ADVISORY NO. 260

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TOPIC: UNILATERAL SUSPENSION OF TIBS PURSUANT TO RME (A POST LEGISLATIVE UPDATE)

This Advisory supercedes Advisory Nos. 250 and 257. Both Advisories should be annotated to refer to Advisory Number 260.

The initial RME Advisory of January 15, 1999, was precipitated by the decision of the State Office of Administrative Hearings involving Cigna Insurance Company. That decision very firmly rejected the attempt of the Texas Workers' Compensation Commission to assess an administrative violation against Cigna because of its suspension of benefits based upon the opinion of an RME physician. This case followed Employer's Casualty Company v. Maxmiliano Davis, a District Court decision from the 134th Judicial District Court of Dallas County, granting summary judgment to Employer's Casualty on an appeal of this same issue.

Because the statute provides that MMI may be certified by "a doctor" and does not limit the certification to the report of a treating or designated doctor, absent a specific TWCC rule to the contrary, both SOAH and a District Court have determined that a carrier may suspend benefits upon the certification of MMI by any doctor, including RME doctors. SOAH acknowledged that the TWCC may pass a rule that limits or restricts this. At the time of our advisory on January 15, 1999, the Commissioners unanimously instructed the staff to prepare a rule that would limit the right of carriers to suspend benefits, and provide for a right of review to employees. That rule, although drafted, was never proposed by the Commissioners.

More recently, the Legislature has passed **House Bill No. 2510**. That House Bill outlines a protocol for suspension of TIBs. The statute will not be effective until January 1, 2000.

Notwithstanding the clear statutory language, the decisions of a District Court and a State Office of Administrative Hearings, and notwithstanding the legislative proposal that will be effective in six months, the stated policy of the Commission remains unchanged. Compliance & Practices has adopted the position that carriers suspending benefits based upon a carrier's RME physician will be subject to administrative violation and will be referred for violation. Our firm has confirmed this policy of Compliance & Practices as recently as June 4th. This position of Compliance & Practices has been consistent since the January 27, 1999 press release of the Commission responding to the Cigna decision.

Notwithstanding this stated policy of the Compliance & Practices Division, we are informed that several field offices of the Texas Workers' Compensation Commission are simply referring RME suspension cases to a designated doctor and refusing to set Benefit Review Conferences on these issues. This indicates acquiescence on the part of those disability review officers to the suspension of benefits by carriers. Moreover, an internal memorandum of the Commission acknowledges that TWCC will have a difficult time assessing administrative violations in these cases. And finally, and perhaps most importantly, notwithstanding the Cigna decision, and notwithstanding the early interest on the part of the Commissioners in developing a rule in response to the SOAH decision, as of the date of the writing of this Advisory, TWCC has neither proposed nor adopted any specific rule that would modify the Administrative Law Judge's determination that MMI may be certified by any doctor, as opposed to a treating doctor or designated doctor only.

For all of these reasons, it is appropriate for carriers to now review internal policies about suspension of benefits. The industry as a whole seems to be in the process of conducting this review.

The conservative approach is to continue to observe the stated policy of Compliance & Practices until expressly withdrawn or modified. Carriers with a low tolerance for litigation costs attendant to the appeal of administrative violations through the State Office of Administrative Hearings would be well advised to defer any policy change at this time. On the other hand, assuming a high tolerance for these costs, a carrier may consider the much more aggressive strategy of immediate suspension. A choice to suspend should be defensible for the reasons outlined above.

This firm recommends a middle ground outlined by **H.B. 2510.** Continue the payment of benefits following an RME suspension based upon MMI. Notify the Commission of our intention to suspend or reduce the payment of temporary income benefits on the 14th day following the filing of the notice of suspension with the Commission. Send a certified copy of this letter to the claimant and the claimant's treating doctor. Attempt to obtain the treating doctor's concurrence with the RME recommendation. If the treating doctor concurs, suspend immediately. In the absence of a concurrence and fourteen days after notice to the Commission, suspend benefits and file an immediate TWCC-21. Be aware that this middle ground is not endorsed by the Texas Workers' Compensation Commission. A carrier following this procedure may still be subject to administrative violation.