

ADVISORY NO. 268

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TOPIC: ACTION PLANS AND COOPERATIVE PLANS – A CHANGE IN COMPLIANCE & PRACTICES POLICIES

The Texas Workers' Compensation Commission has changed its philosophy regarding Compliance Plans. They have discontinued "Partnership Plans" requiring self-audits. They are substituting "Cooperative Plans," which are basically Partnership Plans without the self-audit requirement. Many carriers were never comfortable with the idea of a self-policing system obligating carriers to turn themselves in, and will be delighted with this development. Unfortunately, this does not indicate a relaxation in Compliance & Practices' oversight. They are simply redirecting their energies and will focus on a different means of enforcement. Aspects of this change are beneficial. Other aspects of it will be very problematic.

TWCC will perform over seventy medical and indemnity audits per year. In the past, a substantial number of these audits were self-audits that were validated by TWCC. Those will simply be replaced by audits performed by TWCC in our offices. They will not discontinue general audits of our performance.

TWCC will further continue the referral audits. These are audits of individual files that are generated by a complaint received by the TWCC offices. The complaint may originate outside TWCC or it may be referred from a TWCC employee. Carriers are required to respond to the complaints and the TWCC will explore a form of self-audit for referred violations. To date, TWCC has capped those violations at \$2,000 per infraction. There will be no cap or maximum under the new policy. Most violations will be under \$2,500. Some may exceed that.

TWCC will monitor the frequency of referral violations. When it determines that a particular carrier has an excessive frequency of violations, and particularly if those violations seem to involve a recurring issue or mistake, TWCC will then direct an audit team to audit the performance of that carrier. Thus, their future audits will target the habitual violators and each audit will focus on the area that seems to be causing the greatest frequency of violations. Fines generated by those claims audited will not be subject to the negotiated maximum of \$2,000 under current Action Plans. They will free float according to a formula. TWCC utilizes the regulatory criteria according to Section 415.021(c) of the Labor Code. However, the precise formula, as before, remains undisclosed.

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Following an audit, and subject to some qualifiers that exclude a carrier from participating in a plan (among which are an excessively high historical frequency of administrative violations), the Commission will offer the opportunity for the carrier to enter into a Cooperative Plan. These are substantially identical to the current action plans that have been negotiated in the last year or two. As noted, it does exclude the self-audit feature. The Commission expects the Cooperative Plan to be specific to the problems identified in the audit. If the Commission accepts the plan, it reduces the fines by 50%. This is a one-time reduction. If the violations continue, TWCC will send our another audit team, and those fines will not be reduced, even if the carrier proposes a new Cooperative Plan.

To summarize, the TWCC is relieving us of the burden of having to perform self-audits. In its place, TWCC is substituting a method of compliance that will be more focused on the carriers for whom performance is substandard. For most of these carriers, there will be a one-time opportunity to reduce their fines. Continued noncompliance will result in higher fines well in excess of the current maximums under Partnership Plans.

This new policy will supercede existing Partnership Action Plans. If an audit is currently scheduled, but has not been performed, and if TWCC has not told you otherwise, you should be relieved from the obligation of that self-audit. Your Partnership Plan is basically suspended. If your compliance rate is high, you will benefit from this change, and your chances of an audit are minimal. If your compliance rate is poor, you can expect much more TWCC attention and much higher fines.

We believe that the change in policy will present very significant problems to those carriers for whom compliance rates fall below the standard expected by the Commission. We urge carriers to approach this problem prospectively – before it occurs. We recommend continued self-audits according to TWCC methodology so that management may be apprised of your potential exposure and be provided the opportunity to address those problems and avoid having files referred to the TWCC Compliance & Practices Division and/or triggering a full-scale compliance audit.