ADVISORY NO. 447
###

TOPIC: CLAIMS HANDLING AFTER THE LAWTON DECISION

In the wake of the Texas Supreme Court's decision in *State Office of Risk Management v. Lawton* last week, carriers are rightly asking how the decision will affect their claims handling practices. In *Lawton* the court held that the 60-day period for challenging compensability of an injury does not apply to a dispute over the extent of injury. In reaching this holding, the Court wrote, "Section 409.021(c)'s sixty-day deadline applies only to compensability. Rule 124.3(e), . . . must be construed accordingly".

Lawton arose after a series of Division Appeals Panel decisions had held that, in the absence of any dispute, the extent of a compensable injury is defined by the injuries or diagnosed conditions which the carrier could have reasonably discovered through an investigation of the claim during the waiver period. See Texas Division of Workers' Compensation Decision Nos. 041738-s and 042048-s. The Appeals Panel's reasoning was adopted in a series of Dallas Court of Appeals decisions decided in the last several years: *Fed. Ins. Co. v. Ruiz*, 281 S.W.3d 177 (Tex. App.—Dallas 2009, no pet.); *Sanders v. Am. Prot. Ins. Co*., 260 S.W.3d 682 (Tex. App.—Dallas 2008, no pet.); and *Zenith Ins. Co. v. Ayala*, ____ S.W.3d ___ (Tex. App.—Dallas 2008, pet. filed).

Lawton expressly disapproved of *Ruiz* and *Sanders*. *Ayala* is pending on petition for review at the Supreme Court and will likely be reversed. The Appeals Panel decisions upon which the *Lawton* theory was based should be considered disapproved as well.

We anticipate that the claimant in *Lawton* will file a motion for rehearing. It is highly likely that the motion will be overruled.

We have been asked whether the doctrine of extent of injury waiver survives in any form after *Lawton*. We do not believe that it does. The Supreme Court's holding was clear and unmistakable. The sixty-day period for challenging compensability of an injury does not apply to a dispute over the extent of injury.

If the *Lawton* decision remains intact after motion for rehearing, carriers are free to reevaluate their business practices, particularly with respect to the filing of a PLN-11 to dispute extent of injury. The following options should be considered by carriers if *Lawton* stands as written.

Appeal Cases in the Pipeline

If you have a claim in which the Division has issued a decision and order or an Appeals Panel decision that finds waiver of extent of injury, and if your deadline to file an appeal to the

Appeals Panel or a suit for judicial review has not passed, examine those cases immediately to determine whether such an appeal should be taken. We fully expect that the Appeals Panel and district courts of this state will follow the Supreme Court's guidance in this area. You should give your self the chance to take advantage of this ruling on cases that have been recently decided.

When are PLN-11s Still Required?

File a PLN-11 disputing extent of injury strictly in compliance with Rules 124.3(e) and 133.240(a).

Rule 124.3(e) states that a carrier should file a dispute of extent of injury (on a PLN-11) when the carrier receives a medical bill that involves treatment(s) or service(s) that the carrier believes is not related to the compensable injury. Such disputes should be filed no later than the earlier of the date that the carrier disputes the bill, or the due date for the carrier to pay or deny the medical bill. This deadline is the 45th day after the date the carrier receives a complete medical bill.

Thus, if you receive a complete medical bill that involves treatment or services that you believe are not related to the compensable injury, you must file a PLN-11 disputing the extent of injury prior to your dispute of the bill or the "pay or denial" deadline.

Failure to meet this deadline may be an administrative violation. A fair reading of *Lawton* makes it clear however that missing this 45-day deadline will not result in a waiver of your right to contest the extent of the injury.

Are "60-day PLN-11s" Still Required?

To avoid a Division decision finding waiver of extent of injury, we previously recommended that carriers consider filing a PLN-11 within 60 days of receipt of first notice of the injury. That advice was found in FO&L Advisories 398 and 428.

We no longer believe that the preemptive filing of a PLN-11 within the first 60 days of the claim is necessary to preserve extent of injury defenses – assuming that the Lawton decision remains intact after motion for rehearing. Carriers who wish to cease that practice should do so upon issuance of the Supreme Court's mandate in Lawton.

Are "60-day PLN-11s" Still Permitted?

Some carriers have concluded that the 60-day PLN-11 practice affords them a business advantage through the early identification and communication of the accepted compensable injury. These carriers believe that an internal deadline to identify the accepted injury – at the diagnosis level – creates a good claims handling practice. These carriers report that their efforts

to communicate the nature and extent of the accepted injury to the claimant and treating health care provider reduce the need for other communications on the file and reduce the number of medical disputes arising in their files.

Other carriers have advised us that the benefits found in filing the 60-day PLN-11 are outweighed by the administrative cost of that process. This is particularly true, they report, when the 60-day PLN-11 process is followed on medical only claims.

After *Lawton*, a carrier is still permitted to identify the nature and extent of a compensable injury and to communicate the carrier's acceptance of that condition to the treating doctor and the claimant. Where carriers choose to engage in this practice, we recommend that they do so by way of a simple letter to the provider and/or claimant, rather than on a PLN-11 form. Such a letter can simply state the carrier's acceptance of the compensable injury in language such as the following:

> The carrier has accepted that the claimant's compensable injury extends to and includes: _____ [list diagnosis(es) and not symptoms or body parts].

We do not recommend that carriers include a description of any disputed conditions in these letters. Such extent of injury disputes should be relegated to the situations where you are still required by Rule 124.3(e) to file a PLN-11 (see discussion above).

We will monitor the continuing appellate status of the *Lawton* decision and keep you advised of the court's ruling as events warrant. If you have questions about the effect of the *Lawton* decision on your claims process generally, or any individual claim, please feel free to contact our office to discuss.