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ATTORNEY GENERAL OPINION NO. 91- 36

Robert A. Anderson
Workers Compensation Director
Kansas Department of Human Resources
600 Merchants Bank Tower
800 S.W. Jackson
Topeka, Kansas 66612-1227

Re: Labor and Industries--Workers Compensation--Medical
Compensation; Powers of Directors; Schedules of
Maximum Fees; Advisory Panel; Contracts With
Private Entities to Compile Information

Synopsis: The privileged nature of information, gathered to
recommend a maximum fee schedule covering health
care providers in workers compensation, does not
preclude the advisory panel from contracting with a
private entity to compile the information. Cited
herein: K.S.A. 1990 Supp. 44-510.

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Dear Mr. Anderson:

As director of the division of workers compensation you
inquire whether you are precluded from having a private entity
compile or summarize information, gathered for use in the
establishment of a medical fee schedule pursuant to K.S.A.
1990 Supp. 44-510, by the privilege provided in subsection
(a) (10).

K.S.A. 1990 Supp. 44-510(a) (10) states:

"Except as provided by K.S.A. 60-437 and amendments thereto, all reports, information, statements, memoranda, proceedings, findings and records submitted to the director for the purposes of this section, including any records of peer review committees, shall be privileged and shall not be subject to discovery, subpoena, or other means of legal compulsion for release to any person or entity and shall not be admissible in evidence in any judicial or administrative proceeding, except those authorized pursuant to this section."

The provision above provides a public interest privilege for all the information gathered pursuant to K.S.A. 44-510, dealing with medical compensation, powers of the director of workers compensation, schedules of maximum fees established by the advisory panel, excessive medical fees and penalties, utilization and peer review. The exception to the above privilege is provided by K.S.A. 60-437 which states:

"A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that matter if the judge finds that such person or any other person while the holder of the privilege has (a) contracted with a party against whom the privilege is claimed that he or she would not claim the privilege or, (b) without coercion, or without any trickery, deception, or fraud practiced against him or her, and with knowledge of the privilege, made disclosure of any part of the matter or consented to such a disclosure made by anyone."

The exception deals with the waiver of the privilege by contract or by previous disclosure and is thus not relevant to your question.

At issue is whether contracting to have privileged information summarized waives the public interest privilege provided by K.S.A. 44-510(a)(10).

In our opinion the privileged nature of the information remains privileged unless waived as provided in K.S.A. 60-437. See 81 Am.Jur.2d Witnesses §§ 286, 287 (1976) (dealing with legislation forbidding disclosure of information). The statute in question states that the privileged information "shall not be subject to discovery, subpoena, or other means of legal compulsion" and "shall not be admissible in evidence in any judicial or administrative proceeding. . . ." As commonly used the term "proceeding" includes all methods of invoking the action of a court. 1 Am.Jur.2d Actions § 3 (1962). It is clear that the information is protected against legal compulsion. Thus the public interest privilege provided by the statute involves the interposition or action of a court. See Barber v. Williams, 244 Kan. 318, 324 (1989) (when the language of the statute is plain, we must give effect to the intent as expressed). Therefore we opine that the protection afforded by the public interest privilege does not preclude you from entering into a contract to have the information summarized.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Guen Easley
Assistant Attorney General