

ADVISORY NO. 351
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TOPIC: OBTAINING MEDICAL RECORDS AFTER HIPAA

Many health care providers (HCPs) are refusing to release medical records to workers' compensation insurers. While there are very heightened sensitivities to the protection of a patient's privacy, this is an overreaction and is inconsistent with the clear language of the privacy protection afforded under HIPAA.

Workers' compensation related medical information is not covered by HIPAA. The Act only regulates conduct with respect to "covered entities." 45 C.F.R. §160.300. While a "health plan" may be a covered entity, the definition of health plan expressly excludes any plan or program to the extent that it provides or pays for the cost of "excepted benefits." 45 C.F.R. §160.103. Workers' compensation benefits are within the class of excepted benefits as defined by HIPAA PHS Act 42 USC 300gg-91(c)(1)(D). Accordingly, the Congressional Act expressly excludes workers' compensation carriers from the purview of HIPAA. To even make it clearer, HHS adopted a more specific statement:

A covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers' compensation or other similar programs established by law, that provide benefits for work related injuries or illness without regard to fault.

45 C.F.R. §164.512(l). Accordingly, HIPAA, and the HHS regulations adopted pursuant to HIPAA, clearly permit HCPs to transmit to a workers' compensation carrier all medical information related to a workers' compensation patient.

TWCC has issued Advisory 2003-05 clarifying that HIPAA "recognizes the legitimate need for insurers and other entities involved in the workers' compensation system to have access to an injured worker's PHI as authorized by state or other law. 45 C.F.R. §§164.512(a) and 164.502(b)."

The Workers' Compensation Act, and the TWCC rules *require* the disclosure of various health or medical information that must be exchanged with the carrier. TEX.LAB.CODE §413.021(b)(3) (return to work coordination); Rule 129.5 (TWCC-73s); 130.1 (MMI and impairment); 133.1(a) (information necessary for the bill to be complete); 133.104 (consulting doctor reports); and 133.105 (physical therapy notes). HCPs must report information when required by TWCC rule. Rule 180.22(b). The failure of the HCP to comply with the Act or TWCC rules subjects the HCP to very substantial fines and penalties and removal from the

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treating doctor list. TEX.LAB.CODE §§415.003(5), 408.0231, 180.26(c).

If the provider refuses to disclose medical records, to the extent that medical information is necessary to appropriately document the service provided, then we recommend that you communicate the issues about documentation within fourteen days of receipt of the bill, and if there is no response, deny the bill within forty-five days for lack of documentation (Code "N"). Explain the basis for the position. We suggest language similar to the below:

Provider has refused to provide medical records documenting services provided. Carrier unable to determine if services are: (a) related to compensable injury, (b) reasonable, (c) necessary to treat compensable injury, or (d) in compliance with the fee guidelines.

Rule 133.304. In addition, if the information is required by TWCC rule, we recommend referring the issue to TWCC C&P for investigation of the HCP's refusal to provide records required by TWCC rules.

We are attaching a suggested letter stating these positions to a provider. Additionally, we are attaching a copy of TWCC Advisory 2003-05, and a HIPAA-compliant release if you wish to attempt to obtain a medical authorization from the claimant.