SUBJECT: Relating to confidential employer-insurance carrier communications

COMMITTEE: Business and Industry — committee substitute recommended

VOTE: 5 ayes — Oliveira, Bohac, Orr, Villalba, Workman

2 nays — E. Rodriguez, Walle

WITNESSES: For — Cathy Dewitt, Texas Association of Business; Sam McMurry, Texas Self Insurance Association; William Weldon, The Travelers Companies Inc.; (*Registered, but did not testify:* Lee Ann Alexander, Liberty Mutual Insurance; Kathy Barber, NFIB of Texas; Pam Beachley, Texas Cotton Ginners' Trust; Albert Betts, Association of Fire and Casualty Companies of Texas; Pamela Bratton, Society of Human Resource Management Texas State Council; Brent Connett, Texas Conservative Coalition; Jeff Dodson, The Boeing Co.; Jon Fisher, Associated Builders and Contractors of Texas; Michael Johnson, American Airlines; Lee Loftis, Independent Insurance Agents of Texas; John Marlow, ACE Group; Matt Matthews, Texas Association of Staffing; David Mintz, Texas Apartment Association; Lucinda Saxon, American Association of Independent Claims Professionals; Emily Somerville, Apollo Group; Joe Woods, Property Casualty Insurers Association of America)

Against — John A Davis, Texas Trial Lawyers Association; Fabiola Flores, Texas Workers Advocates; Rick Levy, Texas AFL-CIO; Brad McClellan; Alan Tysinger; (*Registered, but did not testify:* Jason Byrd, Texas Trial Lawyers Association; Chris Jones, Combined Law Enforcement Associations of Texas (CLEAT); Emily Timm, Workers Defense Project)

On — (*Registered, but did not testify*: Rob Bordelon, TDI Division of Workers Compensation; Amy Lee, Texas Department of Insurance; Brian White, Office of Injured Employee Counsel)

BACKGROUND: The Texas Supreme Court ruled in *In re: XL Specialty Insurance Company, et al.* that attorney-client privilege does not protect communications between the workers compensation insurer’s lawyer and the covered employer.

Labor Code, Subtitle A, is the Texas Workers' Compensation Act.

Labor Code, sec. 409.011 (b) (1)-(5) describes the employer's rights under the Texas Workers' Compensation Act. This includes the employer's right to communication from the Division of Workers' Compensation within the Texas Department of Insurance (TDI) explaining the employer's right to be present and give evidence at administrative hearings of an employee's claim, the right to report suspected fraud, the right to contest the worker's injury compensability, and the right to receive notice of a claim settlement proposal or an administrative or judicial proceeding relating to the claim's resolution. Labor Code, sec. 415.002 (b) states an employer has a right to freely discuss a claim with a carrier, assist in an investigation and evaluation or a claim, or attend a proceeding of the division and participate at the proceeding.

Labor Code, sec. 415.002 (a) (6) imposes an administrative penalty on the insurance carrier or its representative if the carrier allows a non-self-insured employer to dictate methods and terms on which a claim is handled and settled.

DIGEST:

CSHB 1468 would amend the section of the Texas Workers Compensation Act governing what information may be provided to the employer and the employer's rights. The bill would extend the right for the insurance coverer and the covered employer to have confidential communications not subject to disclosure. The carrier could refuse to disclose or prevent another person from disclosing these communications.

Covered employer includes the employer's attorneys, consultants, sureties, indemnitors, employees, third-party administrators, and other agents.

The communication subject to confidentiality would include mental impressions, conclusions, opinions, claims-handling strategies, litigation strategies, legal theories regarding the claim, claim statute, claim reserves, or proprietary business practices.

The communications between the covered employee and the insurance carrier would be made confidential in furtherance of the employer's rights as outlined in Labor Code sec. 409.011 (b) (1)-(5) and Labor Code sec. 415.002 (b).

The bill would not apply to communications offered as evidence in a judicial proceeding between the carrier and the covered employee, communications made to the insurance carrier in violation of Labor Code sec. 415.002 (a) (6), or public records subject to open access requirements. These confidential communications would not affect the requirement for both parties to exchange medical reports, expert witness reports, medical records, and other information. Nor would they affect the right of the commissioner of Insurance to obtain information for the purpose of monitoring compliance with the law or reviewing the performance of carriers.

The bill would apply only to communications between an insurance carrier and a covered employee occurring on or after the effective date of the bill.

The bill would take effect on September 1, 2013.

SUPPORTERS SAY:

This bill would extend confidentiality protections to communications between the employer holding the workers' compensation policy and the insurance company. This reverses the court's ruling in *In re: XL Specialty Insurance Company, et al.* that this communication is subject to discovery. This is an important protection because insurance companies and employers need to be able to have unfettered discussion about the factual basis of workers' compensation claims.

The committee substitute would make an important distinction in specifying that this information was "confidential" and not "privileged." Confidential communications may therefore still be subject to court review, unlike privileged information, while still allowing a degree of cooperation and discussion between the covered employer and the insurer. This bill would therefore not imply that the relationship between the covered employer and the insurance company's lawyer was the same as a client-attorney relationship, or even that their interests were perfectly aligned. The bill simply would extend the protection of "confidentiality" to these communications.

Covered employers and insurance companies could have a need to discuss a claim confidentially if the facts of the claim touched on proprietary business information.

OPPONENTS SAY:

Insurer-employer communication ought to be subject to discovery like any other information, and it is unfair to the other party in the lawsuit that

these communications are secret. Extending a form of privilege to the employer-insurer relationship is inappropriate, as recognized by the *In re: XL Specialty Insurance Company, et al.* decision. An insurer's lawyer is obligated to represent the interests of the insurer, not those of the covered employer, and inasmuch as those interests may diverge, this type of confidentiality should not be applied to the relationship.

What exactly covered employers and insurance companies would need to discuss confidentially is unclear. The law prohibits an insurance company from allowing a covered employer to dictate the strategy used to settle the workers compensation claim. Insurance companies are no longer subject to bad faith lawsuits from employees, in the wake of the Texas Supreme Court decision in *Texas Mutual Insurance Company v. Ruttiger*, and therefore would not need to share information with employers to construct a defense for those lawsuits.

If the law did pass, an insurance company could deny a claim on the basis of confidential information from the employer, which would undermine the workers' compensation system's transparency and could make the employer liable to litigation from the denied worker.