



**Office of the Attorney General  
State of Texas**

**DAN MORALES**  
ATTORNEY GENERAL

December 9, 1997

Mr. Robert Marquette  
Acting Executive Director  
Texas Workers' Compensation Commission  
Southfield Building, MS-4D  
4000 South IH-35  
Austin, Texas 78704

Letter Opinion No. 97-106

Re: Interpretation of Texas Labor Code section  
412.008(b) (ID# 39611)

Dear Mr. Marquette

Your predecessor has requested an opinion from this office concerning a contract dispute between the Texas Workers' Compensation Commission ("TWCC") and the Texas Department of Criminal Justice ("TDCJ"). While this office cannot interpret contracts or resolve contract disputes in the opinion process, we can advise you on the purely legal questions implicated by your request.

As we understand the dispute, it concerns the amount to be paid by TDCJ under an interagency contract with TWCC's State Risk Management Division, which provides risk management services to state agencies. The formula for such payment is given by section 412.008(b) of the Texas Labor Code, which reads:

The amount of the costs to be paid by a state agency under the interagency contract is based on:

- (1) the number of employees of the agency compared with the total number of all state agencies to which this chapter applies;
- (2) the dollar value of the agency's property and assets and liability exposure compared to that of all state agencies to which this chapter applies;  
and
- (3) the number and aggregate cost of claims and losses incurred by the agency compared to those incurred by all state agencies to which this chapter applies.

The argument between the two agencies appears to begin with a difference of interpretation concerning what constitutes or ought to constitute "liability exposure" for the purpose of section 412.008(b)(2), and what constitutes or ought to constitute "claims and losses" for the purpose of section 412.008(b)(3). TDCJ takes the view that "liability . . . speaks to costs incurred either in damages or incidental expenses (litigation costs, attorneys fees, remedial actions) which arise from

incidents within the agency's control. TDCJ's position is that the issues in dispute in *Alberti* were outside its control, and therefore should not be assessed as 'liabilities' under Section 412.008 of the Labor Code."<sup>1</sup> Letter from Wayne Scott, Executive Director, TDCJ, to Todd K. Brown, Executive Director, TWCC (June 9, 1997). TWCC disagrees.

We agree with TWCC. Whatever the merits of TDCJ's argument as a policy matter, we can find no warrant in the plain language of the statute for this gloss. Neither "liability exposure" nor "claims and losses" are modified in the statute by any such phrase as "within the agency's control." The statute does not distinguish agencies as principal defendants from agencies as third party defendants. Even assuming that TDCJ's exposure in the *Alberti* litigation was beyond its control, *but see Alberti v. Sheriff of Harris County*, 937 F.2d 984 (5th Cir. 1991), that does not mean it is not "liability exposure," nor that judgments and costs arising therefrom are not "claims and losses."

TDCJ further argues that TWCC or its representatives have in past years accepted its *Alberti* argument, and that therefore TWCC is obliged to continue to do so. Letter from Wayne Scott to Todd K. Brown, *supra*; Letter from Robert P. Koenig, Sr., Risk Manager, TDCJ, to Zhongmin Li, Chief of State Administration and Research, State Risk Management Division (June 11, 1996).

We cannot agree with this argument:

[T]he principle of estoppel is not ordinarily applicable to the state in respect of acts done in its governmental capacity, nor can the state be estopped by unauthorized or illegal acts on the part of its officers or agents, nor by the failure of public officers to perform their duties.

67 TEX. JUR. 3D *State of Texas* § 123 (1989) (footnotes omitted).

The mere fact that agents of the Risk Management Division may in the past have accepted the argument urged by TDCJ does not bind the Division or TWCC to accept that argument in the future. We find nothing in the statutory language which empowers such employees to waive any part of the required costs. Accordingly, no such purported waiver in the past estops TWCC from demanding the costs authorized and required by section 412.008(b) of the Labor Code.

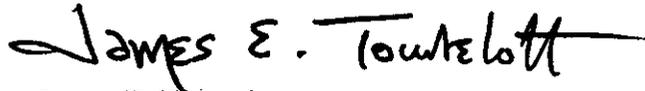
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<sup>1</sup>By *Alberti*, we understand this letter to refer to a case originally styled *Alberti v. Klevenhagen*, see 790 F.2d 1220 (5th Cir. 1986), a conditions of confinement case regarding the Harris County Jail into which TDCJ was impleaded as a third party defendant in 1989. See *In re Clements*, 881 F.2d 145 (5th Cir. 1989).

**S U M M A R Y**

Nothing in the language of section 412.008(b) of the Labor Code, concerning the formula for costs to be paid by a state agency to the State Risk Management Division of the Workers' Compensation Commission under an interagency contract for risk management services, restricts the liability exposure or cost of claims and losses used in that formula to those "which arise from incidents within the agency's control." The State Risk Management Division, in calculating such costs, is not estopped from assessing them in full because its agents or representatives may have waived some part of them in the past.

Yours very truly,

A handwritten signature in black ink that reads "James E. Tourtelott". The signature is written in a cursive style with a long horizontal flourish extending to the right.

James E. Tourtelott  
Assistant Attorney General  
Opinion Committee