Honorable Nancy Bear Usera
Commissioner
Department of Labor

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Confidentiality of workers' compensation files

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BACKGROUND

You have asked whether workers' compensation files containing medical records, maintained by the Department of Labor, can be considered confidential. The Workers' Compensation Act (AS 23.30) does not specifically hold that medical information on file with the Department is confidential. However, AS 09.25.120, involving the inspection and copying of public records, excludes "medical and related public health records" from public information disclosure requirements. The issue then is whether medical confidentiality provided under AS 09.25.120 can be extended to the medical records in the workers' compensation files maintained by the Department. Additionally you have asked about the disclosure of nonmedical information from injured workers' files to persons who are not a party to a workers' compensation claim. (The current legislature passed SB 219, and section 7 of that bill specifically treats workers' compensation medical records as confidential. The governor has not yet acted on the bill.) 1/

As indicated in your request memo, parties to a specific claim, such as a rehabilitation provider or an agent of the workers' compensation insurance carrier, need access to the injured workers' medical records. Indeed, access of information by involved parties is mandated by the broad discovery procedures allowed by the workers' compensation statutes and regulations. A

1/ HCS CSSB 219 provides, "[E]xcept for medical records released to the employer, carrier, rehabilitation provider, rehabilitation administrator, or other person selected by the employee, the employee's medical records in the possession of the division of workers' compensation are confidential and are not subject to the public records inspection requirements of AS 09.25.110 -- 09.25.121.

public inquiry, on the other hand, is based on the freedom of information statutes, AS 09.25.110 -- 09.25.120 (often referred to as Access to Public Records Statutes).

SHORT ANSWER

The workers' compensation procedures allow for almost unlimited discovery by involved parties of injured workers' medical files maintained by the Division of Workers' Compensation. Discovery would extend to the injured employees' previous workers' compensation files on record with the division. 2/ The workers' compensation regulations provide that an injured employee can object to a request for information based on relevancy, and regulations provide for a pre-hearing to determine if a protective order should be issued. 8 AAC 45.095.

Under the freedom of information statutes, "public records" are generally accessible to the public. AS 09.25.120. Workers' compensation files have historically been considered public records. However, privacy interests addressed by Alaska Constitution article I, section 22, and possibly the medical records exclusion in AS 09.25.120, may be a basis to safeguard unwarranted disclosure of sensitive information. At the very least an injured worker, through regulations, could be given an opportunity to object before the release of medical information based on a public request. Without a specific confidentiality statute, other information contained in the workers' compensation files is open to the public.

2/ If a procedure is not expressly provided by the Workers' Compensation Act, the Administrative Procedure Act (APA) would apply. (AS 44.62.050.) The Alaska Rules of Civil Procedure (ARCP) offer additional guidance. Both the APA and ARCP provide for full disclosure and discovery.

DISCUSSION

I. Requests For Medical Record From Involved Party. 3/

Historically, the Workers' Compensation Board has directed that discovery be open and informal. AS 23.30.107, concerning release of information, provides:

> Upon request, an employee shall provide written authority to the employer, carrier, rehabilitation provider, or rehabilitation administrator to obtain medical and rehabilitation information relative to the employee's injury.

The board in Green v. Kake Tribal Corp., AWCB Decision No. 87-0149 (July 6, 1987), comments on its general discovery philosophy by stating:

> AS 23.30.107 requires an employee to furnish written authority for interested parties to obtain medical and rehabilitation information "relative to the employee's injury." We have previously determined that information sought only have some relationship or connection to the injury, and that it may include work and income history.

In Cooper v. Boatel Inc., AWCB Decision No. 87-0108 (May 4, 1987), the board directed the employee to provide wage and prior injury information. More recently, in Carver v. Sunrise Bakery, AWCB Decision No. 89-0148 (June 15, 1989), the board determined:

> The insurer correctly notes that our regulations require applicants to serve copies of all medical reports in possession, which are or may be relevant to the claim, upon all parties. That

3/ "Involved party" refers to the injured worker and his representative; the workers' compensation provider (insured or self-insured) and its representatives such as an adjuster or an attorney; and rehabilitation providers.

> requirement extends to later-acquired medical records at 30 day intervals. AS 23.30.095(h); 8 AAC 45.052(b) and (d). There is no requirement, however, that an applicant obtain records on their own account or by request of an insurer. Rather, in regard to medical records, AS 23.30.107 provides that upon request of the employee "shall provide written authority . . . to obtain medical and rehabilitation information relative to the employee's injury."

(Emphasis added.) While the release of information provisions are construed broadly, regulations do allow an employee to object and seek a protective order. 4/

Participants in the workers' compensation system recognize that medical information is the cornerstone for the administration of a claim. AS 23.30.095(e) in part addresses

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4/ 8 AAC 45.095 provides:

> RELEASE OF INFORMATION. (a) An employee who, having been properly served with a request for release of information, feels that the information requested is not relevant to the injury must, within 10 days after receipt of the request, petition for a prehearing under 8 AAC 45.065.
>
> (b) If after a prehearing the board determines that information sought from the employee is not relevant to the injury which is the subject of the claim, a protective order will be issued.
>
> (c) If after a prehearing an order to release information is issued and an employee refuses to sign a release, the board will, in its discretion, limit the issues at the hearing on the claim to the propriety of the employee's refusal. If after the hearing the board finds that the employee's refusal to sign the requested release was unreasonable, the board will, in its discretion, refuse to order or award compensation until the employee has signed the release.

information in a medical examination and provides:

> Facts relative to the injury or claim communicated to or otherwise learned by a physician or surgeon who may have attended or examined the employee, or who may have been present at an examination are not privileged, either in the hearings provided for in this chapter or an action to recover damages
> against an employer who is subject to the compensation provisions of this chapter.

(Emphasis added.) Further, AS 23.30.095(h) mandates that the parties to workers' compensation proceedings have a continuing obligation to provide physician's reports to the adverse party. 8 AAC 45.052.

Procedures before the board are addressed under AS 23.30.135(a) and provide, in part, "In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided in this chapter." Board action shows the relative informality of discovery procedures under the workers' compensation setting. See also Cook v. Alaska Workers' Compensation Bd., 476 P.2d 29 (Alaska 1970), allowing hearsay evidence at board hearings. Workers' compensation regulation 8 AAC 45.052 establishes that parties to a workers' compensation dispute will provide copies of all relevant medical reports in their possession to all parties to the claim. This is an ongoing obligation.

The ease of access and informality in the discovery of medical information is to facilitate the economic handling of the vast volume of workers' compensation claims. Access to information about the injured employee extends beyond medical information to such things as unemployment insurance information and social security information. The board regularly requires an employee to supply this information to the carrier for the adjudication of a claim. The necessity of obtaining a medical history is further warranted by the need for second-injury-fund information. See AS 23.30.205. Documenting written records of a previous injury can have a significant financial impact on a claim adjudication. Finally, ease of access to information helps facilitate the discovery of fraudulent claims as provided for in AS 23.30.022. Thus, we find that there is no violation of the

law to allow involved parties open access to medical records maintained by the division, absent a protective order.

II. Access To Medical Records By A Noninvolved Party.

The Alaska public records statutes, AS 09.25.110 -- 09.25.120, provide for access by the public to all public records unless specifically excluded by law. Assuming that Senate Bill 219 is not vetoed by the governor, section 7 specifically provides for division confidentiality of employee medical records except to involved parties. An analysis of public access to employee medical records must be tempered by the possible passage of SB 219.

The filing of a workers' compensation claim has been viewed as similar to filing a personal injury lawsuit, in which case the physician-patient evidentiary privilege is waived. See Trans-World Inv. v. Drobny, 554 P.2d 1148, 1151 (Alaska 1976), giving a historical background on physician-client privilege. In Drobny, our court states:

> Further, we hold that the filing of a personal injury action waives the physician-patient privilege as to all information concerning the health and medical history relevant to the matters which the plaintiff has put in issue. The scope of the waiver extends to all matters pertinent to the plaintiff's claim, including but not limited to those matters the relevancy of which is based on a historical or casual connection.

(Footnotes omitted.)

Board decisions reflect that information filed with the division is a public record. For example, in Green v. Kake Tribal Corp., supra, at 4, the board comments, "[w]e have no interest in viewing irrelevant information or in having it included in our files, which are open to the public." (Emphasis added.) In Carver v. Sun Rise Bakery, supra, at 5, the board states, "[i]f the employee timely objects, defendants must not file the information with us until a pre-hearing or hearing has

been held to determine whether the evidence should become a part of our public record." (Emphasis added.) There is a long-established administrative practice of division records being public.

On the other hand, Alaska's constitutional right of privacy provides, "The right of the people to privacy is recognized and shall not be infringed." Alaska Constitution article I, section 22. On the premise that workers' compensation files are public records, our court would likely hold that public access to the records outweighs the privacy interest. For example, in Mun. of Anchorage v. Daily News, 794 P.2d 584, 589 (Alaska 1990), our court held that a public employee's performance evaluations were subject to public disclosure under the public records statutes. The court stated that "exceptions to these disclosure requirements are construed narrowly in furtherance of the legislature's express bias in favor of broad public access." The legislative history of AS 09.25.110 -- 09.25.120, as outlined in City of Kenai v. Kenai Peninsula Newspapers, Inc., 642 P.2d 1316 (Alaska 1982), also reflects the broad legislative policy of open records, and indicates that any ambiguities must be resolved in favor of public disclosure.

Absent the passage of Senate Bill 219, the division could consider regulations to provide the injured worker with an opportunity to oppose disclosure. A public request for medical records, other than from involved parties, could trigger a letter to the employee advising of the request. Regulations could be formulated to permit the injured worker to have a hearing such as provided under 8 AAC 45.095; or upon notice, the employee could seek a protective order directly through the court system. A public request for specific medical records is believed to be relatively rare, so the potential hearing process would be infrequent. The public hearing procedure before adoption of new regulations would also be a forum for discussion of the confidentiality issue.

III. Public Access To Nonmedical Records.

There is no specific exception to the release of nonmedical information contained in the division files. SB 219 only refers to the confidentiality of an employee's medical records. A public request for general information should normally be granted. AS 09.25.110 provides for payment of a standard copying fee and additional costs should division

personnel time exceed five hours per month to produce the requested records. AS 09.25.115, enacted in 1990, encourages a public agency to make information available in electronic format, and suggests public disclosure through on-line access to an electronic file, or data base. Thus, recent legislation affirms the policy of broad public access to agency records. Of course, the workers' compensation claimant may seek a protective order to avoid disclosure of sensitive nonmedical information.

We have examined public records disclosure through numerous informal attorney general opinions, most notably related to information contained in permanent fund dividend (PFD) applications. We have concluded that information contained in PFD applications is not protected from disclosure under AS 09.25.100, although in some cases information contained in a PFD application may be kept confidential under the privacy provision of the Alaska Constitution, requiring analysis on a case-by-case basis. The names of PFD applicants are not constitutionally protected. See 1987 Inf. Op. Att'y Gen. (July 15; 663-87-0598). PFD applications are analogous to workers' compensation records (nonmedical). Alaska Supreme Court cases reflect a balancing test, weighing the public interest in disclosure against the individual's reasonable expectations of privacy. Considering that workers' compensation records are already in the possession of a state agency, privacy expectations are diminished. Thus, if there is some legitimate public purpose for utilizing the information, the balance will be tipped in favor of disclosure.

CONCLUSION

Involved parties have almost unlimited access to injured workers' records on file with the division. Broad disclosure statutes and regulations facilitate the policy that proceedings before the board will be informal and expeditious. These broad discovery rules are reflected in the Administrative Procedure Act and the Alaska Rules of Civil Procedure. The injured worker may seek a protective order to prevent public disclosure of sensitive material. A request for medical records from a noninvolved party highlights the conflict between a policy of access to public records and individual privacy interests. Historically, the records on file with the division have been treated as public records similar to court records. The pending passage of SB 219 specifically provides that except for involved parties, medical records on file with the division are

confidential and not subject to the public records inspection requirements. All other records of the division are accessible to the public in a manner that does not overly interfere with division business.

Do not hesitate to contact me should you have any questions regarding this opinion.

TJS:jh