TEXAS
WORKERS' COMPENSATION COMMISSION
SOUTHFIELD BUILDING, MS-4D 4000 SOUTH IH-35, AUSTIN, TEXAS 78704-7491
(512)448-7900

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May 15, 2002

The Honorable John Cornyn
Attorney General, State of Texas
Price Daniels, Sr. Building
209 W. 14th Street, 6th Floor
Austin, Texas 78701

Via Certified Mail Return Receipt Requested

RQ-0551-GC

ATTN: Opinion Committee

RE: Request for Attorney General Opinion

Dear General Cornyn:

This question arises because of a matter brought to the attention of our agency, the Texas Workers' Compensation Commission (" the Commission") by a carrier's attorney who practices before the Commission. As Director of Legal Services of the Commission, I respectfully request an Attorney General's opinion on the following question:

> Whether the Commission's Rule 102.4(b) has the force and effect of law and is therefore an exception to Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct.

FACTS:

A carrier's attorney has indicated a concern that the Commission's Rule 102.4(b) is placing attorneys who represent carriers in a difficult and unfair position. The attorney asserts that compliance with rule 102.4(b) violates Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct because it mandates mailing or delivery of written communication to both a claimant who is represented by a lawyer and his or her lawyer. Specifically, this situation has come up in the context of the notice of an administrative appeal before the Commission. Other carriers' attorneys who practice before the Commission are complying with rule 102.4(b).

The Commission adopted amendments to Commission Rule 102.4(b) effective August 29, 1999, 24 TexReg 6488. Specifically, this rule states that:

> After an insurance carrier, employer, or health care provider is notified in writing that a claimant is represented by an attorney or other representative, copies of all written communications related to the claim to the claimant shall thereafter be mailed or delivered to the representative as well as the claimant, unless the claimant requests delivery to the representative only.

Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct states in pertinent part

that:

(a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer *or is authorized by law to do so.* (emphasis mine).

DISCUSSION:

The Commission believes that situations, such as the procedure under rule 102.4(b), are covered as an "authorized by law" exception under rule 4.02 of the Disciplinary Rules. Here, direct contact by mail or delivery of written communication to the attorney and the represented claimant is permissible because the underlying rule promulgated by the Commission requiring the communication is within the Commission's statutory authority and has the force and effect of law. Since the rule has the force and effect of law, it qualifies as an exception to rule 4.02 of the Disciplinary Rules which allows communication to a represented person, organization of entity if the communicator " is authorized by law to do so".

State agencies (such as the Commission) only have powers granted by statute. *State v. P.U.C. of Texas*, 883 S.W.2d 190, 194 (Tex.1994); *Martinez v. Tex. Employment Com'n*, 570 S.W.2d 28, 31(Tex.1978); *State v. Jackson*, 376 S.W.2d 341,344 (Tex. 1964); *Key Western Life Ins. Co. v. Bd. Of Ins.*, 163 Tex 11, 350 S.W.2d 839,848 (1961); *RR Com'n v. Rowan Oil Co.*,152 Tex. 259 S.W.2d 173, 176 (1953); *State v. Robinson*, 119 Tex. 302, 30 S.W.2d 292,297 (1930).

In 1993, the Texas legislature incorporated the Texas Workers' Compensation Act (" the Act") into the Texas Labor Code, Title 5, Subtitle A. Section 402.061 of the Texas Labor Code specifically states in clear and express language that "The commission shall adopt rules as necessary for the implementation and enforcement of this subtitle". Pursuant to its power to adopt rules necessary to administer the Act, the Commission amended its rule 102.4(b) in 1999.

In promulgating this rule, the Commission followed the applicable requirements of the Texas Administrative Procedure Act ("the APA"), Tex. Gov't Code § 2001.021 –2001.37 (Subchapter B. Rulemaking). As prescribed by the APA, the Commission provided notice of the proposed rule to "all interested persons", a reasonable time for the required public comment (at least thirty days from the date the notice of the proposed rule was published in the *Texas Register* on March 19, 1999) and final notice setting forth the rule as adopted with reasoned justification of the rule as adopted.

The Commission in its proposal preamble for amendments relating to communications between participants in a workers' compensation claim, of which rule 102.4 was one, stated in part that the amendments were being proposed "to streamline the communications process between participants regarding actions on a claim that may directly affect the delivery of benefits". With specific reference to rule 102.4, the Commission stated that " Proposed amendments to subsection (b) require employers and health care providers as well as carriers, when notified by the claimant of attorney or other representation, to mail or deliver copies of all written communications to the claimant as well as the claimant's representative. The existing subsection only requires carriers to include the claimant's representative in all written communications. This will ensure that all participants are informed regarding the status of a claim".

Prior to the amendments, the rule only required carriers to include the claimant's representative who may or may not be an attorney in all written communications. The rule's practical effect is to require employers, carriers and health care providers to mail or deliver copies of all written communications to the claimant and the claimant's representative. The rule is also flexible as it provides that a claimant can request delivery to the representative only.

Parties who have an interest in a rule's outcome have a statutory right under the APA to submit comments or arguments for or against a proposed rule. At this stage, affected parties i.e. attorneys for carriers in this situation voice their position and present arguments in favor or against the promulgation of a rule. During the time for public comment on rule 102.4(b), the Commission received one comment. The commentator contended that " the current rule requires the carrier to mail only copies of written notices and reports to the claimant and its (sic) representative. We do not think that the additional burden of providing all written communications should be placed on the carrier or employer, but rather should rest with the claimant's representative ". The Commission did not receive comments from carriers' attorneys regarding a possible conflict with rule 4.02 of the Disciplinary Rules.

In its notice for adoption published in the Texas Register on August 20,1999, the Commission reiterated its position that " these changes will help ensure that all participants are informed regarding the status of a claim". The Commission disagreed with the commentator and responded that " It is essential for both claimants and their representatives to be fully involved and knowledgeable of all activities occurring in claims to minimize disputes and ensure proper delivery of benefits. Requiring the claimant's representative to distribute written communications to the claimant would cause a delay in the claimant obtaining the information and is a less efficient method of getting the information to the claimant".

It is presumed that administrative regulations are valid, and the burden of demonstrating their invalidity is on the challenging party. *Browning – Ferris, Inc. v. Texas Dept. of Health*, 625 S.W. ed 764,767 (Tex. App.- Austin 1981, writ ref'd n.r.e.). Further, valid rules and regulations promulgated by an administrative agency acting within its statutory authority have the force and effect of legislation. *Lewis v. Jacksonville Bldg. and Loan Ass'n*, 540 S.W.2d 307, 310 (Tex.1976).

In *B-R Dredging Co. v. Rodriquez*, 564 S.W.2d 693 (Tex. 1978) the Texas Supreme Court considered an administrative law issue in the context of rule interpretation and application. In this case, the Texas Supreme Court held that the Army Corps of Engineers Safety Manual did not have the force and effect of a safety statute because the safety manual failed to meet the criteria enunciated by the court. It held on page 696 that " Generally, administrative regulations only have the full force and effect of law when (1) a statute exists which specifically authorizes the issuance of rules and regulations by the agency; (2) the rule or regulation adopted is within the authority of the agency; and (3) the rule or regulation is adopted according to the procedure prescribed by statute". Most significantly, the safety manual was not adopted according to the procedures prescribed by the Federal Administrative Procedure Act.

SUMMARY:

It is the Commission's position that its rule 102.4(b) has the force and effect of law because it meets the three-prong criteria under *B-R Dredging Co. v. Rodriquez* in that:

1. a statute, section 402.061 of the Texas Labor Code, exists which specifically authorizes the issuance of rules by the Commission to implement and enforce the Texas Workers' Compensation Act;

2. the adopted rule is within the authority of the Commission in its administration of the Act and
3. the rule was adopted according to the procedure prescribed by statute, APA, Tex.Gov't Code § 2001.021 – 2001.37 (Subchapter B. Rulemaking).

Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct recognizes an exception to the prohibition when it is " authorized by law". Since Commission rule 102.4(b) has the force and effect of law, it qualifies as an exception. Therefore carriers' attorneys must mail or deliver written communications to a represented claimant in a workers' compensation case before the Commission.

Thank you in advance for your opinion on this matter.

Sincerely,

Craig H. Smith
Director, Legal Services

CHS/ec