

## CHAPTER VI FATALITY INVESTIGATIONS

- I) **General.** To the extent feasible, fatality investigations must be opened within one (1) working day from the date it is reported or the date the Division of Compliance is made aware of the occurrence.
- A) **Definitions.** The following definitions apply for this chapter.
- i) **Fatality.** Any death resulting from a work-related incident, including death resulting from a heart attack.
  - ii) **Next-of-Kin (NOK).** Immediate family member(s) or the person(s) listed as the emergency contact on the deceased's employment records. The NOK may designate another person(s) as the point of contact.
  - iii) **Reporting.** Notification to the agency within the required period.
- B) **No Fatality Investigation Planned.** When KY OSH does not investigate, supporting information, documentation, and a conclusion for not conducting an investigation must be provided in the casefile.
- II) **Action.**
- A) **Pre-Investigation Activities.** KY OSH fatality investigations are often the subject of scrutiny; it is imperative investigations are thorough, complete, and professional.
- i) **Supervisor.** The supervisor ensures necessary forms are completed and reports the event to the Director, Commissioner, Deputy Commissioner, Assistant Director, and OSH Federal-State Coordinator (FSC). The director or designee provides all pertinent information to the Secretary.
  - ii) **Preemption.** There may be situations when it is not clear regarding KY OSH authority to investigate. Follow the guidelines in Chapter IV.
    - (a) **General.** When KY OSH authority is uncertain, the CSHO opens the investigation at once.
      - (1) When the Director or designee cannot resolve an issue, all pertinent information is relayed to the Commissioner, Deputy Commissioner, and FSC, who consults with the Department of Workplace Standards Legal Division (DWSLD). Clarification is provided as soon as possible.
      - (2) When KY OSH previously determined that it does not have authority, the FSC is notified immediately.

- (b) If KY OSH jurisdiction is partial, an investigation is conducted. All apparent violations are noted including those where authority is not clear and the FSC is notified immediately.
- iii) Preliminary Investigation. Upon notification of an incident involving a fatality, KY OSH gathers as much information as possible. When possible, this is done immediately through discussion with the person reporting the fatality. When KY OSH receives knowledge of the incident through the media, or sources other than a representative of the employer, KY OSH contacts the employer as soon as possible to obtain additional information when appropriate. Such contact may be considered an opening conference.
- iv) Investigation Team. When an investigation team composed of experts in specific disciplines is necessary, the supervisor advises the Program Manager. The Program Manager determines the composition of the team and directs the investigation and may designate a team leader. The team proceeds promptly to the scene.
- v) Use of Expert Assistance. When the supervisor determines expert assistance is needed, he or she consults with the Program Manager.
- vi) CSHO Selection. The supervisor selects a CSHO and dispatches her / him to the site. The primary CSHO assigned to conduct an investigation must have completed required training.
- vii) Office of General Counsel. An attorney from the DWSLD is assigned to support the CSHO and the supervisor.
  - (a) The attorney's role is to consult and assist obtaining documents, considering standard(s) to cite if necessary, employee / employer relationships, multi-employer issues, etc. Although the attorneys are not overseeing or directing the investigation, they meet at least monthly with the CSHO and/or the supervisor to discuss the progress of the investigation and any other issues. The CSHO and supervisor discuss the findings with the assigned attorney prior to closing the investigation.
  - (b) When an employer or employee representative(s) attorney(s) is involved in the investigation, the CSHO may coordinate document requests and interviews through the employer or employee representative(s) attorney. When issues with the employer or employee representative(s) attorney arise, the CSHO and supervisor refer the employer or employee representative(s) attorney to the assigned DWSLD attorney. A DWSLD attorney must attend the closing and informal conferences when the employer or employee representative(s) attorney attends.
  - (c) A copy of all written communication between Department of Workplace Standards staff and DWSLD attorney(s) are included in the casefile.
- viii) Other Agency. When another agency participates in the investigation, the Director, Commissioner, Deputy Commissioner, Assistant Director, and FSC must be notified. The

Program Manager and supervisor ensures the CSHO and/or team members are fully instructed in the relationship with the other agency(s) and area(s) of responsibility.

- B) **Investigation Procedures.** Every reasonable effort must be made to determine the cause of the incident and if a violation(s) of a safety and health standard(s), regulation(s), or KRS 338.031 occurred.
- i) Scope. Fatality investigations must include a complete evaluation of the circumstances of the incident. The CSHO must use all reasonable resources to thoroughly investigate the incident, and the cause of the fatality must be stated in the Narrative. When the cause of the fatality is not apparent and cannot be determined, the Narrative must document why the cause of the fatality was not determined.
  - ii) Comprehensive Investigation. Depending on the circumstances surrounding the incident, it may be necessary to conduct a comprehensive investigation, before, concurrent with, or after the fatality investigation. If other areas or operations at the site have hazards similar to those that caused the incident, they must be brought to the employer's and employee representative's attention immediately.
  - iii) Abbreviated Opening Conference. The CSHO may reduce time spent in the opening conference by limiting remarks to the bare essentials of CSHO identification, the purpose of the visit, and the request for an escort by employee and employer representative(s). The CSHO must inform the employer that a more extensive discussion of other topics, including a records review, will be conducted.
  - iv) Interview Procedures.
    - (a) As early as possible, the CSHO must identify and interview **all** persons with knowledge of the incident, such as, but not limited to, employees, employee and employer representative(s), first responders, police officers, medical responders, and bystanders.
    - (b) The CSHO must conduct employee interviews privately and advise individuals of discrimination protections.
- C) **Next-of-Kin.** As soon as practicable after opening the investigation, the CSHO compiles a list of NOK names and contact information. The CSHO contacts the NOK as soon as possible. This gives the CSHO the opportunity to establish rapport with the NOK and communicate the incident is being investigated. Care must be taken to ensure sensitivity and tact are exercised during all communications and correspondence with the NOK. The CSHO must document in the casefile all communication and attempted communication with the NOK.
- i) When NOK cannot be determined through employment records or interviews, the CSHO must make an effort to identify NOK through a search of police records, hospital admission records, coroner's records, newspapers, and any other available sources. When the search does not identify a NOK, the casefile must include documentation to reflect the search.

**NOTE.** Contact with the NOK requires professional judgment. In some situations, procedures may not be followed exactly. For instance, in some small businesses, the employer, owner, or supervisor may be a relative of the deceased. In such circumstances, NOK correspondence may need to be edited.

- (a) The CSHO contacts the NOK prior to the initial notification letter being sent to the NOK. The CSHO requests work-related information concerning the fatality and encourages the NOK to contact the CSHO with any additional information.
- (b) When the NOK does not want to be involved, the CSHO documents the NOK's request in the casefile.
- (c) The CSHO ensures the following is explained during initial communication with the NOK:
  - (1) KY OSH inspects the worksite(s) to determine if a violation occurred;
  - (2) Investigation scope may be comprehensive or limited to the incident;
  - (3) The investigation may take up to six (6) months;
  - (4) When KY OSH determines the employer violated a safety or health standard(s), regulation(s), or KRS 338.031, the agency may issue citations and penalties;
  - (5) Releasable portions of the casefile will be made available free of charge to the NOK; and
  - (6) At any time during the investigation, the NOK may contact KY OSH to inquire about the status of the case or to ask questions.
- (d) Following initial personal contact, the CSHO must send an Initial Next-of-Kin Letter to the NOK within five (5) working days. When the CSHO cannot make personal contact with the NOK, an edited Initial Next-of-Kin Letter may be sent to the NOK. A copy of the letter must be retained in the casefile and the date the Initial Next-of-Kin Letter was sent must be entered into the casefile. The minimum contents of the initial contact letter are:
  - (1) The purpose and scope of the investigation;
  - (2) A request for information relevant to the investigation including an offer to meet and discuss information the NOK may have; and
  - (3) A statement offering information such as:
    - (a) Being informed of investigation milestones;

- (b) The offer to answer questions; and
- (c) The releasable portions of the casefile will be made available free of charge to the NOK.
- (e) Follow-up communications are vital. These communications allow the CSHO to provide updates on the status of the investigation and provide the NOK an opportunity to ask questions. However, the CSHO may not divulge privileged information such as the name of potential witnesses or discussions with cabinet legal personnel. Follow-up communication with the NOK should occur periodically until the investigation is complete and the findings are communicated to the NOK.
- (f) KY OSH will exchange investigation updates including, at a minimum, the investigation findings letter, citations, penalties, informal conference process, and contest process.
- (g) After the closing conference, the CSHO must contact the NOK to explain the findings and address questions. When information changes, the NOK must be updated.
- (h) When the CSHO cannot contact the NOK, the CSHO must document in the casefile attempts to contact the NOK.
- (i) *No Proposed Citations.* When citations are not proposed, the CSHO must explain the findings of the investigation to the NOK. The CSHO must be prepared to discuss and explain:
  - (1) Citations are not issued solely because there was a fatality.
  - (2) The CSHO inspected the worksite(s) to determine if a violation(s) of a safety or health standard(s), regulation(s), or KRS 338.031 occurred.
  - (3) The investigation did not substantiate a violation(s).
  - (4) Releasable portions of the casefile are available free of charge to the NOK through an open records request to the DWSLD.
  - (5) Within five (5) working days of closing the case, the Director sends a case closure letter to the NOK. The letter must contain a copy of the narrative.
  - (6) When the CSHO cannot contact the NOK, the CSHO must document in the casefile attempts to contact the NOK.
- (j) *Proposed Citations.* After the closing conference and before issuance of a citation(s), the CSHO contacts the NOK to explain the alleged violation(s), proposed penalty(s), reduction factors, violation classification, abatement requirements, informal conference, and contest procedure. The CSHO explains how to make an open records request and that releasable portions of the casefile are made available free of charge to the NOK.

- (k) The CSHO explains that communications between KY OSH and the NOK will continue until the case becomes a final order of the KY OSH Review Commission.

**NOTE.** The CSHO should emphasize that civil penalties are established in KRS 338.991.

- (l) KY OSH sends the Citations Issued Next-of-Kin Letter to the NOK including a copy of the Citation and Notification of Penalty as well as a copy of the Narrative.
  - (m) Only the Commissioner or designee can make changes to the citation and penalty after issuance. When a supervisor recommends the deletion of a citation, he / she contacts the Director to discuss the recommendation. A written memorandum of the recommendation and decision must be included in the casefile.
  - (n) After an informal conference, the Program Manager must send the NOK a letter detailing changes in the citation(s), penalty(s), or abatement date(s) as the result of the informal conference.
  - (o) Once an employer files a notice of contest, only the Commissioner has the authority to make changes in the citation(s) and penalty(s).
  - (p) Within five (5) days of assignment, the attorney assigned to litigate a fatality case sends the NOK a letter notifying him / her the case was referred to the DWSLD, introducing himself / herself, and asking the NOK to contact the attorney with questions regarding the litigation process.
  - (q) The attorney assigned to prosecute the case notifies the NOK by letter informing him / her of the date, time, and location of any administrative hearing.
  - (r) When the case is closed in the DWSLD, the assigned attorney sends the NOK a letter informing him / her the case concluded. The letter includes a recitation of the settlement or final decision, if the case went to a hearing, as well as copies of pertinent documents, such as the Order of Settlement and Settlement Agreement, hearing officer's recommended order, or the decision and order of the commission.
- ii) The following letters are normally sent to the NOK.
- (a) *Initial Next-of-Kin Letter.* Sent by the CSHO within five (5) working days after initial contact with NOK.
  - (b) *No Citations Next-of-Kin Letter.* Sent by the Director or designee within five (5) working days of case closure when no citations are recommended. This letter is the final Next-of-Kin Letter.
  - (c) *Citations Issued Next-of-Kin Letter.* Sent by the Director or designee within five (5) working days of citation(s) issuance.

- (d) *Informal Conference Next-of-Kin Letter*. Sent by the Director or designee within five (5) working days of informal conference conclusion explaining any resolution or lack thereof.
  - (e) *Next-of-Kin Contest Letter*. Sent by the Director or designee within five (5) working days of when a contest is received.
  - (f) *Attorney Assigned Next-of-Kin Letter*. Sent by the DWSLD attorney within five (5) working days of assignment.
  - (g) *Next-of-Kin Hearing Letter*. Sent by the DWSLD attorney within five (5) working days upon scheduling of a hearing.
  - (h) *Final Next-of-Kin Attorney Letter*. Sent by the DWSLD attorney when the casefile is returned to the Division of OSH Compliance.
  - (i) *Initial Follow-up Next-of-Kin Letter*. Sent by the CSHO within five (5) working days after the opening of a follow-up investigation and initial contact with the NOK for the follow-up investigation. The letters above must be sent again, as applicable, for the follow-up investigation to inform the NOK of the findings.
  - (j) *Final case closure letter*. Sent by the Director within five (5) working days of case closure.
- iii) When a NOK letter is returned as undeliverable, the letter and envelope must be date stamped and included in the casefile. The address on returned NOK letters must be verified for accuracy. When accurate, KY OSH will call the NOK to confirm the address. All attempts to obtain the correct mailing address must be documented in the casefile.

**NOTE.** In some circumstances, it may not be appropriate to follow these exact procedures; i.e., in the case of a small business, the owner or supervisor may be a relative of the deceased. Modify the letter to take special circumstances into account or do not send the letter, as appropriate. Any deviation from these procedures must be approved by the next line supervisor and the reason for deviating documented in the casefile.

#### **D) Special Situations.**

- i) Agency Cooperation. When other agencies are involved, the CSHO or the team leader works with the other agencies as closely as possible to:
  - (a) Obtain all available information; and
  - (b) Assist in the investigation.
- ii) Rescue Operations. KY OSH has no authority to direct rescue operations and should not attempt to do so. KY OSH has authority to monitor and inspect the working conditions of

employees engaged in rescue operations. When the CSHO is aware the employer intends to use a rescue procedure that may be in violation of a standard, regulation, or KRS 338.031 and less hazardous procedures are available, the employer must be advised.

- iii) Emergency Situations. Emergencies may necessitate immediate rescue work, and any loss of time may increase injuries or fatalities.
  - (a) As long as the potential exists to save a life, the employer or responding agency(s) will not normally receive citations during emergency situations.
  - (b) When the potential to save a life no longer exists, citations may be issued.
- iv) Multi-Employer Worksites. The CSHO documents the contractual and actual relationship between employers at the worksite. The CSHO obtains copies of contracts.
- v) Public Information Policy. The CSHO does not respond to media inquiries. All media inquiries must be referred to the cabinet's media liaison or public information contact.

### III) **Criminal Prosecution.**

- i) The Director consults with the Commissioner or designee and the DWSLD when considering a case for criminal referral.
- ii) Criminal referrals are normally made to the Attorney General and local prosecutor. Referrals are generally limited to fatality and fatality-related cases with a willful serious, failure to abate, or repeat serious violation directly related to a fatality. Other cases may be recommended for referral as the Commissioner or designee deem appropriate.
- iii) The DWSLD notifies the Commissioner or designee in writing if the DWSLD identifies a case that merits consideration for referral.
- iv) The Commissioner or designee consults with the DWSLD when the DWSLD recommends a case for criminal prosecution to the Commissioner or designee.
- v) The DWSLD drafts a letter to the Attorney General and local prosecutor recommending criminal prosecution. The letter is reviewed and approved by the Commissioner or designee.
- vi) The Commissioner or designee makes the final determination and referral.
- vii) The Commissioner or designee generally refers a case to the Attorney General and local prosecutor for criminal prosecution within thirty (30) days of citation issuance or other appropriate time.
- viii) In the event of a referral to the Attorney General and local prosecutor, and at the appropriate time, the Commissioner or designee notifies the next-of-kin in writing of the referral.

ix) CSHOs can bring the issue of a potential criminal referral to the attention of her / his supervisor at any time during the inspection and review process. The supervisor forwards the information to the Program Manager who in turn forwards the information to the Director.