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YOU ARE ENTITLED TO PRIVACY

By Scott O'Mara

The California Constitution, Article 1, §1; the Health Insurance Portability & Accountability Act (HIPAA); the Confidentiality of Medical Information Act (CMIA); and Labor Code §3762 are all legal enactments which afford California injured workers several layers of privacy resulting from legislative actions and Supreme Court decisions.

The first statement of privacy rights is set forth in the California Constitution, Article 1, §1, which states:

"All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

The California Supreme Court, in *Hill v. National Collegiate Athletic Assoc. (Hill)* (1994) 7 Cal. 4th 1, reinforces the right to privacy and sets forth a cause of action which an individual can civilly pursue for invasion of privacy under the U.S. Constitution. This case speaks to medical information, the reasonable expectancy of privacy, and the serious nature of invasion of privacy, whether its impact on the individual is actual or potential.

In the Workers' Compensation arena — whether a case involves an insurance carrier or a third-party administrator — there is no justification for an ***employer or employer's agent*** to have access to a worker's medical information, or to speak to the worker or his/her doctor regarding the particulars of their medical information when California law provides for the employer to obtain the information needed regarding the employability of the injured worker from the claims administrator. The law effectively creates a wall between the claims administrator and the employer concerning the disclosure of medical information.

The third-party administrator — whether it is State Compensation Insurance Fund or another entity, or an in-house administrator such as Risk Management or the Department of Human Resources — is limited to disclosing information within their possession, which balances the employer's need for information with the worker's right to privacy. The employer, through their agent for the administration of Workers' Compensation claims, can acquire *basic and limited* information regarding the employability of the worker.

The Labor Code, the California Constitution and case law all reflect a strong and narrow limitation as to an employer's access to information. Labor Code §3762 states as follows:

(c) An insurer, third-party administrator retained by a self-insured employer pursuant to section 3702.1 to administer an employer's workers' compensation claims, and those employees and agents specified by a self-insured employer to administer the employer's workers' compensation claims, are prohibited from disclosing or causing to be disclosed to an employer, any medical information, as defined in subdivision (b) of Section 56.05 of the Civil Code, about an employee who has filed a workers' compensation claim, except as follows:

(1) Medical information limited to the diagnosis of the mental or physical condition for which workers' compensation is claimed and the treatment provided for this condition.

(2) Medical information regarding the injury for which workers' compensation is claimed that is necessary for the employer to have in order for the employer to modify the employee's work duties.

Civil Code §56.05 also articulates relevant ideas as to what medical information employers need and provides guidance as to where they should not go.

The Confidentiality of Medical Information Act (CMIA) reinforces limitations on employer access to medical information. Labor Code §3762 specifically limits what information the administrator of Workers' Compensation claims may disclose to the employer. Most importantly, Workers' Compensation laws provide the method by which employers may obtain — ***from the claims administrator, not the treating doctor*** — the limited information necessary to determine an injured worker's employability. Additional liability may be placed upon physicians who engage in violation of CMIA, as set forth in the case of *Pettus v. Cole* (1996) 49 Cal. App. 4th 402.

Therefore, employers are limited in their access to medical information, and treating doctors are limited in what they are allowed to disclose.

As citizens of the great state of California, we are afforded several levels of privacy. As established, these privacy rights emanate from the Supreme Court's decisions and its interpretation of the California Constitution's Declaration of Rights and numerous legislative enactments. Case law has narrowed the scope of medical information discoverable in Workers' Compensation cases.

Therefore, if your employer seeks to have you sign a medical release form on an orthopedic case — and the form indicates you are approving access to information relative to marital or drug counseling, drug usage, psychiatric or psychological care — be aware that such form

would not be an appropriate discovery vehicle for the employer, as it is too broad and violates privacies afforded California workers under the California Constitution and the case law interpreting same.

If your employer wants to meet with you to inquire as to your diagnoses, the treatment you are receiving, and the restrictions the doctor has placed, be aware that these inquiries are not appropriate, and this information must be provided to them through the Workers' Compensation carrier, a third-party administrator such as SCIF, or an in-house claims administrator such as Risk Management or the Department of Human Resources.

From time to time, situations arise where the supervisor — whether it be a sergeant, lieutenant, captain, battalion chief, division chief or higher-ranking officer — will seek information regarding a worker's medical condition and force the worker to meet with the supervisor to provide information regarding such subjects as the treatment being received and the restrictions which have been placed. Such action by the employer is inappropriate. If it occurs, you can state that your counsel has instructed you not to address these issues (unless you receive a direct order to do so from command, in which case you will follow same). However, persisting with such questioning will create a point of individual liability for the person in command.

The concept of privacy is pertinent and appropriate and is embraced by the California Constitution, the Civil Code, and the California Labor Code, which sets forth a prohibition from disclosing or causing to disclose to the employer medical information which is limited by Labor Code §3762. If you have questions, please do not hesitate to contact us.

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