

FLAHIVE, OGDEN & LATSON

ADVISORY NO. 25

TOPIC: CHECKLIST OF DEFENSES FOR NOTICE OF REFUSALS

Article 8308, Section 5.21 requires that the TWCC 21, Notice of Refusal, "specify the grounds for refusal." The statute specifically provides that the grounds specified in the notice constitute the only basis for the insurance carrier's defense on the issue of compensability. Unless the injury itself is in question, a Notice of Refusal is not required. Arguably, issues of extent and duration of disability and impairment would not require a Notice of Refusal.

Where a Notice of Refusal is required, we must specify the "grounds." Rule 124.6(a)(9) requires "a full and complete statement of the grounds." It does not require a list of all of the evidence that we have in our possession supporting the defense.

At present, many Notice of Refusals simply recite some of the factual bases and never recite the actual grounds for the refusal. It may be inadequate to state that the accident was unwitnessed or that the employee did not report the accident until seven days later. Neither of those particularize a ground for refusal. These statements are evidence of a defense or ground for refusal that the employee did not get hurt on the job.

Accordingly, it would be a good idea to state the precise grounds or grounds of refusal. It may be unnecessary to list all of the facts that support it. If time permits, it certainly does not hurt to add those and the Commission may, indeed, interpret this rule and statute to require that we list all of the evidence. At present, there is no such interpretation that requires this.

The following is a non-exclusive checklist of many of the grounds of refusal that should be expressly stated when applicable:

1. The above named employer was not an insured on the date alleged.
2. The claimant was not employed by the insured on the date of the alleged injury.
May add specific defense where applicable:
 - a) Claimant was an independent contractor.
 - b) Claimant was a borrowed servant.
 - c) Claimant was terminated prior to injury.
 - d) Claimant did not work on the date in question.

- e) (For occupational diseases) The claimant was not employed by the employer on the date of last injurious exposure to the hazards of the disease. Section 5.01(d).
3. The claimant was not injured on the job. (Remember, you may wish to recite evidentiary issues such as no witness, inconsistent history of injury, claimant not credible witness, delay in reporting, spite claim, no inconsistent with injury, etc.) As a part of a "no injury" defense, may add specific defense where applicable:
- a) Any disability or impairment was solely caused by non-occupational conditions.
 - b) The employee's disability/impairment is solely caused by intervening injuries or illnesses.
 - c) The claimant's disability/impairment, if occupational, resulted from repetitious mental or emotional stress.
 - d) This is a heart attack case that does not meet the three part test for compensability under Section 4.15.
4. The alleged injury did not occur in the course and scope of the claimant's employment with the insured. May add specific defense where applicable:
- a) Claimant was traveling to and from work.
 - b) Claimant was involved in a personal mission at the time of the alleged accident.
 - c) Claimant was intoxicated at the time of the alleged injury.
 - d) Alleged injury was caused by the claimant's willful intention to injure himself.
 - e) The injury was caused during the claimant's unlawful attempt to injure another.
 - f) The alleged injury was caused by horseplay.
 - g) The injury resulted because of a third party's personal attack on the claimant and not because of the employment.
 - h) The alleged injury occurred in an off-duty recreational activity unassociated with the claimant's work.

- i) If a mental or emotional injury is demonstrated, it resulted from a legitimate personal action and would not be compensable.
5. The employer was not notified within thirty days. Section 5.01.
 6. No claim was filed with the Commission within one year from the date of injury.
 7. The following jurisdictional issues are probably not issues of "compensability". A TWCC 21 is probably not required, although there is certainly no harm in filing the TWCC and declaring the following defenses to jurisdiction:
 - a) Claimant elected to recover workers' compensation under the law of another jurisdiction.
 - b) Claimant was not a Texas employee.
 - c) Claimant was not hired or recruited in Texas an/or claimant was not injured within one year of leaving the state.
 - d) Claimant elected to retain common law rights and is not covered under workers' compensation. Section 3.08(b).

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