

ADVISORY NO. 329
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TOPIC:*CONTINENTAL CASUALTY COMPANY V. DOWNS*

On June 6, 2002, the Supreme Court affirmed the San Antonio Court of Appeals' Decision in *Continental Casualty Company v. Downs*. Briefly stated, this opinion now requires carriers to either pay benefits, or deny the payment of those benefits with a copy to the claimant, within seven days of first written notice of an injury.

This was a 5-4 decision of the Supreme Court. A Motion for Rehearing will be filed. If one judge in the majority changes his or her vote, it will reverse the prior decision. The Supreme Court is reluctant to reverse itself on a published opinion. It has happened and it could happen in this case. Carriers must assume that it will not happen and immediately implement stringent procedures to protect your interests.

TWCC will decline to follow the decision in *Continental v. Downs* until notified that the decision is final. Until then, TWCC will follow its prior advisory of 2001-02 described by FOL Advisory 290.

What You Should Do

Within seven days (all references to time are a reference to action AFTER "written notice" per Rule 124.1) you should initiate benefits and timely pay those benefits to the date of any timely denial, or you should file a Notice of Refusal (TWCC-21, Block 43). Because benefits are not always payable within the first seven days, the Court of Appeals, on Motion for Rehearing, expressly permitted the carrier to file a notice of intention to pay (described below as a "*Downs*" notice). The Supreme Court does not address this problem. They have not approved a *Downs* notice, but there is little practical alternative to a *Downs* notice if benefits are not due.

If there is no seven-day waiting period, a *Downs* notice is clearly inadequate to preserve defenses. In those cases (delayed reporting for lost time injury, death cases, etc.), benefits must be initiated within seven days).

How to File a *Downs* Notice

Check Box No. 1 on a TWCC-21 form and forward the completed form to:

Texas Workers' Compensation Commission
FLAHIVE, OGDEN & LATSON

4000 South IH-35
CERT-21s-MS 93A
Austin, TX 78704.

FOL recommends that each carrier file a *Downs* notice on “each and every written notice of injury.” We recommend that this process occur at the time that the claim is established. This recommendation includes no-lost-time/medical-only claims. The *Downs* notice must be prepared by a licensed adjuster. Do not submit notices from non-licensed medical-only clerks.

The *Downs* notice must be filed in paper format. There is currently no Rule or Advisory that would permit an electronic filing.

TWCC requests that these be filed in batches. Please do not file these notices individually. They have a massive paperwork responsibility and they have requested our cooperation in meeting this new obligation. File one copy of the form. TWCC will file stamp it with a special TWCC stamp “ACKNOWLEDGED NOT FILED” and the form will be returned to the insurance carrier via the Austin Commission representative. TWCC will not retain copies of *Downs* notices. It will be the carrier’s responsibility to store and maintain these copies. FOL will return these notices to you in the same batches sent to us by TWCC.

Downs notices must be filed in Austin and NOT in the field offices. Carriers must follow the express instructions by TWCC so as to maximize documentation of the carrier’s compliance with the *Downs* case.

Benefits Must Be Timely Paid!

In addition to filing a *Downs* notice within seven days, a carrier must timely pay benefits. The Supreme Court characterized Continental’s failure as resulting in something other than a waiver. They described it as a “consequence.” The consequence attaches to the failure to “timely pay benefits.” In most cases, benefits will not be due within seven days. For that reason, a *Downs* notice must be filed, and then benefits must be subsequently initiated. Filing a *Downs* notice will not insulate a carrier against the *Downs* “consequence” if the carrier later fails to timely initiate the benefits. Therefore, carriers have two responsibilities. The *Downs* notice must be filed, AND payments must be timely initiated.

Although the duty to continue those payments to the time of the denial was not discussed, carriers should timely continue the payments of those benefits to the date of denial. We cannot rule out the possibility that some plaintiff’s lawyer will contend that a timely *Downs* notice and timely initial payment were not sufficient if the carrier was late on any payment after the initial

payment and prior to the date of the denial of the claim.

Denials Filed After *Downs* Notices

Although carriers strive to achieve consistency in communications to claimants, and while it may appear inconsistent to file one notice saying benefits will be paid, and to later file a subsequent notice denying the payment of those benefits, this has been described by the Supreme Court as a statutory obligation. We should not be in bad faith for following the statute as instructed by the Supreme Court. The prior *Downs* notice will not invalidate a subsequently filed Notice of Refusal. It should not be the basis for bad faith inasmuch as we have been directed by the Supreme Court to do this. That should be the case, even if the *Downs* notice is filed on day one and the denial is filed on day seven.

Governmental Self-Insureds and Certified Self-Insureds

The obligations announced by the Supreme Court apply to both Governmental Self-Insureds and Certified Self-Insureds. Because the “Employer” and the “Carrier” are the same entity, *Downs* duties begin as of the date of the first notice to any person permitted to receive these reports of injuries. A.P. 992763. Accordingly, this duty may begin as of the date that a foreman or supervisor is first notified of an on-the-job injury.

Copies To The Claimant

It is not clear whether copies of the *Downs* notice must be mailed to the claimant within seven days. TEX.LAB.CODE 409.021(a) directs that carriers “begin the payment of benefits as required by the subtitle,” or file a notice of refusal. The unresolved question is how one begins the payment of benefits before benefits are owed. TWCC and the Court of Appeals have resolved that by a directive to file a *Downs* notice checking Box 1. TWCC does not require that carriers copy claimants on these *Downs* notices. Carriers may nevertheless have a duty to do this! The majority opinion states:

The Legislature intended to provide employees with a prompt notice to their benefit claims and to streamline the process to avoid early attorney involvement.

Rule 124.2(e)(1) provides that a carrier “shall notify the Commission and the claimant of . . . first payment of indemnity benefits on a claim.”

Although Rule 124.2 specifically prohibits a *Downs* notice (the rule was adopted prior the

Downs case), and although the rule requires notice of first payments to the Commission by EDI, the rule does clearly require the carrier to send a copy of notices of initial payments to the claimant. Accordingly, we recommend that you copy *Downs* notices to the claimant. They should be sent to the claimant by the same method that you send copies of the notice of refusal.

Although we have consulted with the Commission about their policy, we have nothing in writing from TWCC. These recommendations are subject to further clarification from the Supreme Court or from TWCC. If you have any questions about these processes, please contact Jack Latson at (512) 435-2156.