

TITLE 28. INSURANCE

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

CHAPTER 129: INCOME BENEFITS--TEMPORARY INCOME BENEFITS Title 28 TAC §129.5

INTRODUCTION. The Texas Department of Insurance, Division of Workers' Compensation (division) proposes the amendment of 28 Texas Administrative Code (TAC) §129.5, *Work Status Reports*. The proposed amendments to §129.5 are necessary to conform the division's rules to the Legislative changes adopted by House Bill 2546, 85th Legislature, Regular Session (HB 2546) that was effective on June 9, 2017. HB 2546 amended Labor Code §408.025 by adding a new subsection to allow a treating doctor to delegate to a physician assistant the authority to complete and sign a Work Status Report regarding an injured employee's ability to return to work. The delegating treating doctor is responsible for the acts of the physician assistant under §408.025.

Section 129.5 addresses **Work Status Reports**. The division proposes an amendment to §129.5(a)(1) to replace "§133.4 of this title (relating to Consulting and Referral Doctors)" with "§180.22(c) and (e) of this title (relating to Health Care Provider Roles and Responsibilities." This proposed amendment is necessary to update the citation to the definition of a treating or referral doctor. Section 133.4 no longer contains these definitions.

New §129.5(b) re-letters existing subsections (b) through (j) to (c) through (k). This non-substantive amendment is necessary to account for added text.

Amended §129.5(a)(4) deletes "(employee)." This non-substantive change is necessary to conform to agency style.

Amended §129.5(a)(2), (a)(4)(A), (a)(4)(B), (a)(4)(C), (d)(2), (d)(4), (e)(1), (e)(2), (e)(3), (f), (g), (g)(1), (g)(2), (h), (i)(3), and (k) add the word "injured" before the word "employee." This non-substantive change is necessary to conform to agency style.

Amended §129.5(a)(2), (a)(3), (d)(1), (d)(4), (e)(1), and (i)(3) add the word "injured" before the word "employee's." This change is necessary to conform to agency style.

New §129.5(b) adds, "A treating doctor may delegate authority to complete, sign, and file a Work Status Report to a licensed health care practitioner authorized to accept the delegation under Labor Code §408.025. The delegating treating doctor is responsible for the acts of the health care practitioner under this subsection." This change is necessary to conform the division's rules to HB 2546. Currently, physician assistants are the only licensed health care practitioners to whom the authority to complete, sign, and file a Work Status Report may be delegated under Labor Code §408.025.

Amended §129.5(c), (d), (e), (g), (i), (i)(2), (i)(3), (j), (j)(1), (j)(2), and (j)(3) add "or delegated health care practitioner" after the word "doctor" to the subsections. This change is necessary to conform the division's rules to the legislative change and to communicate or establish that regardless of whether a doctor or delegated health care

practitioner completes, signs, and files a Work Status Report, all substantive or procedural requirements specified by the rule are the same.

Amended §129.5(c) and (d) update "Commission" to "division." This non-substantive change is necessary to reflect the change in the agency's name.

The division notes that amended §129.5(e) defines the situations in which treating doctor or delegated health care practitioner shall complete and file a Work Status Report. Work Status Reports should be completed and filed by treating doctors or delegated health care practitioners only when one of these situations outlined in amended §129.5(e) has occurred.

Amended §129.5(e)(3) adds "or delegated health care practitioner's" after the word "doctor's" to the subsection. This change is necessary to conform the division's rules to the legislative change and to communicate that regardless whether a doctor or delegated health care practitioner has completed, signed, and filed a Work Status Report, all current substantive and procedural requirements specified by the rule are the same.

Amended §129.5(e)(3) deletes "(carrier)". This non-substantive change is necessary to conform to agency style.

Amended §129.5(e)(3), (f), (g), (i)(1), (j), (j)(2), and (j)(3) add the word "insurance" before the word "carrier". This change is necessary to conform to agency style.

Amended §129.5(e)(3) deletes "to" after the word "not." This non-substantive change corrects a typographical error.

Amended §129.5(f) adds “by hand delivery or electronic transmission if the injured employee agrees to receive the report by electronic transmission.” This change is necessary to allow an injured employee the opportunity to receive the form by electronic transmission with the injured employee’s agreement. This change increases efficiency within the workers' compensation system by allowing for Work Status Reports to be provided to the injured employee electronically via telemedicine services, if the use of telemedicine services are proper according to licensing board standards and other division rules. By allowing electronic transmission to an injured employee, the injured employee will have access to prompt, high-quality medical care which is a division goal under Labor Code §402.021(b)(9). In implementing the division’s goals, the Legislature requires the workers’ compensation system to take maximum advantage of technological advances to provide the highest levels of service possible to system participants. The division notes that this amendment does not change the requirements relating to when the Work Status Report must be provided to an injured employee.

Amended §129.5(f) adds the letter “(e)” after the word “subsection” and deletes the letter “(d)” to correct the citation.

Amended §129.5(g) adds the letter “(e)” after the word “subsection” and deletes the letter “(d)” to correct the citation.

Amended §129.5(i)(1) and (i)(2) delete “facsimile or” from the paragraphs. The change is necessary because facsimile is already included in the definition of electronic transmission in 28 TAC §102.4(m) of this title.

Amended §129.5(i)(3) adds “or delivered by electronic transmission if the injured employee agrees to receive the report by electronic transmission” This change increases efficiency within the workers' compensation system by allowing for Work Status Reports to be provided to the injured employee electronically via telemedicine services if the use of telemedicine services are proper according to licensing board standards and other division rules. By allowing electronic transmission to an injured employee, the injured employee will have access to prompt, high-quality medical care which is a division goal under Labor Code §402.021(b)(9). In implementing the division’s goals, the Legislature requires the workers’ compensation system to take maximum advantage of technological advances to provide the highest levels of service possible to system participants.

Amended §129.5(j) removes the word “a” and adds the “an”. This non-substantive change is necessary to be grammatically accurate.

Amended §129.5(j) removes a comma after the word “carrier.” This non-substantive change is necessary to be grammatically accurate.

Amended §129.5(j)(1) adds “(e)(1), (e)(2), and (g)” and deletes “(d)(1), (d)(2), and (f)” to correct the citations.

Amended §129.5(j)(2) adds “(e)(3)” and deletes “(d)(3)” to correct the citation.

Amended §129.5(k) adds “(g)” after §126.6 in two instances and deletes “(f)” in two instances to correct the citation.

Amended §129.5(k) removes a comma after the word “restrictions.” This non-substantive change is necessary to be grammatically accurate.

Lastly, in amended §129.5(k), the division is removing "(on anyone's behalf)." This change is necessary to clarify that a required medical examination doctor is not able to conduct an examination on anyone's behalf.

FISCAL NOTE. Matt Zurek, Deputy Commissioner of Health Care Management, has determined that for each year of the first five years the amended sections are in effect, there will be no fiscal impact to state or local governments as a result of enforcing or administering the proposal. There will be no measurable effect on local employment or the local economy as a result of the proposed amendments. Any economic costs to those state and local governments that provide workers' compensation coverage are discussed below.

PUBLIC BENEFIT AND COSTS. Mr. Zurek has also determined that, for each of the first five years amended §129.5 is in effect, the public benefits anticipated as a result of the proposed amendments include aligning §129.5 with the current statute and increasing efficiency within the workers' compensation system. Although physician assistants are allowed to treat injured employees in the workers' compensation system by delegated authority, previously they were not allowed to complete and file Work Status Reports. Allowing a licensed physician assistant who has been delegated authority by the treating doctor to complete, sign, and file Work Status Reports will increase efficiency in the workers' compensation system. Efficiency will also be increased by allowing for electronic transmission of the Work Status Report to the

injured employee if the injured employee agrees to receive the report via electronic transmission. The ability for the injured employee to receive a Work Status Report electronically, upon agreement, will enable the use of telemedicine services if the use of telemedicine services are proper according to licensing board standards and other division rules, and will help ensure the injured employee receives prompt and high quality medical care.

ANTICIPATED COSTS TO COMPLY WITH THE PROPOSAL. Mr. Zurek anticipates that, for each of the first five years the amendments of §129.5 are in effect, there will be no costs to persons required to comply with the proposal. The proposed amendments do not change the circumstances under which Work Status Reports addressing an injured employee's ability to return to work may be completed and do not change the reimbursement amount for these reports. Instead, the amendments result in a cost savings to system participants by allowing for electronic transmission of required forms to injured employees if the injured employee agrees to receive the form via electronic transmission. If the injured employee agrees and electronic transmission is used, cost will be reduced by a printing cost of \$0.10 per page for each of the first five years. An additional cost savings may also apply for system participants who previously mailed a Work Status Report to the injured employee, which would equal \$0.49 for each Work Status Report mailed.

Government Code §2001.0045 requires a state agency to offset any costs associated with a proposed rule by: (1) repealing a rule imposing a total cost that is

equal to or greater than that of the proposed rule; or (2) amending a rule to decrease the total cost imposed by an amount that is equal to or greater than the cost of the proposed rule. As described above, the division has determined that the proposed amendments will not impose a cost on system participants.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS.

Government Code §2006.002(c) provides that if a proposed rule may have an adverse economic effect on small businesses, micro-businesses, or rural communities, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. Government Code §2006.001(2) defines “small business” as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit, is independently owned and operated, and has fewer than 100 employees or less than \$6 million in annual gross receipts. Government Code §2006.001(1) defines “micro business” similarly to “small business” but specifies that such a business may not have more than 20 employees. Government Code §2006.001(1-a) defines a “rural community” as a municipality with a population of less than 25,000.

In accordance with Government Code §2006.002(c), the division has determined that the proposed amendments to §129.5 will not have an adverse economic effect on

small businesses, micro-businesses, or rural communities. Therefore, a regulatory flexibility analysis is not required.

GOVERNMENT GROWTH IMPACT STATEMENT. Government Code §2001.0221 requires that a state agency prepare a government growth impact statement describing the effects that a proposed rule may have during the first five years that the rule would be in effect. The proposed amendments to §129.5 will not create or eliminate a government program and will not require the creation or elimination of existing employee positions. The proposed amendments will not require an increase or decrease in future legislative appropriations to the division and will not result in an increase or decrease in fees paid to the division. The proposal does not create a new regulation, expand an existing regulation, or limit an existing regulation. The number of individuals subject to the rule's applicability has increased by the proposal because licensed physician assistants authorized to complete Work Status Reports under Labor Code §408.025 will now be included in the rule. The legislative amendment of HB 2546 created the increase in applicability. The proposal has no impact on the state's economy.

TAKINGS IMPACT ASSESSMENT. The division has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of

government action. Therefore, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. If you would like to comment on this proposal, please submit your written comments by 5:00 p.m. CST on May 21, 2018. A request for a public hearing must be sent separately from your written comments. Send written comments or hearing requests by email to rulecomments@tdi.texas.gov or by mail to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, Office of the General Counsel, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645. If a hearing is held, written comments and public testimony presented at the hearing will be considered.

STATUTORY AUTHORITY. Amended §129.5 is proposed under the authority of Labor Code §401.024, *Transmission of Information*; Labor Code §402.00111, *Relationship Between Commissioner of Insurance and Commissioner of Workers' Compensation*; Labor Code §402.00116, *Chief Executive; Separation of Authority; Rulemaking*; Labor Code §402.021, *Goals; Legislative Intent; General Workers' Compensation Mission of Department*; Labor Code §402.061, *Adoption of Rules*; Labor Code §408.004, *Required Medical Examinations: Administrative Violations*; Labor Code §415.0035, *Additional Violations by Insurance Carrier or Health Care Provider*; and Labor Code §408.025, *Reports and Records Required from Health Care Providers*.

Labor Code §401.024 states that the commissioner may prescribe the form and manner for transmitting any authorized or required electronic transmission.

Labor Code §402.00111 states that the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority, under the Texas Workers' Compensation Act.

Labor Code §402.00116 establishes the commissioner of workers' compensation as the division's chief executive and administrative officer, and requires the commissioner to administer and enforce the Act.

Labor Code §402.021 states two basic goals of the Texas workers' compensation system are to ensure that each employee has access to prompt, high-quality medical care and receives services to facilitate the employee's return to employment as soon as it is safe and appropriate. In implementing these goals, the system must take maximum advantage of technological advances to provide the highest levels of service possible to system participants.

Labor Code §402.061 states that the commissioner shall adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act.

Labor Code §408.004 states that the commissioner may require an employee to submit to a medical examination to resolve a question about the appropriateness of health care received.

Labor Code §408.025 states that a treating doctor may delegate to a physician assistant the authority to complete and sign a Work Status Report.

Labor Code §415.0035 states that a health care provider commits an administrative violation if that person fails or refuses to timely file required reports.

TEXT.

§129.5 Work Status Reports

(a) As used in this section:

(1) the term "doctor" means either the treating doctor or a referral doctor, as defined by §180.22(c) and (e) of this title (relating to Health Care Provider Roles and Responsibilities) [~~§133.4 of this title (relating to Consulting and Referral Doctors)~~];

(2) "substantial change in activity restrictions" means a change in activity restrictions caused by a change in the injured employee's medical condition which either prevents the injured employee from working under the previous restrictions or which allows the injured employee to work in an expanded and more strenuous capacity than the prior restrictions permitted (approaching the injured employee's normal job);

(3) "change in work status" means a change in the injured employee's work status from one of the three choices listed in subsection (a)(4) of this section to another of the choices in that subsection; and

(4) the term "work status" refers to whether the injured employee's [~~employee~~] medical condition:

(A) allows the injured employee to return to work without restrictions (which is not equivalent to maximum medical improvement);

(B) allows the injured employee to a return to work with restrictions; or

(C) prevents the injured employee from returning to work.

(b) A treating doctor may delegate authority to complete, sign, and file a Work Status Report to a licensed health care practitioner authorized to accept the delegation under Texas Labor Code §408.025. The delegating treating doctor is responsible for the acts of the health care practitioner under this subsection.

(c)[(b)] The doctor or delegated health care practitioner shall file a Work Status Report in the form and manner prescribed by the division [~~Commission~~].

(d)[(e)] The doctor or delegated health care practitioner shall be considered to have filed a complete Work Status Report if the report is filed in the form and manner prescribed by the division [~~Commission~~], signed, and contains at minimum:

- (1) identification of the injured employee's work status;
- (2) effective dates and estimated expiration dates of current work status and restrictions (an expected expiration date is not binding and may be adjusted in future Work Status Reports, as appropriate, based on the condition and progress of the injured employee);
- (3) identification of any applicable activity restrictions;
- (4) an explanation of how the injured employee's workers' compensation injury prevents the injured employee from returning to work (if the doctor believes that the injured employee is prevented from returning to work); and
- (5) general information that identifies key information about the claim (as prescribed on the report).

~~(e)~~ The doctor or delegated health care practitioner shall file the Work Status Report:

(1) after the initial examination of the injured employee, regardless of the injured employee's work status;

(2) when the injured employee experiences a change in work status or a substantial change in activity restrictions; and

(3) on the schedule requested by the insurance carrier [~~carrier~~], its agent, or the employer requesting the report through its insurance carrier, which shall not [~~te~~] exceed one report every two weeks and which shall be based upon the doctor's or delegated health care practitioner's scheduled appointments with the injured employee.

~~(f)~~ The Work Status Report filed as required by subsection ~~(e)~~ [~~e~~] of this section shall be provided to the injured employee at the time of the examination by hand delivery or electronic transmission if the injured employee agrees to receive the report by electronic transmission, and shall be sent, not later than the end of the second working day after the date of examination, to the insurance carrier and the employer.

~~(g)~~ In addition to the requirements under subsection ~~(e)~~ [~~e~~], the treating doctor or delegated health care practitioner shall file the Work Status Report with the insurance carrier, employer, and injured employee within seven days of the day of receipt of:

(1) functional job descriptions from the employer listing available modified duty positions that the employer is able to offer the injured employee as provided by §129.6(a) of this title (relating to Bona Fide Offers of Employment); or

(2) a required medical examination doctor's Work Status Report that indicates that the injured employee can return to work with or without restrictions.

~~(h)~~~~(g)~~ Filing the Work Status Report as required by subsection (g) ~~[(f)]~~ of this section does not require a new examination of the injured employee.

~~(i)~~~~(h)~~ The doctor or delegated health care practitioner shall file the Work Status Report as follows:

(1) A report filed with the insurance carrier or its agent shall be filed by ~~facsimile or~~ electronic transmission;

(2) A report filed with the employer shall be filed by ~~facsimile or~~ electronic transmission if the doctor or delegated health care practitioner has been provided the employer's facsimile number or e-mail address; otherwise, the report shall be filed by personal delivery or mail; and

(3) A report filed with the injured employee shall be hand delivered to the injured employee or delivered by electronic transmission if the injured employee agrees to receive the report by electronic transmission, unless the report is being filed pursuant to subsection (g) ~~[(f)]~~ of this section and the doctor or delegated health care practitioner is not scheduled to see the injured employee by the due date to send the report. In this case, the doctor or delegated health care practitioner shall file the report with the injured employee by ~~[facsimile or]~~ electronic transmission if the doctor or delegated health care practitioner has been provided the injured employee's facsimile number or e-mail address; otherwise, the report shall be filed by mail.

(j)[(+)] Notwithstanding any other provision of this title, a doctor or delegated health care practitioner may bill for, and an insurance [a] carrier shall reimburse, filing a complete Work Status Report required under this section or for providing a subsequent copy of a Work Status Report which was previously filed because the insurance carrier, its agent, or the employer through its insurance carrier[~~7~~] asks for an extra copy. The amount of reimbursement shall be \$15. A doctor or delegated health care practitioner shall not bill in excess of \$15 and shall not bill or be entitled to reimbursement for a Work Status Report which is not reimbursable under this section. Doctors or delegated health care practitioners are not required to submit a copy of the report being billed for with the bill if the report was previously provided. Doctors or delegated health care practitioners billing for Work Status Reports as permitted by this section shall do so as follows:

(1) CPT code "99080" with modifier "73" shall be used when the doctor or delegated health care practitioner is billing for a report required under subsections (e)(1), (e)(2), and (g) [~~(d)(1), (d)(2), and (f)~~] of this section;

(2) CPT code "99080" with modifiers "73" and "RR" (for "requested report") shall be used when the doctor or delegated health care practitioner is billing for an additional report requested by or through the insurance carrier under subsection (e)(3) [~~(d)(3)~~] of this section; and

(3) CPT code "99080" with modifiers "73" and "EC" (for "extra copy") shall be used when the doctor or delegated health care practitioner is billing for an extra copy of a previously filed report requested by or through the insurance carrier.

~~(k)(f)~~ As provided in §126.6(g) [~~§126.6(f)~~] of this title (relating to Order for Required Medical Examinations), a doctor who conducts a required medical examination [~~(on anyone's behalf)~~] in which the doctor determines that the injured employee can return to work immediately with or without restrictions[;] shall file the Work Status Report required by this section, but shall do so in accordance with the requirements of §126.6(g) [~~§126.6(f)~~]

CERTIFICATION.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Issued at Austin, Texas, on April _____, 2018.

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Division of Workers' Compensation