Sent: **Tue 7/22/2008 11:20 AM**
From: **WSIA/Dave Kaplan**
To: **Schurke, Judy (LNI); 'Kennedy, Victoria (LNI)'; 'Vanek, Jean M. (LNI)'; Gellermann, AnnaLisa (LNI)**
CC: **Johnson, Bill; 'Forrestor, Rebecca'**
BC: **'Donna Egeland'; 'Kathleen Collins'**
Subject: **Concerns regarding "Pay During Appeal" Implementation**

Dear Judy,

Back in mid-June 2008 the Department shared with us a FAQ (Frequently Asked Questions) document, related to the implementation of the "pay during appeal" legislation that passed during the 2008 Legislative Session. We appreciate the fact that the Department gave us a day or two to review the document in advance of its distribution.

We solicited feedback from the self-insured community regarding the FAQ, and a number of concerns directly related to the implementation of the legislation cropped up that we feel need to be addressed. I'll attempt to outline them here, though they're in no particular order.

PENALTIES

The FAQ states "The Department will consider a penalty for any unreasonable delay. Payments mailed more than ten calendar days after the date of the Department order will be considered unreasonably delayed." According to the document this is "consistent with penalty determinations prior to the recent legislative changes."

There are two issues here: tolling for purposes of the penalty; and when the first payment should be paid. Regarding the issue of the tolling for the penalty, the 10 days is not consistent with current practice. Currently the basis on which that determination is made is for payments made some time after the employer receives written communication from the Department that benefits have been awarded. If according to the new law benefits are due on the date the Department order awarding benefits is issued, how can an employer be held accountable for payment of benefits (and penalized) if they have not been timely notified (or notified at all) that the Department has awarded benefits? Written communications has been the standard for the tolling of the awarding of benefits for purposes of penalties. Additionally, RCW 51.32.210 provides that self-insured employers are required to promptly adjudicate claims, with first payment due within 14 days (on time loss claims) and continue to be paid at regular semi-monthly intervals. Also, RCW 51.32.190 provides that self-insured employers are required to pay temporary benefits provisionally on a semimonthly or bi-weekly basis. Both of those provisions are far longer than 10 calendar days. Why would the payment period (semimonthly or bi-weekly) be any different under this new law? **While the law may be clear from when benefits are due, we believe that penalties should only be applicable for payments not made within the semimonthly or bi-weekly time period allowed in RCW 51.32.190, and only after the employer receives written communications of the department's order awarding benefits, just as it is today.**

This semimonthly or bi-weekly time period from the date an employer receives written communications is a reasonable expectation, and there is nothing in the new statute that indicates otherwise. The policy stated in the FAQ is entirely Department interpretation for implementation purposes, and we believe this will unfairly penalize employers ... particularly when they are making every attempt to comply with this new law.

WHAT ARE "BENEFITS"

Blanket allowance orders are not an awarding of benefits; they are a statement that the Department believes a claim is compensable. Yet, the FAQ states "In addition, a claim allowance order is considered an order awarding benefits." Benefits are specific, and the Department should no longer be issuing blanket orders for allowance. Why? Because there is no way to know which benefits are in fact owing without the benefits being listed. Just as self-insured employers are to allow claims for specific benefits, so should the Department. Without specific benefits being cited in the Department's order, incentives are created to include any and all conditions and treatments, indemnity requests, and pension requests in the mix without prior substantiation by an attending physician of the conditions warranting consideration of those benefits. Employers would essentially be on the hook to pay benefits when the issue itself is compensability, and no specific conditions or benefits are included in

the order. In effect, an allowance order grants a "blank check" for the injured worker to find out what ails them. **Objective medical findings should be the standard to make that determination. Employers should not have to pay benefits on blanket allowance orders.**

PROTESTS

The application of this new law to protests/reconsideration is a mistake in interpreting Legislative intent. The Legislature wished to provide continuing benefits to injured workers when an employer appeals an order to the Board of Industrial Insurance Appeals. In fact, the language in the bill is entirely geared toward appeals to the BIIA, not for reconsideration by the Department. Regardless of the language in the legislation, it is not appropriate for the Department to interpret this law as applying to protests. **Protests are an administrative reconsideration of an initial decision by the Department. Nothing more. To interpret the new law otherwise is a gross expansion of the intent of the legislation that was not envisioned by the Legislature.** The FINAL order has always been the basis for the decision on which an appeal is considered. That can result in the initial order becoming final, on direct appeal to the Board of Industrial Insurance Appeals, or after reconsideration. Either way the benefits are not owing until final. While benefits may be "due" when the Department issues an order, that does not mean they should be paid until the order is final. **We want the Department to reconsider the interpretation that this applies to protests as well as appeals.** Additionally, under the current law, self-insured employers are entitled to up to 60 days to decide whether or not to protest or appeal a claim. By applying this to reconsiderations/protests, this abrogates employers' rights under the law to even consider a protest. A further problem is that, as outlined in Example #3, with medical benefits being due within the five (or ten) days, this runs counter to the provisions of RCW 51.36.085 which states that self-insured employers have 60 days to pay medical bills. **How will the Department address this discrepancy?**

PAYMENT OF BENEFITS ON PROTESTS

While the Department feels free to require payment of benefits when the order is first issued, the FAQ states "you must pay benefits ordered up through the date you send your protest to the Department (either the date mailed or the date faxed)." This makes no sense. If, as the Department contends, benefits are due from the date the first order awarding benefits is issued, then a protest would not stay payment of those benefits. This is another reason we believe the Department is incorrect in its determination that the law applies to protests/reconsideration as well as appeals to the BIIA. Also, we see the administrative problems associated with this approach. For TPAs and employers paying benefits provisionally, this poses no problem. But for those employers that are not required to pay provisional benefits, to then turn around and pay benefits for just a few days (based on the protest being filed), on a claim where compensability is the issue, we feel is unsupportable. **We believe that benefits should not be paid until a final order is issued by the Department, whether on direct appeal (the initial order) or after reconsideration.**

ATTORNEY REPAYMENT OF BENEFITS

While the new law is clear on injured worker reimbursement, what is not clear is how claimant's attorneys (who receive a portion of the benefits as compensation) will be refunding overpaid benefits. The Department's FAQ is completely silent on how an injured worker's attorney is to repay their portion of the benefits, should the order be overturned on either reconsideration or appeal. **We want to know how the Department intends to address this issue.**

MEDICAL BILL PAYMENTS

Under RCW 51.36.085 self-insurers have 60 days to pay medical bills, and interest is accrued if the payments are later than that. How will that square with the pay during appeal legislation? Often times there's a question as to whether the medical benefits are work-related, exceed the Medical Aid Rules and Fee schedule for number of visits or rate of compensation, and other such issues. This appears to conflict with current statutory authority on medical bill payment, which self-insurers are not likely to surrender. **How does the Department intend to address this issue?**

We believe that the issues raised above are legitimate and need to be addressed promptly.

Please let us know what steps the Department will be taking to address our concerns. Thank you.

Cordially,

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