

ADVISORY NO. 428

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TOPIC: PRESERVING WAIVER DEFENSES: AN UPDATE

On August 7, 2006 we described the extent-of-injury waiver argument that had been adopted by the Appeals Panel of the Division of Workers' Compensation, and noted that the Appeals Panel had approved the filing (within the first 60 days) of a PLN-11 that defines the injury based on the carrier's reasonable investigation. We noted that the Appeals Panel had specifically approved this approach in Texas Workers' Compensation Commission Appeals Panel Decision No. 000119. The panel's decision in that case has been followed in a number of cases since that time. See Texas Workers' Compensation Commission Appeals Panel Decision No. 060701-s, and cases cited therein.

There is now a Court of Appeals decision that confirms the presence of waiver under circumstances that we described in our 2006 advisory. In *State Office of Risk Management v. Lawton*, No. 10-07-00072-CV (Tex. App. – Waco, April 16, 2008), the Court of Appeals approved of the Appeals Panel's decisions, which have held that "the nature of the injury will be defined by that information that could have been reasonably discovered in the carrier's investigation prior to the expiration of the waiver period."

Accordingly, the Court of Appeals' *Lawton* decision emphasizes the importance of the carrier's initial investigation, as well as its need to reasonably define the extent of the compensable injury within the first 60 days.

The State Office of Risk Management has filed a petition for review with the Texas Supreme Court in *Lawton*. Unless *the Supreme Court reverses Lawton* however, we continue to recommend that carriers protect themselves from a waiver-of-extent argument by fully investigating the claim and, thereafter, filing PLN-11s that provide as follows:

"The claimant's compensable injury is limited to ___ [list specific diagnosis(es) - NOT body parts] _____. No other condition naturally resulted from or was affected by the original incident. All other injuries, conditions, diagnoses, and/or symptoms related to the injured body part or any other part of the claimant's body are denied as not resulting from the accident. "

We will continue to monitor the *Lawton* decision and keep you advised of any further developments with respect to that case.

FLAHIVE, OGDEN & LATSON