

TITLE 28. INSURANCE

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

CHAPTER 160 – REPORTS OF INJURY AND OCCUPATIONAL DISEASE--GENERAL PROVISIONS

AMEND: §160.2 and §160.3, NEW: §160.1

1. INTRODUCTION.

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) adopts amendments to §160.2 and §160.3 of this title (relating to Non-Subscribing Employer's Report of Injury and Subscribing Employer's Report of Injury, respectively) and new §160.1 of this title (relating to Applicability) regarding reports of injury and occupational disease by employers. Sections 160.1 - 160.3 implement certain statutory provisions in Labor Code Chapter 411, Subchapter C, specifically Labor Code §411.032 that require an employer to file with the Division a report for certain on-the-job injuries and occupational diseases. New §160.1 and the amendments to §160.2 and §160.3 are adopted with changes to the proposed text published in the February 24, 2012, issue of the *Texas Register* (37 TexReg 1166). These changes, however, do not materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

In accordance with Government Code §2001.033, the Division's reasoned justification for these amendments and new rule is set out in this order, which includes the preamble, which in turn includes the rules. The reasoned justification is contained throughout the preamble, including the reasons why the new and amended rules are necessary; the factual, policy and legal bases for the new and amended rules; a summary of comments received from interested parties, names of the entities that commented and whether they were in support of or in opposition to the adoption of the

rules, and the reasons why the Division agrees or disagrees with the comments and recommendations.

The Division published an informal draft of these proposed amendments and new rule on the Division's website for informal comment on November 8, 2011. The Division received five informal comments. The public comment period for these proposed new and amended rules ended on March 26, 2012. The Division received eight public comments. No public hearing was requested or held for this proposal.

Simultaneous with the adoption of these amendments and new rule, the Division has adopted amendments to §110.1 and §110.101 and new §§110.7, 110.103, and 110.105 of this title. These other adopted amendments and new rules relate to other reporting requirements placed upon employers and are published elsewhere in this issue of the *Texas Register*.

2. REASONED JUSTIFICATION.

The adopted amendments to §160.2 and §160.3 and adopted new §160.1 concern reports of injury by employers pursuant to requirements in Labor Code §411.032. Labor Code §411.032(a) requires an employer to file with the Division a report of each: (1) on-the-job injury that results in the employee's absence from work for more than one day; and (2) occupational disease of which the employer has knowledge. In accordance with Labor Code §411.002, employers subject to these reporting requirements are: (1) employers who obtain workers' compensation insurance coverage; and (2) employers who are not required to and do not obtain workers' compensation insurance coverage and who employ five or more employees not exempt from workers' compensation insurance coverage. Additionally, Labor Code §411.001 defines "employer" for purposes of Labor Code Chapter 411, including Labor Code §411.032, as "a person who makes a contract of hire." Labor Code §411.032(b) specifies that the Commissioner of

Workers' Compensation (Commissioner) shall adopt rules and prescribe the form and manner of employer reports of injury and occupational disease filed under Labor Code §411.032.

Information reported to the Division by employers in accordance with Labor Code §411.032 is included in the job safety information system and associated data base mandated by Labor Code §411.031 and §411.033. These statutes require the Division to maintain a job safety information system which includes a comprehensive data base that incorporates all pertinent information relating to each injury reported under Labor Code §411.032. This information must include the age, sex, wage level, occupation, and insurance company payroll classification code of the injured employee; the nature, source, and severity of the injury; the reported cause of the injury; the part of the body affected; any equipment involved in the injury; the number of prior workers' compensation claims by the employee; the prior loss history of the employer; the standard industrial classification code of the employer; the classification code of the employer; and any other information considered useful for statistical analysis.

The adopted amendments and new rule, which are more fully described below, update and clarify existing Division rules that implement the employer report of injury requirements in Labor Code §411.032. This adoption includes a new rule which defines the applicability of the rules in Chapter 160. This adoption also includes amendments to existing Division rules in §160.2 and §160.3 that specify the form and manner in which subscribing and non-subscribing employers are to submit to the Division the reports of injury required by Labor Code §411.032. Finally, other adopted amendments correct non-substantive typographical, grammatical, and punctuation errors in the current rule text; re-letter and renumber rule text; and update the term "Commission" to "division."

This adoption first amends the title of Chapter 160 to read "Reports of Injury and Occupational Disease--General Provisions." This adopted amendment is necessary in order to conform to current statutory nomenclature in Labor Code §411.032 and to more accurately describe the contents of this chapter.

Adopted new §160.1 provides that Chapter 160 applies to an employer as defined by Labor Code §411.001(2) and that is subject to Labor Code Chapter 411, Subchapter C. Adopted new §160.1 is necessary to clarify the applicability of this chapter to an employer, as defined in Labor Code §411.001(2). This definition was previously contained within §160.2(a).

Section 160.2 governs reports of injury by non-subscribing employers who employ five or more employees not exempt from workers' compensation insurance coverage. Adopted amendments to §160.2(a) clarify the use of the term non-subscriber and replace the statutory reference to Labor Code §411.001(2), specifically describing a non-subscriber as an employer who does not have workers' compensation insurance coverage. This adopted amendment is necessary in order to clarify the use of the term "non-subscriber" in this rule. The adopted amendment to subsection (a) also reorders the injuries that must be reported in a manner that is consistent with the ordering in Labor Code §411.032(a). Finally, the adopted amendments to subsection (a) clarify that employers are required to report each occupational disease of which they have knowledge. This adopted amendment is necessary to make this rule consistent with Labor Code §411.032(a)(2) which requires an employer to file a report with the Division of each "occupational disease of which the employer has knowledge."

The adopted amendments to §160.2(b) harmonize rule language with Labor Code §411.032, which requires an employer to file with the Division a report of each on-the-job injury that results in the employee's absence from work for more than one day and occupational disease

of which the employer has knowledge. This alignment of this rule with the statutory language of §411.032 is necessary to provide clarity and transparency in employer reporting requirements under this section. The adopted amendments to §160.2(b) reorder and clarify when a non-subscribing employer shall file a report with the Division, specifically, that a report must be filed with the Division not later than the seventh day of the month following the month in which, as applicable, the death occurred, the employee was absent from work for more than one day as a result of an on-the-job injury, or the employer acquired knowledge of the occupational disease. These amendments are not designed to substantively change current Division policies and procedures concerning employer injury and occupational disease reporting requirements. Instead, these amendments provide rule consistency with statutory language and requirements, for example, adding “on-the-job” to describe injury and “employer knowledge” of the occupational disease. The adopted amendments are also necessary to resolve any existing confusion of system participants as to when and what information is to be reported under these rules.

The adopted amendments to §160.2(c) clarify and codify current Division procedures which allow a report to be submitted to the Division in writing or electronically. These amendments are necessary to incorporate more current methods of information submission and to conform terminology in this rule to terminology in §102.5 concerning the electronic transmission of information. Finally, the adopted amendments to subsection (c) clarify and delineate, by rule, the specific data elements an employer must include in a report of injury. These amendments are necessary in order to ensure that the Division receives all the relevant and required data in an employer's report of injury, which is necessary to maintain the job safety data base required under Labor Code §411.033. Additionally, these adopted amendments align the types of data elements included in an employer report of injury between subscribing and non-subscribing employers to the

extent possible. Required information under Labor Code §411.033, included in rule text, includes, for example, the age, sex, wage level, and occupation of the injured employee, the reported cause of the injury, the equipment involved in the injury, and the standard industrial classification code of the employer. In addition, the Division requires the reporting of certain data elements based on their relevancy to injury and occupational disease reporting to the Division, as applicable under Labor Code §411.033(10) concerning other information that is considered useful for statistical analysis. This other information considered useful for statistical analysis under Labor Code §411.033(10) provides the Division insight into, for example, the average length of employment prior to injury, the safety record of an employer, and injury analysis based on age.

Adopted new subsection (d) states that employers are responsible for timely and accurate filing of reports under this section. It further provides that a report required by this section is considered filed with the division only when it accurately contains all of the data elements specified under subsection (c) of this section and is received by the division. This adopted rule is necessary in order to ensure that the Division obtains timely and accurate reports of injury.

Section 160.3 governs reports of injury and occupational disease by subscribing employers. The adopted amendments to subsection (a) clarify the definition of a subscriber as an employer who does have workers' compensation insurance coverage and adds a statutory reference to Labor Code §411.032, concerning injury reporting requirements. Additional amendments to subsection (a) are non-substantive and continue to provide direction to subscribing employers on what satisfies a report of injury in respect to a covered employee under the Labor Code.

Adopted new subsection (b) sets forth the form and manner in which a subscribing employer is to report deaths, injuries, and occupational diseases incurred by their employees who have waived workers' compensation insurance coverage under Labor Code §406.034. Prior to these

adopted amendments, this rule did not clearly prescribe the form and manner for subscribing employers to report injuries and occupational diseases incurred by employees who opt out of coverage under Labor Code §406.034. As stated, subscribing employers are required to report injuries and occupational injuries to the Division under Labor Code §411.032. The adopted amendments establish a reporting process that is consistent with the process used by non-subscribing employers when filing a report of injury. Specifically, a subscribing employer subject to this subsection must file with the Division a report of each death, on-the-job injury that results in more than one day's absence from work for the injured employee, and occupational disease of which the employer has knowledge. Adopted subsection (c) requires these reports of injury to be submitted in the form, manner, and timeframes prescribed by §160.2(b) and §160.2(c).

Adopted new subsection (d) states that employers are responsible for timely and accurate filing of reports under this section. It further provides that a report required by this section is considered filed with the division only when it accurately contains all of the data elements specified under subsection (c) of this section and is received by the division. This adopted rule is necessary in order to ensure that the Division obtains timely and accurate reports of injury.

The Division has made changes to the text as proposed in §160.2(d) and §160.3(d) in response to comment. Specifically, the Division proposed subsection (d) of as follows “. . . required by this section is considered timely filed with the division only when it contains all of the data elements specified under subsection (c) of this section, contains accurate information, and is received by the division.” The Division changed this language to read as follows “. . . required by this section is considered filed with the division only when it accurately contains all of the data elements specified under subsection (c) of this section and is received by the division.” The

adopted non-substantive amendments prevent any potential for confusion as to when a report of injury must be filed by the employer.

Finally, the Division added a January 1, 2013 effective date to §§160.1 - 160.3. The adopted amendments will apply to each: death, on-the-job injury that results in more than one day's absence from work for the injured employee, and occupational disease of which the employer has knowledge occurring on or after this effective date. This adopted amendment is necessary in order to provide additional time to those affected by the changes to implement these changes.

3. HOW THESE SECTIONS WILL FUNCTION.

The adopted amendments and new rule set forth a framework within which subscribing and non-subscribing employers will report injuries.

Section 160.1 provides an applicability section, defining an employer as defined by Labor Code §411.001(2) and that is subject to Labor Code Chapter 411, Subchapter C.

Section 160.2 provides that an employer that employs five or more employees and does not have workers' compensation insurance coverage, a non-subscriber, shall file a report of injury with the Division for each: death, on-the-job injury that results in more than one day's absence for the injured employee, and occupational disease of which the employer has knowledge. This section requires a report to be filed under this section not later than the seventh day of the month following the month in which: the death occurred, the employee was absent from work for more than one day as a result of an on-the-job injury, or the employer acquired knowledge of the occupational disease, as applicable. Additionally, this report must be filed in writing or electronically, in the form and manner prescribed by the Division, and include all data elements listed in §160.2(c). Finally, this section requires employers to accurately file reports, and this section also explains that a

report is considered filed with the Division when the report contains all the data elements specified under subsection (c), and is received by the Division.

Section 160.3 provides that an employer that has workers' compensation insurance coverage, a subscriber, and shall file a report of injury with the Division pursuant to Labor Code §411.032. This section provides that an employer fulfills this requirement by filing a report of injury in accordance with Labor Code §409.005 and applicable Division rules, unless the Division requests that the employer file a report with the Division for a specific injury. Section 160.3 further provides reporting requirements for employers covered by workers' compensation insurance, whether by commercial insurance or through self-insurance, regarding an employee who has waived workers' compensation insurance coverage in accordance with Labor Code §406.034. For injuries and occupational diseases incurred by employees who have waived coverage, the employer shall file a report of injury with the Division of each death, on-the-job injury that results in more than one day's absence from work for the injured employee, and occupational disease of which the employer has knowledge. This report is required to be filed in the form, manner, and timeframes prescribed by the Division in §160.2(b) and (c) and include a statement that the injured employee waived workers' compensation insurance coverage in accordance with Labor Code §406.034. This section requires employers to accurately file reports, and this section also explains that a report is considered filed with the Division when the report contains all the data elements specified under subsection (c), and is received by the Division.

4. SUMMARY OF COMMENTS AND AGENCY'S RESPONSE.

General: Commenters support the Division's proposed rules and note their appreciation of the opportunity to discuss these rules prior to adoption.

Agency Response: The Division appreciates the supportive comments.

General: A commenter suggests amending the rule so that a filing is deemed received timely if all information is considered accurate by the Texas Department of Insurance, allowing consideration for non-material filing errors.

Agency Response: The Division disagrees with the recommended change to permit filings to be considered timely with inaccurate required data. Although the Division disagrees with the comments, it has made the clarifying changes by moving the placement of the word “accurately” to earlier in this section and removing the word “timely” from the second sentence to clarify employers must meet the timeliness requirement under these rules as well as the accuracy requirement. The Division notes that the adopted language and policy continues to prohibit all filing errors for required information. No required information is immaterial. Parties subject to Division rules are responsible for accurately reporting to ensure the Division receives quality data.

General: A commenter notes their lack of support of the addition of data elements to be reported on the DWC-7, including employee’s wage, date of hire, first day absent from work and return-to-work date or expected date.

Agency Response: The Division disagrees with this comment and clarifies that the aforementioned data elements are purposely included in an attempt by the Division to align the injury reporting requirements for non-subscribing and subscribing employers. The Division clarifies that employee wage information is specifically required to be collected for reported injuries under Labor Code §411.033 and notes that the following data elements: employee date of hire, first day absent from work, and return-to-work date or expected date are collected under Labor Code §411.033(10) as other information considered useful for statistical analysis. This data is

statistically useful to the Division because the length of time from hire to reported injury, first day of absence from work and return or expected return date can assist the Division in observing and monitoring system-wide return-to-work and workplace safety trends.

General: A commenter states if given the timeframe to report the information required for the DWC-7, the cause of the injury could be still under investigation and inquires if it is possible for the employer to indicate that the investigation is still ongoing on the report.

Agency Response: The Division disagrees with allowing an employer to indicate on a report of injury that an investigation of the cause of injury is ongoing. The Division adds that further time to investigate the information required for the DWC-7 is not necessary to provide accurate information to the Division, as adopted §160.2(c)(23) requires the report of injury to include “the reported cause of injury.” This data is required to be included in the job safety data base under Labor Code §411.033 and refers to only the cause of the injury reported to the employer. Therefore, the commenter’s recommendation is not necessary.

§160.2: One commenter expresses their concern about the enforceability of §160.2 and suggests the following language be added as §160.2(e): “Failure to file a report of injury as required by this rule is an administrative violation.”

Agency Response: The Division disagrees and declines to make this change. This language and authority for related administrative violations is provided in Labor Code §411.032(c) which states that “an employer commits an administrative violation if the employer fails to report to the division as required under Subsection (a) unless good cause exists, as determined by the commissioner, for the failure.” Additionally, under Labor Code §415.021 the Commissioner has

authority to enforce refusal to comply with a rule through assessment of administrative penalties.

Therefore, the commenter's suggested provision is not necessary.

§160.2(b): A commenter suggests modifying the requirements of §160.2(b) to include the following language: "An employer shall file a report of injury required by subsection (a) with the division not later than 30 days following: (1) death; (2) the employer acquired knowledge of an occupational disease; or (3) the employee lost more than one day from work as a result of an on the job injury." The commenter states filing a report of injury by the seventh day of the month is difficult at times because there are often claims that occur during the first week of the month with a date of injury from the end of the prior month. These claims are hard to timely review and get related information from the client/insured to the Division. The commenter explains that employers filing timely under the current proposed rule may do so without verifying that they meet the requisite criteria, which will result in giving the Division inaccurate information and misfiling of a DWC-7.

Agency Response: The Division disagrees with this recommendation and explains that these rule amendments are to clarify previously existing language regarding reports of injury. The Division further explains there is no situation under these rules where a non-subscribing employer will have less than seven days to provide the Division with the information requested, which is consistent with the current reporting requirements in place for injuries covered by workers' compensation under Labor Code §409.005. Additionally, the Division states that the adopted filing requirements support a simplified procedure by requiring one consistent filing timeline, monthly, for a non-subscribing employer to report injury information to the Division.

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

For: Texas Association of Responsible Nonsubscribers.

For, with changes: Insurance Council of Texas.

Neither for nor against, with changes: Texas Alliance of Nonsubscribers, an individual, and Office of Injured Employee Counsel.

6. STATUTORY AUTHORITY.

The new rule and amendments are adopted under Labor Code §§411.032, 411.001, 411.002, 411.033, 406.034, 401.024, 409.005, 504.002(a)(5), 504.002(a)(7) and under the general authority of §402.061.

Labor Code §411.032 requires an employer to file with the Division a report of each: (1) on-the-job injury that results in the employee's absence from work for more than one day; and (2) occupational disease of which the employer has knowledge. Labor Code §411.032 also charges the Commissioner to adopt rules to prescribe the form and manner of reports filed under this section. Labor Code §411.001 defines "employer" for purposes of Labor Code Chapter 411 to mean "a person who makes a contract of hire." Labor Code §411.002 provides that an employer who obtains workers' compensation insurance coverage is subject to Labor Code Chapter 411. Labor Code §411.002 also provides that an employer is subject to Labor Code Chapter 411 if the employer is not required to and does not obtain workers' compensation insurance coverage, and employs five or more employees not exempt from workers' compensation insurance coverage. Labor Code §411.033 lists required data elements relating to each injury reported under Labor Code §411.032 which must be included in the job safety information maintained by the Division. Labor Code §406.034 outlines the right of an employee to retain the common-law right of action to recover damages for personal injuries or death. Labor Code §401.024 provides the Commissioner the authority to permit or require the use of electronic transmission to transmit information. Labor

Code §409.005 delineates a procedure for a subscribing employer's filing of a report of injury and the format to be used. Labor Code §504.002(a)(5) provides that Labor Code §406.034 is not included in Labor Code Chapter 504. Labor Code §504.002(7) provides that Labor Code Chapter 411 applies to and is included in Labor Code Chapter 504. Labor Code §402.061 provides that the Commissioner shall adopt rules as necessary for the implementation and enforcement of this subtitle.

7. TEXT.

§160.1. *Applicability*

(a) This chapter applies to an employer as defined by Labor Code §411.001(2) and that is subject to Labor Code Chapter 411, Subchapter C.

(b) This section is effective January 1, 2013.

§160.2. *Non-Subscribing Employer's Report of Injury.*

(a) An employer that does not have workers' compensation insurance coverage (non-subscriber) and employs five or more employees not exempt from workers' compensation insurance coverage shall file with the division a report of each:

(1) death;

(2) on-the-job injury that results in more than one day's absence from work for the injured employee; and

(3) occupational disease of which the employer has knowledge.

(b) An employer shall file a report required by subsection (a) of this section with the division not later than the seventh day of the month following the month in which:

(1) the death occurred;

(2) the employee was absent from work for more than one day as a result of the on-the-job injury; or

(3) the employer acquired knowledge of the occupational disease.

(c) A report shall be filed in writing or electronically and shall be in the form and manner prescribed by the division. A report must include:

(1) the employer's business name;

(2) the employer's North American Industry Classification System (NAICS) codes;

(3) the employer's business mailing address;

(4) the employer's physical address (if different from mailing address);

(5) the employer's telephone number;

(6) the employer's federal employer identification number (FEIN);

(7) the name, title, telephone number, signature, and date of signature of the person completing the report for the employer;

(8) the reporting period;

(9) the injured employee's name;

(10) the employee's social security number;

(11) the employee's date of birth;

(12) the employee's date of hire;

(13) the employee's sex;

(14) the employee's occupation;

(15) the employee's hourly wage;

(16) the employee's NAICS code;

(17) the employee's race/ethnic identification;

- (18) the address where injury or occupational disease occurred;
- (19) the type of location of where injury or occupational disease occurred;
- (20) the date of injury or occupational disease;
- (21) the date reported by employee;
- (22) the return-to-work date or expected date;
- (23) the reported cause of injury;
- (24) the nature of injury or occupational disease;
- (25) any equipment involved in the injury;
- (26) body part(s) affected;
- (27) the first day of absence from work;
- (28) the number of days absent from work;
- (29) whether the injury is an occupational disease;
- (30) whether the injury resulted in death; and
- (31) a description of incident.

(d) Employers are responsible for timely and accurate filing of reports under this section. A report required by this section is considered filed with the division only when it accurately contains all of the data elements specified under subsection (c) of this section and is received by the division.

(e) This section is effective January 1, 2013.

§160.3. *Subscribing Employer's Report of Injury.*

(a) An employer that has workers' compensation insurance coverage (subscriber) shall file a report of injury with the division pursuant to Labor Code §411.032. A subscribing employer's

report of injury filed in accordance with Labor Code §409.005 and applicable division rules satisfies that employer's requirement to file a report of injury under Labor Code §411.032, unless the division requests that the employer file a report with the division for a specific injury.

(b) For an employee who has waived workers' compensation insurance coverage in accordance with Labor Code §406.034, an employer covered by workers' compensation insurance, whether by commercial insurance or through self-insurance as provided by the Texas Workers' Compensation Act, shall file with the division a report of each:

(1) death;

(2) on-the-job injury that results in more than one day's absence from work for the injured employee; and

(3) occupational disease of which the employer has knowledge.

(c) The report of injury required by subsection (b) of this section shall be filed in the form, manner, and timeframes prescribed by the division in §160.2(b) and (c) of this title (relating to Non-Subscribing Employer's Report of Injury) and shall include a statement that the injured employee has waived workers' compensation coverage in accordance with Labor Code §406.034.

(d) Employers are responsible for timely and accurate filing of reports under this section. A report required by this section is considered filed with the division only when it accurately contains all of the data elements specified under subsection (c) of this section and is received by the division.

(e) This section is effective January 1, 2013.

8. CERTIFICATION.

This agency hereby certifies that the new rule and adopted amendments have been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued at Austin, Texas, on the 13th day of July, 2012.

X

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

IT IS THEREFORE THE ORDER of the Commissioner of Workers' Compensation that the amendments to §160.2 and §160.3, relating to Non-Subscribing Employer's Report of Injury and Subscribing Employer's Report of Injury, respectively, and new §160.1, relating to Applicability, are adopted.

AND IT IS SO ORDERED.

X

ROD BORDELON
COMMISSIONER OF WORKERS' COMPENSATION

ATTEST:

X

Dirk Johnson

General Counsel

COMMISSIONER ORDER NO.