

EX PARTE COMMUNICATION PROHIBITED BETWEEN EMPLOYER'S ATTORNEY AND CLAIMANT'S PHYSICIAN

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A new Commonwealth Court decision in *Pennsylvania State University v. Workers' Compensation Appeal Board (Sox)*; 454 C.D. 2013, 455 C.D. 2013; filed December 19, 2013, has changed the law regarding communications between an employer and a panel physician when taking depositions. No longer is counsel for the employer able to meet with the panel physician prior to the deposition as to do so violates the injured worker's expectation of privacy.

In this case, the claimant sustained an initial work injury in 2006. After receiving benefits for that injury, the claimant went back to work for the employer. The claimant then sustained additional work injuries on July 19, 2009, and on October 18, 2009. The employer acknowledged the October 18, 2009, work injury by issuing a Medical Only Notice of Compensation Payable. Later, the claimant filed claim petitions, as well as a penalty petition, against the employer. The claimant also filed a reinstatement petition against the employer for his 2006 work injury.

During litigation of the petitions, the employer sought to depose the claimant's treating physicians, who happened to be employees of the panel facility. The claimant objected and sought an order from the Workers' Compensation Judge precluding the depositions on the basis that the depositions of the physicians would be an *ex parte* contact by the employer's counsel.

In response to the claimant's objection, the employer asserted attorney/client privilege to justify the *ex parte* contact with the treating physicians. The judge, however, found that the claimant enjoyed a physician/patient privilege with the treating physicians and that, in the absence of consent, the employer was precluded from engaging in *ex parte*, non-disclosed communications. The judge further concluded that an attorney/client relationship did not exist between the employer's counsel and the treating physicians because of their status as employees. The judge permitted the employer to schedule the deposition of a treating physician, but prohibited counsel for the employer from having any *ex parte* contact with any physician to be deposed. The judge further permitted the claimant's counsel to cross examine a physician as to any *ex parte* contacts made.

The judge granted the claim petitions against the employer, who appealed to the Workers' Compensation Appeal Board. The Board affirmed and concluded that the issue of whether the judge's interim order was violative of attorney/client privilege was moot because the employer submitted the reports of the physicians into evidence, as is permissible under §422 (c) of the Act, where the period of disability involved is less than 52 weeks. The employer appealed to the Commonwealth Court.

The employer argued to the Commonwealth Court that the judge's decision prohibiting them from deposing the claimant's treating physicians was prejudicial. According to the employer, the judge may have decided the case differently if the employer's attorney had been allowed to consult and depose the treating physicians without restrictions. The employer further argued that the judge improperly limited the employer's counsel's contact with the treating physicians because the physicians were employees and *ex parte* communications were, therefore, subject to attorney/client privilege.

The Commonwealth Court rejected the employer's arguments and found that the judge's interim order was proper. In the court's view, although the physicians were employees, they were acting in their capacity as the claimant's treating providers, not as the employer's employees. In other words, they were not "clients" of employer's counsel. The court concluded that the application of an attorney/client privilege in this context would be improper since it would confer upon the employer an unfair strategic advantage. The court also rejected the employer's argument that the Rules of Civil Procedure permitted counsel to engage in *ex parte* communications with the treating physicians because the case was in litigation. The court held that, although the privacy right against disclosing private medical information was waived, the Rules of Civil Procedure do not permit an employer's attorney to obtain information in any way he sees fit. Moreover, the court rejected the employer's argument that the employment relationship between the treating physicians and the employer circumvented the Rules of Civil Procedure. II



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