

SUBJECT: Continuing the Office of Injured Employee Counsel

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 12 ayes — Cook, Menendez, Craddick, Frullo, Geren, Harless, Hilderbran, Huberty, Oliveira, Smithee, Solomons, Turner

0 nays

1 absent — Gallego

WITNESSES: For — (*Registered, but did not testify:* Michelle Romero, Texas Medical Association)

Against — None

On — (*Registered, but did not testify:* Norman Darwin, Office of Injured Employee Council; Kelly Kennedy, Sunset Advisory Commission; Amy Lee, Texas Department of Insurance – Division of Workers’ Compensation; Brian White, Office of Injured Employee Council)

BACKGROUND: The Office of Injured Employee Counsel (OIEC) was established in 2005 by HB 7 by Solomons as a part of an overhaul of the workers’ compensation system. It is administratively attached to, but independent of, the Texas Department of Insurance (TDI). The office assists unrepresented injured employees through TDI’s Division of Workers’ Compensation (DWC) dispute resolution process, educates injured employees regarding the Texas workers’ compensation system, and advocates on behalf of injured employees as a class during rulemaking and judicial proceedings.

Ombudsman services provide assistance at no cost to injured employees. When providing assistance, OIEC is statutorily required to prepare an injured employee for a proceeding, including meeting with the injured employee for 15 minutes before any informal or formal hearing.

Each ombudsman holds a workers' compensation insurance claims adjuster's license and has completed a comprehensive training program designed specifically for OIEC ombudsmen.

OIEC educates and provides general assistance to injured employees on the workers' compensation system by providing referrals to other local, state, and federal agencies and assisting injured workers in filing complaints through the appropriate entities and licensing boards.

The Labor Code authorizes OIEC to access information from all executive agencies and excepts OIEC from confidentiality restrictions governing claim files and directs DWC to release claim information to OIEC for any statutory or regulatory purpose related to its duties. For dispute resolution proceedings, state law authorizes release of a claim file to only a select group of people involved in a dispute – the injured employee or beneficiary, the employer, the insurance carrier, and their representatives. The statute does not require OIEC to have a direct relationship with an injured employee in a dispute before obtaining that injured employee's claim file.

OIEC is governed by the public counsel, appointed by the governor and confirmed by the Texas Senate, who serves a two-year term. The public counsel must be licensed to practice law in Texas. OIEC employs 158.5 full-time equivalent employees and operates 24 field offices across the state.

The Legislature appropriated about \$20 million to OIEC for fiscal 2010-11. Unless continued by the Legislature, the agency's authority will expire on September 1, 2011.

DIGEST: CSHB 1774 would continue the Office of Injured Employee Counsel until September 1, 2017.

The bill would limit the office's access to medical and private information to the same information related to the employee's injury and workers' compensation claim to which the employee or any other party to the claim was entitled. The Division of Workers' Compensation would be required to provide, upon request from OIEC, the identity, claim number, and contact information of claimants receiving assistance from the office.

The bill would establish the deadline for the office's report to the Legislature as January 1 of every odd-numbered year.

The bill also would add and modify standard Sunset provisions governing complaints made to the office, rulemaking, and dispute resolution.

The bill would take effect September 1, 2011, and would apply to a claim for workers' compensation benefits based on a compensable injury regardless of whether the injury occurred before, on, or after the effective date.

**SUPPORTERS
SAY:**

The Office of Injured Employee Counsel (OIEC) should be continued because the office is successful at advocating for and assisting injured employees. When OIEC becomes involved, 70 percent of the issues being disputed are resolved without being sent on to a contested case hearing. If a contested case hearing occurs, an injured employee is nearly four times more likely to win a dispute with an OIEC ombudsman's assistance than without any legal representation or assistance. OIEC's independence from DWC ensures OIEC's focus on the interests of injured employees.

Access to injured employee information. The bill would restrict OIEC access to injured employee files to protect employee privacy and to permit access only to the files that directly pertain to an OIEC client.

Current law permits OIEC to access all workers' compensation claim files, and this access unfairly exceeds that of other parties to DWC proceedings. Although it does not appear that OIEC has misused its authority, the agency's exemption from statutory confidentiality restrictions on claim files places the agency in a more favorable position than other parties to the same proceedings. Such increased access creates the appearance of impropriety and unfairness in what is supposed to be a level playing field. In comparable regulatory arenas, public counsel offices do not have any greater access to information than other interested parties. Allowing the agency to access a claim file, which can include medical data, for an injured employee who has not requested help infringes on that injured employee's privacy.

The bill would not hinder OIEC's ability to perform its duties because the agency does not need access to claim files for injured employees it is not directly assisting in dispute resolution proceedings or to effectively advocate for injured employees as a class.

Medical experts on staff. The bill need not include a specific provision requiring OIEC to have medical experts on staff to advise ombudsmen. OIEC already may hire these individuals if it chooses. The choice of whether to have medical experts should be based on availability of funding, not required by statute.

OPPONENTS
SAY:

The bill should not restrict the information available to the Office of Injured Employee Counsel. The bill also should be amended to require OIEC to employ medical experts to advise the office's ombudsmen.

Access to injured employee information. The bill would inhibit the agency's ability to gather and analyze aggregate data on injured employees, diminishing the agency's capacity to advocate on their behalf.

OIEC has not misused its authority, and no changes should be made to current law permitting OIEC to access injured employee information. OIEC's management is sensitive to appearances of impropriety and understands the importance of confidential claim information. The agency accesses individual claimant information only after the injured employee authorizes its release and understands the agency's services.

There is no reason to further address the officer's access to information. As a result of OIEC's legislative recommendation to the 81st Texas Legislature, HB 673 substantially amended Labor Code, sec. 404.111 to reduce OIEC's access to attorney work product and enhance both civil and criminal penalties for any employee that improperly discloses confidential claim information.

Medical experts on staff. The bill should require the OIEC to have medical experts on staff to advise ombudsmen to increase the quality and usefulness of services provided to injured employees. Medical experts could advise ombudsmen as to what questions to ask, which could increase the effectiveness of their counsel dramatically. In 2009, OIEC requested medical experts for their staff, but the request was not included in their fiscal 2010-11 appropriations.

NOTES:

The committee substitute differs from the bill as filed by specifying certain information to which the Office of Injured Employee Counsel would have access and moving the reporting deadline forward one month.

The companion bill, SB 651 by Huffman, was considered in a public hearing by the Senate Government Organization Committee on March 21 and left pending.