Oops. I think I just issued an impermissible back-up denial

By Kelly J. Niemeyer ■ April 15, 2016

You, the adjuster, have just mistakenly issued an acceptance for a condition that you never intended to accept on your compensable claim. What do you do?

More importantly, what do you NOT do? You do not immediately turn around following the acceptance and simply issue a revocation of your acceptance. This is known as an impermissible back-up denial and can cause you more harm than good: an impermissible back-up denial may invite litigation, resultant attorney fees and penalties. No action will get an attorney on a claimant's case faster than a guaranteed procedural deficiency such as an attempted back-up denial.

There are instances when where a back-up denial is appropriate (relative to claim compensability in the first instance or a new/omitted condition under an already accepted claim.) The insurer or self-insured employer may revoke an acceptance and issue a denial at any time when the denial is due to fraud, misrepresentation or other illegal activity by the claimant. It is, of course, the insurer's burden of proof to establish by a preponderance of the evidence that such fraud, misrepresentation or other illegal activity actually occurred. The burden then shifts to the worker under ORS 656.262(6)(a) to prove that the claim is nevertheless compensable.

A back-up denial can also be issued issue based upon the discovery of "new evidence" that was not reasonably obtainable with due diligence before the adjuster issued the acceptance. New evidence is not cut and dry. For instance, if you could have taken the claimant's statement before your denial or could have reviewed certain medical records, which were brought to your attention and obtainable before the denial, you cannot turn around and rely upon the information gained from the statement or medical records later on as "new evidence" justifying the issuance of your back-up denial.

Ultimately, situations in which you have issued a back-up denial merit a quick (or long) call with your attorney in order to ensure you are making the right decisions

In a case where you actually have new (post-denial) evidence, your revocation of the acceptance must occur within 2 years from the acceptance. You should always ensure that you verify coverage information upon receipt of a new claim. If you accept the claim and later find out your insurer did not actually provide coverage, in most cases, a back-up denial is not the answer to remedy the problem.

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Impermissible back-up denials (continued)

What constitutes "fraud" or "misrepresentation" and what is "new evidence"? These topics individually can occupy an entire blog. (We are happy to answer any general or specific questions about these topics – call us.)

When faced with the circumstance outlined above, you should not immediately issue a denial, revoking your earlier acceptance. Rather, you should speak with your attorney in order to see if your denial qualifies under one of the exceptions referenced above. By issuing a revocation of your mistakenly issued acceptance you may be creating a bigger headache for yourself.

For instance, if through error you issue an acceptance for a contusion of the wrong body part, you can probably simply mitigate your damage by following up with the medical providers in order to obtain the necessary information to show that the inadvertently accepted contusion is not an issue under the claim. Therefore, when you ultimately close the claim, the focus remains on the appropriate body parts. (Do not forget you need the attending physician to comment on the inadvertently accepted condition as well.) Alternatively, revoking the acceptance that was originally issued in error creates litigation and the inevitable rescission of your impermissible back-up denial. Now you've added defense costs, claimant's attorney's fees and penalty exposure compounding your problems.

While the above example relates to a minor condition, sometimes an acceptance is inadvertently issued relative to a major condition that leaves you wishing you had called in sick for work that day. In other words, potential claim exposure has increased dramatically as a result of your action. In this circumstance it is absolutely imperative that you discuss your options with your attorney. Strategic processing to mitigate damage is a must in these situations and can take on many forms. In addition, settlement of the claim may become a realistic and cost-effective solution.

Ultimately, situations in which you have issued a back-up denial merit a quick (or long) call with your attorney in order to ensure you are making the right decisions moving forward in order to decrease claim exposure and mitigate damage. It's not the end of the world. It's simply a new piece of the puzzle that must be effectively addressed with your defense counsel.

As always, the attorneys at Reinisch Wilson Weier PC are happy to discuss your general or specific questions relative to back-up denials or any other issues that come up in the ever-changing landscape of the Oregon workers' compensation system. ■