



TEXAS DEPARTMENT OF STATE HEALTH SERVICES

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EDUARDO J. SANCHEZ, M.D., M.P.H.  
COMMISSIONER

OPEN RECORDS DIVISION

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AUG 23 2005

August 17, 2005

Honorable Greg Abbott  
Attorney General of Texas  
P.O. Box 12548 Capitol Station  
Austin, Texas 78711-2548

**RQ-0382-GA**

OPINION COMMITTEE

FILE # ML-44343-05

I.D. # 44343

Re: Request for Opinion regarding fee for records charged by a hospital for workers' compensation claims as governed by Tex. Labor Code Ann. §408.025 and Tex. Health and Safety Code Ann. §241.154(d)(4).

Dear General Abbott:

The Department of State Health Services recently received a request from a legal representative of Hendrick Medical Center in Abilene, Taylor County, Texas seeking an attorney general opinion on an issue affecting the public interest<sup>1</sup>. The Department is the licensing authority over hospitals pursuant to TEX. HEALTH & SAFETY CODE ANN. Ch. 241 and as such is an authorized agent to request an opinion on behalf of licensed hospitals. Specifically, the Department of State Health Services ("Department") requests that an opinion be issued regarding the fee for records charged by a hospital for workers' compensation claims as governed by TEX. LABOR CODE ANN. §408.025 and TEX. HEALTH & SAFETY CODE ANN §241.154(d)(4).

Hospitals frequently receive requests from workers' compensation carriers for copies of medical records pertaining to individuals who have been involved in work-related injuries and who are seeking workers' compensation benefits. Carriers often request any and all medical records pertaining to the injured worker regardless of whether such records were created in connection with the work-related injury.

The specific dispute in question arose in context of a workers' compensation claim where a Hearing Officer of the Texas Workers' Compensation Commission, at the behest of a workers' compensation carrier, issued an Order and Subpoena compelling Hendrick Medical Center ("Hendrick") to produce "all medical records" relating to an injured worker to a carrier's counsel and ordering Hendrick to apply the lower TWCC fee schedule. Since the hospital was not a party to the workers' compensation proceeding, it was not permitted to appear at the contested case hearing to challenge the subpoena or to make a record so that an Appeals Panel could consider the issue. The Legal Department of TWCC also declined to issue an advisory opinion to resolve this dispute. Thus, Hendrick sought assistance from the Department.

<sup>1</sup> See attached correspondence from Edwin L. Meador of Buford and Ryburn, L.L.P. Re: Request for TDSHS to request an Attorney General Opinion.

Hon. Greg Abbott  
P.2 - Hosp. Fee WC Records  
August 17, 2005

This legal dispute is not unique to Hendrick, but adversely affects all hospitals licensed under TEX. HEALTH & SAFETY CODE ANN. §241.154(d)(4) that may be subject to similar administrative orders and subpoenas. As the hospital licensing authority, the Department appears to be the logical vehicle through which an attorney general opinion could be requested. Given the frequency of similar requests for records, the significant dollar amount in controversy when such requests are considered in the aggregate, and the inability of hospitals to have the legal dispute resolved administratively, the Department requests that the Attorney General render an opinion on this subject.

The TEX. HEALTH & SAFETY CODE ANN. §241.154(b) contains a fee schedule specifically governing a fee that a hospital may charge when providing copies of health care information (i.e. medical records). However, the TEX. HEALTH & SAFETY CODE ANN §241.154(d)(4) prohibits application of this fee schedule when request is made for records "relating to treatment or hospitalization for which workers' compensation benefits are being sought." In the scenario presented, TEX. HEALTH & SAFETY CODE ANN. §241.154(d)(4) defers to the fee schedule authorized by §408.025 of the Tex. Labor Code. Hospitals interpret these phrases *literally* as referring only to the *records created in connection with the work-related injury*. Workers' compensation carriers interpret these phrases broadly as referring to any and all medical records relating to an injured worker who is seeking workers' compensation benefits.

The Department characterizes the issues of concern to be addressed as follows:

1. Whether a hospital licensed under Ch. 241 of the Texas Health and Safety Code may charge retrieval and copying fees for health care information in accordance with § 241.154(b) of the Health and Safety Code when the requested records do not relate to treatment or hospitalization for which workers' compensation benefits are being sought, but are records relating to prior or subsequent treatment of conditions or injuries for which workers' compensation benefits are not being sought?
2. Whether the phrase "records relating to treatment or hospitalization for which workers' compensation benefits are being sought" that is set forth in TEX. HEALTH & SAFETY CODE ANN. §241.154(d)(4) and the corresponding phrase of "records relating to treatment or hospitalization for which compensation is being sought" that is promulgated by TEX. LABOR CODE ANN. §408.025(d) were intended to refer to: (1) records created in connection with the treatment or hospitalization for which workers' compensation benefits are being sought; or (2) records relating to any treatment or hospitalization of an injured worker who is seeking workers' compensation benefits?

Hon. Greg Abbott  
P.3 - Hosp. Fee WC Records  
June 16, 2005

The department requests that your office issue an opinion on the interpretation regarding the fee for records charged by a hospital for workers' compensation claims as governed by TEX. LABOR CODE ANN. §408.025 and TEX. HEALTH & SAFETY CODE ANN. 241.154(d)(4). If you have any questions concerning this request, please do not hesitate to have a member of your staff contact Marc Connelly, Assistant General Counsel at 512/ 458-7236. Thank you for your attention to this matter.

Sincerely,

Handwritten signature of Eduardo J. Sanchez, M.D. in black ink.

Eduardo J. Sanchez, M.D., M.P.H.  
Commissioner

EJS/cc-mac/sdm



# BURFORD & RYBURN, L.L.P.

Attorneys and Counselors at Law

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March 15, 2005

Marc Allen Connelly, Assistant General Counsel  
Office of General Counsel  
Texas Department of State Health Services  
1100 W. 49<sup>th</sup> Street  
Austin, Texas 78756-3199

Re: *Request for TDSHS to request an Attorney General Opinion*

Dear Mr. Connelly:

In follow-up to our recent telephone conversations, I am writing to ask the Texas Department of State Health Services, as the licensing authority over hospitals operating pursuant to Chapter 241 of the Texas Health and Safety Code, to request an attorney general opinion on a question affecting the public interest. I represent Hendrick Medical Center in Abilene, Taylor County, Texas. Hendrick is a non-profit hospital licensed pursuant to Chapter 241. Although Hendrick Medical Center is an eleemosynary institution, it is a private facility and does not fall within the scope of Section 402.042(b)(4) of the Texas Government Code as would authorize it to request an attorney general opinion. Section 402.042(b)(2), however, specifically authorizes the head of a department of state government to request an attorney general opinion.

A recent article by Attorney General Greg Abbott published in the Weekly AG Column suggests if you are not authorized to request an opinion, you should contact an authorized requestor to see if he or she would be willing to make a request on your behalf. The legal dispute in question is not unique to Hendrick Medical Center, but adversely affects all hospitals licensed pursuant to Chapter 241. Although Hendrick Medical Center is not authorized to directly request an opinion, the TDSHS is an appropriate authorized requestor with an interest in facilitating a resolution to the legal dispute.

### **Factual Background**

Hospitals frequently receive requests from workers' compensation carriers for copies of medical records pertaining to individuals who have been involved in work-related injuries and who are seeking workers' compensation benefits. Because the veracity of the workers' compensation claim is sometimes in question, carriers often request copies of "any and all medical records" pertaining to the injured worker, regardless of whether such records were created in connection with the work-related injury.

Workers' compensation carriers routinely insist that the significantly lower fee schedule promulgated by the Texas Workers' Compensation Commission (TWCC) governs the fee that may be charged by a hospital for all medical records regardless of whether such records were created in connection with the work-related injury or whether such records are historical records that were created even prior to the work-related injury. Hospitals insist that when the records do not relate to treatment or hospitalization for the work-related injury, the higher fee schedule contained in the Health and Safety Code governs the fee that may be charged.

The significance of this legal dispute from a fiscal standpoint becomes apparent when the amount authorized under each fee schedule is considered in the aggregate. Each individual request involves a seemingly small amount of money. However, in the specific dispute that brought this matter to the forefront, the fee authorized by the Health and Safety Code was approximately four times that authorized by the TWCC fee schedule. When considered in the aggregate on a monthly or annual basis, and when considered in the aggregate for all hospitals subject to Chapter 241, the amount in controversy involves a significant amount of money.

The specific dispute in question arose in the context of a workers' compensation claim where a Hearing Officer of the Texas Workers' Compensation Commission, at the behest of a workers' compensation carrier, issued an Order and Subpoena compelling Hendrick Medical Center to produce "all medical records" relating to an injured worker to a carrier's counsel and ordering Hendrick to apply the lower TWCC fee schedule. Since the hospital was not a party to the workers compensation proceeding, it was not permitted to appear at the contested case hearing to challenge the subpoena or to make a record so that an Appeals Panel could consider the issue. The Legal Department of the Texas Workers' Compensation Commission also declined to issue an advisory opinion to resolve the dispute.

As mentioned above, this legal dispute is not unique to Hendrick Medical Center, but adversely affects all hospitals licensed under Chapter 241 that may be subject to similar administrative orders or subpoenas. As the hospital licensing authority, the Texas Department of State Health Services appears to be the logical vehicle through which an attorney general opinion could be requested. Given the frequency of similar requests for records, the significant dollar amount in controversy when such requests are considered in the aggregate, and the inability of hospitals to have the legal dispute resolved administratively, an attorney general opinion is needed to resolve this matter.

#### **Legal Dispute**

Section 241.154(b) of the Health and Safety Code contains a fee schedule specifically governing the fee a hospital may charge when providing copies of health care information (*i.e.* medical records). Section 241.154(d)(4), however, prohibits application of this fee schedule when request is made for records "relating to treatment or hospitalization for which workers' compensation benefits are being sought." In that circumstance, the Health and Safety Code

defers to the fee schedule authorized by the Texas Labor Code. Section 408.025(d) of the Texas Labor Code provides that the TWCC fee schedule is to be applied in response to a request of an injured employee, the employee's attorney, or the insurance carrier for "records relating to treatment or hospitalization for which compensation is being sought."

The dispute in question concerns what was intended by the Legislature's use of the phrases "**records relating to treatment or hospitalization for which workers' compensation benefits are being sought**" in the Health and Safety Code and the phrase "**records relating to treatment for which compensation is being sought**" in the Labor Code. Hospitals interpret these phrases literally as referring only to the records created in connection with the work-related injury. Workers' compensation carriers interpret these phrases broadly as referring to any and all medical records relating to an injured worker who is seeking workers' compensation benefits.

Carriers claim that because pre-existing conditions or injuries may be relevant to the resolution of the workers' compensation claim, those records "relate to treatment or hospitalization for which workers' compensation benefits are being sought." While there is no dispute this broad category of records may be discoverable and relevant to the resolution of a workers' compensation claim, the appropriate fee schedule is not determined by whether such records are discoverable or relevant. Determination of the appropriate fee schedule depends on whether the requested records relate to treatment or hospitalization for which workers' compensation benefits are being sought. Records created prior to the work-related injury do not, as a matter of law, relate to treatment or hospitalization for which workers' compensation benefits are being sought. Similarly, records relating to treatment or hospitalization occurring subsequent to the work-related injury and for which workers' compensation benefits are not being sought are not subject to the lower TWCC fee schedule.

#### **Statutory Authority in Question**

As you know, Chapter 241 of the Texas Health and Safety Code is known as the "Texas Hospital Licensing Law." TEX. HEALTH & SAFETY CODE ANN. § 241.001 (Vernon 2001). Subchapter G of Chapter 241, entitled "Disclosure of Health Care Information," specifically governs the release of health care information by hospitals licensed under Chapter 241. Section 241.154 states as follows with regard to permissible fees for providing copies of health care information:

(b) Except as provided by Subsection (d), the hospital or its agent may charge a reasonable fee for providing the health care information and is not required to permit the examination, copying, or release of the information requested until the fee is paid unless there is a medical emergency. . . .

*Id.* at § 241.154(b). The statutory fee schedule is set forth at Section 241.154(b)(1) & (2). Section 241.154(d) sets forth exceptions to application of the fee schedule, one of which forms the basis of the present conflict. Subsection (d)(4) states as follows:

- (d) A hospital may not charge a fee for:
- (1) ...;
  - (4) **health care information relating to treatment or hospitalization for which workers' compensation benefits are being sought**, except to the extent permitted under Chapter 408 of the Texas Labor Code.

*Id.* at § 241.154(d)(4) (emphasis added).

The language limiting the exception at Section 241.154(d)(4) is significant because it corresponds with similar limiting language contained in the Texas Labor Code. Section 408.025(d) of the Texas Labor Code states as follows:

(d) On the request of an injured employee, the employee's attorney, or the insurance carrier, a health care provider shall furnish **records relating to treatment or hospitalization for which compensation is being sought**. The commission may regulate the charge for furnishing a report or record, but the charge may not be less than the fair and reasonable charge for furnishing the report or record.

TEX. LAB. CODE ANN. § 408.025(d) (Vernon Supp. 2004) (emphasis added). This statute authorizes the TWCC to promulgate a rule regulating the charge for furnishing records relating to treatment or hospitalization for which compensation is being sought. This fee schedule is set forth at TWCC Rule 133.106(f)(4) and results in a significantly lower payment to hospitals for copies of records.

#### Analysis

Section 241.154(d)(4) clearly prohibits application of the hospital fee schedule when a request is made for records "relating to treatment or hospitalization for which workers' compensation benefits are being sought." When this exception applies, the Labor Code and TWCC Rules promulgated under the authority of Section 408.025 provide the appropriate fee schedule. The dispute concerns what the Legislature intended by use of the foregoing phrases when identifying medical records that are subject to the TWCC fee schedule.

One must presume the Legislature used the foregoing phrases for a reason. If the Legislature had intended to make the exception broad enough to encompass all medical records relating to an injured worker, it could have easily done so by prohibiting the application of the hospital fee schedule in response to a request for records relating to an injured worker who is seeking workers' compensation benefits. Instead, the Legislature limited the exception to records relating to treatment or hospitalization for which workers' compensation benefits are being sought. This limited exception focuses only on records that were created in connection with treatment or hospitalization for which workers' compensation benefits are being sought.

Marc Allen Connelly  
Assistant General Counsel  
March 15, 2005  
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Records created in relation to prior or subsequent treatment or hospitalizations for which workers' compensation benefits are not being sought, simply fall outside the exception and are subject to the customary hospital fee schedule.

I think you will agree when hospitals undertake to provide treatment or hospitalization for injured workers, they do so with the understanding they are subject to the lower TWCC fee schedule when later asked to provide copies of those medical records to the carrier. However, hospitals are not required to accept the lower fee schedule when providing copies of records that do not relate to the specific treatment or hospitalization for which workers' compensation benefits are being sought. The Legislature created a narrow exception to the customary fee schedule that was not intended to encompass birth records or records pertaining to non-work-related treatment or hospitalizations merely because such records may relate to or be relevant to a workers' compensation carrier's defense of a claim.

I have taken the liberty of drafting two questions that I believe characterize the issues that need to be answered by an attorney general opinion:

Whether a hospital licensed under Chapter 241 of the Texas Health and Safety Code may charge retrieval and copying fees for health care information in accordance with Section 241.154(b) of the Health and Safety Code when the requested records do not relate to treatment or hospitalization for which workers' compensation benefits are being sought, but are records relating to prior or subsequent treatment of conditions or injuries for which workers' compensation benefits are not being sought?

Whether the phrase "records relating to treatment or hospitalization for which workers compensation benefits are being sought" that is set forth at Section 241.154(d)(4) of the Texas Health and Safety Code and the corresponding phrase "records relating to treatment or hospitalization for which compensation is being sought" that is set forth at Section 408.025(d) of the Texas Labor Code were intended to refer to: (1) records created in connection with treatment or hospitalization for which workers' compensation benefits are being sought; or (2) records relating to any treatment or hospitalization of an injured worker who is seeking workers' compensation benefits?

I appreciate your willingness to consider this matter and believe it is the type of legal dispute for which an attorney general opinion would be appropriate. I trust that you will not hesitate to contact me if you have any questions or if I may be of any assistance. Kindest personal regards.

Marc Allen Connelly  
Assistant General Counsel  
March 15, 2005  
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Very truly yours,

BURFORD & RYBURN, L.L.P.



Edwin L. Meador

ELM:me

cc: Tim FitzGerald  
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