

SUBJECT: Revising authority of Office of Injured Employee Counsel ombudsmen

COMMITTEE: Business and Industry — committee substitute recommended

VOTE: 7 ayes — Deshotel, Elkins, Gattis, Keffer, Orr, Quintanilla, S. Turner
0 nays
4 absent — Christian, England, Giddings, S. Miller

WITNESSES: For — (*Registered, but did not testify*: Marianne Bogel)
Against — None
On — Rick Levy, Texas AFL-CIO; (*Registered, but did not testify*: Jonathan Bow, State Office of Risk Management; Norman Darwin, Office of Injured Employee Counsel)

BACKGROUND: In 2005, the 79th Legislature enacted HB 7 by Solomons, making changes to workers' compensation, the no-fault, state-supervised system established under the Workers' Compensation Act (Labor Code, Title 5, subtitle A) to pay the medical expenses of employees injured on the job and to compensate them for lost earnings. The duties of the Texas Workers' Compensation Commission were transferred to the Texas Department of Insurance (TDI). HB 7 also created the Office of Injured Employee Counsel (OIEC), an office administratively attached to, but independent of, TDI to represent the interests of injured employees. OIEC represents individual claimants, advocates on behalf of injured employees as a class, and operates an ombudsman program. OIEC is governed by a public counsel appointed by the governor and confirmed by the Senate for a two-year term that expires February 1 of each odd-numbered year.

HB 7 also eliminated the ability of parties to appeal medical disputes to the State Office of Administrative Hearings (SOAH). In November 2006, the 201st Judicial District Court of Travis County ruled in *HCA Healthcare Corporation, et al. v. Texas Department of Insurance and the Division of Workers' Compensation* that the provision was unconstitutional because it did not provide a hearing, only review and judicial review, for medical fee disputes and medical necessity disputes.

In 2007, the 80th Legislature enacted HB 724 by Solomons, which re-established SOAH hearings and amended Labor Code, sec. 413.031 to direct that a party to a medical necessity dispute, other than one regarding spinal surgery, that remained unresolved after a review of medical service was entitled to a hearing. The hearing would be conducted by SOAH not later than 60 days after the date on which a party requested a hearing. The hearing would be conducted in the manner provided for a contested case under Government Code, ch. 2001, the Administrative Procedure Act.

DIGEST: CSHB 673 would amend Labor Code, ch. 404, subchapter C to modify the OIEC's enabling statute and would:

- allow OIEC to refuse to assist those who threaten or abuse OIEC staff or want to commit fraud or other criminal acts;
- allow OIEC ombudsmen to help an injured employee in a SOAH hearing;
- provide confidentiality for communications between an injured employee and an ombudsman;
- change the requirement that notices on injured employee rights and responsibilities also be reviewed by TDI; and
- limit access of OIEC ombudsmen and other staff to TDI attorney work product.

Refusal of OIEC assistance. The OIEC could refuse to help or terminate ongoing assistance to any workers' compensation claimant who:

- was abusive or violent or threatened any OIEC staff member;
- made unreasonable demands for office services or assistance in claiming workers compensation benefits; or
- committed or threatened to commit a criminal act to pursue a workers compensation claim.

The OIEC office would have to notify both the claimant and TDI in writing that services had been terminated under these provisions. The staff would be required to notify the appropriate law enforcement agency if the claimant committed or threatened to commit a criminal act.

Ombudsman representation at administrative hearings. CSHB 673 would amend Labor Code, sec. 404.105 to allow an OIEC ombudsman to appear on an injured worker's behalf before a SOAH hearing on a workers' compensation administrative dispute resolution or a TDI or

OIEC enforcement action alleging a violation of the Texas Workers' Compensation Act.

Confidentiality. CSHB 673 would extend current Insurance Code exemptions from disclosure of examination reports and other information to the OIEC. The bill would not compel an ombudsman to disclose any information provided by an injured employee related to a workers' compensation claim. However, the bill would not prohibit or alter an ombudsman's duty to notify an appropriate law enforcement agency should the injured worker disclose an attempt to defraud the workers' compensation system or commit another criminal act.

Adoption of notice of rights and responsibilities. The bill would allow OIEC to adopt a notice of injured workers rights and responsibility after consultation with TDI commissioner, but without approval from TDI. Any notice of rights and responsibilities would have to be consistent with state law and TDI rules and would not be allowed to create an entitlement to any workers' compensation benefits not already permitted by state law.

Limit to TDI attorney work product. CSHB 673 would restrict access by OIEC ombudsmen to TDI attorney-client communications, attorney work product, or privileged information protected by the Texas Rules of Civil Procedure or the Texas Rules of Evidence. Should OIEC ombudsmen gain access to information to which they were not entitled, they would not be allowed to disclose the information to claimants or anyone else assisting claimants. The provision would not apply to information about potential criminal acts that would be reported under other sections of the bill.

The bill would take effect on September 1, 2009.

**SUPPORTERS
SAY:**

CSHB 673 would provide clarity in the statutes governing a relatively new agency. The changes reflect the lessons learned by the OEIC since its creation in 2005 and are included in the agency's legislative recommendations to the Legislature. The revisions would benefit workers' compensation claimants, employers, and the rest of the state's citizens.

Refusal of OIEC assistance. CSHB 673 would protect OEIC staff and others from those who could be abusive or threatening or want to commit fraud or another criminal act to obtain workers' compensation benefits. This would be rare, but procedures should be in place to address it.

In one incident, an injured worker told his attorney he would blow up OEIC and “take as many of them with me.” The attorney found the threat credible, reported it, and it was investigated by the Department of Public Safety. Under current law, an ombudsman would have no obligation to report the threat and would be required to continue assisting the individual. CSHB 673 would help remedy this oversight in the law.

The requirement to report the commission or threat of criminal action would mirror the duty of attorneys to report such information about clients and would provide a balancing responsibility to the limited claim to a type of confidentiality privilege provided in the bill. Ombudsmen could speak frankly with claimants but would not be obligated to withhold knowledge about potential fraud or criminal activity to law enforcement agencies.

Most OIEC staffers joined the agency to help injured Texans and have special training for when they encounter difficult clients and situations. CSHB 673 would address a small number of cases when OEIC staff should not have to tolerate abuse or threats.

CSHB 673 would provide notice and a due process for those judged to be abusive or threatening and would prevent OIEC from arbitrary action in denying assistance. OIEC staffers know how stressful it is to cope with a debilitating injury and the complex workers’ compensation process and would be judicious in decisions to withhold assistance and counsel.

Ombudsman representation at administrative hearings. CSHB 673 would clarify the role of ombudsmen, who are not lawyers, to represent injured workers in SOAH hearings. Ombudsmen are especially important in the medical benefits dispute system because attorneys cannot be compensated for representing injured workers pursuing medical claims. The Legislature last session allowed ombudsmen representation in medical claims hearings, but questions remain about their role in other cases, including when TDI alleges violations of the Texas Workers’ Compensation Act. In a recent case, an ombudsman agreed to assist a claimant whose attorney had dropped the client, in a hearing before SOAH. TDI ultimately dropped the allegation for lack of evidence, but it is uncertain whether the OEIC or the ombudsman acted properly. CSHB 673 would provide legislative guidance to define OEIC ombudsmen’s authority to assist claimants in the administrative appeals process.

Confidentiality. CSHB 673 would provide an appropriate, but limited, confidentiality privilege for communications between an injured worker and an ombudsmen. OEIC representatives educate and help injured workers with a complex and often confusing process and should be able to maintain an open line of communication. CSHB 673 would recognize and protect this relationship. As non-attorneys, ombudsmen do not automatically have a confidentiality privilege, and the courts could potentially grant requests to call them as witnesses. The bill would protect OEIC and the state if someone wanted to call an ombudsman as a witness.

Adoption of notice of rights and responsibilities. CSHB 673 would prevent potential technical problems from the unusual statutory requirement that the notice of rights and responsibilities be adopted by both OEIC and TDI. The change would allow this document to be amended easily to reflect changes in state law and TDI rules.

CSHB 673 would allow TDI oversight on adopting and distributing the list of rights and responsibilities. TDI would be consulted on changes, but its formal approval would not be required. The bill also would state that these rules did not add any entitlement or potential increase in costs to the workers' compensation program.

Limit to TDI attorney work product. CSHB 673 would help preserve the fairness and integrity of the dispute resolution system by denying ombudsmen access to confidential TDI files. Attorneys preparing for trial do not have access to the opposing lawyers' records of communication with their clients or other privileged work product. Ombudsmen who represent one side in an administrative hearing should not have unfair access to information from others participating in the process.

The bill would not limit OEIC access to TDI records to monitor its field staff, conduct research, or provide effective customer service to injured workers and the public. It would be impractical and prohibitively expensive to segregate OEIC and TDI databases. Also, maintaining a common recordkeeping function would help identify potential fraud cases where claimants were providing different information to OEIC and TDI.

OPPONENTS
SAY:

Refusal of OEIC assistance. CSHB 673 would provide only a vague standard for refusing access to OEIC services. People caught in a stressful position, such as being injured and unable to work, can be unreasonable and easily perceived as abusive and threatening.

Ombudsman representation at administrative hearings. Ombudsmen should not be put in the position of representing claimants against the state, especially in administrative hearings alleging fraud.

NOTES:

The substitute differs from the original version by adding provisions that would require OEIC to consult with the TDI commissioner on the notice of injured workers rights and responsibilities and would require them to be consistent with state law and TDI rules and not create an entitlement to workers' compensation benefits. The substitute deleted references to public information laws and access to TDI investigation files listed in the original version.

The companion bill, SB 1925 by Watson, has been referred to the Senate State Affairs Committee.