

§120.2 Employer's First Report of Injury and Notice of Injured Employee Rights and Responsibilities

1. INTRODUCTION. The Texas Department of Insurance, Division of Workers' Compensation, adopts amendments to § 120.2 concerning an employer's first report of injury and adopts by reference the Office of Injured Employee Counsel (OIEC) "Notice of Injured Employee Rights and Responsibilities in the Texas Workers' Compensation System" publication. The amendments are adopted with changes to the proposed text published in the June 29, 2007 issue of the *Texas Register* (32 TexReg 3964).

2. REASONED JUSTIFICATION. The adopted amendments to § 120.2 are necessary to implement Labor Code § 409.005 and to provide for the distribution of the Notice of Injured Employee Rights and Responsibilities in the Texas Workers' Compensation System (Notice of Rights and Responsibilities) contemplated by Labor Code § 404.109. In response to written comments received from interested parties, the Division has changed some of the proposed language in the text of the rule as adopted. These changes, however, do not introduce new subject matter or affect persons in addition to those subject to the proposal as published. The amendments are summarized as follows. The specific language of the summary of injured employee rights and responsibilities has been removed and replaced with a reference to the "Notice of Injured Employee Rights and Responsibilities in the Texas Workers' Compensation System" publication. Subsections (a) & (c) contain minor grammatical changes.

Subsection (b) clarifies what the report should contain. Subsection (d) requires the employer to provide a copy of the report as well as the employee rights and responsibilities publication to the injured employee at the time the first report of injury is filed with the carrier. In response to comments, the proposed text of subsection (f) was omitted and subsections (f) through (h) were relettered accordingly. Subsection (h) is amended to remove language regarding penalties to comply with amendments to Labor Code that remove specific classification of such a violation. Other subsections are amended to clarify instructions, to update references to reflect organizational changes and to update legal references. The title of the rule is also amended.

3. HOW THE SECTION WILL FUNCTION. The amendment to subsection (a) modifies the language of the subsection to improve its clarity and readability; the amendment does not change the subsection's substantive requirements. The amendments to subsection (b) clarify what the employer's first report of injury must contain. This includes the information required by § 120.1(a), any additional information prescribed by the Division, and the information necessary for an insurance carrier to electronically transmit a first report of injury to the Division.

The amendment to subsection (c) clarifies that it is the employee's absence from work for more than one day due to an injury that triggers the employer's requirement to file with the carrier a first report of injury. The amendment to subsection (d) clarifies the requirement that an employer provide the employee with a copy of the rights and

responsibilities publication at the time the written report of injury is provided to the employee. The specific language of the publication is removed from § 120.2 and replaced with a reference to the OIEC Notice of Rights and Responsibilities. The amendment to subsection (f) notes that the employer should maintain a record of both the date the Notice of Rights and Responsibilities is given to the employee and the date the report of injury is filed with the insurance carrier. The requirement that the employer maintain a record of the date the report is filed with the insurance carrier is not a substantive change, as this requirement is present in the currently enacted version of §120.2. The amendment to subsection (g) modifies the language of the subsection to improve its clarity and readability; the amendment does not change the subsection's substantive requirements. Subsection (h) notes that failure to comply with this section is an administrative violation, but removes language regarding penalties in order to comply with amendments to the Labor Code that remove specific classification of such a violation.

4. SUMMARY OF COMMENTS AND AGENCY'S RESPONSE.

General: Two commenters agree with the rule as written.

Agency response: The Division appreciates the comments.

Comment: A commenter suggests that the rule include a provision requiring employers to provide each injured employee with copies of the Division's Employer Rights and Employer Responsibilities fact sheets. The commenter also suggests that employers

provide this document when distributing the Office of Injured Employee Counsel's "Notice of Injured Employee Rights and Responsibilities in the Texas Workers' Compensation System" publication.

Agency response: Section 409.011(c) of the Texas Labor Code requires that the Division provide employers with information regarding its rights and responsibilities at least once during a calendar year. There is no statutory authority, however, for requiring an employer to provide employer fact sheets to injured employees.

In addition to complying with § 409.011(c), the Division has added its Employer Rights and Employer Responsibilities fact sheets to the employee section of its website. The Office of Injured Employee Counsel will also update the "Notice of Injured Employee Rights and Responsibilities in the Texas Workers' Compensation System." The new Notice will contain information regarding the choice of a treating doctor by injured employees who are receiving non-network medical treatment after the subsections providing for the Division's Approved Doctor List expire on September 1, 2007. The inactivation of the Approved Doctors List is mandated by § 408.023(k) of the Labor Code.

Comment: A commenter suggested that § 120.2(d) provide for the provision of electronic notice to the injured employee if the employee has an email address.

Response: The Division agrees and the appropriate changes will be made.

Comment: A commenter said that § 120.2(f) is overly burdensome to the employer. Commenter reasons that the Division is disregarding its own threshold for reporting and

placing an administrative burden on employers that go beyond anything contemplated by the statute. The commenter concluded that this section should be deleted in its entirety.

Response: It was the Division's intent through proposed subsection (f) to promote the legislative goals established by Labor Code § 402.021 and distribute the OIEC publication to all injured employees regardless of whether an employee is absent from work for a day and a first report of injury was required to be filed by the employer. However, in order to alleviate a potential administrative burden on employers, the Division omitted the provision.

Comment: A commenter said that inclusion of record maintenance in § 120.2(g) is an unnecessary administrative burden for the employer, and that the Notice of Rights and Responsibilities is readily available from numerous sources.

Response: The Division agrees in part; the Notice of Rights and Responsibilities is readily available from numerous sources, but we must ensure that it reaches all of the injured employees. It is the responsibility of the employer to prove that this has been accomplished.

Comment: A commenter writes that number 3 of the Rights portion of the "Notice of Injured Employee Rights and Responsibilities" publication disregards the existence of health care networks and is confusing.

Response: Division disagrees. The information in this section addresses the selection of a doctor for network claims as well as non-network claims.

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

For: The Boeing Company, Office of Injured Employee Counsel

For, with changes: Service Group, Inc.

Against: Lockheed Martin Aeronautics Company

6. STATUTORY AUTHORITY. The amendments are adopted under the Texas Labor Code §§ 402.021, 404.109, 409.005, 402.00111, and 402.061. Section 404.109 calls for the Public Counsel to prepare and provides for the Commission of Workers' Compensation and the Commissioner of Insurance to distribute by rule a notice of injured employee rights and responsibilities. Section 409.005 provides the procedure for filing a report of injury, the format to be used, and authorizes the adoption of rules that must be included in the report and implementation of electronic filing of the reports. Section 402.0011 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under the Labor Code and § 402.021 establishes basic goals for the workers compensation system of Texas. Section 402.061 provides the Commissioner with the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

7. TEXT.

§120.2. Employer's First Report of Injury and Notice of Injured Employee Rights and Responsibilities.

(a) The employer shall report to the employer's insurance carrier each death, each occupational disease of which the employer has received notice of injury or has knowledge, and each injury that results in more than one day's absence from work for the injured employee. As used in this section, the term "knowledge" includes receipt of written or oral information regarding diagnosis of an occupational disease, or the diagnosis of an occupational disease through direct examination or testing by a doctor employed by the employer.

(b) The Division shall prescribe the form, format, and manner of the employer's first report of injury (report). The report shall contain:

(1) the information required by § 120.1(a) of this title (relating to Employer's Record of Injuries);

(2) any additional information prescribed by the Division in accordance with the Labor Code § 402.00128(b)(10); and

(3) the information necessary for an insurance carrier to electronically transmit a first report of injury to the Division.

(c) The report shall be filed with the insurance carrier not later than the eighth day after having received notice of or having knowledge of an occupational disease or death, or not later than the eighth day after the employee's absence from work for more than one day due to a work-related injury. For purposes of this section, a report is filed

when personally delivered, mailed, reported via tele-claims, electronically submitted, or sent via facsimile.

(d) The employer shall provide a written copy of the report and a written copy of the Notice of Injured Employee Rights and Responsibilities in the Texas Workers' Compensation System (Notice of Rights and Responsibilities) to the injured employee by personal delivery, mail, electronic submission or facsimile. The Notice of Rights and Responsibilities shall be in English and Spanish, or in English and any other language common to the employee. The written report may be the report specified in subsection (b) of this section, or at a minimum shall contain the information listed in § 120.1(a) of this title (relating to Employer's Record of Injuries).

(e) The Notice of Rights and Responsibilities is adopted by reference and may be obtained from:

(1) the department's website at www.tdi.state.tx.us;

(2) the Office of Injured Employee Counsel's website at www.oiec.state.tx.us; or

(3) Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, Austin, Texas, 78744-1609.

(f) The employer shall maintain a record of the date the copy of the report of injury and the date the Notice of Rights and Responsibilities were provided to the employee. The employer shall also maintain a record of the date the report of injury is filed with the insurance carrier.

(g) If the insurance carrier has not received the report, the employer has the burden of proving that the report was filed within the required time frame. If the carrier receives the report by mail, it will be presumed that the report was mailed four days prior to the date received by the carrier. The employer has the burden of proving that good cause exists if the employer failed to timely file or provide the report.

(h) A party who fails to comply with this section commits an administrative violation.

CERTIFICATION. This agency hereby certifies that the adopted 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 _____, 2007.

Norma Garcia
General Counsel
Texas Department of Insurance
Division of Workers' Compensation

IT IS THEREFORE THE ORDER of the Commissioner of Workers' Compensation that amendments to § 120.2, concerning requesting employer's first report of injury and notice of injured employee rights and responsibilities, are adopted.

AND IT IS SO ORDERED.

ALBERT BETTS
COMMISSIONER OF WORKERS' COMPENSATION

ATTEST:

Norma Garcia
General Counsel

COMMISSIONER'S ORDER NO.