ADVISORY NO. 215

###

TOPIC: LEGISLATURE PASSES WORKERS' COMPENSATION CHANGES DEFINITION OF STATUTORY MMI OIL AND GAS INDEPENDENT CONTRACTORS DEFINED

The authors of the 1989 Act knew that some provisions of the law would have to be "fine tuned" as time passed, and observations could be made about how the law was implemented. The Sunset process in 1995 helped alleviate some of the problems. The Legislature evidently believed that additional problems remain that require changes to the law. In the final few days of the 1997 Legislative session, the House and Senate passed a number of changes to the workers' compensation system. Despite a number of proposals, however, the most controversial of the bills were left dead in a House or Senate Committee. One bill, HB 3139, dealing with confidentiality of claim file materials passed both houses, but was left pending in Conference Committee. Of the bills that passed, the ones that will most affect day to day claims handling are described below.

The most sweeping of the bills is HB 3522, signed by the Governor on July 2, 1997, which amends eight sections of the Texas Labor Code that relate to the administration and enforcement of the workers' compensation law by the Texas Workers' Compensation Commission (TWCC). Among other things, HB 3522 seeks to rectify a recent interpretation of the statute providing situations under which lifetime income benefits (LIBS) are available. Under the current interpretations by the Appeals Panel, a claimant who suffers an injury to his brain, but not his skull, is not entitled to LIBS, even where such injury results in insanity or imbecility. HB 3522 removes the reference to skull, and provides that LIBS are available to a claimant who suffers a physically traumatic injury to the brain resulting in incurable insanity or imbecility. The Senate added the provision requiring a physically traumatic injury by amendment, thereby eliminating the problem of mental trauma injuries that do not result from physical impact. This provision only affects claims for workers' compensation benefits based on a compensable injury that occurs on or after September 1, 1997.

The most important change made by HB 3522, however, is a change in the definition of maximum medical improvement. The change authorizes the commission, on application by either the claimant or the insurance carrier, to extend the 104-week period described by Section 401.011(30)(B) if the employee has had spinal surgery, or has been approved for spinal surgery under Section 408.026 and commission rules, within 12 weeks before the expiration of the 104-week period. However, the bill requires that the order to extend the statutory period for maximum medical improvement must be to a date certain, based on medical evidence presented to the commission. Either the claimant or the insurance carrier may dispute an application for extension made under this section. It is not clear how this provision will work, although the TWCC is required to pass implementing rules. In any case, it does not appear that there will be any litigation regarding this provision for a while as, according to the implementing legislation,

this provision only affects claims for workers' compensation benefits based on a compensable injury that occurs on or after January 1, 1998. A claim based on a compensable injury that occurs before that date is governed by the law in effect on the date that the compensable injury occurred, and the former law is continued in effect for that purpose.

For breaching a settlement agreement that establishes a compliance plan, HB 3522 provides an administrative violation punishable by a Class A administrative violation ($10,000). A previous provision implementing a $50,000 violation was scrapped. In determining the amount of the penalty, the TWCC is required to consider the total volume of claims handled by the insurance carrier. This provision applies only to a violation that occurs on or after September 1, 1997. A violation that occurs before that date is governed by the law in effect on the date the violation occurred, and the former law is continued for that purpose.

HB 3522 also amends various sections of the Labor Code to allow the annual maintenance tax assessed on both carriers and certified self-insurers to be used to support the prosecution of workers' compensation insurance fraud in the state. Previous provisions designating a separate funding for this provision were deleted. Therefore, it is not clear that the change is anything more than a codification of what is already being done.

Regarding internal administration of the TWCC, HB 3522 now requires a person, to be eligible for designation as an ombudsman, to have at least one year, rather than three years, of demonstrated experience in the field of workers' compensation. The bill also provides specific reimbursement to commission members for attending and preparing for commission meetings, including expenses.

Another bill, SB 445, signed by the Governor on May 15, 1997, seeks to rectify recent interpretations of the 1989 Act by the Appeals Panel dealing with sole proprietors without employees in the oil and gas industry who perform services on wells. Under these decisions, the operator of the well is being required to provide workers' compensation insurance coverage for the hired individual, despite the fact that the operator does not pay employment taxes or withhold FICA or federal income taxes for that individual since that individual is not the operator's employee. The bill clarifies that an oil or gas well worker or service provider who is an independent contractor with no employees shall be treated the same as independent contractors with employees, and is not entitled to coverage under the operator's workers' compensation policy, unless agreed to by both parties. This provision becomes effective September 1, 1997, and is apparently retroactive.

The 1989 Act currently allows insurance carriers engaged in a workers' compensation lawsuit to settle their case and then claim that the settlement agreement reverses or modifies an appeals panel decision awarding benefits. Carriers have also used judgments based on default or on an agreement of the parties to accomplish the same end. Additionally, carriers sometimes attempt to use these settlement agreements and judgments to seek reimbursement through the Subsequent Injury Fund for any benefits they may have provided to a claimant. HB 3137 prevents reimbursement from the Subsequent Injury Fund in either of these situations. It also applies some of the Section 410.256 requirements with regard to court approval of settlements to

a new Section 410.257 on court approval of judgments. Finally, it would make any judgment entered or settlement approved without complying with the law void. The intent is to place the burden of compliance with these provisions on the litigating parties rather than the TWCC. The bill also requires that the party who initiated a judicial proceeding must file any proposed judgment (including a default judgment) or settlement with the executive director of the TWCC not later than the 30th day before the date on which the court is scheduled to enter the judgment or approve the settlement. This provision applies only to a proceeding initiated on or after September 1, 1997. Proceedings initiated before that date are not affected.

Under current law, the carrier may only request a RME once in a 180-day period. HB 3161 provides that the TWCC may adopt rules requiring a claimant to submit to more than one RME in a 180-day period under specific circumstances, including to determine whether there has been a change in the claimant's condition, whether it is necessary to change the claimant's diagnosis, and whether treatment should be extended to another body part. However, unreasonably requesting RMEs would subject the carrier to a Class B administrative violation. Interestingly, this provision is prospective in nature, and only applies to dates of injury on or after September 1, 1997.

One other major change is to the wrongful discrimination chapter of the Labor Code. Currently, if a company chooses to terminate or otherwise discriminate against an employee who has filed a workers' compensation claim, the employee has to prove that the employer's motivation for termination was linked to the worker's historical compensation claim. After several amendments, and a Conference Committee, H.B. 768 was passed, and now requires the claimant to establish that an action of the employee protected under Section 451.001 was a substantial cause of the discrimination. Previous versions of the bill also limited the damages that could be claimed by the employee to economic damages not including damages for pain and suffering, mental anguish, loss associated with disfigurement, or loss of companionship or consortium. This provision was stripped by the Conference Committee. This Act applies only to a cause of action that accrues on or after September 1, 1997.

HB 3197 amends the Insurance Code to provide for regulation by the department of utilization review agents who conduct utilization reviews under the workers' compensation statute. Currently, many workers' compensation insurance carriers contract with utilization review agents to make determinations on the medical necessity of care delivered to patients. Utilization review agents are regulated under general health insurance policies by the Texas Department of Insurance. However, there are no provisions under the Labor Code that provide for regulation of utilization

review agents performing reviews of workers' compensation medical cases. This provision only applies to a utilization review conducted on or after January 1, 1998.

HB 3202 makes nonsubstantive changes to the Insurance Code to correct outdated references and to eliminate conflicts in the statute. S.B. 1, enacted in 1989, either inadvertently deleted or misnamed several subsection titles, and H.B. 62, enacted in 1991, renamed the State Board of Insurance the Texas Department of Insurance. Additionally, in 1995, the commissioner of insurance was allowed to designate a statistical agent in one part of the code, but changes were not made to another part of the code to reflect the amendment.

H.B. 3279 allows the TWCC to recover the costs of providing editing and redacting services required by statutory mandates prior to making requested copies or providing access to information in commission files. In addition to requiring that the fee be reasonable, the bill require the charge to conform to the rules of the General Services Commission that prescribe the method for computing the charge for copies. This provision is effective immediately.