payment shall be made on or before the 37th day of the first quarter; and

(3) the last payment shall be made on or before the 67th day of the first quarter.

(b) Subsequent Quarters. For subsequent quarters, the insurance carrier shall pay supplemental income benefits as follows:

(1) the first payment shall be made on or before the tenth day after the day on which the insurance carrier received the Application for Supplemental Income Benefits, or the seventh day of the quarter, whichever is later;

(2) the second payment shall be made on or before the 37th day of the quarter; and

(3) the last payment shall be made on or before the 67th day of the quarter.

§130.108. Contesting Entitlement or Amount of Supplemental Income Benefits; Attorney Fees.

(a) Injured Employee Disputes. An injured employee may contest the determination by the Division or the insurance carrier regarding non-entitlement to, or the amount of, supplemental income benefits by requesting a benefit review conference as provided by Chapter 141 of this title (relating to Dispute Resolution – Benefit Review Conference).

(b) Insurance Carrier Dispute; First Quarter. If an insurance carrier disputes a Division finding of entitlement to, or amount of, supplemental income benefits for the first quarter, the insurance carrier shall request a benefit review conference as provided by Chapter 141 of this title (relating to Dispute Resolution – Benefit Review Conference) within 10 days after receiving the Division determination of entitlement. An insurance carrier waives the right to contest the Division determination of entitlement to, or amount of, supplemental income benefits for the first quarter if the request is not received by the Division within 10 days after the date the insurance carrier received the determination.

(c) Insurance Carrier Dispute; Subsequent Quarter With Prior Payment. If an insurance carrier disputes entitlement to a subsequent quarter and the

insurance carrier has paid supplemental income benefits during the quarter immediately preceding the quarter for which the Application for Supplemental Income Benefits is filed, the insurance carrier shall dispute entitlement to the subsequent quarter by requesting a benefit review conference as provided by Chapter 141 of this title (relating to Dispute Resolution – Benefit Review Conference) within 10 days after receiving the Application for Supplemental Income Benefits. An insurance carrier waives the right to contest the entitlement to supplemental income benefits for the subsequent quarter if the request is not received by the Division within 10 days after the date the insurance carrier received the Application for Supplemental Income Benefits. The insurance carrier does not waive the right to contest entitlement to supplemental income benefits if the insurance carrier has returned the injured employee's Application for Supplemental Income Benefits pursuant to §130.104(c) of this title (relating to Determination of Entitlement or Non-entitlement for Subsequent Quarters).

(d) Insurance Carrier Disputes; Subsequent Quarter Without Prior Payment. If an insurance carrier disputes entitlement to a subsequent quarter and the insurance carrier did not pay supplemental income benefits during the quarter immediately preceding the quarter for which the Application for Supplemental Income Benefits is filed, the insurance carrier shall send the determination to the injured employee within 10 days of the date the form was filed with the insurance carrier and include the reasons for the insurance carrier's

finding of non-entitlement and instructions about the procedures for contesting the insurance carrier's determination as provided by subsection (a) of this section.

(e) Liability. An insurance carrier who unsuccessfully contests a Division determination of entitlement to supplemental income benefits is liable for:

(1) all accrued, unpaid supplemental income benefits, and interest on that amount, and;

(2) reasonable and necessary attorney's fees incurred by the injured employee as a result of the insurance carrier's dispute which have been ordered by the Division or court.

§130.109. Reinstatement of Entitlement if Discharged with Intent to Deprive of Supplemental Income Benefits.

(a) An injured employee who has lost entitlement to supplemental income benefits under §130.106(a) of this title (relating to Loss of Entitlement to Supplemental Income Benefits), and is discharged from employment within 12 months of losing entitlement, will become re-entitled if the employer discharged the injured employee with intent to deprive the injured employee of supplemental income benefits.

(b) An injured employee seeking reinstated supplemental income benefits under this section shall request a benefit contested case hearing, as provided by

Chapter 142 of this title (relating to Dispute Resolution – Benefit Contested Case Hearing).

(c) The injured employee bears the burden of proof of discharge with intent to deprive.

(d) Supplemental income benefits reinstated under this section begin to accrue on the day after the injured employee's discharge.

8. CERTIFICATION. The agency hereby certifies that the adopted amendments 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
Texas Department of Insurance
Division of Workers' Compensation

IT IS THEREFORE THE ORDER of the Commissioner of Workers' Compensation that §§130.101-130.109 specified herein, concerning supplemental income benefits, are adopted.

_____
Rod Bordelon
Commissioner of Workers' Compensation

ATTEST:

_____
Dirk Johnson
General Counsel

COMMISSIONER ORDER NO. _____