

ADVISORY NO. 278
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TOPIC: *DOWNNS UPDATE*

TWCC has issued a clarification that it will apply *Downns* only in the counties from which an appeal would be taken to the Fourth Court of Appeals in San Antonio. This probably creates more confusion than it is worth. It does indicate a great deal of reluctance on the part of the Commission to follow this particular precedent of the San Antonio Court of Appeals.

We further understand that a Motion for Rehearing remains pending before the San Antonio Court of Appeals. The delay in deciding this motion certainly suggests some controversy within the court about the original decision. There remains a possibility, and it grows increasingly stronger, that the Court will amend its decision and cure much, if not all of this problem. Because this “clarification” has been issued by staff, and because it is not an advisory opinion of the Appeals Panel, and because the Appeals Panel may or may not elect to follow this informal advisory of the Commission, we should continue to treat *Downns* as a potential problem requiring that all cases be paid or disputed within seven days in accordance with the *Downns* case.

Until the Appeals Panel clearly reverses its prior holding, or until the *Downns* case is reversed on Motion for Rehearing or by the Supreme Court, we have the continuing problem that the *Downns* case might be applied as precedent. In the *Downns* case, the carrier failed to pay and failed to deny within seven days. If you do either, according to *Downns*, you preserve your right to deny the claim within sixty days.

The San Antonio Court failed to consider that compensation may not be payable within seven days. Surely the Court would not require us to pay benefits that are not owed so that a potential defense might be preserved. We do not know the answer to the question. It is unlikely that *Downns* will stand and in the event that it is not reversed, it is unlikely that it would be interpreted to require that we pay benefits before those benefits are due. Nevertheless, until this is further clarified, the safest course of handling is to deny all claims within seven days as to which you have any potential defense, and on which you have some reasonable investigation to support the defense.

FLAHIVE, OGDEN & LATSON