OVERVIEW OF NEW "SAFE HARBOR"

In the 2012 legislative session a "safe harbor" for employers was established in the penalties and attorney fees statute (§1201). The statute established a telephone conference with the employer, employee and OWC judge on a "preliminary determination hearing" to consider the employee's first payment, termination or modification of benefits. An employer who accepted the findings of the WCJ in the PD would be free of any award of penalties and attorney fees. The 2012 legislation also amended the prematurity statute (§1314) to give full access of the employer to the WC Court. This was to overturn case law that did not permit the employer to initiate a claim against the employee for the purpose of having the court render an opinion as to whether benefits were owed (generally referred to as a declaratory judgment).

In response to these changes, the attorneys representing claimant drafted HB 660, which was a total rejection of the 2012 law changes.

A compromise was reached by the claimant attorneys and representatives of employers. A substitute bill was drafted – HB 728 [Act 337]. This bill was designed to meet the concerns of the claimant attorneys regarding the ability of the employer to file a 1008 to controvert benefits and the concern of employers that the prior safe harbor provisions may have been limited to issues regarding the calculation of the average weekly wage and that the statute needed to include other issues which involve the termination, modification or reduction of benefits.

Effective Date 8/01/13 – The bill has a section in which the legislature declared that the Act is to be applied retroactively as well as prospectively. We anticipate a challenge to the retroactive application but expect the OWC will initiate procedures to implement the new preliminary determination hearing and expedited hearing procedures.

PROCEDURES FOR AN EMPLOYER/PAYOR TO CONTROVERT A CLAIM

There are a number of circumstance in which an employer under the new law will be permitted to suspend, terminate or modify the employee's indemnity and medical benefits without first filing suit or seeking a judicial order. The employer will be able to do so with the protections of the "safe harbor" from penalties and attorney fees

established in §1201.1 if the employer has accepted the claim as compensable [subject to further investigation and possible controversion] and complies with the specific requirements in §1201.1 paragraph (A) . However, even the employers who do not qualify for the safe harbor may utilize the suspension, termination and modification procedures but they must do so with the risk of having the court award penalties and attorney fees if their suspension, termination or modification of benefits is found to be unreasonable.

Actions Necessary for Employer/Payor to Qualify for Safe Harbor

1. **First payment of indemnity benefits** – upon making the first payment of indemnity the employer/payor shall send the notice of payment [Form 1002] to the employee and ***send it on the same day or before the date the payment is made*****;**
2. Send a copy of the notice of payment to the OWC ***within 10 days*** it was sent to the employee;
3. If represented ***send a copy of the notice to the attorney by fax same day sent to employee*** [fax will be evidence that employer/payor has complied with paragraph (A)];
4. **After the first payment** any modification, suspension or termination of benefit notice form is to be sent to the employee ***by certified mail on or before the date that the change in benefits becomes effective*** (also send copy by fax to the attorney);
5. Send a copy of the notice of any such change in benefits ***to the OWC on same day sent to the employee.***

Procedure for Employer/Payor to Assert its Right to Safe Harbor

1. When the employee files suit against the employer due to a dispute over benefits the employer/payor who qualifies for the Safe Harbor ***must request the "preliminary determination" in the Answer to the suit;***
2. If an Answer has already been filed and a new dispute arises after the filing of a notice of termination, suspension or modification, the request for a preliminary determination must be filed in an amended answer.

Issues that May Give Rise to Termination, Suspension or Modification of Benefits

1. Employee fails to execute the choice of physician form [§1121 (5)] the employer may suspend medical benefits until the employee executes the form. The ***form must be provided to the employee either in person or by certified mail*** [§1121(B)2)(b)]. Note that even if form is returned, if employee is illiterate or there is a language barrier, a representative of the employer must attest by

signature on the form that he has explained the form to the employee [§1121(B)(4)];

2. Employee fails to appear for an employer medical examination ***(SMO) after being given 14 days notice prior to the date of the examination*** [§1124]. The employer may suspend indemnity benefits until the employee appears for the examination;
3. Employee fails to cooperate in vocational rehabilitation [§1226] the employer may reduce the indemnity benefits by 50% until the employee cooperates in his vocational rehabilitation;
4. Employee fails to return the form 1020 showing other earnings [§1208 G & H] the employer may suspend indemnity benefits. ***Note that the form should be provided to the employee and the employee is given 14 days to return the form*** before the employer can suspend the benefits.

<u>Procedures after Employer/Payor Files Notice of Suspension, Termination or Modification of Benefits</u>

1. Employee either sends the notice form back to the employer/payor or send "amicable demand" to the employer/payor regarding reinstatement of his benefits;
2. No suit can be filed for seven days after sending the demand to give employer/payor time to respond;
3. If employer agrees to reinstate benefits no suit can be filed and no claim can be made for penalties and attorney fees;
4. If employer does not agree to "amicable demand" within seven days the employee may files suit (form 1008);
5. If the employer qualifies for the safe harbor the employer/payor must request a preliminary determination in the Answer;
6. If there is a dispute over the employer/payor's right to a preliminary determination the WCJ shall have a hearing to decide the issue;
7. After receipt of the request for a preliminary determination the WCJ shall have a telephone conference with the parties to agree on discovery deadlines;
8. The preliminary determination hearing is to be held no later than 90 days from the telephone conference [one extension of 30 days may be granted]
9. Witnesses – physicians may give evidence either by certified reports (parties can agree to non-certified) or by deposition. Other witnesses can be called to testify at the hearing or if agreed by deposition;
10. WCJ must issue decision within 30 days of the hearing;
11. Employer has ten days from mailing of the preliminary determination to notify the court and employee that it either accept or reject the decision;
12. Employer may reject the preliminary determination and go to trial (assumes risk of penalties and attorney fees);

13. Employer may accept the decision but must comply with the decision (payment of any benefits owed) within ten days if it is to have the safe harbor against any penalties and attorney fees;
14. Employer may accept the decision and comply with the determination and also request trial on the issues;
15. The employee may reject the determination if he notifies the court within ten days of the decision;
16. In a claim filed against a party who is not qualified to request a preliminary determination or who chooses not to request the preliminary determination the matter will be tried in a regular proceeding;

Issues that are Subject to an Expedited Hearing

1. Employee seeks choice of physician [§1121(B)(1)];
2. Employee claims denial of vocational services or inadequate services [§1226(B)(3)(a)];
3. Employer/payor seek to compel employee to sign choice of physician form [§1121(B)(5)];
4. Employer/payor seek to compel the employee's submission to a medical evaluation (SMO) [§1124];
5. The employer seeks to require the employee to return form LWC-1025 or LWC-1020 [§1208 (F) (G) & (H)];
6. The employee seeks to have a suspension of benefits lifted for failure to comply with returning the choice of physician form [§1121(B)(1)];
7. The employee seeks to have a suspension of benefits lifted for failure to submit to a medical examination lifted [§1124];
8. The employee seeks to have a suspension of benefits lifted for failure to return the forms 1025 or 1020 [§1208(H);
9. The employee seeks to have a reduction in benefits lifted for failure to cooperate with vocational rehabilitation [§1226(B)(3)(c)].

The trigger for the expedited hearing would be the filing of a 1008 by the employee either due to the suspension, termination, modification or reduction of benefits after the filing of the notice of same by the employer/payor. When the 1008 is filed either the employee files a motion for an expedited hearing to have the suspension, termination, modification or reduction of benefits lifted or the employer files the motion for an expedited hearing to have the court order the employee to return forms (choice of physician, other earnings form 1020 or fraud notice form) or to appear for a medical examination. The hearing on the motion is to be held no later than 30 days from filing of the motion.

Safe Harbor on the expedited hearing is only available to the employer/payor who is entitled to the preliminary determination AND complies with the Order issued from the expedited hearing within 10 calendar days.

Trip Wires to Consider

Form filing and time requirements - Care needs to be taken by the employer/payor in reviewing their claims procedures to be sure that they comply with the requirements established in this safe harbor statute for filing of forms, copying the employee or his attorney, and the time requirements for various actions by the employer/payor. In the above summary note the ***bold and italicized*** notations regarding filing and time requirements. Also with the increasing number of claims involving Spanish speaking workers the employer/payor also needs to be certain that any forms that they are relying on for suspension, termination, modification or reduction of benefits should be provided to the employee in a language that he can read.

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