

TODD K. BROWN
EXECUTIVE DIRECTOR



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TEXAS
WORKERS' COMPENSATION COMMISSION
SOUTHFIELD BUILDING, 4000 SOUTH IH-35, AUSTIN, TEXAS 78704-7491
(512) 448-7900

July 31, 1992

The Honorable Dan Morales
Attorney General
Price Daniel, Sr. Building
209 West 14th Street
Austin, Texas 78701

RQ 418

RECEIVED

MAY 03 92

Opinion Committee

Dear General Morales:

The attached request for an opinion was forwarded to your office in late May, 1992. The request apparently never reached your office as we have not received notice of an assignment of an inquiry number, and checks with your office failed to locate the request. We are, therefore, re-submitting the request. We hope this does not result in duplicate filings with your office.

Very truly yours,

Susan Cory
for Todd K. Brown
Executive Director

TKB/jbp

enclosure

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ID # 16876
MBJ

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Dear General Morales:

I am writing to request an opinion regarding what information retained by the Commission must be searched and released as part of a record check or pre-employment check of an employee. Specifically, I would like an opinion as to:

Opinion Committee

1. Whether information related to NLTs (no lost time injuries or injuries involving one day or less of lost time) which is not required by law or administrative rule to be filed with the Commission must be retained?¹
2. Whether any information described above that is maintained by the Commission must be released as part of a record check or a pre-employment check?
3. If you determine that the information described in question 1 is not required to be released as part of a record check or a pre-employment check, is the information still confidential or is it subject to disclosure under the Open Records Act?
4. If you determine that the information described in question 1 must be released as part of a record check or a pre-employment check or is subject to disclosure under the Open Records Act, may the Commission charge a special fee for such a search?

These questions were also issues under the old workers' compensation laws and are not unique to the new law.

Art. 8308-5.05 of the Texas Workers' Compensation Act provides for the filing of a written report (TWCC-1) in specific circumstances. Subsection (a) states:

If an injury results in the absence of the employee from

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work for more than one day or if the employee notifies the employer of an occupational disease ..., the employer shall file a written report with the commission and the insurance carrier. The report must be mailed or delivered to the commission and the insurance carrier not later than the eighth day after:

- (1) the employee's absence from work for one day due to an injury; or
- (2) the employer receives notice ... that the employee has contracted an occupational disease. (emphasis added)

Although the Act requires employers to maintain a log of all injuries to employees, only those injuries which meet the criteria set out in Art. 8308-5.05 are required to be reported to the Commission.

Despite the fact that neither the Act nor the Commission's administrative rules require the filing of a TWCC-1 for injuries in which an employee is absent from work for one day or less, many employers are filing the TWCC-1 with the Commission for such injuries known as NLTs. At the present time, the Commission is maintaining this information by date of injury in microfilm format.

Art. 8308-2.31 of the Act addresses the confidentiality of claim file information and the circumstances under which claim file information may be released. The concept of the confidentiality of claim file information was carried over from Art. 8307, §9a, the previous workers' compensation law. Subsection (a) states:

Information in or derived from a claim file regarding an employee is confidential and may not be disclosed by the commission except as provided by this Act.

With regard to record checks, subsection (c) states:

The commission shall perform and release a record check on an employee, including current or prior injury information, to the parties listed in Subsection (d) of this section if:

- (1) the claim is open or pending before the commission, on appeal to a court of competent jurisdiction, or the subject of a subsequent suit where the insurance carrier or the subsequent injury fund is subrogated to the rights of the named claimant; and
- (2) the requesting party requests the release on a form developed by the commission for this purpose and provides all required information. (emphasis added)

Art. 8308-2.33 of the Act also entitles a prospective employer who

has workers' compensation insurance coverage to obtain information on an applicant's prior injuries upon compliance with certain requirements. Art. 8308-2.34(b) then provides for the release of information in response to a request for a pre-employment check. Subsection (b) states:

If the commission finds that the applicant has made two or more general injury claims in the preceding five years, the commission shall release the date and description of each injury to the employer. (emphasis added)

The first issue to be resolved is whether the Commission is required to retain information related to NLTs, including TWCC-1's, which is not required to be filed with the Commission by either the Act or the administrative rules. The retention and storage of such documents requires a significant amount of space as well as staff time. In addition, the retention of such information does not assist the Commission in meeting any of its legislative mandates although it may be retrieved in the event that an employee with an NLT subsequently loses additional time and the injury becomes reportable.

In support of the position that the Commission is not required to maintain this information, the Commission notes that Art. 8308-5.05 contemplates that:

- (1) the TWCC-1 be filed only when an employee has lost more than one day of work due to the injury; and
- (2) the filing of the TWCC-1 occur during the period beginning on the day the employee has been absent from work for one day due to the injury and ending on the eighth day after the employee was absent from work for one day due to the injury.

The purpose of these two requirements is to ensure that the Commission is provided with notice of a specific event (the absence of an employee for more than one day due to an injury) in a timely manner. A TWCC-1 submitted to the Commission on an NLT does not fulfill these requirements because it does not provide the Commission with notice of the correct event. Instead, the submission of a TWCC-1 for an NLT merely provides the Commission with notice that an injury was reported to the employer, and notice of that event (the reporting of an injury prior to the loss of more than one day from work) is not required by either the Act or the administrative rules.

Because the Commission currently retains information related to NLTs on microfilm and will continue to do so pending your response to the first question, it is also necessary that the issue of whether such information must be released as either a part of a record check or a part of a pre-employment check be resolved. The Commission asserts that information maintained by the Commission relating to NLTs, including TWCC-1's, is not a part of any claim or claim file and, therefore, is not required to be released as part

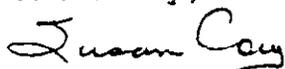
of either a record check or a pre-employment check. It is further suggested that the information is not either "current or prior injury information" (§2.31) or "a date and description" of an injury (§2.34) and, in fact is not injury information at all, because it is not required by the Act or the administrative rules to be filed with or maintained by the Commission. Additionally, it is argued that such information is not "open or pending" before the Commission and, therefore, cannot serve as the basis of a request for a record check under Art. 8308-2.31(d). Finally, the Commission's interpretation serves the intent of the law to prevent discrimination against employees who have filed prior workers' compensation claims. To report to employers filings which never rise to the status of a claim would defeat legislative intent.

If you determine that the information inquired about in the first question must be maintained by the Commission but that it need not be released as part of a record check or pre-employment check, the third issue to be resolved is whether such information is confidential under Art. 8308-2.31(a) and, therefore, excepted from disclosure under §3(a)(1) of the Open Records Act. Such information is currently maintained by the Commission on microfilm by date of injury and retrieval of it is time consuming and potentially difficult if the requestor has only a name and does not know the date of injury. More importantly, the purpose of both Art. 8308-2.31 and its predecessor, Art. 8307, §9a, is to protect the identity of injured workers and, thereby, more effectively prevent discrimination against individuals who have filed prior workers' compensation claims. This protection will be eliminated unless information retained by the Commission related to NLTs is classified as "information in or derived from a claim" and protected by Art. 8308-2.31(a) and Art. 6252-17a, §3(a)(1).

Finally, if you determine that the information inquired about in the first question must be retained by the Commission and released as a part of either a record check, a pre-employment check, or an Open Records request, the issue of whether an additional fee may be charged for the search required to locate the information must be resolved. As noted previously, such information is currently stored in microfilm format by date of injury. Searching through this information is cumbersome at best and, if the requestor does not know the date of injury, such a search could be extremely time consuming. As a result of the additional burden on the Commission to locate such information, it seems appropriate that a special fee should be charged to those persons seeking access to it.

If you have any questions or need additional information, please contact Susan Cory, General Counsel, at the address above or at (512) 440-3972.

Sincerely,


for Todd K. Brown
Acting Executive Director

03 - WPS/Attorney General/Attorney General/Record/DA



COPY

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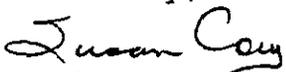
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