

ADVISORY NO. 137

AVOIDING ADMINISTRATIVE VIOLATIONS

_____As you are well aware, the Commission has become much more aggressive in enforcing administrative violations. One carrier has received proposed fines in the amount of \$450,000. These fines are unacceptable to you and to upper management.

The primary focus of the Texas Workers' Compensation Commission involves the timely initiation of benefits, timely payment of benefits from week to week, and improper comp rates.

INITIATION

In all cases of initial payment, remember that your time begins to run from the date of first written notification. From this date, you have seven (7) days in which to complete your investigation and file a Notice of Refusal (TWCC-21). The Texas Workers' Compensation Commission is currently not capturing administrative violations on Notices of Refusal that are dated on the seventh day, whether filed on the same day or not. The rules require actual filing with the TWCC. We accordingly recommend that it be actually FILED by the seventh day following written notification.

You may mail any document directly to the Commission or you may mail two copies of any document to us and we will file and secure a date-stamp on the extra copy and return a file-marked copy to you for your records. We cannot maintain a copy in our office since we do not set up a file on routine mail and the Commission number is rarely available at the time that we receive initial notification. Your date-stamped copy would operate as an acknowledgment of your timely filing. If you have waited until the last day, we strongly recommend that these be faxed to our office at fax number 512-477-4996. We will then hand carry them to the Commission and have them hand filed and file stamped on that day.

We will NOT retain a copy of this filing for your documentation. We will not be able to provide any service other than the same day delivery of any copy faxed to us for filing and received by our fax by 4:00 p.m. on the day on which it is to be filed.

If you cannot file a Notice of Refusal within seven days, you MUST initiate the payment of income benefits within fourteen (14) days of first written notice. Even if you have a perfectly valid and absolutely provable defense (i.e., you receive a blood alcohol test showing .30% blood alcohol at the time of the accident), you must pay weekly compensation through the date you file the Notice of Refusal. In the event of a defense discovered on the eleventh day, pay at least four (4) days of benefits (we recommend a full week), file your A-1, A-2, and on the same TWCC-21 complete the Notice of Refusal, setting forth all defenses you can support based upon your investigation. If the liability defense is clearly established by your investigation, you do not need

a Benefit Review Conference to suspend benefits. If it is a gray area judgment call, continue benefits and request an expedited BRC to obtain an interlocutory order to suspend benefits.

IF YOU HAVE A SINGLE DEFENSE, AND YOU SUSPECT THAT OTHER DEFENSES MAY BE APPLICABLE, AND YOU ARE UNWILLING TO WAIVE THESE DEFENSES AND RELY ON A SINGLE THEORY, YOU MUST CONTINUE THE PAYMENT OF TEMPORARY INCOME BENEFITS UNTIL ALL DEFENSES ARE DEVELOPED, BASED UPON THE INVESTIGATION, AND THEN FILE THE NOTICE OF REFUSAL. REMEMBER THAT YOU CANNOT WAIT MORE THAN SIXTY (60) DAYS FROM THE DATE OF FIRST WRITTEN NOTIFICATION TO FILE THIS NOTICE.

Many carriers are trapped by failing to include split time in calculating the first benefit check. If the employee loses only one day, returns to work, and begins losing time two months later, we must pick up the first day of lost time in calculating the seven days of the first week of benefits. Failure to include that day results in the failure to timely pay benefits, and this may be discovered years later (resulting in hundreds of days for which we failed or refused to pay benefits that were due). Another problem arises when the injury occurs on a Friday, the employee is not scheduled to work on the weekend, and cannot return to work on the following Monday. Where the TWCC 1 indicates that lost time began on Friday, or when the injury is so serious that it is obvious that the employee would have not been able to work on the following Saturday and/or Sunday (whether he was scheduled or not), begin calculating the benefits on the day after the injury, even if it is a weekend. If, however, the initial report indicates that the employee's lost time began on the following Monday, and the injury is not so severe as to compel a belief that the employee would have been unable to work, calculate the first day of lost time as the following Monday. If you do not want to make a judgment call, always start the benefits on the first day following the injury.

Another trap is the delayed lost time case. We are currently trying to convince the TWCC that we have to resume benefits (or first pay if never paid initially) within seven days of subsequent notification that an employee is losing time from work. ANY NOTICE to you, written or otherwise, that fairly informs you of an employee's inability to work that may be related to a compensable injury will trigger the duty to investigate and/or pay within these guidelines. Accordingly, you must have an in-office procedure to immediately consolidate this information to the file, review it, and determine if it affects your obligation to pay benefits within seven days.

COMPUTATION

Remember that your first payment must be based on either the wage statement or on the last pay check. If you do not have a wage statement, obtain the gross amount of the last pay check from the E-1 or by calling the employer, document that in your file, and begin the payment of temporary income benefits based upon that "investigation." Follow up with the employer to expedite the wage statement and, upon receipt of the wage statement, adjust the temporary income benefit rate. DOCUMENT THE INFORMATION UPON WHICH YOU BEGIN THE PAYMENT OF TEMPORARY INCOME BENEFITS. THIS MUST BE BASED ON THE LAST PAY CHECK.

FROM WEEK TO WEEK

If you begin the payment of benefits, you must then ensure that benefits are timely paid from week to week. We have previously excused the failure to timely pay the waiting period. This was based upon a technical defense. The Commission has refused to recognize that defense and we now have to litigate this issue. Until it is established, assume that all waiting periods must be timely paid and your first and fourth checks must be simultaneously issued by the twenty-eighth day of lost time.

Continue to pay benefits from week to week as they accrue. If your records document that a check due on the 22nd of the month was actually mailed on the 23rd of the month, and if that file is audited, you may receive an administrative violation with a fine in the amount of \$5,000.00 for that one day. In negotiations, or upon trial, we may be able to significantly reduce that figure. However, you will nevertheless be exposed for up to \$5,000.00 for a single day's delay.

To ensure that weekly benefits are timely paid, consider advance payment. Do NOT prepay compensation by a full week. You do not want to overreact and pay benefits you do not owe. However, unless you have some reason otherwise (a good faith belief that the employee is about to be released or about to return to work), we recommend that you pay benefits three days in advance. For a compensative period ending on the 22nd of the month, we recommend that you establish a payment date on the 19th of the month. The next payment due on the 29th will be issued on the 26th, etc. Thus, even if there is a delay, and the delay is no more than three days, you still will not have committed an administrative violation.

Managers should be particularly attuned to holidays. Many of the administrative violations result from extended holidays in which the office is closed and payments cannot be made. If this cannot be remedied by a software solution, for each holiday that combines with a weekend or in which there will be an extended period when your office is closed, we recommend that you manually adjust your payment diary so that the checks are issued in advance and not after your return.

Remember that impairment income benefits must be paid within five (5) days of the receipt of the written documentation certifying maximum medical improvement or statutory MMI. If benefits are continuing from week to week, it is permissible to "re designate" the continued payment of the temporary income benefits as impairment income benefits, and file the appropriate A-1 A-2s, even after the date that the first impairment income benefit check is due. The important thing is to continue to pay the benefits on a timely basis and the paperwork can follow. Similarly, supplemental income benefits must be paid within seven (7) days of the receipt of the TWCC-52 or the ending of the impairment income benefit payments, whichever is later. Subsequent checks must be paid on or before the thirty-seventh (37th) day and sixty-seventh (67th) day, and so forth.

You have up to ten (10) days to file a request for Benefit Review Conference disputing the obligation to pay supplemental income benefits. If you are delayed past the seven days, but

are within ten, and have a reasonable basis to dispute the payment of supplemental income benefits, file a request for a BRC challenging the obligation to pay SIBs. The Commission does not require that we pay SIBs during dispute resolution.

SUSPENSION

Do NOT suspend the payment of benefits absent a documented basis for the suspension. There is no specific authority that either permits or prohibits the suspension of benefits based upon a verbal medical release. However, this should be avoided except in extraordinary situations. Obtain documentation of the basis for your suspension and then file your A-2. Remember that you must file your A-2s within ten (10) days of suspension of benefits.

We recommend that this advisory be duplicated and circulated to each of your adjusters or incorporated into a training program that will reinforce the importance of these practices throughout your organization.