

**SUBCHAPTER B. Claims Procedure for
Beneficiaries of Injured Employees
28 TAC §122.100**

1. INTRODUCTION. The Commissioner of Workers' Compensation (Commissioner), Texas Department of Insurance, Division of Workers' Compensation (Division) adopts amendments to §122.100 of this title (relating to Claim for Death Benefits). These amendments are adopted without changes to the proposed text published in the December 18, 2009 issue of the *Texas Register* (34 TexReg 9095). The public comment period ended on January 18, 2010. The Division did not receive a request for a public hearing.

2. REASONED JUSTIFICATION. These adopted amendments to §122.100 are necessary due to legislative amendments made by House Bill (HB) 1058, enacted by the 81st Legislature, Regular Session, effective September 1, 2009.

HB 1058 amended provisions in the Texas Workers' Compensation Act (Act) that apply to "eligible parents" and their entitlement to death benefits under the Act. These adopted amendments to §122.100 concern HB 1058's amendments to Labor Code §408.182 that change the legal standard an eligible parent must meet in order to file a death benefits claim after the one year filing deadline. The Division is publishing elsewhere in this issue of the *Texas Register* adopted amendments to §132.6 and §132.11 of this title (relating to Eligibility of Other Surviving Dependents and Eligible Parents To Receive Death

Benefits and Distribution of Death Benefits, respectively) that concern HB 1058's amendments to the definition of "eligible parent" and provisions governing the distribution of death benefits to eligible parents.

Prior to HB 1058's effective date of September 1, 2009, Labor Code §408.182(d-2) provided that the Commissioner may extend the one year time period an eligible parent has to file a death benefits claim only if the eligible parent submits proof satisfactory to the Commissioner of a compelling reason for the delay in filing the claim. HB 1058 amended Labor Code §408.182(d-2) by replacing this compelling reason standard with the good cause standard which is a standard used in various other contexts in the Act. This legislative amendment provides that an eligible parent's "[f]ailure to file a claim [for death benefits] in the time required bars the claim unless good cause exists for the failure to file a claim under this section."

Section 2 of HB 1058 provides that its amendments to Labor Code §408.182 apply only to a claim for death benefits that is based on a compensable injury that occurs on or after September 1, 2009. Thus, the application of the good cause standard is expressly prospective and will apply only in cases where an eligible parent's claim for death benefits is based on a compensable injury occurring on or after September 1, 2009. Section 2 of HB 1058 further provides that a claim based on a compensable injury that occurs before September 1, 2009 is governed by the law in effect on the date that the compensable injury occurred. Thus, the compelling reason standard will continue to apply to

compensable injuries occurring prior to September 1, 2009 but on or after September 1, 2007, the date House Bill 724 of the 80th Texas Legislature, Regular Session, added eligible parents to the Act as legal beneficiaries.

The adopted amendments to §122.100(e)(2) apply the good cause standard to an eligible parent whose death benefits claim is based on a compensable injury occurring on or after September 1, 2009. The adopted amendments to §122.100(e)(3) clarify that the compelling reason standard remains applicable to an eligible parent whose death benefits claim is based on a compensable injury occurring on or after September 1, 2007 but prior to September 1, 2009. These adopted amendments must be read in conjunction with the adopted amendments to §132.6 concerning the definition of "eligible parent."

3. HOW THE SECTION(S) WILL FUNCTION. The adopted amendments amend §122.100(e)(2) to state that failure to file a claim for death benefits within one year after the date of the employee's death shall bar the claim of a legal beneficiary, other than the subsequent injury fund, unless, except as provided by paragraph (3) of this subsection, good cause exists for failure to file the claim in a timely manner.

The adopted amendments amend §122.100(e)(3) to state that failure to file a claim for death benefits within one year after the date of the employee's death shall bar the claim of a legal beneficiary, other than the subsequent injury

fund, unless, for a legal beneficiary who is an eligible parent as defined by §132.6(e) of this title (relating to Eligibility of Other Surviving Dependents and Eligible Parents To Receive Death Benefits), the parent submits proof satisfactory to the Commissioner of Workers' Compensation of a compelling reason for the delay in filing the claim for death benefits.

4. SUMMARY OF COMMENTS AND AGENCY'S RESPONSE.

Comment: Two commenters support the rule as proposed.

Agency Response: The Division appreciates the supportive comments.

Comment: A commenter states that placing an arbitrary time limit to file a death benefits claim upon a person who is grieving from the loss of a loved one or who is a minor is morally wrong and unreasonable and is therefore bad law. This commenter also states that if no claim is filed, the insurer should be compelled to seek out the beneficiaries and in any case hold the benefit in reserve.

Agency Response: The one year filing deadline is a statutory requirement. The Division may not enact a rule that alters these statutory deadlines.

However, the Act and Division rules allow exceptions to this one year filing deadline. The Act and Division rules provide that status as a minor or incompetent justifies the filing of a death benefits claim after the one year deadline. Other legal beneficiaries, including eligible parents as provided by HB 1058 and these adopted amendments, may file a death benefits claim after the

one year deadline if good cause exists for the beneficiary's failure to file the claim timely. For eligible parents whose claim is based on a compensable injury occurring prior to September 1, 2009, a claim may be filed after the one year deadline if the parent establishes a compelling reason for the delay in filing the claim.

Section 132.17 of this title (relating to Denial, Dispute, and Payment of Death Benefits) already requires insurance carriers to conduct an investigation when a death is reported. This duty to conduct an investigation includes identifying potential legal beneficiaries. This rule also requires an insurance carrier to maintain documentation relating to its attempt to identify potential beneficiaries.

Finally, an insurance carrier must pay death benefits to a legal beneficiary in cases where the claim was filed after the filing deadline if the beneficiary filing the late claim is determined to be entitled to receive death benefits. This is true even if the insurance carrier has already paid the death benefits to the subsequent injury fund. In such cases, the insurance carrier will pay death benefits to the legal beneficiary who is later determined to be entitled to the benefits and the subsequent injury fund will reimburse the insurance carrier for the amount overpaid to the fund, in accordance with Labor Code §403.007 and Division rules.

Comment: A commenter states that the term "good cause" should replace "compelling reason" in §122.100(e)(3).

Agency Response: The Division disagrees. The purpose of adopted §122.100(e)(3) is to continue the applicability of the compelling reason standard to an eligible parent whose claim for death benefits is based on a compensable injury occurring on or after September 1, 2007 but prior to September 1, 2009. Adopted §122.100(e)(3) is consistent with Sections 2 and 3 of HB 1058.

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

For: Office of Injured Employee Counsel and Property Casualty Insurers Association of America

For with changes: Texas Mutual Insurance Company

Against: One individual

Neither for nor against, with recommended changes: None

6. STATUTORY AUTHORITY. These amendments are adopted under Labor Code §§409.007, 408.183, 408.182, 408.181, 402.061, and 402.00111.

Labor Code §409.007 provides that a person must file a claim for death benefits with the Division not later than the first anniversary of the date of the employee's death. Labor Code §408.183 provides that an eligible parent is entitled to receive death benefits until the earlier of the date the eligible parent dies or the date of the expiration of 104 weeks of death benefit payments. Labor

Code §408.182 requires death benefits to be paid to surviving eligible parents, as defined by that section, of the deceased if there is no eligible spouse, no eligible child, and no eligible grandchild, and there are no surviving dependents of the deceased employee who are parents, siblings, or grandparents of the deceased. Labor Code §408.182 also provides that the failure of an eligible parent to file a claim for death benefits in the time required bars the claim unless good cause exists for the failure to file a claim under this section. Labor Code §408.181 requires an insurance carrier to pay death benefits to the legal beneficiary if a compensable injury to the employee results in death. 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 §402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under Labor Code Title 5.

7. TEXT.

§122.100. Claim for Death Benefits

(a) In order for a legal beneficiary, other than the subsequent injury fund, to receive the benefits available as a consequence of the death of an employee which results from a compensable injury, a person shall file a written claim for compensation with the Division within one year after the date of the employee's death.

(b) The claim should be submitted to the Division either on paper or via electronic transmission, in the form, format, and manner prescribed by the Division, and should include the following:

(1) the claimant's name, address, telephone number (if any), social security number, and relationship to the deceased employee;

(2) the deceased employee's name, last address, social security number (if known) and workers' compensation claim number (if any); and

(3) other information, as follows:

(A) a description of the circumstances and nature of the injury (if known);

(B) the name and location of the employer at the time of the injury;

(C) the date of the compensable injury, and date of death;
and

(D) other known legal beneficiaries.

(c) A claimant shall file with the Division a copy of the deceased employee's death certificate and any additional documentation or other evidence that establishes that the claimant is a legal beneficiary of the deceased employee.

(1) If the claim is filed with the Division in paper format, the additional evidence regarding legal beneficiary status shall be filed at the same time as the claim.

(2) If the claim is filed via electronic transmission, the additional evidence regarding legal beneficiary status may be filed separately in paper format and sent either by mail, facsimile, or hand delivery.

(d) Each person must file a separate claim for death benefits, unless the claim expressly includes or is made on behalf of another person.

(e) Failure to file a claim for death benefits within one year after the date of the employee's death shall bar the claim of a legal beneficiary, other than the subsequent injury fund, unless:

(1) that legal beneficiary is a minor or otherwise legally incompetent;

(2) except as provided by paragraph (3) of this subsection, good cause exists for failure to file the claim in a timely manner; or

(3) for a legal beneficiary who is an eligible parent as defined by §132.6(e) of this title (relating to Eligibility of Other Surviving Dependents and Eligible Parents To Receive Death Benefits), the parent submits proof satisfactory to the Commissioner of Workers' Compensation of a compelling reason for the delay in filing the claim for death benefits.

CERTIFICATION. This agency hereby certifies that the adopted amendments have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas on _____, 2010.

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 §122.100 specified herein, concerning claims for death benefits, are adopted.

AND IT IS SO ORDERED

ROD BORDELON
COMMISSIONER OF WORKERS' COMPENSATION

ATTEST:

Dirk Johnson
General Counsel

COMMISSIONER'S ORDER NO.